Nos. 15-35738, 15-35739

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**J.E.F.M., *et al.*,
Plaintiffs-Appellees,
v.
LORETTA LYNCH, *et al.*,
Defendants-Appellants.**

On Appeal from the United States District Court
For the Western District of Washington
No. 2:14-cv-01026-TSZ

PLAINTIFFS-APPELLEES' PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

This case involves a certified class of thousands of unrepresented children in removal proceedings. They assert a right to appointed counsel under the Due Process Clause and the immigration statute. The question in this appeal is whether the district court had jurisdiction to consider their claims. The Panel held it did not, and in doing so generated multiple conflicts with caselaw from the Supreme Court, this Court, and other circuits governing the interpretation of jurisdictional statutes. The Panel's decision also closes the courthouse doors to the vast majority of children in the Plaintiff class, who now will *never* obtain judicial review of their appointed counsel claims. This Court should grant rehearing or rehearing en banc in order to reconcile the conflicts created by the Panel's decision, and because this is a case of exceptional importance.

The central dispute concerns 8 U.S.C. 1252(b)(9), which provides that "*[w]ith respect to review of an order of removal* . . . [j]udicial review of all questions of law and fact . . . *arising from any action taken or proceeding brought to remove an alien* from the United States" must be sought via petition for review of a final removal order. 8 U.S.C. 1252(b)(9) (emphases added). This text is far from plain, "and courts have debated [its] meaning." *Aguilar v. U.S. ICE*, 510 F.3d 1, 10 (1st Cir. 2007) (stating that the "words 'arising from' do not lend themselves to precise application"); *see also Hiroshi Motomura, Judicial*

Review in Immigration Cases After AADC: Lessons from Civil Procedure, 14 Geo. Immigr. L.J. 385, 415 (2000) (describing Section 1252(b)(9)'s "several crucial ambiguities," including meaning of "'arising from any action taken or proceeding brought to remove an alien'").

Notwithstanding the statute's ambiguity, the parties agree on one critical point: Section 1252(b)(9) is a claim-channeling, not a claim-barring, provision. Therefore, it must be construed to allow judicial review of Plaintiffs' claims in *some* federal forum. *See* ECF 27 at 14; ECF 9 at 27-28.[1] Put differently, if subjecting Plaintiffs' claims to Section 1252(b)(9)'s requirements would bar the child Plaintiffs from obtaining meaningful judicial review of those claims, then their claims should not be read to "aris[e] from" removal proceedings. *Cf. Aguilar*, 510 F.3d at 11-12 (reading "arising from" to exclude "claims that cannot effectively be handled through the available administrative process").

The Panel in this appeal concluded that the petition for review process supplies an adequate forum for Plaintiffs' appointed counsel claims. *See* ECF 100-1 ("Slip Op.") at 22-23. To access that forum, however, unrepresented children must first bring their claims to immigration court, be ordered removed, appeal to the Board of Immigration Appeals ("BIA"), and then raise their claims

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[1] "Dkt." refers to the district court docket in *J.E.F.M. v. Lynch*, No. 14-cv-01026-TSZ (W.D. Wash.), and "ECF" to this Court's docket in No. 15-35739.

for appointed counsel in petitions for review. *See Barron v. Ashcroft*, 358 F.3d 674, 676-78 (9th Cir. 2004). Extensive allegations and evidence show that most unrepresented children cannot navigate that process, as the lead concurrence acknowledges. *See* Slip Op. at 28-30 (McKeown, J., concurring).

Strikingly, the Panel did *not* find that most unrepresented children, including the child class members here, could in fact obtain judicial review of their appointed counsel claims through the petition-for-review process. Instead, the Panel pointed to a *single* child's case from 12 years ago and asserted that this lone instance "lays rest to the contention that right-to-counsel claims will *never* surface through the PFR process." *Id.* at 23 (emphasis added). On this basis, it rejected Plaintiffs' argument that because Section 1252(b)(9) operated to preclude, rather than merely channel, meaningful judicial review of appointed counsel claims for most class member children, the statute must be construed to permit Plaintiffs to bring their claims in district court.

The Panel's decision conflicts with the Supreme Court's and this Court's law governing Section 1252(b)(9) and other claim-channeling statutes in two ways. *First*, the Panel created conflict with prior case law by misapprehending the central inquiry here. The question is not whether meaningful judicial review is hypothetically possible for a few isolated children. "Rather, the question is whether, as applied *generally* to those covered by a particular statutory provision,

hardship *likely found in many cases* turns what appears to be simply a channeling requirement into *complete* preclusion of judicial review." *Shalala v. Illinois Council on Long Term Care., Inc.*, 529 U.S. 1, 22-23 (2000) (first and second emphases added) (citing *McNary v. Haitian Refugee Center*, 498 U.S. 479, 496-97 (1991)).

Second, the Panel created conflict within this Court and with other circuits because prior decisions have read Section 1252(b)(9) to be wholly inapplicable to claims, like those here, that *do not challenge final removal orders*. *See Nadarajah v. Gonzales*, 443 F.3d 1069, 1075–76 (9th Cir. 2006) (finding that Section 1252(b)(9) does not apply because "there is no final order of removal"). Because this case includes thousands of child class members who have not been ordered removed, such children are by definition not challenging a final removal order, and Section 1252(b)(9) does not apply to them.[2]

[2]At oral argument, Defendants offered to provide certain information about unrepresented children's cases to Plaintiffs' counsel. Slip Op. at 23 n.10. Using that information, counsel have found *one* unrepresented child who successfully filed a BIA appeal after the child's mother found an attorney. The BIA dismissed the appeal, and on November 30 undersigned counsel filed a petition for review of this child's removal order. *See C.J.L.G. v. Lynch*, No. 16-73801. Plaintiffs ask that the Panel in this case agree to hear *C.J.L.G.* as akin to a "comeback" case under Ninth Circuit General Order 3.6(d).

It remains uncertain whether this Court will address the appointed counsel issue in C.J.L.G.'s case. Even if the Court were to rule in C.J.L.G.'s favor, it is unclear whether and how most class member children – who cannot access the existing claim-channeling scheme – would benefit from a favorable decision.

PROCEDURAL BACKGROUND

This case arises on interlocutory review of the district court's order granting in part and denying in part Defendants' motion to dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Because Defendants asserted that the complaint's allegations were facially insufficient to invoke federal jurisdiction, *see* ER 62 n.5, the district court was required to "[a]ccept[] the plaintiff's allegations as true and draw[] all reasonable inferences in the plaintiff's favor." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). This same standard governed the Panel's de novo review. *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013).

The operative complaint alleged that Section 1252's channeling scheme prevents most unrepresented children from obtaining meaningful judicial review of their claims. *See* ER 417-24. Unrepresented children frequently cannot even attend their hearings without assistance, much less raise and preserve appointed counsel claims through administrative appeals and petitions for review. *See* ER 421-24. Plaintiffs argued that because of the barriers facing unrepresented children, the existing claim-channeling scheme is "tantamount to a complete denial of judicial review for most [unrepresented children]" seeking to raise appointed counsel claims, *McNary*, 498 U.S. at 496-97, and that Section

1252(b)(9) could not be read to preclude Plaintiffs from raising their claim in district court.

The district court found that Section 1252(b)(9) barred Plaintiffs' statutory claim, but not their constitutional claim.[3] Defendants took an interlocutory appeal. ER 194 This Court denied Defendants' motions for a stay pending appeal. ER 195. Shortly before the Panel heard oral argument, the district court certified a class of unrepresented children in the Ninth Circuit who are in removal proceedings "on or after" June 24, 2016. Dkt. 309.

ARGUMENT

I. The Panel's Decision Conflicts with *McNary v. Haitian Refugee Center* and Decisions of this Court Applying *McNary* to Claim-Channeling Statutes.

1. In holding that Section 1252(b)(9) barred Plaintiffs from bringing their claims in district court, the Panel contradicted the rule set forth in *McNary v. Haitian Refugee Center* concerning the interpretation of claim-channeling statutes. *McNary* explained that a claim-channeling provision cannot be read to result in the "*practical* equivalent of a total denial of judicial review of generic constitutional and statutory claims" for "*most*" litigants because courts presume that Congress intends to preserve an effective avenue for judicial review when it

[3] The district court rejected several of Defendants' other arguments, which are not at issue here. *See* ER 65-69, 80-85, 248-52.

enacts a claim-channeling provision. 498 U.S. at 496-97 (emphases added). Holding otherwise, *McNary* explained, would turn a supposed channeling scheme into one that effectively precludes judicial review, thereby violating the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *Id.* at 496.

The Panel contradicted this rule by finding "meaningful judicial review" available here based on the *possibility* that a few children might receive judicial review of their appointed counsel claims. Slip Op. at 22-24 (identifying single case from 2004 to refute that "it was essentially impossible to get the right-to-counsel claim before a federal court"). But the Supreme Court's claim-channeling decisions do not require that it be "essentially impossible" for every potential litigant to bring a claim to court. *Id.* at 22. Rather, they ask whether *most* litigants before the Court *in this case*—here, members of a certified class of unrepresented children—can obtain judicial review through the channeling scheme.

In *McNary* itself, for example, the Supreme Court focused on the "practical" effect that the channeling scheme would have on the claims of "most" plaintiff class members. 498 U.S. at 496-97 (refusing to apply channeling scheme because doing so "is tantamount to a complete denial of judicial review for most undocumented aliens"). *Shalala* similarly looked to whether "hardship likely

found *in many cases* turns what appears to be simply a channeling requirement into *complete* preclusion of judicial review." 529 U.S. at 22-23 (first emphasis added). This Court's opinion in *Ortiz v. Meissner* likewise focused on whether "*these plaintiffs*" could obtain a "meaningful opportunity for . . . resolution of this claim." 179 F.3d 718, 722 (9th Cir. 1999).

Under this standard, it is not enough that one or some small handful of similarly-situated children could access the judicial review scheme. Rather, *most* litigants before the Court *in this case* must have an avenue for meaningful judicial review for this Court to conclude that Congress intended to apply the channeling scheme to them.

2. The Panel distinguished *McNary* on the ground that its interpretive rule was "dicta," Slip Op. at 19, and that Section 1252(b)(9) uses language broader than the statute addressed in *McNary*, *id.* at 17, 20 ("*McNary* was, at its core, a statutory interpretation case involving a completely different statute."). Those holdings only deepen the conflict.

First, the Panel's dismissal of *McNary*'s interpretive rule as dicta conflicts with not only *McNary*, but also a series of other Supreme Court decisions. Both before and after *McNary*, the Supreme Court has consistently applied the rule that claim-channeling provisions must preserve meaningful judicial review for most litigants because of the constitutional concerns that arise from barring judicial

review of legal claims. *McNary* cited *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), which in turn quoted, *inter alia*, *Marbury v. Madison*, 1 Cranch 137, 163 (1803), for the proposition that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." *See also Webster v. Doe*, 486 U.S. 592, 603 (1988) (stating that "[a] serious constitutional question . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim") (quotation marks omitted). These concerns exist in many contexts, but they have particular force here because the Suspension Clause unquestionably protects each noncitizen's right to judicial review of the legality of their removal. *See INS v. St. Cyr*, 533 U.S. 289, 313 (2001) ("Because of that Clause, some judicial intervention in deportation cases is unquestionably required by the Constitution.") (citation and quotation marks omitted).[4]

Second, the Panel's holding that *McNary*'s rule is limited to the specific statute at issue there conflicts with several opinions of this Court. These cases have treated *McNary*'s principles as governing law (not dicta), and applied them

[4] Congress also recognized that Section 1252(b)(9) should not be read to *bar* judicial review. The legislative history of the REAL ID Act of 2005, which amended the statute, states that "this section does not eliminate judicial review" and that "[n]o alien . . . will be deprived of judicial review of such [constitutional and legal] claims." 151 Cong. Rec. H2813, H2873 (daily ed. May 3, 2005); ECF 27 at 22-23.

to various jurisdictional statutes, immigration and non-immigration alike. *See City of Rialto v. West Coast Loading Corp.*, 581 F.3d 865, 872-75 (9th Cir. 2009) (applying *McNary*'s "guiding principles" outside immigration context); *Walters v. Reno*, 145 F.3d 1032, 1052-53 (9th Cir. 1998) (relying on *McNary* to distinguish between "obtain[ing] judicial review of the merits of their INS proceedings," and "enforc[ing] constitutional rights to due process in the context of those proceedings"); *Mace v. Skinner*, 34 F.3d 854, 859 (9th Cir. 1994) (finding jurisdiction where claims, "like those asserted in *McNary*, are not based on the merits of his individual situation, but constitute a broad challenge to allegedly unconstitutional FAA practices").[5]

3. The evidence the Panel relied on to affirm the adequacy of the channeling scheme underscores its alteration of the proper legal standard. The Panel cited the case of a *single* child from over 12 years ago who was initially ordered removed pro se, but then was represented by one of Plaintiffs' counsel at the BIA and on his petition for review, where he raised an appointed counsel claim. Slip Op. at

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[5] The Panel's decision also conflicts with the very authority on which it relied. It cited the First Circuit's decision in *Aguilar*, Slip Op. at 10, 12, 14, but *Aguilar* recognized that Section 1252(b)(9) must be construed in light of *McNary*'s constitutional underpinnings. *See* 510 F.3d at 14-16. The Panel also cited *Elgin v. Department of Treasury*, 132 S.Ct. 2126, 2132 (2012) (Slip Op. at 11), for the proposition that "heightened scrutiny is not appropriate where Congress channels judicial review of constitutional questions to a particular court," but *Elgin* acknowledged that a court must also ask whether the claim at issue "can receive meaningful review within the [statutory] scheme." 132 S.Ct. at 2136-39.

23-24. While the Panel acknowledged that the case settled without resolving the appointed counsel claim, it nevertheless found that this lone case "lays rest to the contention that right-to-counsel claims will *never* surface through the PFR process." *Id.* at 23 (emphasis added). In so holding, the Panel failed to ask whether most unrepresented child class members here could obtain review, despite the *thousands* of children who have been ordered removed in this circuit since 2004 and who never obtained judicial review of their legal claims. *Cf.* Dkt. 212, Ex. 3 at 10-11. Indeed, while thousands of removal orders have been entered against unrepresented children, this Court has never issued a published opinion in any petition for review involving an unrepresented child, let alone decided the appointed counsel claims at issue here.

The Panel also cited a series of "special protections" that purportedly help children preserve their claims for judicial review, such as the obligation of immigration judges ("IJs") to develop the record. Slip Op. at 21-22. However, the Panel nowhere suggested that these safeguards would secure meaningful review of the appointed counsel claim for *most* unrepresented child class members. On the contrary, two Panel members made clear that these protections are of little practical use. *Id.* at 29 (McKeown, J., concurring) (observing that IJs have "scant time to delve deeply into the particular circumstances of a child's case") (citing ECF 31 at 4, 7); *id.* at 30 ("[M]eritorious application[s] for asylum . . . or other

relief may fall through the cracks, despite the best efforts of immigration agencies and the best interests of the child.”).

The operative complaint also addresses these very safeguards and plausibly alleges that they are not sufficient to protect children’s rights, including their right to judicial review. *See* ER 442 ¶115 (explaining why bar on conceding removability is toothless and routinely circumvented); ER 420-21 ¶46 (alleging why general immigration court procedures cannot protect children’s ability to present claims). The efficacy of these “protections” was heavily disputed in district court. *See* Dkt. 342 at 16 (showing that “friends of court” cannot substitute for counsel).

The Panel’s decision to apply the claim-channeling requirement here, even though it did *not* find that meaningful review is available for *most* of the unrepresented class member children now before the Court, creates conflict with governing law and warrants rehearing.

II. The Panel’s Decision Also Conflicts with This Court’s Decision in *Nadarajah*, and Other Circuits’ Decisions Interpreting Section 1252(b)(9).

1. The Panel created conflict in this circuit’s law for a second reason: it applied Section 1252(b)(9) to bar claims brought by litigants who do not have final removal orders. This conflicts with *Nadarajah*, which held that Section 1252(b)(9) does not apply in cases where there is no final removal order. *See*

Nadarajah, 443 F.3d at 1075-76 (finding that Section 1252(b)(9) does not apply "in cases that do not involve a final order of removal"); *see also St. Cyr*, 533 U.S. at 313 ("[Section 1252(b)(9)] applies only '[w]ith respect to review of an order of removal under subsection (a)(1).'").

The Panel offered almost no explanation as to how its decision is consistent with *Nadarajah*. *See* Slip Op. at 12. The Panel expressly noted that that Section 1252(b)(9) did not apply in *Nadarajah* because "his petition did not involve a final order of removal," without explaining why that same rule is not dispositive as to the children in this case who have no final orders. *Id*.

The Panel distinguished another case about Section 1252(b)(9) – *Singh v. Gonzales* – but failed to address *Singh*'s statement that "[b]y virtue of their explicit language, both §§ 1252(a)(5) and 1252(b)(9) apply only to those claims seeking judicial review of orders of removal." 499 F.3d 969, 978-79 (9th Cir. 2007).[6] *Singh* found jurisdiction even though the petitioner *did* have a final order, because finding otherwise would have deprived the petitioner of a "'day in court,' which is [not] consistent with Congressional intent underlying the REAL ID Act." *Id*. at 979. But in so holding, *Singh* nowhere purported to undermine *Nadarajah*'s straightforward rule that Section 1252(b)(9) does not apply where

[6] The Panel also relied on Section 1252(a)(5), but that provision also applies only to "judicial review of an order of removal," and is therefore inapplicable for the same reasons.

there is no final order. The Panel made several other observations about the claims in *Singh*, including that Singh "did not challenge a final order of removal" under Section 1252(b)(9), and that "Singh would have had no legal avenue to obtain judicial review of this claim." Slip Op. at 13. Yet the Panel offered no clear explanation as to why these rationales did not apply to Plaintiffs' case as well.[7]

The Panel's application of Section 1252(b)(9) to children who do not have final removal orders was also inconsistent with the rule animating *all* of this Court's prior Section 1252(b)(9) decisions. Before the Panel's ruling, *every one* of this Court's published decisions dismissing district court actions under Section 1252(b)(9) have involved individuals with existing final removal orders. For example, in *Martinez v. Napolitano*, the noncitizen had already received a final removal order, unsuccessfully petitioned for review, and *then* went to district court to attack his removal order anew. 704 F.3d 620, 621 (9th Cir. 2012). This Court found no district court jurisdiction because "[t]he statute, by its plain language, applies only to 'judicial review of an order of removal' and does not eliminate the ability of a court to review claims that are independent of

[7] To the extent that the Panel relied on the difference between claims that arise "after a final order was entered" and those that "arose before," Slip Op. at 13, that difference cannot explain *Nadarajah*, where the petitioner's challenge to his detention also arose before any final removal order. *See* 443 F.3d at 1075-76.

challenges to removal orders." *Id.* at 622 (citation and quotation marks omitted). *See also V. Singh v. Holder*, 638 F.3d 1196, 1211-12 & n.7 (9th Cir. 2011) (explaining that "the REAL ID Act was inapplicable because there was not yet any final order of removal"); *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1082-83 (9th Cir. 2010) (finding that Section 1252(b)(9) applied because "[petitioner's] present challenge is properly construed as a challenge to an 'order of removal'"), *overruled in part on other grounds by Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012); *cf. Viloria v. Lynch*, 808 F.3d 764, 767 (9th Cir. 2015) (holding that Section 1252(b)(9) bars petition-for-review jurisdiction if there is no final removal order, "even if it appears a removal order is likely forthcoming").

Accordingly, this Court previously followed the simple rule that Section 1252(b)(9), by its terms, has no application where there is no final order of removal. The Panel's contrary holding warrants en banc review.

2. The Panel's decision also conflicts with several other circuits that have found, like *Nadarajah*, that Section 1252(b)(9) applies only to claims challenging removal orders. *See Chehazeh v. Att'y Gen.*, 666 F.3d 118, 132-33 (3d Cir. 2012) ("Because Chehazeh is not seeking review of any order of removal – as there has been no such order with respect to him – § 1252(b)(9) does not preclude judicial review."); *Ochieng v. Mukasey*, 520 F.3d 1110, 1115 (10th Cir. 2008)

("[Sections] 1252(a)(5) and 1252(b)(9) [] do not apply . . . as [petitioner] would not be seeking review of an order of removal . . . ."); *Madu v. U.S. Att'y Gen.*, 470 F.3d 1362, 1367 (11th Cir. 2006) ("Because section 1252(b)(9) applies only '[w]ith respect to review of an order of removal,' . . . we find that section 1252(b)(9) does not apply to this case."); *see also Kellici v. Gonzales*, 472 F.3d 416, 419-20 (6th Cir. 2006).

The Panel's reading of Section 1252(b)(9) thus creates conflict with a number of other circuits that have interpreted the statute.[8]

3. Adhering to this circuit's settled interpretation of Section 1252(b)(9) would not undermine Congress's intent "to streamline judicial review of immigration proceedings," Slip Op. at 15, because normal principles of administrative exhaustion require most claims arising in immigration court prior to the issuance of a removal order to be raised in a petition for review. *See El Rescate v. Exec. Office of Immigration Review*, 959 F.2d 742, 747 (9th Cir. 1992). For example, a litigant who disagrees with an IJ's denial of a continuance, or who challenges the IJ's finding that a particular ground of removability applies to her, must

[8] Only the First Circuit has read Section 1252(b)(9) as "not limited to challenges to singular orders of removal." *Aguilar*, 510 F.3d at 133. However, *Aguilar* "appears to conflict with the Supreme Court's explicit instruction in *St. Cyr*." *Chehazeh*, 666 F.3d at 133. In any event, because *Aguilar* acknowledged the continuing applicability of *McNary*, Plaintiffs would have prevailed even under its restrictive rule. *See* 510 F.3d at 10-12, 14-17; *supra* n.5.

ordinarily object before the IJ and appeal an adverse decision to the BIA, even though there is no final removal order. Only then can the individual seek federal court review of her claims. *See generally Barron*, 358 F.3d at 678.

But as the Panel recognized, exhaustion can be excused where, as here, it would be futile or impossible for the litigants to present the claim. *See* Slip Op. at 24-25. Such claims can be brought in district court if the litigants do not have final orders of removal. Section 1252(b)(9), which applies only "with respect to review of an order of removal," *St. Cyr*, 533 U.S. at 313 (citation and quotation marks omitted), did nothing to change that longstanding rule.

III. This Case is of Exceptional Importance, As it Concerns the Due Process Rights of Thousands of Children Facing Removal.

The Plaintiff class includes thousands of unrepresented children in removal proceedings in this circuit. *See* Dkt. 272 (class numerosity declaration). There can be no serious dispute that if the Plaintiff children cannot proceed in district court, the vast majority of them will *never* obtain judicial review of their appointed counsel claims. The lives of many of these children are at stake, as most class member children are asylum seekers who have fled extremely violent conditions in Central America. *See* Dkt. 271 at 2. Statistical evidence establishes that their chances of success will dramatically increase if they obtain attorneys. *See* ECF 63-2, ¶¶17-21.

The Panel's decision has shut the courthouse doors to thousands of child class members. The decision warrants rehearing for that additional reason.

CONCLUSION

For these reasons, this Court should grant rehearing or rehearing en banc.

Dated: December 5, 2016

Respectfully submitted,

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I hereby certify that on December 5, 2016, I caused to be electronically filed the foregoing PLAINTIFFS-APPELLEES' PETITION FOR REHEARING AND REHEARING EN BANC, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Matt Adams
MATT ADAMS
Counsel for Appellants

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. E. F.M., a minor, by and through his Next Friend, Bob Ekblad; J. F.M., a minor, by and through his Next Friend Bob Ekblad; D. G. F.M., a minor, by and through her Next Friend, Bob Ekblad; F. L.B., a minor, by and through his Next Friend, Casey Trupin; G. D.S., a minor, by and through his mother and Next Friend, Ana Maria Ruvalcaba; M. A.M., a minor, by and through his mother and Next Friend, Rose Pedro; J. E. V.G.; A. E. G.E.; G. J. C.P.,
Plaintiffs-Appellees/ Cross-Appellants,

v.

LORETTA E. LYNCH, Attorney General; JUAN P. OSUNA, Director, Executive Office for Immigration Review; JEH JOHNSON, Secretary, Homeland Security; THOMAS S. WINKOWSKI, Principal Deputy Assistant Secretary, U.S. Immigration and Customs

Nos. 15-35738
15-35739

D.C. No.
2:14-cv-01026-TSZ

OPINION

Enforcement; NATHALIE R. ASHER, Field Office Director, ICE ERO; KENNETH HAMILTON, AAFOD, ERO; SYLVIA M. BURWELL, Secretary, Health and Human Services; ESKINDER NEGASH, Director, Office of Refugee Resettlement,
Defendants-Appellants Cross-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted July 7, 2016
Seattle, Washington

Filed September 20, 2016

Before: Andrew J. Kleinfeld, M. Margaret McKeown,
and Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge McKeown;
Concurrence by Judge McKeown;
Concurrence by Judge Kleinfeld

SUMMARY[*]

Immigration

The panel affirmed in part and reversed in part the district court's jurisdictional determinations in a class action brought by indigent minor immigrants alleging that they have due process and statutory rights to appointed counsel at government expense in immigration proceedings.

The panel affirmed the district court's dismissal for lack of jurisdiction of the minors' statutory claims for court-appointed counsel. The panel held that because the right-to-counsel claims "arise from" removal proceedings, they must be raised through the administrative petition for review process pursuant to 8 U.S.C. §§ 1252(b)(9) and 1252(a)(5).

The panel reversed the district court's determination that it had jurisdiction over the minors' constitutional claims. The panel held that the district court erred in finding that an exception to the Immigration and Nationality Act's exclusive review process provided jurisdiction over the due process right-to-counsel claims. The panel held that the district court incorrectly found that the claims challenged a policy or practice collateral to the substance of removal proceedings, and that because an Immigration Judge was unlikely to conduct the requisite due process balancing the administrative record would not provide meaningful judicial review.

[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Specially concurring, Judge McKeown, joined by Judge M. Smith, wrote to highlight the plight of unrepresented children in immigration proceedings, and to underscore that the Executive and Congress have the power to address this crisis without judicial intervention.

Specially concurring, Judge Kleinfeld agreed that it is unlikely that children or even adults can protect all their rights in deportation proceedings without a lawyer. Judge Kleinfeld wrote that solving the representation problem is a highly controversial political matter, and that advocating for a particular reform is unnecessary and better left to the political process.

COUNSEL

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OPINION

McKEOWN, Circuit Judge:

This interlocutory appeal requires us to answer a single question: does a district court have jurisdiction over a claim that indigent minor immigrants without counsel have a right to government-appointed counsel in removal proceedings? Our answer to this jurisdictional query is no. We underscore that we address only the jurisdictional issue, not the merits of the claims. Congress has clearly provided that all claims—whether statutory or constitutional—that "aris[e] from" immigration removal proceedings can only be brought through the petition for review process in the federal courts of appeals. 8 U.S.C. §§ 1252(a)(5) & (b)(9). Despite the gravity of their claims, the minors cannot bypass the immigration courts and proceed directly to district court. Instead, they must exhaust the administrative process before they can access the federal courts.

BACKGROUND

The appellees (collectively the "minors" or "children") are immigrant minors, aged three to seventeen, who have been placed in administrative removal proceedings. The children are at various stages of the removal process: some are waiting to have their first removal hearing, some have already had a hearing, and some have been ordered removed in absentia. None of the children can afford an attorney, and

each has tried and failed to obtain pro bono counsel for removal proceedings.

The children, suing on behalf of themselves and a class, claim a due process[1] and statutory right to appointed counsel at government expense in immigration proceedings.[2] They claim that, as minors, they "lack the intellectual and emotional capacity of adults," yet are "force[d] . . . to appear unrepresented in complex, adversarial court proceedings against trained [government] attorneys." According to the complaint, this lack of representation "ensure[s] that [they and] thousands of children [are] deprived of a full and fair opportunity to identify defenses or seek relief for which they qualify" in immigration court.

The children acknowledge that, generally, an immigrant who has been placed in removal proceedings can challenge those proceedings only after exhausting administrative remedies and filing a petition for review (PFR) in a federal court of appeals. But they argue that this case falls outside the general rule because, in light of the complex nature of removal proceedings and the appeals process, minors cannot

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[1] Immigration proceedings are civil, not criminal, in nature. Thus, the right-to-counsel claims invoke the Fifth Amendment's due process requirement, not the Sixth Amendment's right-to-counsel provision, which is reserved for criminal proceedings.

[2] This appeal was taken from the district court's order dismissing the second amended complaint, which was brought on behalf of all minors without counsel. The district court denied the government's motion to stay the proceedings pending resolution of the interlocutory appeal. After the briefs were filed in this case, the minors filed a third amended complaint, redefined the proposed class to include an indigency limitation, and dismissed some of the named plaintiffs. None of this activity affects our analysis.

effectively raise right-to-counsel claims through the PFR process. As a result, they conclude, they would be denied meaningful judicial review of their right-to-counsel claims if the district court lacked jurisdiction to hear the case.

The government moved to dismiss the complaint on multiple grounds, including ripeness (because in some cases the removal proceedings had not commenced and in others they had not concluded at the time the complaint was filed) and jurisdiction (because the Immigration and Nationality Act (INA) channels judicial review of claims arising out of removal proceedings through the PFR process. 8 U.S.C. §§ 1252(a)(5) & (b)(9)). The district court granted the government's motion in part and denied it in part. As to ripeness, the court dismissed for lack of jurisdiction the named parties "against whom removal proceedings have not yet been initiated," reasoning that "[r]emoval proceedings might never be commenced." The other children's claims were ripe because the agency did not have authority to appoint counsel or to declare a statute barring government-funded counsel unconstitutional, and "[e]xhaustion is not required to make a claim ripe when the agency lacks authority to grant relief."

The district court then turned to the government's jurisdictional challenge. The court recognized that the INA's judicial review mechanism, 8 U.S.C. §§ 1252(a)(5) and 1252(b)(9), "is broad in scope" and was "designed to consolidate and channel review of *all* legal and factual questions that arise from the removal of an alien into the administrative process, with judicial review of those decisions vested exclusively in the courts of appeal." (quoting *Aguilar v. ICE*, 510 F.3d 1, 9 (1st Cir. 2007) (emphasis in original)).

Despite the statutory strictures, the district court identified an exception to the INA's exclusive review process and concluded that it had jurisdiction over the minors' due process right-to-counsel claims. Citing *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), and *City of Rialto v. West Coast Loading Corporation*, 581 F.3d 865 (9th Cir. 2009), the court explained that the due process claims challenged a procedure or policy collateral to the substance of removal proceedings and, in light of the fact that "an immigration judge is unlikely to conduct the requisite [due process] balancing, the administrative record would be insufficient to provide a basis for meaningful judicial review." Conversely, the district court held that it lacked jurisdiction over the statutory right-to-counsel claims, in part because "the [constitutional] balancing standard does not apply and . . . concerns about the adequacy of the administrative record are not warranted."

The government filed this interlocutory appeal, challenging the district court's determination that it had jurisdiction over the constitutional claims. The minors cross-appealed, disputing, among other issues, the district court's dismissal of the statutory claims.

Analysis

I. The Immigration and Nationality Act Provides Exclusive Judicial Review through the Petition for Review Process.

This appeal turns on our interpretation of two provisions of the INA, so we begin with the statute.[3] The section titled "Exclusive means of review," 8 U.S.C. § 1252(a)(5), prescribes the vehicle for judicial review: "[A] petition for review . . . shall be the sole and exclusive means for judicial review of an order of removal . . . ." Lest there be any question about the scope of judicial review, § 1252(b)(9) mandates that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order . . . ."

Section 1252(b)(9) is, as the First Circuit noted, "breathtaking" in scope and "vise-like" in grip and therefore swallows up virtually all claims that are tied to removal proceedings. *See Aguilar v. ICE*, 510 F.3d 1, 9 (1st Cir. 2007). Taken together, § 1252(a)(5) and § 1252(b)(9) mean that *any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the PFR process. *See Viloria v. Lynch*, 808 F.3d 764, 767 (9th Cir. 2015) ("It is well established that this court's jurisdiction over removal proceedings is limited to review of final orders of removal."); *cf. Bibiano v. Lynch*, — F.3d —, 2016 WL 4409351, at *5 (9th Cir. 2016) (holding that 8 U.S.C. § 1252(b)(2)'s venue provision is not jurisdictional, but contrasting the venue statute with other statutes in the INA that use the terms "judicial review" or "jurisdiction").

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[3] Section 1252(b)(9) encompasses both the statutory and constitutional claims, which the parties acknowledge stand or fall together.

Although §§ 1252(a)(5) and 1252(b)(9) might seem draconian at first glance, they have two mechanisms that ensure immigrants receive their "day in court." *Singh v. Gonzales*, 499 F.3d 969, 979 (9th Cir. 2007). First, while these sections limit *how* immigrants can challenge their removal proceedings, they are not jurisdiction-stripping statutes that, by their terms, foreclose *all* judicial review of agency actions. Instead, the provisions channel judicial review over final orders of removal to the courts of appeals. *See Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2132 (2012) (explaining that heightened scrutiny is not appropriate where Congress channels judicial review of constitutional questions to a particular court but does not deny all judicial review of those questions). The Supreme Court has thus characterized § 1252(b)(9) as a "'zipper' clause,"[4] *Reno v. Am.-Arab Anti-Discrimination Comm. (AAADC)*, 525 U.S. 471, 483 (1999), explaining that the statute's purpose "is to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals[.]" *INS v. St. Cyr*, 533 U.S. 289, 313 & n.37 (2001).

Second, and equally importantly, § 1252(b)(9) has built-in limits. By channeling only those questions "arising from any action taken or proceeding brought to remove an alien," the statute excludes from the PFR process any claim that does not arise from removal proceedings. Accordingly, claims that are independent of or collateral to the removal process do not fall

[4] "The term 'zipper clause' comes from labor law, where it refers to a provision in a collective bargaining agreement that prohibits further collective bargaining during the term of the agreement or, more generally, that limits the agreement of the parties to the four corners of the contract." Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 Harv. L. Rev. 1963, 1984–85 (2000).

within the scope of § 1252(b)(9). *See Torres-Tristan v. Holder*, 656 F.3d 653, 658 (7th Cir. 2011) ("Ancillary determinations made outside the context of a removal proceeding, however, are not subject to direct review."); *Aguilar*, 510 F.3d at 11 (reading "arising from" "to exclude claims that are independent of, or wholly collateral to, the removal process"); *see also City of Rialto*, 581 F.3d at 874 (recognizing that *McNary* allowed the petitioners to challenge a policy that was collateral to their substantive eligibility for relief).

Thus, we have distinguished between claims that "arise from" removal proceedings under § 1252(b)(9)—which must be channeled through the PFR process—and claims that are collateral to, or independent of, the removal process. *See Aguilar*, 510 F.3d at 11; *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075–76 (9th Cir. 2006); *Singh*, 499 F.3d at 979. For example, in *Nadarajah v. Gonzales*, we held that an immigrant could challenge his five-year administrative detention by filing a petition for a writ of habeas corpus in district court, notwithstanding § 1252(b)(9). 443 F.3d at 1075–76. Nadarajah had "prevailed at every administrative level of review," had been granted asylum, and had "never been charged with any crime," yet was being held in detention "without any established timeline for a decision on when he may be released from detention." *Id.* at 1071, 1075. We explained that § 1252(b)(9) "does not apply to federal habeas corpus provisions that do not involve final orders of removal." *Id.* at 1075. Because "Nadarajah ha[d] prevailed at every administrative level" and been granted asylum, his petition did not involve a final order of removal, and § 1252(b)(9) did not channel jurisdiction to the courts of appeals. *Id.* at 1076.

Similarly, in the unique situation in *Singh v. Gonzales*, we recognized that the district court had jurisdiction over the petitioner's ineffective-assistance-of-counsel claim that arose after his attorney failed to file a timely PFR. 499 F.3d at 980. We noted that Singh's claim could not have been raised before the agency because it arose after a final order of removal was entered and, absent habeas review, Singh would have had no legal avenue to obtain judicial review of this claim. We therefore concluded that his petition did not challenge a final order of removal under § 1252(b)(9). *Id.* at 979. We did not, however, allow Singh to raise a different ineffective assistance of counsel claim that arose before a final order of removal entered and that could and should have been brought before the agency. *Id.* at 974; *cf. Skurtu v. Mukasey*, 552 F.3d 651, 658 (8th Cir. 2008) (distinguishing *Singh* and holding that a right-to-counsel claim must be brought through the PFR process because the claim is a "direct result of the removal proceedings").

In contrast, in *Martinez v. Napolitano*, we held in the context of a district court challenge under the Administrative Procedure Act that "[w]hen a claim by an alien, however it is framed, challenges the procedure and substance of an agency determination that is 'inextricably linked' to the order of removal, it is prohibited by section 1252(a)(5)." 704 F.3d 620, 623 (9th Cir. 2012).

In light of §§ 1252(b)(9) and 1252(a)(5) and our precedent, the children's right-to-counsel claims must be raised through the PFR process because they "arise from" removal proceedings. The counsel claims are not independent or ancillary to the removal proceedings. Rather, these claims are bound up in and an inextricable part of the administrative process. The First Circuit was the first court

to consider whether a right-to-counsel claim falls outside the scope of § 1252(b)(9). The court unequivocally said no. Thus, we agree with the court's analysis in *Aguilar* that, "[b]y any realistic measure, the alien's right to counsel is part and parcel of the removal proceeding itself. . . . [A]n alien's right to counsel possesses a direct link to, and is inextricably intertwined with, the administrative process that Congress so painstakingly fashioned." *Aguilar*, 510 F.3d at 13.

Right-to-counsel claims are routinely raised in petitions for review filed with a federal court of appeals. *See, e.g.*, *Ram v. Mukasey*, 529 F.3d 1238, 1242 (9th Cir. 2008) (holding that the petitioner did not knowingly and voluntarily waive the right to counsel); *Zepeda-Melendez v. INS*, 741 F.2d 285, 289 (9th Cir. 1984) (holding that the INS's deportation of an immigrant without notice to counsel violated the immigrant's statutory right to counsel). In part, this is because immigration judges have an obligation to ask whether a petitioner wants counsel: "Although [immigration judges] may not be required to undertake Herculean efforts to afford the right to counsel, at a minimum they must inquire whether the petitioner wishes counsel, determine a reasonable period for obtaining counsel, and assess whether any waiver of counsel is knowing and voluntary." *Biwot v. Gonzales*, 403 F.3d 1094, 1100 (9th Cir. 2005). An immigration judge's failure to inquire into whether the petitioner wants (or can knowingly waive) counsel is grounds for reversal. *See id.* As we discuss below, special protections are provided to minors who are unrepresented. *See infra* at pp. 21–22.

The legislative history of the INA, as well as amendments to § 1252(b)(9), confirm that Congress intended to channel all claims arising from removal proceedings, including right-to-counsel claims, to the federal courts of appeals and bypass the

district courts. Consolidation of the review process for immigration orders of removal began in 1961, when Congress amended the INA to channel immigrants' challenges to their removal proceedings to the courts of appeals via the PFR.[5] H.R. Rep. No. 87-1086, at 22 (1961), *as reprinted in* 1961 U.S.C.C.A.N. 2950, 2966; *see also Magana-Pizano v. INS*, 152 F.3d 1213, 1220 (9th Cir. 1998) (recognizing 1961 changes to INA), *vacated on other grounds*, 526 U.S. 1001 (1999) (mem.). The change was intended to "create a single, separate, statutory form of judicial review of administrative orders for the [removal] of aliens from the United States" and to shorten the time frame for judicial review of deportation orders by "eliminat[ing] . . . a suit in a District Court." H.R. Rep. No. 109-72, at 172 (2005) (Conf. Rep.), *reprinted in* 2005 U.S.C.C.A.N. 240, 297–301 (citations omitted).

Congress continued to streamline judicial review of immigration proceedings in 1996, when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3546 (1996). IIRIRA "repealed the old judicial-review scheme . . . and instituted a new (and significantly more restrictive) one in

[5] The text of the 1961 statute differs from the text of §§ 1252(a)(5) and 1252(b)(9). It reads: "[The petition for review process] shall apply to, and shall be the exclusive procedure for, the judicial review of all final orders of deportation . . . made against aliens within the United States pursuant to administrative proceedings . . . ." 8 U.S.C. § 1105a(a) (1964). As we explained in *Magana-Pizano*, the statute was subject to various "interim measures" from 1961 to 1996. 152 F.3d at 1220. In 1996, Congress repealed § 1105a(a) and enacted § 1252(b)(9). *AAADC*, 525 U.S. at 475. It enacted § 1252(a)(5) in 2005 as part of the REAL ID Act. *Singh*, 499 F.3d at 977. In each of these amendments, Congress has consistently sought to channel judicial review of immigration proceedings through the PFR process.

8 U.S.C. § 1252." *AAADC*, 525 U.S. at 475. The new judicial review provisions were designed to make perfectly clear "that only courts of appeals—and not district courts—could review a final removal order," that "review of a final removal order is the only mechanism for reviewing any issue raised in a removal proceeding," and that the statute was "intended to preclude all district court review of any issue raised in a removal proceeding."[6] H.R. Rep. No. 109-72, at 173.

When it enacted § 1252(b)(9) in 1996, Congress was legislating against the backdrop of recent Supreme Court law. In 1991, in *McNary v. Haitian Refugee Center*, the Court offered a blueprint for how Congress could draft a jurisdiction-channeling statute that would cover not only individual challenges to agency decisions, but also broader challenges to agency policies and practices. A group of immigrants, who applied unsuccessfully for amnesty under the special agricultural workers (SAW) program (or thought they would be unsuccessful in the future), filed an action in district court, alleging injuries caused by "unlawful practices

[6] In the REAL ID ACT of 2005, Congress amended § 1252(b)(9) to clarify that federal courts lack habeas jurisdiction over orders of removal. The statute now contains an additional sentence on habeas jurisdiction, but the operative jurisdiction-channeling language has not changed from 1996. The 2005 amendment provides that: "Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact." 8 U.S.C. § 1252(b)(9). Congress amended the statute in response to *St. Cyr*, in which the Supreme Court held that the pre-2005 version of § 1252(b)(9) did not clearly strip the courts of habeas jurisdiction over immigrants who had committed crimes. *See* H.R. Rep. No. 109-72, at 173.

and policies adopted by the INS in its administration of the SAW program." 498 U.S. at 487. The Court held that, under the governing statute, the district court had jurisdiction to hear a challenge to INS practices and policies because the statute channeled only individual—not wider policy—claims through the PFR process.[7]

Of significance to our analysis, the Court explained that Congress *could have* crafted language to channel challenges to agency policies through the PFR process if it had chosen to do so:

> [H]ad Congress intended the limited review provisions of § 210(e) . . . to encompass challenges to INS procedures and practices, it could easily have used broader statutory language. Congress could, for example, have . . . channel[ed] into the Reform Act's special review procedures "all causes . . . arising under any of the provisions" of the legalization program. It moreover could have . . . referr[ed] to review "on all questions of law and fact" under the SAW legalization program.

Id. at 494 (citations omitted).

In *McNary*, the Court did everything but write the future statute and so it makes sense to presume that Congress was aware of this precedent when it amended the INA in 1996.

[7] The operative language in the statute at issue in *McNary* provided that "judicial review of a determination respecting an application for adjustment of status" must be brought through a PFR. *Id.* at 486, 491.

See United States v. Wells, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with [the Supreme Court's] precedents. . . ."). With this presumption in mind, we note that § 1252(b)(9) neatly tracks the policy and practice jurisdiction-channeling language suggested in *McNary*: the amended section channels review of "all questions of law and fact" to the courts of appeals for all claims "arising from any action taken or proceeding brought to remove an alien from the United States." 8 U.S.C. § 1252(b)(9). Thus, the legislative history and chronology of amendments to § 1252(b)(9) confirm the plain meaning of the statute. We conclude that §§ 1252(a)(5) and 1252(b)(9) channel review of all claims, including policies-and-practices challenges, through the PFR process whenever they "arise from" removal proceedings. Because the children's right-to-counsel claims arise from their removal proceedings, they can only raise those claims through the PFR process. *Aguilar*, 510 F.3d at 13.

II. The Minors Have Not Been Denied All Forms of Meaningful Judicial Review.

The minors do not seriously dispute that the plain text of § 1252(b)(9) prohibits them from filing a complaint in federal district court. Instead, they attempt to get around the statute by claiming that they have been (or will be) denied meaningful judicial review in light of their juvenile status. In other words, they argue that § 1252(b)(9), as applied in this context, creates a Catch-22 that effectively bars all judicial review of their claims.

The argument goes as follows: Minors who obtain counsel in their immigration proceedings will be unable to raise right-to-counsel claims because they have no such

claim. As a practical matter, children who lack counsel will be unable to reach federal court to raise a right-to-counsel claim because they are subject to the same exhaustion requirements and filing deadlines that apply to adults. Even if an unrepresented child were able to navigate the PFR process, the child would still be deprived of meaningful judicial review, because the record on appeal would be insufficient to sustain review. Because, according to the minors, their right-to-counsel claims will never see the light of day through the PFR process, the panel should construe § 1252(b)(9) as not covering these claims.

The assertion that the minors will be denied meaningful judicial review stems from dicta in *McNary*. In *McNary*, the Court noted that the SAW regime imposed several practical impediments to judicial review. Most importantly, SAW procedures "d[id] not allow applicants to assemble adequate records" for review.[8] 498 U.S. at 496. Agency interviews were neither recorded nor transcribed, and SAW applicants had "inadequate opportunity" to present evidence and witnesses on their own behalf. *Id.* Because the administrative record was minimal, the courts of appeals "[had] no complete or meaningful basis upon which to review application determinations." *Id.* As a result, if the workers were "not allowed to pursue their claims in the District Court, [they] would not as a practical matter be able to obtain meaningful judicial review of their application denials or of

[8] The Court cited two other aspects of the SAW program that were problematic but are not pertinent here: first, under the statute, judicial review was available only if immigrants voluntarily surrendered themselves for deportation after being denied relief, and second, the plaintiffs "adduced a substantial amount of evidence, most of which would have been irrelevant in the processing of a particular individual application." 498 U.S. at 496–97.

their objections to INS procedures." *Id.* Citing the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action," the Court concluded that it is "most unlikely that Congress intended to foreclose all forms of meaningful judicial review." *Id.*

The difficulty with the minors' argument is that *McNary* was, at its core, a statutory interpretation case involving a completely different statute.[9] *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 14 (2000) (declining to apply *McNary* because it "turned on the different language of that different statute," and noting that "the Court suggested that statutory language similar to the language at issue here—any claim 'arising under' . . . —would have led it to a different legal conclusion"). The point in *McNary* was that Congress used language ("a determination respecting an application" for SAW status) that did not encompass the constitutional pattern and practice claims urged by the workers. As a consequence, their claims fell outside of the narrow channeling provisions of the statute.

[9] Because this case turns on the interpretation of the statute, the district court's reliance on cases involving different statutes is misplaced. *See Proyecto San Pablo v. INS*, 189 F.3d 1130 (9th Cir. 1999) (holding that the district court had jurisdiction to hear challenges to agency policies under a statute that read "[t]here shall be judicial review of a [denial of an application for adjustment of status by the agency] only in the judicial review of an order of deportation," 8 U.S.C. § 1255a(f)(4)(A)); and *Ortiz v. Meissner*, 179 F.3d 718 (9th Cir. 1999) (holding that the district court had jurisdiction to hear policies and practices challenge under 8 U.S.C. §§ 1255a(f) and 1160(e), which provided that "[t]here shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation[.]"). Neither case involved the zipper clause of § 1252(b)(9) or the "arising from" language. Both *Proyecto* and *Ortiz* analyzed *McNary* only in the context of the Immigration Reform and Control Act.

In providing two alternative formulations of channeling language, the Court more than foreshadowed what language would be "expansive" enough to remove district court jurisdiction. Thus, the Court's note to Congress laid out the language necessary to limit "challenges to INS procedures and practices." *McNary*, 498 U.S. at 494. *McNary* does not provide an avenue for litigants to circumvent an unambiguous statute.

We would be naive if we did not acknowledge that having an unrepresented minor in immigration proceedings poses an extremely difficult situation. But we are not convinced that agency removal proceedings raise the same concerns that were present in the SAW proceedings. Unlike the SAW program, removal hearings are recorded and transcribed and provide a basis for meaningful judicial review. Immigration judges are both trained and required to probe the record and to ask questions to elicit information about possible avenues of relief. *See* 8 U.S.C. § 1229a(b)(1) (detailing immigration judges' obligation to "administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses"). Immigration judges must "adequately explain the hearing procedures to the alien," *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002), and where immigrants proceed pro se, the judges have a duty to "fully develop the record." *Id.* (quoting *Jacinto v. INS*, 208 F.3d 725, 733–34 (9th Cir. 2000)). They are also required to inform immigrants of any ability to apply for relief from removal and the right to appeal removal orders. *See United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1050 (9th Cir. 2004).

Unrepresented minors receive additional special protections in removal proceedings. Unless the child is accompanied by "an attorney or legal representative, a near

relative, legal guardian, or friend," the immigration judge cannot accept the child's admission of removability. 8 C.F.R. § 1240.10(c). Immigration judges also must ensure that any waiver of the right to counsel is knowing and voluntary; on review, we can "indulge every reasonable presumption against waiver," *United States v. Cisneros-Rodriguez*, 813 F.3d 748, 756 (9th Cir. 2015) (citation omitted), and when the petitioner is a minor, we factor "the minor's age, intelligence, education, information, information, and understanding and ability to comprehend" into our analysis. *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1033 (9th Cir. 2004). Further, recognizing "a growing need for support systems the courts can use to effectively and efficiently manage the cases of unaccompanied minors," in 2014, the Office of the Chief Immigration Judge provided guidelines for "The Friend of the Court Model for Unaccompanied Minors in Immigration Proceedings." Although the friend of the court does not act as a representative, the friend's assistance role can be critical in monitoring the proceedings. These protections distinguish removal proceedings from the SAW program, and the concerns highlighted by *McNary* are not in play.

At argument, counsel for the children claimed that it was essentially impossible to get the right-to-counsel claim before a federal court. This assertion is belied by the fact that the minors' counsel has previously raised a right-to-counsel claim through the PFR process. *See Guzman-Heredia v. Gonzales*, No. 04-72769 (9th Cir.). In *Guzman-Heredia*, the petitioner was a fourteen-year-old boy who was placed in removal proceedings. He explained to the immigration judge "that he had been unable to find an attorney to represent him and requested that the Immigration Judge appoint an attorney for him." The judge denied the request, stating that he could not "give people a free lawyer." The immigration judge then

ordered the petitioner removed, and the Board of Immigration Appeals affirmed. At this stage, the petitioner obtained pro bono counsel, who argued in a PFR that:

> Petitioner's Fifth Amendment right to due process was violated when the Immigration Judge refused to appoint an attorney to represent him in removal proceedings. Because Petitioner is an unaccompanied child of 14 years of age, he is of limited cognitive abilities and lacks understanding of legal process. Due to the seriousness of the proceedings against him and the importance of the interest at stake, namely immigration proceedings in which the government seeks to remove Petitioner from his family, home and school in the United States, the Constitution compels that Petitioner have been afforded the protection of appointed counsel at public expense.

Id. Although the case ultimately settled, *Guzman-Heredia* lays rest to the contention that right-to-counsel claims will never surface through the PFR process.

The reality is that current counsel for the minors are in a unique position to bring multiple test cases on the counsel issue.[10] The claim in this suit is that indigent minors are

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[10] Following discussion at oral argument, to facilitate a test case, through December 2016 the government is providing the children's counsel with notice of any minor without counsel that the government is aware of ordered removed by an immigration judge following a merits hearing. To take the government at its word that it is willing to cooperate

entitled to government-provided counsel as a matter of constitutional and statutory right. For accompanied minors, a parent could make the claim or, for unaccompanied minors, a next friend could help them do so.[11] Even better, the IJ and the government could acknowledge that absent a knowing and voluntary waiver, a minor proceeding without counsel has de facto requested a right to court-appointed counsel.

Under any of these scenarios, a right-to-counsel claim is teed up for appellate review. It is true that at present neither the immigration judge nor the Board of Immigration Appeals has authority to order court-appointed counsel. But the question at hand is a legal one involving constitutional rights. Even if not raised in the proceedings below, the court of appeals has authority to consider the issue because it falls within the narrow exception for "constitutional challenges that are not within the competence of administrative agencies to decide" and for arguments that are "so entirely foreclosed . . . that no remedies [are] available as of right" from the agency.[12] *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004) (first quotation); *Alvarado v. Holder*, 759 F.3d 1121,

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with counsel, the government should continue such notice.

[11] The Friend of the Court Model for Unaccompanied Minors can provide an avenue for counsel to play a role in individual proceedings. For example, one of the children's counsel appeared as a friend in an individual immigration proceeding in July 2016 and stated that although he did not represent the child, "for whatever value it has in the record that [the minor] does I know want appointed counsel." *See* Attachment to Government's Letter to the Court, dated August 18, 2016.

[12] Under the statute, immigrants in removal proceedings have "the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing." 8 U.S.C. § 1229a(b)(4)(A). Agency regulations recognize the same privilege. 8 C.F.R. § 238.1(b)(2).

1128 (9th Cir. 2014) (second quotation; quotation marks and citation omitted, first alteration in original); *see also, e.g.*, *Sola v. Holder*, 720 F.3d 1134, 1135 (9th Cir. 2013) (per curiam) (recognizing exception to exhaustion requirement for constitutional challenges to agency procedures and the statute the agency administers).

We recognize that a class remedy arguably might be more efficient than requiring each applicant to file a PFR, but that is not a ground for ignoring the jurisdictional statute. Indeed, should a court determine that the statute barring payment for counsel does not mean what it says—a position taken by the minors—that statute would be "infirm across the circuit and in every case." *Naranjo-Aguilera v. INS*, 30 F.3d 1106, 1114 (9th Cir. 1994). We also recognize that there are limited—and already more than stretched—pro bono resources available to help unaccompanied minors navigate the removal process. But these considerations cannot overcome a clear statutory prescription against district court review. Relief is through review in the court of appeals or executive or congressional action.

In sum, the minors' claim that they are entitled to court-appointed counsel "arises from" their removal proceedings and §§ 1252(a)(5) and 1252(b)(9) provide petitions for review of a removal order as the exclusive avenue for judicial review. The district court lacks jurisdiction over the minors' claims.[13]

[13] Because the district court lacks jurisdiction, we do not reach the other issues the minors raise on cross-appeal.

AFFIRMED as to the statutory claim; REVERSED as to the constitutional claim. The parties shall each bear their own costs on appeal.

McKEOWN, Circuit Judge, with whom M. SMITH, Circuit Judge, joins, specially concurring:

Jurisdictional rulings have an anodyne character that may suggest insensitivity to the plight of the parties, particularly in a case involving immigrant children whose treatment, according to former Attorney General Eric Holder, raises serious policy and moral questions.[1] But we must heed the Supreme Court's admonition that "[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). We did not reach the merits here because we hewed to the statute channeling federal court jurisdiction. That said, I cannot let the occasion pass without highlighting the plight of unrepresented children who find themselves in immigration proceedings. While I do not take a position on the merits of the children's constitutional and statutory claims, I write to underscore that the Executive and Congress have the power to address this crisis without judicial intervention. What is missing here? Money and resolve—political solutions that fall outside the purview of the courts.

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[1] Attorney General Eric Holder, Remarks at the Hispanic National Bar Association 39th Annual Convention (Sept. 12, 2014), *available at* https://www.justice.gov/opa/speech/remarks-attorney-general-eric-holder-hispanic-national-bar-association-39th-annual.

In fiscal year 2014, more than 60,000 unaccompanied minors made their way to the United States,[2] prompting the Department of Homeland Security to declare a crisis at our southern border.[3] Although the numbers dropped in fiscal year 2015, the surge has now reappeared. According to the Pew Research Center, "[t]he number of apprehensions of unaccompanied children shot up by 78%" during the first six months of fiscal year 2016.[4] Indeed, earlier "some Members of Congress as well as the Administration characterized the issue as a humanitarian crisis."[5] The border crisis created what has been called a "perfect storm" in immigration courts, as children wend their way from border crossings to immigration proceedings.[6] The storm has battered immigration "courtrooms crowded with young defendants but

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[2] William Kandel, *Unaccompanied Alien Children: An Overview*, Congressional Research Service, 1 (May 11, 2016), *available at* https://fas.org/sgp/crs/homesec/R43599.pdf.

[3] Julia Preston, *U.S. Setting Up Emergency Shelter in Texas as Youths Cross Border Alone*, N.Y. Times, May 16, 2014, *available at* http://www.nytimes.com/2014/05/17/us/us-sets-up-crisis-shelter-as-children-flow-across-border-alone.html?_r=0.

[4] Jens Krogstad, *U.S. Border Apprehensions of Families and Unaccompanied Children Jump Dramatically*, Pew Research Center, May 4, 2016, *available at* http://www.pewresearch.org/fact-tank/2016/05/04/u-s-border-apprehensions-of-families-and-unaccompanied-children-jump-dramatically/.

[5] *See* Kandel, *supra* note 2, at 1.

[6] ABA Commission on Immigration, *A Humanitarian Call to Action: Unaccompanied Children in Removal Proceedings Present a Critical Need for Legal Representation*, 1 (June 3, 2015), *available at* http://www.americanbar.org/content/dam/aba/administrative/immigration/UACSstatement.authcheckdam.pdf (internal quotation marks omitted).

lacking lawyers and judges to handle the sheer volume of cases."[7]

The net result is that thousands of children[8] are left to thread their way alone through the labyrinthine maze of immigration laws, which, without hyperbole, "have been termed second only to the Internal Revenue Code in complexity." *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987) (internal quotation marks omitted); *see also Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) (emphasizing the complexity of immigration laws and noting that lawyers may be the only ones capable of navigating through it). This reality prompted the Chief Immigration Judge to acknowledge that "[t]he demands placed on the [immigration] courts are increasing due to the unprecedented numbers of unaccompanied minors being placed in immigration proceedings. As a result there is a growing need for support systems the [immigration] courts can use to effectively and efficiently manage the cases of unaccompanied minors."[9]

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[7] Liz Robbins, *Immigration Crisis Shifts from Border to Courts*, N.Y. Times, Aug. 23, 2015, *available at* http://www.nytimes.com/2015/08/24/nyregion/border-crisis-shifts-as-undocumented-childrens-cases-overwhelm-courts.html.

[8] According to the Transactional Records Access Clearinghouse at Syracuse University, between 2011 and 2014, the number of juvenile cases in immigration courts leaped from 6,425 in 2011 to 59,394 in 2014. As of September 2015, children in more than 32,700 pending immigration cases were unrepresented.

[9] Memorandum from the Executive Office for Immigration Review, The Friend of the Court Model for Unaccompanied Minors in Immigration Proceedings (Sept. 10, 2014).

Given the onslaught of cases involving unaccompanied minors, there is only so much even the most dedicated and judicious immigration judges (and, on appeal, members of the Board of Immigration Appeals) can do. *See* Amicus Curiae Brief of Former Federal Immigration Judges at 7. Immigration judges are constrained by "extremely limited time and resources." *Id.* at 4. Indeed, those judges may sometimes hear as many as 50 to 70 petitions in a three-to-four hour period, *id.*, leaving scant time to delve deeply into the particular circumstances of a child's case.

In light of all this, it is no surprise that then-Attorney General Holder took the position in 2014 that "[t]hough these children may not have a Constitutional right to a lawyer, we have policy reasons and a moral obligation to ensure the presence of counsel."[10] But Congress has clearly—and repeatedly—indicated that these policy and moral concerns may not be addressed in the district court. Rather, these issues come initially within the Executive's purview as part of the administrative removal process, with review available in the Courts of Appeals through the petition for review process.[11] *See* Maj. Op. at 14–17.

To its credit, the Executive has taken some steps within this process to address the difficulties confronting unaccompanied and unrepresented minors. Through the

[10] *See supra* note 1.

[11] As discussed in the majority opinion, under the current statutory scheme, Congress has recognized the "privilege of being represented, at no expense to the Government, by counsel." 8 U.S.C. § 1229a(b)(4)(A). Implementing regulations enacted by the Executive recognize the same limited privilege. *See* 8 C.F.R. § 238.1(b)(2).

Justice AmeriCorps program, the government awarded $1.8 million to support living allowances for 100 legal fellows who will represent children in removal proceedings.[12] The government has also partnered with the United States Conference of Catholic Bishops and the United States Committee for Refugees and Immigrants to provide legal representation to unaccompanied children.[13] The Executive Office for Immigration Review offers legal orientations for custodians of unaccompanied children in removal proceedings and it launched a pilot program to provide legal services to unaccompanied minors.[14]

Yet these programs, while laudable, are a drop in the bucket in relation to the magnitude of the problem—tens of thousands of children will remain unrepresented. A meritorious application for asylum, refuge, withholding of removal or other relief may fall through the cracks, despite the best efforts of immigration agencies and the best interests of the child. Additional policy and funding initiatives aimed at securing representation for minors are important to ensure

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[12] *See* Press Release, Department of Justice, Justice Department and CNCS Announce $1.8 Million in Grants to Enhance Immigration Court Proceedings and Provide Assistance to Unaccompanied Children (Sept. 12, 2014), *available at* https://www.justice.gov/opa/pr/justice-department-and-cncs-announce-18-million-grants-enhance-immigration-court-proceedings.

[13] *See* Announcement of Award of Two Single-Source Program Expansion Supplement Grants To Support Legal Services to Refugees Under the Unaccompanied Alien Children's Program, 79 Fed. Reg. 62,159–01 (Oct. 16, 2014).

[14] *See* Press Release, Department of Justice, EOIR Expands Legal Orientation Program Sites (Oct. 22, 2014), *available at* https://www.justice.gov/eoir/pr/eoir-expands-legal-orientation-programs.

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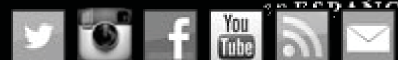
the smooth functioning of our immigration system and the fair and proper application of our immigration laws.

Eventually, an appeal asserting a right to government-funded counsel will find its way from the immigration courts to a Court of Appeals through the petition for review process. It would be both inappropriate and premature to comment on the legal merits of such a claim. But, no matter the ultimate outcome of such an appeal, Congress and the Executive should not simply wait for a judicial determination before taking up the "policy reasons and . . . moral obligation" to respond to the dilemma of the thousands of children left to serve as their own advocates in the immigration courts in the meantime. The stakes are too high. To give meaning to "Equal Justice Under Law," the tag line engraved on the U.S. Supreme Court building, to ensure the fair and effective administration of our immigration system, and to protect the interests of children who must struggle through that system, the problem demands action now.

KLEINFELD, Senior Circuit Judge, specially concurring:

I agree with my colleagues that a child (or for that matter, an adult) is unlikely to be able to protect all his rights in a deportation proceeding unless he has a lawyer. Many advocacy groups are deeply involved in immigration issues, including the ones who provided counsel in this one, and because the solution to the representation problem is a highly controversial political matter, I think our own advocacy of some particular reform measure is unnecessary and the matter is better left to the political process.

THE UNITED STATES DEPARTMENT of JUSTICE



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JUSTICE NEWS

Remarks by Attorney General Eric Holder at the Hispanic National Bar Association 39th Annual Convention

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Washington, DC, United States ~ Friday, September 12, 2014

Remarks as Prepared for Delivery

Buenas tardes. Muchas gracias por sus emotivas palabras y su calurosa bienvenida.

It's a privilege to help welcome the Hispanic National Bar Association to our nation's capital for your 39 th Annual Convention. And it's a great pleasure, as always, to be in such distinguished company.

cited in J.F.M. v. Lynch, No. 15-35738 archived on September 14, 2016

I'd like to thank President [Miguel Alexander] Pozo and the entire HNBA leadership team – along with your Honorary Convention Chair, Ricardo Anzaldua; President [Fernando] Rivero, of the Hispanic Bar Association of the District of Columbia; and all of this organization's members – for everything you've done to bring us together this week. I'd also like to congratulate the award recipients who are being honored for their leadership over the course of this Latina Commission Awards Luncheon. And I want to recognize the law students, attorneys, and judges who make up this remarkable organization – and who have taken time away from their busy schedules and full dockets to take part in this important annual convention.

We come together today in a moment of great consequence – with critical challenges stretching before us. Six decades after *Hernandez v. Texas* extended the Constitution's guarantee of equal protection to people of *all* races and backgrounds – and half a century since the passage of the Civil Rights Act finally codified American equality into American law – there's no question that our nation has taken a range of extraordinary, once-unimaginable steps forward. Yet recent headlines remind us that these advances have *not* put the issue of equal justice to rest.

On the contrary: from America's heartland to our southwest border, the events that have captured attention and sparked debate over the course of this summer illustrate that the fight for equality, opportunity, and justice is not yet over. These issues have not yet been relegated to the pages of history. And although this is a struggle that predates our Republic, it poses challenges as contemporary as any others we currently face.

For over four decades, the HNBA has stood at the forefront of national efforts to confront these challenges – by working to increase diversity on the bench and bar. By helping to educate the leaders of tomorrow. By empowering members of America's Latino communities. And by fostering new opportunities for legal professionals of Hispanic heritage – and particularly Latinas in the law

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– so we can grow their ranks and ensure that their voices are heard from the chambers of our courts to the halls of Congress.

For me – and for my colleagues at every level of today's Department of Justice – this work is *also* a personal and professional priority. More than ten years ago, during my service as Deputy Attorney General, I worked hard to strengthen the Justice Department's internal efforts to build a diverse and effective workforce. When I returned to the Department as Attorney General, in 2009, I significantly expanded this work – because it not only improves our ability to draw on the skills and talents of *everyone* ; it also makes the Justice Department both more credible and more effective. In fact, since I understand this convention includes a job fair, I can't pass up the chance to urge all of the young and aspiring attorneys in this crowd to consider a career in public service – and coming to work for me.

Beyond the institution itself, my colleagues and I also are striving to bolster the legal profession at large – by opening its doors to women and men from every race, background, ethnicity, and walk of life. According to the Pew Research Center, the Hispanic population in the United States currently exceeds 53 million people. It has increased almost sixfold since around the time the HNBA was founded. It's doubled since the year 2000. Yet statistics show that, of the approximately 1.2 million attorneys working in the U.S. today, fewer than 50,000 – that's less than *four percent* – identify as Hispanic.

Although women and people of color have made up an increasing percentage of both licensed lawyers and law students in recent years, the law continues to lag far behind many other professions. So we need to do everything in our power to ensure that the coming decades witness an uptick in the number of people of color, women, people with disabilities – and new immigrants – who find productive avenues into the legal field and the American workforce as a whole. And once they have fair opportunities to compete for these jobs, we need to close the "pay gap" – and make sure every worker is compensated according to their skills and experience, *not* simply their gender or gender identity.

cited in J. F.M. v. Lynch, No. 15-35738 archived on September 14, 2016

As the HNBA has made clear throughout its history, all of us – both collectively and as individuals – have more work to do: to tear down persistent barriers, to combat discrimination, and to uphold the civil rights to which every person is entitled. In our comprehensive work to advance equality, we need to look far beyond law school campuses and workplaces. We need to keep building upon the exemplary record of civil rights enforcement that the Justice Department has established over the last five and a half years. We need to keep striving – through programs such as President Obama's "My Brother's Keeper" initiative – to address persistent opportunity gaps and ensure that *all* people can reach their full potential. And we need to summon our collective experience as legal professionals – and our shared commitment as a nation – to tackle the urgent challenges faced by millions of people every day: from America's immigrant communities to our military bases; from our places of worship to our financial markets; and from our voting booths to our border areas – where, as you know, a critical situation is unfolding as we speak.

Among the most pressing of our domestic challenges is the problem of unaccompanied young people traveling to the United States and entering the country illegally. I know this is an issue with which we are all too familiar, and which has provoked intense discussion throughout the summer – both within, and far beyond, the United States. In fact, earlier this week, I traveled to Mexico City to hold meetings with my counterparts from Mexico, Guatemala, El Salvador, and Honduras. And this was among the major items on our agenda.

As the chief law enforcement officials for each of the nations we serve, my colleagues and I agreed to create a high-level working group, staffed by representatives from each of our offices, to develop an integrated strategy to deal with this situation. This working group will hold its first meeting in the coming weeks. And they will help us formulate a coordinated plan of action.

But another potential solution to this problem is obvious: fixing our broken immigration system.

The Senate, on a bipartisan basis, has already passed a bill that would go a long way to doing just that. The issue is compelling, the solution is present and the need to reaffirm our commitment to remaining a nation of immigrants is critical. This is who we are as an exceptional nation. If we are to remain true to our heritage, we must fix our immigration system, bring people out of the shadows and establish a path to citizenship. There are a variety of ways in which much of this can be done and in the face of House inaction this Administration will proceed. It will do so lawfully and in a manner that is consistent with our values. We will, as Americans always have, seek to make our Union more perfect.

In the meantime – within America's borders – the increasing numbers of unaccompanied children appearing in our immigration courts present an urgent challenge: how to conduct immigration proceedings in an efficient manner while any claims for relief are presented as clearly as possible. One way to address that challenge is to facilitate access to legal representation for these children. Though these children may not have a Constitutional right to a lawyer, we have policy reasons and a moral obligation to insure the presence of counsel. And that's why the Justice Department began planning a legal aid program well before the recent surge of unaccompanied children.

Last July, President Obama announced the creation of a task force to expand national service, calling on federal agencies to meet that goal by creating volunteer opportunities that are aligned with agency priorities. The Justice Department's response to that call was clear. By partnering with the Corporation for National and Community Service to design and implement a new legal aid program, the Department is protecting vulnerable populations while improving our operations and strengthening the delivery of Department services in their communities.

The first phase of this new program – known as "justice AmeriCorps" – was announced in June. It will provide legal aid to children who make the long and often dangerous journey to the U.S. without a parent or legal guardian. And this week, we are taking the next step in this work – by announcing approximately $1.8 million in grant awards to legal aid organizations in more than 15 cities around the country.

These grants will enable recipients to enroll approximately 100 lawyers and paralegals as justice AmeriCorps members, who – after extensive training in December – will begin to represent these children in our immigration courts in early 2015. The justice AmeriCorps members will also help to identify children who have been victims of human trafficking or abuse – and, as appropriate, will refer them to support services and authorities responsible for investigating and prosecuting those who perpetrate such crimes.

This initiative reaffirms our allegiance to the values that have always shaped our pursuit of justice. It will bolster the efficacy and efficiency of our immigration courts, empower new generations of aspiring attorneys and paralegals to serve their country, and provide important legal aid to some of the most vulnerable individuals who interact with our immigration system. Most importantly, it will bring our system closer to our highest ideals – because the way we treat those in need, and particularly young people who may be fleeing from abuse, persecution, and violence, goes to the core of who we are as a nation.

Fortunately, thanks to the work that's underway; the leadership of President Obama and other Administration officials; and the tireless efforts of nonpartisan groups like the Hispanic National Bar Association, it's clear that we stand together this week – in defiance of gridlock and the narrow politics of the moment – *truly* "Unidos en Washington." We stand together in our assertion that civil rights are human rights – and they must be extended to all. We stand together in our demand that equal work should be performed for equal pay – and our daughters deserve the same opportunities as our sons. And we stand together in our conviction that it is both the right – and the responsibility – of *every* American to forge his or her own future; to build on the progress we've seen in recent decades; and to extend the promise of our great country until it includes every single person who dares, and dreams, to call this nation their home.

cited in J.E.F.M. v. Lynch, No. 15-35738 archived on September 14, 2016

As we carry this work into the future, I want you to know how proud I am to count you as colleagues and partners. Always remember that positive change is not inevitable. It is a function of hard work and resilience. I am confident that - together - we will make our great nation even more great, more just. I look forward to everything we will achieve together in the months and years ahead. And I thank you, once again, for all that you do.

Topic:
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Office of the Attorney General

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Speeches of Attorney General Eric H. Holder, Jr.

Updated April 28, 2016

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Unaccompanied Alien Children: An Overview

William A. Kandel
Analyst in Immigration Policy

May 11, 2016

cited in J. F.M. v. Lynch, No. 15-35738 archived on September 14, 2016

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CRS REPORT
Prepared for Members and
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Summary

In FY2014, the number of unaccompanied alien children (UAC, unaccompanied children) that were apprehended at the Southwest border while attempting to enter the United States without authorization reached a peak, straining the system put in place over the past decade to handle such cases. Prior to FY2014, UAC apprehensions were steadily increasing. For example, in FY2011, the Border Patrol apprehended 16,067 unaccompanied children at the Southwest border, whereas in FY2014 more than 68,500 unaccompanied children were apprehended. In FY2015, UAC apprehensions declined 42% to 39,970. In the first six months of FY2016 they stood at 27,754, a figure almost comparable to the same period for FY2014.

UAC are defined in statute as children who lack lawful immigration status in the United States, who are under the age of 18, and who either are without a parent or legal guardian in the United States or without a parent or legal guardian in the United States who is available to provide care and physical custody. Two statutes and a legal settlement directly affect U.S. policy for the treatment and administrative processing of UAC: the Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457); the Homeland Security Act of 2002 (P.L. 107-296); and the *Flores Settlement Agreement* of 1997.

Agencies in the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS) share responsibility for the processing, treatment, and placement of UAC. DHS's Customs and Border Protection (CBP) apprehends and detains unaccompanied children arrested at the border. DHS's Immigration and Customs Enforcement (ICE) handles custody transfer and repatriation responsibilities, apprehends UAC in the interior of the country, and represents the government in removal proceedings. HHS's Office of Refugee Resettlement coordinates and implements the care and placement of unaccompanied children in appropriate custody.

Foreign nationals from El Salvador, Guatemala, Honduras, and Mexico accounted for almost all UAC cases in recent years, especially in FY2014. In FY2009, Mexico accounted for 82% of the 19,688 UAC apprehensions at the Southwest border, while the other three Central American countries accounted for 17%. In FY2014, the proportions had almost reversed, with Mexican nationals comprising 23% of UAC apprehensions and the three Central American countries comprising 77%. For the first six months of FY2016, Mexican nationals made up 21% of total UAC apprehensions.

To address the crisis at its peak in 2014, the Administration developed a working group to coordinate the efforts of federal agencies involved. It also opened additional shelters and holding facilities to accommodate the large number of UAC apprehended at the border. In June 2014, the Administration announced plans to provide funding to the affected Central American countries for a variety of programs and security-related initiatives in order to mitigate the flow of unaccompanied migrant children. In July, the Administration requested, and Congress debated but did not approve, $3.7 billion in FY2014 supplemental appropriations to address the crisis.

For FY2015, Congress appropriated nearly $1.6 billion for the Refugee and Entrant Assistance Programs in ORR, most of which was directed toward the UAC program (P.L. 113-235). For DHS agencies, Congress appropriated $3.4 billion for detection, enforcement, and removal operations, including for the transport of unaccompanied children for CBP. The Department of Homeland Security Appropriations Act, FY2015 (P.L. 114-4) also allowed the Secretary of Homeland Security to reprogram funds within CBP and ICE and transfer such funds into the two agencies' "Salaries and Expenses" accounts for the care and transportation of unaccompanied children. The act also allowed for several DHS grants awarded to states along the Southwest

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border to be used by recipients for costs or reimbursement of costs related to providing humanitarian relief to unaccompanied children. Congress continued to provide base funding at comparable levels for FY2016, but did not appropriate funds for contingency funding that was requested by the Administration to address potential surges in UAC flows.

In the 114th Congress, two bills (H.R. 1153 and H.R. 1149) related to UAC have seen activity. Both would change current UAC policy, including amending the UAC definition, altering the treatment for unaccompanied children from contiguous countries, and changing the processing for unaccompanied children who claim asylum, among other provisions. Several bills were introduced but have seen no legislative activity, including H.R. 191/S. 129, H.R. 1700, H.R. 2491, and S. 44.

CRS has published additional reports on this topic. For a discussion of select factors that may have contributed to the recent surge in UAC migrating to the United States, see CRS Report R43628, *Unaccompanied Alien Children: Potential Factors Contributing to Recent Immigration*, coordinated by William A. Kandel. For a report on answers to frequently asked questions, see CRS Report R43623, *Unaccompanied Alien Children—Legal Issues: Answers to Frequently Asked Questions*, by Kate M. Manuel and Michael John Garcia. For information on country conditions, security conditions, and U.S. policy in Central America, see CRS Report R43702, *Unaccompanied Children from Central America: Foreign Policy Considerations*, coordinated by Peter J. Meyer.

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Background

After several years of increases, the number of unaccompanied alien[1] children (UAC) apprehended at the Southwest border by the Department of Homeland Security's (DHS's) Customs and Border Protection (CBP) peaked at 68,541 in FY2014. During a June 2014 hearing, some Members of Congress as well as the Administration characterized the issue as a humanitarian crisis.[2]

In recent years, most unaccompanied children have originated from three Central American countries—Guatemala, Honduras, and El Salvador—and Mexico. The reasons why they migrate to the United States are often multifaceted and difficult to measure analytically. The Congressional Research Service (CRS) has analyzed several out-migration-related factors, such as violent crime rates, economic conditions, rates of poverty, and the presence of transnational gangs.[3] CRS also has analyzed in-migration-related factors, such as the search for economic opportunity, the desire to reunite with family members, and U.S. immigration policies.

Critics of the Obama Administration assert that the sizable increase in UAC flows in recent years results from a perception of relaxed U.S. immigration policies toward children.[4] They also cite a 2008 law[5] that treats UAC from contiguous countries differently than those from noncontiguous countries (see "Customs and Border Protection" below).

Unaccompanied alien children are defined in statute as children who: lack lawful immigration status in the United States;[6] are under the age of 18; and are without a parent or legal guardian in the United States or without a parent or legal guardian in the United States who is available to provide care and physical custody.[7] They most often arrive at U.S. ports of entry or are apprehended along the southwestern border with Mexico. Less frequently, they are apprehended in the interior of the country and determined to be juveniles and unaccompanied.[8] Although most are age 14 or older, apprehensions of UAC under age 13 have increased.[9]

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[1] *Alien,* a technical term appearing throughout the Immigration and Nationality Act (INA), refers to a foreign national who is not a citizen or national of the United States.

[2] Senate Judiciary Committee hearing on *Oversight of the Department of Homeland Security*, June 11, 2014 (hereinafter referred to as *Senate Oversight Hearing).*

[3] See CRS Report R43628, *Unaccompanied Alien Children: Potential Factors Contributing to Recent Immigration*, coordinated by William A. Kandel.

[4] These critics often cite the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744), passed by the Senate in 2013, which would allow certain unlawfully present aliens to adjust to a lawful immigration status; and the administrative policy entitled Deferred Action for Childhood Arrivals (DACA), which grants certain aliens who arrived in the United States as children prior to a certain period some protection from removal for at least two years. For an example of these arguments, see U.S. Congress, Senate Committee on the Judiciary, *Oversight of the Department of Homeland Security*, 113th Cong., 2nd sess., June 11, 2014. For a discussion of S. 744, see CRS Report R43099, *Comprehensive Immigration Reform in the 113th Congress: Short Summary of Senate-Passed S. 744*, by Ruth Ellen Wasem. For a discussion of DACA, see CRS Report RL33863, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation*, by Andorra Bruno.

[5] The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457).

[6] The child may have entered the country illegally or been admitted legally but overstayed his or her duration of admittance (i.e., a visa overstay.)

[7] 6 U.S.C. §279(g)(2). Although these children may have a parent or guardian who lives in the United States, they are classified as unaccompanied if the parent or guardian cannot provide *immediate* care.

[8] A juvenile is classified as *unaccompanied* if neither a parent nor a legal guardian is with the juvenile alien at the time of apprehension, or within a geographical proximity to quickly provide care for the juvenile. 8 CFR §236.3(b)(1).

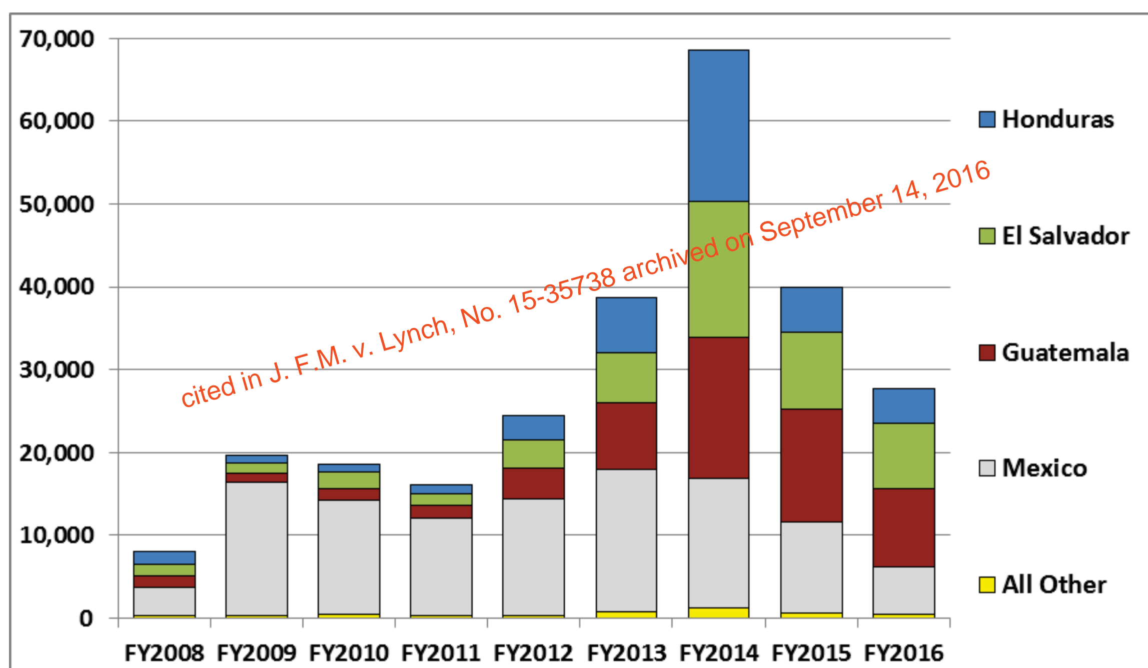
[9] White House, DHS and HHS, "Press Call Regarding the Establishment of the Inter-Agency Unified Coordination (continued...)

This report opens with an analysis of recent UAC apprehension data. It then discusses current policy on the treatment, care, and custody of the population and describes the responsibilities of each federal agency involved with the population. The report then discusses both administrative and congressional actions to deal with the UAC surge in FY2014 and action since then to address possible future surges.

Scope of the Issue

Since FY2011, UAC apprehensions have increased each year through FY2014: from 16,067 in FY2011 to 24,481 in FY2012 to 38,759 in FY2013 and 68,541 in FY2014 (**Figure 1**). At the close of FY2014, the Border Patrol had apprehended more UAC than in any of the previous six years and close to four times as many UAC as in FY2011. In FY2015, apprehensions numbered 39,970, a 42% drop from FY2014 apprehensions.[10] In the first six months of FY2016, apprehensions numbered 27,754, a figure almost comparable to the first six months of FY2014.[11]

Figure 1. UAC Apprehensions at the Southwest Border by Country of Origin, FY2008-FY2016



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Sources: For FY2008-FY2013: U.S. Department of Homeland Security, United States Border Patrol, *Juvenile and Adult Apprehensions—Fiscal Year 2013*. For FY2014-FY2016, Customs and Border Protection, "Southwest Border Unaccompanied Alien Children," http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children.

Notes: FY2016 figures represent six months, from October 1, 2015, through March 31, 2016.

(...continued)

Group on Unaccompanied Alien Children," press release, June 3, 2014.

[10] Customs and Border Protection, "Southwest Border Unaccompanied Alien Children," http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children.

[11] To compare, 28,579 unaccompanied children were apprehended at the Southwest border during the first six months of FY2014 and 15,616 during the first six months of FY2015.

Nationals of Guatemala, Honduras, El Salvador, and Mexico account for the majority of unaccompanied alien children apprehended at the Mexico-U.S. border (**Figure 1**). Flows of UAC from Mexico rose substantially in FY2009 and have remained relatively steady. In contrast, UAC from Guatemala, Honduras, and El Salvador increased sizably starting in FY2011. In FY2009, Mexican UAC accounted for 82% of 19,668 UAC apprehensions, while the other three Central American countries accounted for 17%. By September 30, 2014, those proportions had almost reversed, with Mexican UAC comprising 23% of the 68,541 UAC apprehensions and UAC from the three Central American countries comprising 75%.[12] In FY2015 and the first six months of FY2016, the percentages of unaccompanied children originating from Mexico were 28% and 21%, respectively.

The majority of UAC apprehensions have occurred within the Rio Grande and Tucson border sectors (59% and 13%, respectively, in the first six months of FY2016).[13] The proportions of UAC who were female or who were under the age of 13 also increased in FY2014. Apprehensions of family units (unaccompanied children with a related adult) increased from 14,855 in FY2013 to 68,445 in FY2014 before declining to 39,838 in FY2015. In the first six months of FY2016, family unit apprehensions totaled 32,117.[14] Of these apprehended family units, almost 90% originated from Guatemala, El Salvador, and Honduras.

Current Policy

Two laws and a settlement, discussed below, most directly affect U.S. policy for the treatment and administrative processing of UAC: the *Flores Settlement Agreement* of 1997; the Homeland Security Act of 2002; and the Trafficking Victims Protection Reauthorization Act of 2008.

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During the 1980s, allegations of UAC mistreatment by the former Immigration and Naturalization Service (INS)[15] caused a series of lawsuits against the government that eventually resulted in the *Flores Settlement Agreement* (*Flores Agreement*) in 1997.[16] The *Flores Agreement* established a nationwide policy for the detention, treatment, and release of UAC and recognized the particular vulnerability of UAC as minors while detained without a parent or legal guardian present.[17] It required that immigration officials detaining minors provide (1) food and drinking water; (2) medical assistance in emergencies; (3) toilets and sinks; (4) adequate temperature control and ventilation; (5) adequate supervision to protect minors from others; and (6) separation

[12] The surge in the number of children migrating to the United States mirrors a similar increase among adults. From FY2011 through FY2015, the number of Border Patrol apprehensions of third-country nationals increased almost threefold from 54,098 to 148,995. Over the same period, those apprehended from Mexico decreased from 286,154 to 188,122. United States Border Patrol, *Total Illegal Alien Apprehensions by Fiscal Year*, FY2000-FY2015, accessed by CRS on April 26, 2016 at http://www.cbp.gov/sites/default/files/documents/BP%20Total%20Apps%2C%20Mexico%2C%20OTM%20FY2000-FY2015.pdf.

[13] Customs and Border Protection, "Southwest Border Unaccompanied Alien Children," http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016.

[14] As a basis for comparison, CBP apprehended 19,830 family units at the Southwest border during the first six months of FY2014 and 13,911 during the first six months of FY2015.

[15] The Homeland Security Act of 2002 dissolved the Immigration and Naturalization Service (INS) and its functions were split in the Departments of Homeland Security, Justice, and Health and Human Services.

[16] *Flores v. Meese—Stipulated Settlement Agreement* (U.S. District Court, Central District of California, 1997). Many of the agreement's terms have been codified at 8 CFR §§236.3, 1236.3.

[17] See DHS Office of Inspector General, *CBP's Handling of Unaccompanied Alien Children*, OIG-10-117, Washington, DC, September 2010.

from unrelated adults whenever possible. For several years following the *Flores Agreement*, criticism continued over whether the INS had fully implemented the drafted regulations.[18]

Five years later, the Homeland Security Act of 2002 (HSA; P.L. 107-296) divided responsibilities for the processing and treatment of UAC between the newly created Department of Homeland Security (DHS) and the Department of Health and Human Services' (HHS's) Office of Refugee Resettlement (ORR). To DHS, the law assigned responsibility for the apprehension, transfer, and repatriation of UAC. To HHS, the law assigned responsibility for coordinating and implementing the care and placement of UAC in appropriate custody; reunifying UAC with their parents abroad if appropriate; maintaining and publishing a list of legal services available to UAC; and collecting statistical information on UAC, among other responsibilities.[19] The HSA also established a statutory definition of UAC as unauthorized minors not accompanied by a parent or legal guardian. Despite these developments, criticism continued that the *Flores Agreement* had not been fully implemented.

In response to ongoing concerns that UAC apprehended by the Border Patrol were not being adequately screened for reasons they should not be returned to their home country, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA, P.L. 110-457). The TVPRA directed the Secretary of DHS, in conjunction with other federal agencies, to develop policies and procedures to ensure that UAC in the United States are safely repatriated to their country of nationality or of last habitual residence. The section set forth special rules for UAC from contiguous countries (i.e., Mexico and Canada), allowing such children, under certain circumstances, to return to Mexico or Canada without additional penalties, and directing the Secretary of State to negotiate agreements with Mexico and Canada to manage the repatriation process. The TVPRA mandated that unaccompanied alien children from countries other than Mexico or Canada—along with UAC from those countries who are apprehended away from the border—are to be transferred to the care and custody of HHS and placed in formal removal proceedings. The TVPRA required that children from contiguous countries be screened within 48 hours of being apprehended to determine whether they should be returned to their country or transferred to HHS and placed in removal proceedings.

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Processing and Treatment of Apprehended UAC

Several DHS agencies handle the apprehension, processing, and repatriation of UAC, while HHS handles the care and custody of UAC. The Executive Office for Immigration Review (EOIR) in the U.S. Department of Justice conducts immigration removal proceedings.

DHS's Customs and Border Protection (CBP) apprehends, processes, and detains the majority of UAC arrested along U.S. borders. DHS's Immigration and Customs Enforcement (ICE) physically transports UAC from CBP to HHS's Office of Refugee Resettlement (HHS-ORR) custody. HHS-ORR is responsible for detaining and sheltering UAC who are from noncontiguous countries and those from contiguous countries (i.e., Canada and Mexico) who may be victims of trafficking or have an asylum claim, while they await an immigration hearing. DHS's U.S. Citizenship and Immigration Services (USCIS) is responsible for the initial adjudication of asylum applications filed by UAC. DOJ's EOIR conducts immigration proceedings that

[18] See U.S. Department of Justice, Office of the Inspector General, *Unaccompanied Juveniles in INS Custody*, Executive Summary, Report no. I-2001-009, September 28, 2001.

[19] ORR assumed care of UAC on March 1, 2003, and created the Division of Unaccompanied Children's Services (DUCS) for addressing the requirements of this population. P.L. 107-296, Section 462.

determine whether UAC may be allowed to remain in the United States or must be deported to their home countries. ICE is responsible for returning UAC who are ordered removed from the United States to their home countries. The following sections discuss the role of each of these federal agencies in more detail.

Customs and Border Protection

The Office of Border Patrol (OBP)[20] and the Office of Field Operations (OFO)[21] are responsible for apprehending and processing UAC that come through a port of entry (POE) or are found at or near the border.[22] UAC that are apprehended between POEs are transported to Border Patrol stations, and if they are apprehended at POEs, they are escorted to CBP secondary screening areas. In both cases, when CBP confirms a juvenile has entered the country illegally and unaccompanied, he or she is classified as a UAC and processed for immigration violations, and the appropriate consulate is notified that the juvenile is being detained by DHS.

The Border Patrol apprehends the majority of UAC at or near the border. They also process UAC.[23] With the exception of Mexican and Canadian UAC who meet the criteria discussed below, the Border Patrol has to turn UAC over to ICE for transport to HHS-ORR within 72 hours of determining that the children are UAC.[24] Until 2008, the Border Patrol, as a matter of practice, returned Mexican UAC to Mexico. Under this practice, Mexican UAC were removed through the nearest POE and turned over to a Mexican official within 24 hours and during daylight.

As mentioned, the TVPRA required the Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Secretary of Health and Human Services, to develop policies and procedures to ensure that UAC are safely repatriated to their country of nationality or last habitual residence. Of particular significance, the TVPRA required CBP to follow certain criteria for UAC who are nationals or habitual residents from a contiguous country (i.e., Canada and Mexico).[25] In these cases, CBP personnel must screen each UAC within 48 hours of apprehension to determine the following:

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- the UAC has not been a victim of a severe form of trafficking in persons and there is no credible evidence that the minor is at risk should the minor be returned to his/her country of nationality or last habitual residence;
- the UAC does not have a possible claim to asylum; and
- the UAC is able to make an independent decision to voluntarily return to his/her country of nationality or last habitual residence.[26]

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[20] OBP includes the Border Patrol. OBP and the Border Patrol are used interchangeably throughout this section. OBP is responsible for immigration and customs enforcement *between ports of entry*.

[21] The OFO oversees CBP officers who inspect travelers and goods *at ports of entry*.

[22] When OBP and OFO are both referenced together in this section, "CBP" is used.

[23] The processing of UAC includes gathering biographic information such as their name and age as well as their citizenship and whether they are unaccompanied. Border Patrol agents also collect biometrics on UAC and query relevant immigration, terrorist, and criminal databases.

[24] The 72-hour time period was established in statute by the TVPRA.

[25] 8 U.S.C. §§1101 et seq. Although the screening provision only applies to UAC from contiguous countries, in March 2009 DHS issued a policy that, in essence, made the screening provisions applicable to all UAC. Testimony of Office of Immigration and Border Security Acting Deputy Assistant Secretary Kelly Ryan, in U.S. Congress, Senate Committee on the Judiciary, *Trafficking Victims Protection Reauthorization Act: Renewing the Commitment to Victims of Human Trafficking*, 112th Cong.,1st sess., September 13, 2011.

[26] P.L. 110-457, §235(a)(2)(A).

If CBP personnel determine the minor to be inadmissible under the Immigration and Nationality Act, they can permit the minor to withdraw his/her application for admission[27] and the minor can voluntarily return to his/her country of nationality or last habitual residence.

The TVPRA contains specific safeguards for the treatment of UAC while in the care and custody of CBP, and it provides guidance for CBP personnel on returning a minor to his/her country of nationality or last habitual residence. It also requires the Secretary of State to negotiate agreements with contiguous countries for the repatriation of their UAC. The agreements serve to protect children from trafficking and, at minimum, must include provisions that (1) ensure the handoff of the minor children to an appropriate government official; (2) prohibit returning UAC outside of "reasonable business hours"; and (3) require border personnel of the contiguous countries to be trained in the terms of the agreements.

As mentioned, UAC apprehended by the Border Patrol are brought to a Border Patrol facility, where they are processed. In 2008, the agency issued a memorandum entitled "Hold Rooms and Short Term Custody."[28] Since the issuance of this policy, non-governmental organizations (NGOs) have criticized the Border Patrol for failing to fully uphold provisions in current law and the *Flores Agreement*.[29] Indeed, the DHS Office of Inspector General (OIG) issued a report in 2010 concluding that while CBP was in general compliance with the *Flores Agreement*, it needed to improve its handling of UAC.[30]

The 2010 OIG report, however, did not address whether CBP was in compliance with the TVPRA. As highlighted above, the TVPRA requires CBP personnel to screen UAC from contiguous countries for severe forms of trafficking in persons *and* for fear of persecution if they are returned to their country of nationality or last habitual residence. At least one NGO that conducted a two-year study on UAC[31] asserted in its report that CBP does not adequately do this nor has established related training for their Border Patrol agents.[32]

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Immigration and Customs Enforcement

ICE is responsible for physically transferring UAC from CBP to HHS-ORR custody. ICE also may apprehend UAC in the U.S. interior during immigration enforcement actions. In addition, ICE represents the government in removal procedures before EOIR. Unaccompanied alien

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[27] Under the INA, apprehension at the border constitutes an application for admission to the United States. In this case, the UAC is permitted to return immediately to Mexico or Canada, and does not face administrative or other penalties. INA §235(a)(4); 8 U.S.C. §1225(a)(4).

[28] UAC are held in "hold rooms" at Border Patrol stations. The 2008 memorandum, which is publicly available but redacted, outlines agency policy on the care and treatment of individuals in CBP care and custody. See U.S. Customs and Border Patrol, Memorandum on "Hold Rooms and Short Term Custody," June 2, 2008, http://foiarr.cbp.gov/streamingWord.asp?i=378.

[29] See for example, *Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors*, by Betsy Cavendish and Maru Cortazar, Appleseed, Washington DC, 2011 (hereinafter referred to as *Children at the Border*).

[30] Department of Homeland Security, Office of Inspector General, *CBP's Handling of Unaccompanied Alien Children*, OIG-10-117, Washington, DC, September 2010.

[31] *Children at the Border.*

[32] Relatedly, the 2010 OIG study was unable to determine whether CBP personnel had sufficient training to comply with the provisions in the *Flores Agreement.* Notably, the Appleseed study (*Children at the Border*) included site visits to *ten* Border Patrol facilities as well as site visits to locales in Mexico and interviews with government officials in both countries and minors in custody and who have been repatriated. Whether this limited site visit sample is sufficiently varied to be adequately generalizable to all Border Patrol facilities on the U.S.-Mexico border is unclear.

children who are not subject to TVPRA's special repatriation procedures for some children from Mexico or Canada (i.e., voluntary departure) may be placed in standard removal proceedings pursuant to INA Section 240. The TVPRA specifies that in standard removal proceedings, UAC are eligible for voluntary departure under INA Section 240B at no cost to the child.

ICE is also responsible for the physical removal of all foreign nationals, including UAC who have final orders of removal or who have elected voluntary departure while in removal proceedings. To safeguard the welfare of all UAC, ICE has established policies for repatriating UAC, including

- returning UAC only during daylight hours;
- recording transfers by ensuring that receiving government officials or designees sign for custody;
- returning UAC through a port designated for repatriation;
- providing UAC the opportunity to communicate with a consular official prior to departure for the home country; and
- preserving the unity of families during removal.[33]

ICE notifies the country of every foreign national being removed from the United States.[34] Implementing a removal order depends on whether the U.S. government can secure travel documents for the alien being removed from the country in question.[35] As such, the United States depends on the willingness of foreign governments to accept the return of their nationals. Each country sets its own documentary requirements for repatriation of their nationals.[36] While some allow ICE to use a valid passport to remove an alien (if the alien possesses one), others require ICE to obtain a travel document specifically for the repatriation.[37] According to one report, the process of obtaining travel documents can become problematic, because countries often change their documentary requirements or raise objections to a juvenile's return.[38]

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Once the foreign country has issued travel documents, ICE arranges the UAC's transport. If the return involves flying, ICE personnel accompany the UAC to his or her home country. ICE uses commercial airlines for most UAC removals. ICE provides two escort officers for each UAC.[39] Mexican UAC are repatriated in accordance with Local Repatriation Agreements (LRA), which require that ICE notify the Mexican Consulate for each UAC repatriated. Additional specific requirements apply to each LRA (e.g., specific hours of repatriation).[40]

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[33] Email from ICE Congressional Relations, May 16, 2014.

[34] ICE uses a country clearance to notify a foreign country, through a U.S. Embassy abroad, that a foreign national is being repatriated. In addition, when ICE personnel escort the alien during his or her repatriation, the country clearance process notifies the U.S. Ambassador abroad that U.S. government employees will be travelling to the country.

[35] Conversation with Doug Henkel, Associate Director, ICE Removal and Management Division, February 20, 2012.

[36] Depending on the country and depending on where the UAC is housed, the consular officers will conduct in-person or phone interviews. Olga Byrne and Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System*, Vera Institute of Justice, Washington, DC, March 2012, p. 27 (hereinafter referred to as *The Flow of Unaccompanied Children*).

[37] Annex 9 of the Civil Aviation Convention requires that countries issue travel documents, but the convention lacks an enforcement mechanism.

[38] *The Flow of Unaccompanied Children*, p. 27.

[39] An additional officer is added for each group that exceeds five UAC. The gender of the officers corresponds to the gender of the children repatriated. Email from ICE Congressional Relations, May 16, 2014.

[40] Ibid.

Office of Refugee Resettlement

The Unaccompanied Alien Children Program in ORR/HHS provides for the custody and care of unaccompanied alien minors who have been apprehended by ICE or CBP or referred by other federal agencies. The TVPRA directed that HHS ensure that UAC "be promptly placed in the least restrictive setting that is in the best interest of the child."[41] The HSA requires that ORR develop a plan to ensure the timely appointment of legal counsel for each UAC, ensure that the interests of the child are considered in decisions and actions relating to the care and custody of a UAC, and oversee the infrastructure and personnel of UAC residential facilities, among other responsibilities.[42] ORR also screens each UAC to determine if the child has been a victim of a severe form of trafficking in persons, if there is credible evidence that the child would be at risk if he or she were returned to his/her country of nationality or last habitual residence, and if the child has a possible claim to asylum.[43]

ORR arranges to house the child either in one of its shelters or in foster care; or the UAC program reunites the child with a family member. According to ORR, the majority of the youth are cared for initially through a network of state-licensed, ORR-funded care providers that offer classroom education, mental and medical health services, case management, and socialization and recreation. ORR oversees different types of shelters to accommodate unaccompanied children with different circumstances, including nonsecure shelter care, secure care, and transitional foster care facilities.[44] A juvenile may be held in a secure facility only if he or she is charged with criminal or delinquent actions, threatens or commits violence, displays unacceptably disruptive conduct in a shelter, presents an escape risk, is in danger and is detained for his/her own safety, or is part of an emergency or influx of minors that results in insufficient bed space at nonsecure facilities.[45]

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The same care providers also facilitate the release of UAC to family members or other sponsors who are able to care for them.[46] The *Flores Agreement* outlines the following preference ranking for sponsor types: (1) a parent, (2) a legal guardian, (3) an adult relative, (4) an adult individual or entity designated by the child's parent or legal guardian, (5) a licensed program willing to accept legal custody, or (6) an adult or entity approved by ORR.[47]

In making these placement determinations, ORR conducts a background investigation to ensure the identity of the adult assuming legal guardianship for the UAC and that the adult does not have a record of abusive behavior. ORR may consult with the consulate of the UAC's country of origin as well as interview the UAC to ensure he or she also agrees with the proposed placement. If such background checks reveal evidence of actual or potential abuse or trafficking, ORR may require a

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[41] §§235(a)-235(d) of TVPRA; 8 U.S.C. §1232(b)(2).

[42] Section 235(c) of the TVPRA and Section 462(b) of the Homeland Security Act of 2002 (HSA, P.L. 107-296) describe conditions for the care and placement of UAC in federal custody.

[43] As noted previously, all UAC are initially screened by CBP for trafficking victimization or risk as well as possible claims to asylum, regardless of country of origin.

[44] Shelter care refers to a minimally restrictive level of care, for most UAC without special needs. Secure care facilities are generally reserved for children with behavioral issues, a history of violent offenses, or who pose a threat to themselves or others. Transitional foster care, which involves placement with families, is prioritized for children under age 13, sibling groups with one child younger than 13, pregnant and parenting teens, and children with special needs, including mental health needs. CRS briefing on unaccompanied children with HHS-ORR, May 5, 2014.

[45] *Flores v. Meese—Stipulated Settlement Agreement* (U.S. District Court, Central District of California, 1997), Exhibit 2.

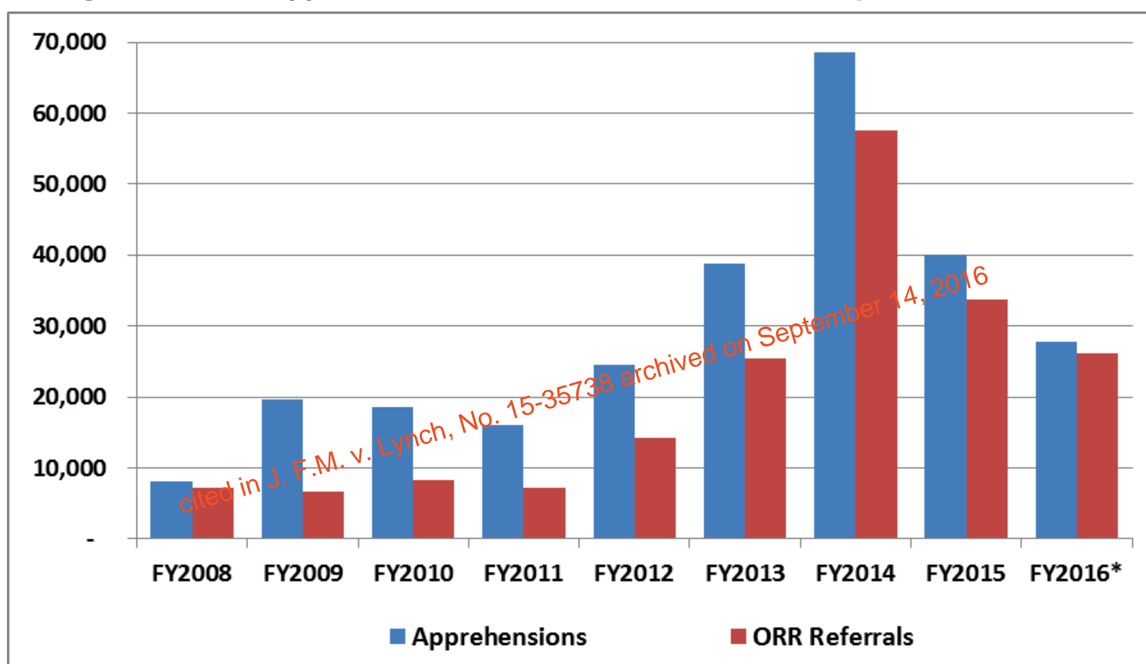
[46] Administration for Children and Families, *Office of Refugee Resettlement, Unaccompanied Alien Children Program*, U.S. Department of Health and Human Services, Fact Sheet, January 2016, (hereinafter referred to as *ORR UAC Fact Sheet*, January 2016.)

[47] *Flores v. Meese—Stipulated Settlement Agreement* (U.S. District Court, Central District of California, 1997), p. 10.

home study as an additional precaution.[48] In addition, the parent or guardian is required to complete a Parent Reunification Packet to attest that they agree to take responsibility for the UAC and provide him/her with proper care.[49]

Figure 2 shows both annual UAC apprehensions and annual referrals of unaccompanied children to HHS-ORR since FY2008. As expected, a positive relationship exists between the two measures; but in recent years, as children from non-contiguous countries have dominated the share of all UAC apprehensions, the correspondence between apprehensions and referrals has increased. In FY2009, when unaccompanied children from the three Northern Triangle countries comprised 17% of all UAC apprehensions, the proportion of children referred to HHS-ORR was 34% of total apprehensions. In the first six months of FY2016, when unaccompanied children from those countries dominated the flow with 78% of all UAC apprehensions, that same proportion was 94%.

Figure 2. UACs Apprehended and Referred to ORR Custody, FY2008-FY2016*



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Source: ***Apprehensions***: See sources for Figure 1 above; ***Referrals***: FY2008-FY2015: HHS-ORR, Fiscal Year 2017, Administration for Children and Families, *Justification of Estimates for Appropriations Committees*, p. 243; FY2016: CRS presentation of unpublished data from the HHS Office of Refugee Resettlement.

Notes: Figures for FY2016 include only the first six months, one half of a fiscal year.

ORR reports that most children served are reunified with family members.[50] Between FY2008 and FY2010, the length of stay in ORR care averaged 61 days and total time in custody ranged

[48] A home study is an in-depth investigation of the potential sponsor's ability to ensure the child's safety and well-being and involves background checks of both the sponsor and any adult household members, one or more home visits, a face-to-face interview with the sponsor and potentially with other household members, and post-release services. Pursuant to the TVPRA of 2008, home studies are required for certain UAC considered especially vulnerable.

[49] Office of Refugee Resettlement, Unaccompanied Children's Services, *ORR/DCS Family Reunification Packet for Sponsors (English/Español)*, http://www.acf.hhs.gov/programs/orr/resource/unaccompanied-childrens-services#Family%20Reunification%20Packet%20for%20Sponsors, accessed by CRS on April 27, 2016.

[50] In FY2014, 96% of discharged UAC were released to a sponsoring family member. Of this group 58% were parents or legal guardians, 29% were other relatives, and 9% were non-relatives. The remaining 4% of UAC were discharged (continued...)

from less than 1 day to 710 days.[51] ORR reported that children spent about 34 days on average in the program as of January 2016.[52] Removal proceedings continue even when UAC are placed with parents or other relatives.[53] As noted above, not all UAC are referred to ORR; for instance, many UAC from contiguous countries voluntarily return home.

The sizable increases in UAC referrals since FY2008 have challenged ORR to meet the demand for its services while maintaining related child welfare protocols and administrative standards.[54] These challenges reached a crescendo in January 2016 when a Senate investigation indicated that in FY2014, some UAC who had originally been placed with distant relatives and parentally-approved guardians ended up being forced to work in oppressive conditions on an Ohio farm.[55] The report outlined a range of what it characterized as serious deficiencies related to the safe placement of children with distant relatives and unrelated adults as well as post-placement follow-up. During the Senate Homeland Security Committee hearing that followed, HHS officials acknowledged limitations of their screening and post-placement follow-up procedures for such sponsors. They also reiterated the legal basis for the termination of UAC custody and HHS liability once custody of the unaccompanied minor was handed over to the sponsor.[56]

U.S. Citizenship and Immigration Services

As mentioned, U.S. Citizenship and Immigration Services (USCIS) is responsible for the initial adjudication of asylum applications filed by UAC.[57] If either CBP or ICE finds that the child is a UAC and transfers him/her to ORR custody, USCIS generally will take jurisdiction over any asylum application, even where evidence shows that the child reunited with a parent or legal guardian after CBP or ICE made the UAC determination. USCIS also has initial jurisdiction over asylum applications filed by UAC with pending claims in immigration court, with cases on appeal before the Board of Immigration Appeals, or with petitions under review with federal

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(...continued)

for other reasons, such as a transfer to DHS due to aging-out of UAC status. Source: unpublished data provided to CRS by Office of Legislative Affairs, Administration for Children and Families, Office of Refugee Resettlement, U.S. Department of Health and Human Services, March 20, 2015.

[51] *The Flow of Unaccompanied Children*, p. 17.

[52] *ORR UAC Fact Sheet*, January 2016. An earlier May 2014 version of this fact sheet cited an average of 35 days.

[53] Some communities and states have objected to unaccompanied children being located in their jurisdictions (either in shelters or in family placements) as well as the lack of notification by HHS-ORR. For more information, see U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration and Border Security, *Impact on Local Communities of the Release of Unaccompanied Alien Minors and the Need for Consultation and Notification*, 113th Cong., 2nd sess., December 10, 2014.

[54] A recent report by the Government Accountability Office (GAO) raised concerns about ORR's lack of a planning process for its capacity needs, inconsistent monitoring of service provision by its nonprofit grantee organizations that provide shelter services, limited contact with children following their placement, and administrative recording of post-placement follow-up procedures. See U.S. Government Accountability Office, *Unaccompanied Children: HHS Can Take Futher Actions to Monitor Their Care*, GAO-16-180, February 2016.

[55] United States Senate, Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations, *Protecting Unaccompanied Alien Children from Trafficking and Other Abuses: The Role of the Office of Refugee Resettlement*, January 28, 2016.

[56] U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations, *Adequacy of the Department of Health and Human Services' Efforts to Protect Unaccompanied Alien Children From Human Trafficking*, 114th Cong., 2nd sess., January 28, 2016.

[57] For information on UAC and asylum, see CRS Report R43664, *Asylum Policies for Unaccompanied Children Compared with Expedited Removal Policies for Unauthorized Adults: In Brief*, by Ruth Ellen Wasem.

courts as of enactment of the TVPRA (December 23, 2008). UAC must appear at any hearings scheduled in immigration court, even after petitioning for asylum with USCIS.

The Executive Office for Immigration Review

The Executive Office for Immigration Review (EOIR) within the U.S. Department of Justice is responsible for adjudicating immigration cases and conducting removal proceedings. Generally, during an immigration removal proceeding, the foreign national and the U.S. government present testimony so that the immigration judge can make a determination on whether the foreign national is removable or qualifies for some type of relief from removal (i.e., the alien is permitted to remain in the United States either permanently or temporarily). The TVPRA requires that HHS ensure, to the greatest extent possible, that UAC have access to legal counsel, and it also permits HHS to appoint independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children.

EOIR has specific policies for conducting removal hearings of UAC to ensure that UAC understand the nature of the proceedings, can effectively present evidence about their cases, and have appropriate assistance. The policy guidelines discuss possible adjustments to create "an atmosphere in which the child is better able to present a claim and to participate more fully in the proceedings." Under these guidelines, immigration judges should:

- establish special dockets for UAC that are separated from the general population;
- allow child-friendly courtroom modifications (e.g., judges not wearing robes, allowing the child to have a toy, permitting the child to testify from a seat rather than the witness stand, allowing more breaks during the proceedings);
- provide courtroom orientations to familiarize the child with the court;
- explain the proceedings at the outset;
- prepare the child to testify;
- employ child-sensitive questioning; and,
- strongly encourage the use of pro bono legal representation if the child is not represented.

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On July 9, 2014, in response to the UAC surge, EOIR issued new guidelines that prioritized unaccompanied children and non-detained families above other cases in the immigration courts and on the same level as detained aliens.[58] On July 18, 2014, EOIR initiated a new case recording system that coincided with its announcement of its revised adjudication priorities.[59] The new system allows EOIR to track legal outcomes of UAC with greater precision.[60]

[58] Immigration and children's advocacy groups have criticized these policies for rushing the adjudication process. See for example, Wendy Feliz, "Immigration Courts Are Ordering Unrepresented Children Deported," *Immigration Impact*, March 10, 2015; and Walter Ewing, "Why More Immigration Judges Are Needed," *Immigration Impact*, May 11, 2015. See also U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration and Border Security, *Oversight of the Executive Office for Immigration Review*, statement of Ranking Member Zoe Lofgren, 114th Cong., 1st sess., December 3, 2015, pp. 34-35.

[59] The four priority categories are: (1) unaccompanied child; (2) adults with a child or children detained; (3) adults with a child or children released on alternatives to detention; and (4) recently detained border crossers. See statement of Juan P. Osuna, Director of Executive Office of Immigration Review, U.S. Department of Justice, *The President's Emergency Supplemental Request for Unaccompanied Children and Related Matters*, in U.S. Congress, Senate Committee on Appropriations, hearings, 113th Cong., 2nd sess., July 10, 2014.

[60] Prior to this system, EOIR tracked only the number of juveniles it processed and could not distinguish between UAC (continued...)

CRS reviewed 17 months of these EOIR data covering July 18, 2014, through December 29, 2015.[61] Of the 49,965 UAC who were given Notices to Appear (NTA) by DHS, 41,792 had been scheduled to appear for their first hearing. Of those scheduled, 14,750 were adjourned, and 6,240 had changes of venues or were transferred. Of the remaining 20,802 initial cases that EOIR classified as completed, 9,695 (47%) resulted in removal decisions. Of these removal decisions, 8,510 (88%) were rendered *in absentia*, meaning that the UAC had not shown up to the hearing. Of the other completed initial cases that did not result in a decision, 4,390 were terminated,[62] 660 resulted in voluntary departure, 5,944 were administratively closed,[63] and 73 resulted in other administrative outcomes. In 40 cases, children received some form of immigration relief. The most usual forms of immigration relief for UAC include asylum, special immigrant juvenile status for abused, neglected, or abandoned children who are declared dependent by state juvenile courts[64] and "T nonimmigrant status" for victims of trafficking.[65]

Administrative and Congressional Action

The Administration and Congress have both taken action since 2014 to respond to the UAC surge. The Administration: developed a working group to coordinate the efforts of the various agencies involved in responding to the issue; temporarily opened additional shelters and holding facilities to accommodate the large number of UAC apprehended at the border; initiated programs to address root causes of child migration in Central America; and requested funding from Congress to deal with the crisis. In turn, Congress considered supplemental appropriations for FY2014 and increased funding for UAC-related activities in HHS/ORR and DHS appropriations for subsequent fiscal years.

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Administrative Action

In response to the UAC surge, the Administration announced in June 2014 that it had developed a Unified Coordination Group comprised of representatives from key agencies and headed by Federal Emergency Management Agency (FEMA) Administrator Craig Fugate.[66] The FEMA administrator's role was to "lead and coordinate Federal response efforts to ensure that Federal agency authorities and the resources granted to the departments and agencies under Federal law

(...continued)

and other minors.

[61] Executive Office for Immigration Review, Unaccompanied Children Priority Code Adjudication, July 18, 2014-December 29, 2015, unpublished data provided to CRS, January 11, 2016.

[62] A case termination refers to a decision by an immigration judge to dismiss the case related to a particular charging document. The charging document for UAC is the Notice to Appear. If a case is terminated in this situation, the child is not subject to removal related to the dismissed charging document. If DHS choses to pursue the case, it must issue a new charging document.

[63] An administrative closing refers to a temporary removal of a case from an immigration judge's calendar or docket. If DHS choses to pursue the case, the case may ultimately be placed back on the judge's calendar or docket.

[64] For more information, see CRS Report R43703, *Special Immigrant Juveniles: In Brief*, by Ruth Ellen Wasem.

[65] For more information, see CRS Report RL34317, *Trafficking in Persons: U.S. Policy and Issues for Congress*, by Alison Siskin and Liana W. Rosen.

[66] Department of Homeland Security, "Statement by Secretary Johnson on Increased Influx of Unaccompanied Immigrant Children at the Border," press release, June 2, 2014, http://www.dhs.gov/news/2014/06/02/statement-secretary-johnson-increased-influx-unaccompanied-immigrant-children-border; and Alejandro Mayorkas, Deputy Secretary of the Department of Homeland Security, "Press Call Regarding the Establishment of the Inter-Agency Unified Coordination Group on Unaccompanied Alien Children," press release, June 3, 2014.

… are unified in providing humanitarian relief to the affected children, including housing, care, medical treatment, and transportation."[67]

From the outset, CBP maintained primary responsibility for border security operations at and between ports of entry and, working with ICE, provided for the care of unaccompanied children in temporary DHS custody.[68] DHS coordinated with the Departments of Health and Human Services, State, and Defense, as well as the General Services Administration and other agencies, to ensure a coordinated and prompt response within the United States in the short term, and in the longer term to work with migrant-sending countries to undertake reforms to address the causes behind the recent flows.[69] In June 2014, DHS initiated a program to work with the Central American countries on a public education campaign to dissuade UAC from attempting to migrate illegally to the United States.[70]

To manage the influx of UAC, HHS/ORR used group homes operated by nonprofit organizations with experience providing UAC-oriented services (e.g., medical attention, education). HHS also coordinated with the Department of Defense (DOD), which temporarily made facilities available for UAC housing at Lackland Air Force Base in San Antonio, Texas, and at Naval Base Ventura County in Oxnard, California. Arrangements at both sites ended August 2014.[71]

To address the legal needs of large numbers of children entering the immigration court system, the Corporation for National and Community Service (CNCS), which administers AmeriCorps,[72] partnered with EOIR to create "Justice AmeriCorps," a grant program that enrolled approximately 100 lawyers and paralegals as AmeriCorps members to provide UAC with legal representation during removal proceedings.[73]

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DOJ's Office of Legal Access Programs established the Legal Orientation Program for Custodians of Unaccompanied Children (LOPC), the goals of which are "to improve the appearance rates of non-detained children at their immigration court hearings, and to protect children from mistreatment, exploitation, and trafficking by increasing access to legal and other services." In FY2014 the LOPC served over 12,000 custodians for children released from ORR custody.[74] The LOPC operates a national call center that provides scheduling assistance and basic

[67] The White House, Office of the Press Secretary, "Presidential Memorandum – Response to the Influx of Unaccompanied Alien Children Across the Southwest Border" press release, June 2, 2014.

[68] As one of its missions, ICE works to dismantle organizations that smuggle UAC into the United States.

[69] Department of Homeland Security, "Statement by Secretary Johnson on Increased Influx of Unaccompanied Immigrant Children at the Border," press release, June 2, 2014, http://www.dhs.gov/news/2014/06/02/statement-secretary-johnson-increased-influx-unaccompanied-immigrant-children-border.

[70] Alejandro Mayorkas, Deputy Secretary of the Department of Homeland Security, "Press Call Regarding the Establishment of the Inter-Agency Unified Coordination Group on Unaccompanied Alien Children," press release, June 3, 2014.

[71] Leslie Berestein Rojas, "Emergency Shelter for Unaccompanied Migrant Kids Opening in Ventura County," *89.3 KPCC, Southern California Public Radio*, June 5, 2014, http://www.scpr.org/blogs/multiamerican/2014/06/05/16777/emergency-shelter-for-unaccompanied-migrant-kids-o/.

[72] For more information on the CNCS and AmeriCorps, see CRS Report RL33931, *The Corporation for National and Community Service: Overview of Programs and Funding*, by Abigail R. Overbay and Benjamin Collins.

[73] Department of Justice and the Corporation for National and Community Service, "Justice Department and CNCS Announce New Partnership to Enhance Immigration Courts and Provide Critical Legal Assistance to Unaccompanied Minors," press release, June 6, 2014, http://www.nationalservice.gov/newsroom/press-releases/2014/justice-department-and-cncs-announce-new-partnership-enhance.

[74] FY2014 information is the most recent available as of April 29, 2016. See United States Department of Justice, Administrative Review and Appeals, *FY 2017 Performance Budget Congressional Budget Submission*, p.4.

legal information to UAC custodians.[75] Additional Administration initiatives include partnering with Central American governments to combat gang violence, strengthen citizen security, spur economic development, and support the reintegration and repatriation of returned citizens.[76] The Administration also initiated a collaborative information campaign with Central American governments to inform would-be migrants on a variety of issues.[77]

Congressional Action

As the UAC crisis unfolded in 2014, congressional attention initially focused on whether the various agencies responding to it had adequate funding. As the crisis began to wane, congressional attention shifted to mechanisms to prevent such a surge from reoccurring.

Appropriations

In the President's original FY2015 budget that was released in March 2014 for the agencies directly responsible for the UAC population (i.e., within HHS/ORR and DHS budgets), the Administration did not request funding increases to help address the UAC surge. However, on May 30, 2014, the Office of Management and Budget updated its cost projections for dealing with the growing UAC population and requested $2.28 billion for FY2015 for ORR's UAC program and $166 million for DHS for CBP overtime, contract services for care and support of UAC, and transportation costs.[78]

On July 8, 2014, the Administration requested $3.7 billion in emergency appropriations, almost all of which was directly related to addressing the UAC surge, including $433 million for CBP, $1.1 billion for ICE, $1.8 billion for HHS, $64 million for the Department of Justice (DOJ), and $300 million for the Department of State.[79] On July 23, 2014, Senator Mikulski introduced the Emergency Supplemental Act, 2014 (S. 2648), which would have funded HHS's Administration for Children and Families' Refugee and Entrant Assistance Program for $1.2 billion, CBP and the Office of Air and Marine for $320.5 million and $22.1 million, respectively, and ICE for $762.8 million for transportation and enforcement and removal costs. S. 2648 would have appropriated $124.5 million to DOJ for court activities related to UAC processing, and the Department of State's and the U.S. Agency for International Development's (USAID's) unaccompanied alien-related activities would have received $300 million, the same amount the Administration requested. Congress did not pass S. 2648.

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In December 2014, the Consolidated and Further Continuing Appropriations Act, 2015 (P.L. 113-235) provided nearly $1.6 billion for Refugee and Entrant Assistance Programs for FY2015, with the expectation that most these funds would be directed toward the UAC program.[80] In addition,

[75] Ibid, pp. 3-4.

[76] White House, Office of the Press Secretary, "Fact Sheet: Unaccompanied Children from Central America," http://www.whitehouse.gov/the-press-office/2014/06/20/fact-sheet-unaccompanied-children-central-america.

[77] Ibid.

[78] Executive Office of the President, Office of Management and Budget, Memorandum to Representative Nita Lowey, May 30, 2014.

[79] The White House, "Fact Sheet: Emergency Supplemental Request to Address the Increase in Child and Adult Migration from Central America in the Rio Grande Valley Areas of the Southwest Border," press release, July 8, 2014.

[80] In addition to the UAC program, the Refugee and Entrant Assistance Program administers the following programs: Transitional/Cash and Medical Services, Victims of Trafficking, Social Services, Victims of Torture, Preventive Health, and Targeted Assistance. For additional information, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*.

P.L. 113-235 included a new provision allowing HHS to augment appropriations for the Refugee and Entrant Assistance account by up to 10% through transfers from other discretionary HHS funds.[81]

In March 2015, the Department of Homeland Security Appropriations Act, 2015 (P.L. 114-4) provided $3.4 billion to ICE for detection, enforcement, and removal operations, including for the transport of unaccompanied children for CBP. The act required that DHS estimate FY2015 UAC apprehensions and the number of necessary agent or officer hours and related costs. It also provided for some budgetary flexibility through the optional reprogramming of funds.[82]

In its FY2016 budget, the Administration requested contingency funding as well as base funding for several agencies in the event of another surge of unaccompanied children. For HHS, the Administration requested $948 million for base funding (the same as FY2015) and $19 million for contingency funding for ORR's Unaccompanied Children Program (within the Refugee and Entrant Assistance Program).[83] Congress met the base funding request but appropriated no monies for contingency funding.

For DHS, the Administration requested $203.2 million in base funding and $24.4 million in contingency funding for CBP to be used for costs associated with the apprehension and care of unaccompanied children.[84] The Administration requested $2.6 million in contingency funding for ICE to be used for transportation costs associated with UAC apprehensions if such apprehensions exceeded those in FY2015.[85] Neither the Senate[86] nor the House[87] appropriated monies for such funds in FY2016. For DOJ, the Administration requested an additional $50 million (two-year funding) for EOIR to process UAC.[88]

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For FY2017, the Administration has requested $1,321 million for ORR's Refugee and Entrant Assistance Program that includes $1,226 million in base funding and contingency funding which, if triggered by larger than expected caseloads, would start at $95 million and could expand up to $400 million.[89] For DHS, the Administration requested $13.2 million for ICE's Transportation

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[81] This paragraph was excerpted from CRS Report R43967, *Labor, Health and Human Services, and Education: FY2015 Appropriations.*

[82] Section 571 of the act permits the Secretary to reprogram funds within CBP and ICE and transfer such funds into the two agencies' "Salaries and Expenses" accounts for the care and transportation of UAC. Section 572 of the act allows for State Homeland Security Program and Urban Area Security Initiative grants that are awarded to states along the Southwest border to be used by recipients for costs or reimbursement of costs for providing humanitarian relief to unaccompanied children.

[83] Department of Health and Human Services, Administration for Children and Families, *Fiscal Year 2016, Justification of Estimates for Appropriations Committees,* p. 21.

[84] The total CBP contingency request was for $134.5 million for costs associated with the apprehension and care of up to 104,000 UAC. Based on the anticipated low probability of such a high number of UAC apprehensions, the FY2016 budget scored the requested increase at $24.4 million.

[85] Base funding for ICE to transport UAC was not separated out from other transportation activities within the budget. The total ICE contingency request was for $27.6 million for costs associated with transportation of up to 104,000 UAC. Based on the anticipated low probability of such a high number of UAC requiring such transportation, the FY2016 budget scored the requested increase at $2.6 million.

[86] S. 1619, S.Rept. 114-68.

[87] H.R. 3128, H.Rept. 114-215.

[88] See U.S. Department of Homeland Security, *FY2016 Congressional Budget Justification*, U.S. Department of Justice, Administrative Review and Appeals, Executive Office for Immigration Review (EOIR), *FY2016 Congressional Budget Justification*; Department of Health and Human Services, Administration for Children and Families, *Fiscal Year 2016, Justification of Estimates for Appropriations Committees.*

[89] Department of Health and Human Services, Administration for Children and Families, *Fiscal Year 2017,* (continued...)

and Removal Program, including $3 million in contingency funding; and $217.4 million for CBP, including $5.4 million in contingency funding.

Legislation

Several pieces of legislation addressing the UAC situation have been introduced in the current Congress; two have seen legislative activity. On March 18, 2015, the House Judiciary Committee marked up the "Asylum Reform and Border Protection Act of 2015" (H.R. 1153); and on March 4, 2015, the House Subcommittee on Immigration and Border Security marked up the Protection of Children Act of 2015 (H.R. 1149).

The Asylum Reform and Border Protection Act of 2015 (H.R. 1153)

The Asylum Reform and Border Protection Act of 2005 (H.R. 1153) would make several changes to current UAC policy. Among them, H.R. 1153 would amend the definition of UAC.[90] The current UAC definition requires that in order for a minor to be deemed unaccompanied, he or she must have no parent or legal guardian available to provide care and physical custody to the minor. H.R. 1153 would amend the language to require as well that no siblings, aunts, uncles, grandparents, or cousins over age 18 are available to provide such care and physical custody. The act would also provide that the term *unaccompanied alien child* would cease if any person in the aforementioned category is found in the United States and is available to provide care and physical custody to the minor.

H.R. 1153 would amend asylum provisions by treating unaccompanied children who may be seeking asylum in another country similar to other (adult) asylum seekers. The so-called Safe Third Country provision requires aliens seeking asylum to make such a claim in the first country in which they arrive. Under current law, UAC are not subject to the Safe Third Country requirement. H.R. 1153 also would require, under most circumstances, UAC to file their asylum claim within one year after arriving in the United States. Under the bill, USCIS would no longer be given initial jurisdiction over UAC asylum petitions.

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H.R. 1153 would require agencies to notify HHS within seven days of the apprehension or discovery of unaccompanied children instead of within 48 hours as under current law. It also would require the transfer of custody of unaccompanied children to HHS no later than 30 days after determining that the minor is a UAC, instead of no later than 72 hours as under current law.

The Protection of Children Act of 2015 (H.R. 1149)

The Protection of Children Act of 2015 (H.R. 1149) would amend current law[91] by requiring unaccompanied children from noncontiguous countries to be returned immediately to their country of origin if they are deemed not to be a victim of or at risk of being a victim of trafficking, or they do not have a fear of returning. Under current law, this immediate repatriation requirement only applies to unaccompanied children from contiguous countries. The act also

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(...continued)

Justification of Estimates for Appropriations Committee, p. 240.

[90] 6 U.S.C. (g)(2)

[91] 8 U.S.C. 1232.

would amend current law by removing language that requires unaccompanied children to *independently* decide if they want to withdraw their application for admission.[92]

H.R. 1149 would amend current law to require the Secretary of State to negotiate repatriation agreements between the United States and any foreign country the Secretary deems appropriate. Under current law, the Secretary is able to negotiate such agreements only with contiguous countries.

H.R. 1149 sets forth a time period for unaccompanied children who do not meet the screening requirements[93] to be placed in removal proceedings. It also differentiates between UAC who did not meet the screening requirements and those that did meet such requirements, mandating the former to be transferred to HHS no later than 30 days after failing to meet such requirements. The bill does not specify a time period for the transfer of UAC who met the screening requirements. Like H.R. 1153, H.R. 1149 would no longer give USCIS initial jurisdiction over the asylum petitions of unaccompanied children.

H.R. 1149 would require HHS to provide DHS with identifying information of the individual with whom the unaccompanied children will be placed. For unaccompanied children who were apprehended on or after June 12, 2012, and before the enactment of the act, H.R. 1149 would require HHS to provide such information to DHS within 90 days of the act's enactment.

In addition, H.R. 1149 would require DHS to investigate any unknown immigration status of the individuals with whom unaccompanied children are placed. If the individual is unlawfully present in the country, the act would require DHS to initiate removal proceedings.

H.R. 1149 would also amend current law to clarify that unaccompanied children "should have *acces*s to counsel" to the greatest extent practicable," but not at the government's expense.

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Policy Challenges

In response to the UAC surge in the spring and summer of 2014, the Administration announced initiatives to unify efforts among federal agencies with UAC responsibilities and to address the situation with programs geared toward unaccompanied children from several Central American countries. Additionally, Congress increased funding for the HHS program responsible for the care of unaccompanied children, and permitted the Secretary of DHS to transfer funds from within a specific CBP and ICE account for the care and transportation of unaccompanied children, among other actions taken. Since FY2014, the Administration has continued to request additional funding for programs geared toward unaccompanied children, and Congress has appropriated for some but not all such requests.

The most recent apprehension data for FY2016 suggest that the flow of unaccompanied children to the United States has not abated, although it was over 40% lower in FY2015 than in FY2014.

Once in the United States, the number of unaccompanied children who will ultimately qualify for asylum or other forms of immigration relief that may allow them to remain in the United States

[92] By withdrawing his or her application for admission, the alien would not be subject to enforcement action.

[93] Under current law, contiguous-country unaccompanied children must be screened for whether they have been victims of a severe form of trafficking in persons and there is no credible evidence that the minor is at risk should the minor be returned to his/her country of nationality or last habitual residence; a possible claim to asylum; and whether they can independently decide to voluntarily return to his/her country of nationality or last habitual residence. P.L. 110-457, §235(a)(2)(A).

remains unclear. Many unaccompanied children have family members in the United States, many of whom may not be legally present. Such circumstances raise challenging policy questions that may pit what is in the "best interests of the child" against what is permissible under the Immigration and Nationality Act and other relevant laws.

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Acknowledgments

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U.S.

U.S. Setting Up Emergency Shelter in Texas as Youths Cross Border Alone

By **JULIA PRESTON** MAY 16, 2014

cited in J.E.F.M. v. Lynch, No. 15-35738 archived on September 14, 2016

With border authorities in South Texas overwhelmed by a surge of young illegal migrants traveling by themselves, the Department of Homeland Security declared a crisis this week and moved to set up an emergency shelter for the youths at an Air Force base in San Antonio, officials said Friday.

After seeing children packed in a Border Patrol station in McAllen, Tex., during a visit last Sunday, Homeland Security Secretary Jeh Johnson on Monday declared "a level-four condition of readiness" in the Rio Grande Valley. The alert was an official recognition that federal agencies overseeing borders, immigration enforcement and child welfare had been outstripped by a sudden increase in unaccompanied minors in recent weeks.

On Sunday, Department of Health and Human Services officials will open a shelter for up to 1,000 minors at Lackland Air Force Base in Texas, authorities said, and will begin transferring youths there by land and air. The level-four alert is the highest for agencies handling children crossing the border illegally, and allows Homeland Security officials to call on emergency resources from other agencies, officials said.

In an interview on Friday, Mr. Johnson said the influx of unaccompanied youths had "zoomed to the top of my agenda" after his encounters at the McAllen Border Patrol station with small children, one of whom was 3.

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A child from Honduras was among the youths from Central America being processed at the Border Patrol station in Brownsville, Tex., in March. Todd Heisler/The New York Times

The children are coming primarily from El Salvador, Guatemala and Honduras, making the perilous journey north through Mexico to Texas without parents or close adult relatives. Last weekend alone, more than 1,000 unaccompanied youths were being held at overflowing border stations in South Texas, officials said.

The flow of child migrants has been building since 2011, when 4,059 unaccompanied youths were apprehended by border agents. Last year more than 21,000 minors were caught, and Border Patrol officials had said they were expecting more than 60,000 this year. But that projection has already been exceeded.

By law, unaccompanied children caught crossing illegally from countries other than Mexico are treated differently from other migrants. After being

apprehended by the Border Patrol, they must be turned over within 72 hours to a refugee resettlement office that is part of the Health Department. Health officials must try to find relatives or other adults in the United States who can care for them while their immigration cases move through the courts, a search that can take several weeks or more.

The Health Department maintains shelters for the youths, most run by private contractors, in the border region. Health officials had begun several months ago to add beds in the shelters anticipating a seasonal increase. But the plans proved insufficient to handle a drastic increase of youths in recent weeks, a senior administration official said.

Jeh Johnson Alex Wong/Getty Images

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Mr. Johnson said Pentagon officials agreed this week to lend the space at Lackland, where health officials will run a shelter for up to four months. The base was also used as a temporary shelter for unaccompanied migrant youths in 2012. It became the focus of controversy when Gov. Rick Perry of Texas objected, accusing President Obama of encouraging illegal migration by sheltering the young people there.

Mr. Johnson said the young migrants became a more “vivid” issue for him after he persuaded his wife to spend Mother’s Day with him at the station in McAllen. He said he asked a 12-year-old girl where her mother was. She responded tearfully that she did not have a mother, and was hoping to find her father, who was living somewhere in the United States, Mr. Johnson said.

Mr. Johnson said he had spoken on Monday with the ambassadors from Mexico and the three Central American countries to seek their cooperation,

and had begun a publicity campaign to dissuade youths from embarking for the United States.

"We have to discourage parents from sending or sending for their children to cross the Southwest border because of the risks involved," Mr. Johnson said. "A South Texas processing center is no place for a child."

Officials said many youths are fleeing gang violence at home, while some are seeking to reunite with parents in the United States. A majority of unaccompanied minors are not eligible to remain legally in the United States and are eventually returned home.

A version of this article appears in print on May 17, 2014, on page A15 of the New York edition with the headline: U.S. Setting Up Emergency Shelter in Texas as Youths Cross Border Alone.
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FACTANK
NEWS IN THE NUMBERS

MAY 4, 2016

U.S. border apprehensions of families and unaccompanied children jump dramatically

BY JENS MANUEL KROGSTAD | 10 COMMENTS

Apprehensions of children and their families at the U.S.-Mexico border since October 2015 have more than doubled from a year ago and now outnumber apprehensions of unaccompanied children, a figure that also increased this year, according to a Pew Research Center analysis of U.S. Customs **and Border Protection data.**

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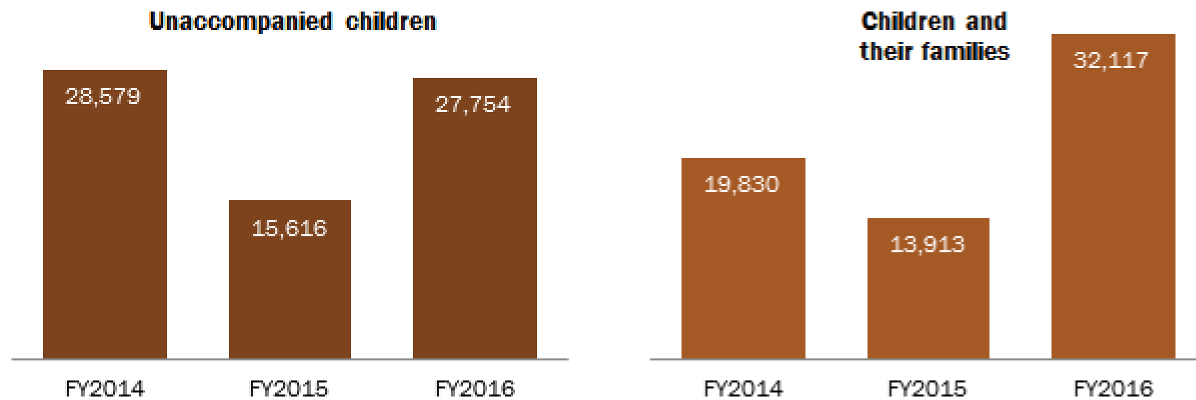
There were 32,117 apprehensions of family members – defined as children traveling with at least one parent or guardian – during the first six months of fiscal 2016 (October 2015 to March 2016). By **comparison, apprehensions of unaccompanied children totaled 27,754 over the same period. The number of family apprehensions is more than double that of the previous year. The number of apprehensions of unaccompanied children shot up by 78%.**

Apprehensions of children and their families exceed those of unaccompanied children in 2016

U.S.-Mexico border apprehensions in the first six months of each fiscal year



Note: Apprehension numbers for children and their families include both the children and adults traveling with them. Data refer to the number of apprehensions, not the number of unique individuals apprehended.

Source: U.S. Customs and Border Protection data.

PEW RESEARCH CENTER

The apprehension of more families than unaccompanied children is a reversal from summer 2014, when thousands of children fled gang violence and poverty in Central America and migrated north to the U.S. without a parent or guardian. During the first six months of fiscal 2014, there were 19,830 apprehensions of children and their families, compared with 28,579 apprehensions of unaccompanied children.

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It remains to be seen whether apprehensions of unaccompanied children or families will surge this summer and surpass the full-year apprehension totals from two years ago. This fiscal year, family and unaccompanied children apprehensions spiked in December 2015, and in January 2016 the Department of Homeland Security launched immigration raids targeting families. Since then, monthly border apprehensions have dropped below 2014 levels. For example, March 2016 apprehensions of children and their families (4,452) and unaccompanied children (4,240) are lower than in March 2014, when authorities apprehended 5,752 children and their families and 7,176 unaccompanied children.

Border apprehensions of children, considered an indicator of the flows of child migrants entering the U.S. illegally, dropped off steeply in fiscal 2015 as Mexico stepped up deportations of Central American children and the U.S. government launched public information campaigns in Central American countries to discourage children from making the trip north. The U.S. also sped up the processing of immigration court cases, but a large backlog in cases still exists.

The surge in family apprehensions at

the U.S.-Mexico border in 2016 is driven by migrants from El Salvador, Guatemala and Honduras, who together make up 90% of these apprehensions so far this fiscal year. The number of family apprehensions from these Central American countries more than doubled in the first six months of fiscal 2016 over the same time period in 2015. Meanwhile, among Mexicans, family apprehensions decreased by 25% over the same period.

Surge in apprehensions of children and their families driven by Honduras, Guatemala and El Salvador

U.S.-Mexico border apprehensions in the first six months of each fiscal year, by country of origin

	El Salvador	Guatemala	Honduras	Mexico
FY2016	11,093	9,720	8,065	1,644
FY2015	3,313	4,537	3,418	2,193

Notes: Apprehension numbers for children and their families include both the children and adults traveling with them. Apprehensions data refer to the number of apprehensions and not to the number of unique individuals apprehended. Family apprehensions from other countries and unaccompanied child apprehensions are not shown.
Source: U.S. Customs and Border Protection data

PEW RESEARCH CENTER

Apprehensions of unaccompanied children so far in 2016 are similar to the first six months of 2014. When looking at where unaccompanied children are from, there have been substantially more apprehensions among those from Guatemala (9,383) and El Salvador (7,914) than Honduras (4,224) during the first six months of fiscal 2016. In 2014, Honduras was the leader in the number of unaccompanied minors apprehended.

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U.S. government officials have started to prepare for a possible increase in migration from Central America this summer. For example, the Department of Health and Human Services has requested additional contingency funding from Congress to shelter apprehended children. In addition, the governor of Texas extended the deployment of the state's National Guard at the border with Mexico in December, which coincided with a spike that month in border apprehensions.

Roughly two-thirds of family apprehensions in this fiscal year have come at the U.S. Customs and Border Protection's Rio Grande sector, located along the southernmost tip of Texas and bounded by Mexico and the Gulf of Mexico. (The sector accounted for a similar share of apprehensions during the first six months of fiscal 2014 and fiscal 2015.)

Note: This post and the text of the first chart have been updated to reflect the fact that the data refer to the number of apprehensions and not the number of unique individuals apprehended.

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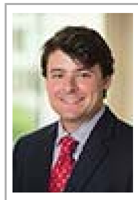

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10 Comments

Anonymous • 4 months ago

People south of the U.S. Border are stopped because they are Indians indigenous to the Americas.

Anonymous • 4 months ago

Why are we not investigating who is benefiting from the building of detention centers in southern Texas away from San Antonio in isolated land y buildings. Who are the stock holders?

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Anonymous • 4 months ago

These people are refugees. What don't you explain why families and children are crossing the border. They are not illegal immigrants but that's how we treat them.

Anonymous • 4 months ago

I suggest you look up the legal definition of "refugee" under US immigration law. You may be using a much broader definition than the law permits. For example, the law does NOT recognize people escaping hard economic conditions as refugees. Nor, does it recognize people running away from crime. People who have participated in organized crime, for instance by paying a human smuggling operation, are ineligible based on poor character. The US govt. tried to set "refugee collection centers" in 2014 in the Central American capitals, but nobody showed up! That's because the phenomenon is run by organized crime gangs....they intimidate customers by issuing death

threats....they make $5K per smuggled person, the equivalent to the life savings of the average Central American family. Pres. Obama and Secy. Johnson and Sen. Sessions are trying to defeat the cruel business plan of the gangs, but liberals in the US who lack street smarts are unwilling to look at the big picture.

Anonymous • 4 months ago

For all the folks wanting to build that wall, how much in taxes are you willing to pay in your taxes. An engineer is estimated it will require $17,000.000.000. $17B is approximately the cost of NASA. And that doesn't take into consideration the Northern Border. The border between the US and Canada is the longest contiguous border in the world and it has zero fences.

Anonymous • 4 months ago

Is there a problem of millions of Canadians pouring across the border from Canada that would necessitate a wall being built on the northern border?

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Anonymous • 4 months ago

Hardly...can't think of any.

Anonymous • 4 months ago

maybe not as much as with Mexico but there is a large number

Anonymous • 4 months ago

Is there any good guess as to the total number of people who aren't caught when crossing the U.S. border and where they go?

Anonymous • 4 months ago

I'd wager its at least 200% more than the ones the Border Patrol apprehend and rapidly getting larger! Time to build THAT wall!!

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Working to promote due process for all immigrants and refugees in the United States

June 3, 2015

A Humanitarian Call to Action: Unaccompanied Children in Removal Proceedings

Present a Critical Need for Legal Representation

The American Bar Association (ABA) is gravely concerned about the lack of legal representation on behalf of unaccompanied children in removal proceedings. The "humanitarian crisis" at the border confronting the nation last summer has developed into a nationwide due process crisis in our country's immigration court system, a system that is already significantly overburdened and under-resourced. These children, many of whom entered the United States during the unprecedented "surge" in 2014, are now facing adversarial removal proceedings opposed by experienced government attorneys, with only about 32% represented by counsel.[1] It is highly unlikely that an unrepresented child will prevail in immigration court, even if he or she has a *bona fide* claim for protection. A recent study found that represented children have a 73% success rate in immigration court, as compared to only 15% of unrepresented children.[2] Furthermore, studies show that children who are represented have a much higher appearance rate in immigration court, 92.5%, versus 27.5% for unrepresented children.[3]

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Starting last summer, the Executive Office for Immigration Review (EOIR) began to prioritize the cases of children who entered the United States during the surge period. As a result, EOIR has expedited the initial hearings after they reunify with sponsors, leaving very little time for the children and their families to get oriented and find counsel before appearing in court.[4] This "perfect storm" has resulted in a total of over 7,706 removal orders placed against unaccompanied children between October 2013 and January 2015.[5] Until the government recognizes the need for universal representation and allocates sufficient funding to make it a reality, it is up to the legal community to respond. The ABA has worked on these issues for several years and continues to take action to address the current crisis through its Commission on Immigration (Commission) and Working Group on Unaccompanied Minor Immigrants (Working Group). The Working Group has set up a website for this purpose at www.ambar.org/ican. Attorneys willing to volunteer to represent unaccompanied children can enroll directly at this website by

[1] *See*, Transactional Records Access Clearinghouse, *Representation for Unaccompanied Children in Immigration Court*, Nov. 25, 2014, available here.
[2] *Id*.
[3] *See*, American Immigration Council, *Taking Attendance: New Data Finds Majority of Children Appear in Immigration Court*, July 2014, available here.
[4] Brian M. O'Leary, Chief Immigration Judge, Executive Office for Immigration Review, *Docketing Practices Relating to Unaccompanied Children Cases and Adult with Children Released on Alternatives to Detention Cases in Light of the New Priorities*, Mar. 24, 2015 available here.
[5] Kate Linthicum, *7,000 Immigrant Children Ordered Deported Without Going to Court, L.A. Times*, Mar. 6, 2015, available here.

signing up at the "Volunteer Now" link. Those who enroll will be matched with a legal service provider in their area who will do their best to match the volunteer with a child in need of representation.

1. **Background:**

Who is an Unaccompanied Alien Child (UAC)?

The Homeland Security Act of 2002 transferred the responsibility for care and custody of "unaccompanied alien children" from the enforcement-oriented (former) Immigration and Naturalization Service (INS) to the welfare-based U.S. Department of Health and Human Services, Office of Refugee Resettlement (DHHS, ORR). An "unaccompanied alien child" is defined as someone who has (A) no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) who has no parent or legal guardian in the United States; or, no parent or legal guardian in the United States available to provide care and physical custody."[6] This major reform was applauded by national advocates who had long criticized the government for placing children in the care and custody of the same agency responsible for prosecuting their deportation cases and executing deportation orders.

Current Situation with Unaccompanied Children at the Border

While the number of children entering the United States at the southwest border has declined considerably since last summer, the overall number remains significant and twice the number that entered the country in 2011. From October 2014 through April 2015, 18,919 unaccompanied children have been processed at the border, a 48% decline from the same time last year.[7] During the height of the surge in June 2014, over 10,000 unaccompanied children entered the United States in one month. The Obama Administration responded with a multi-faceted approach to stopping this steady stream with cross-agency coordination, additional enforcement resources, expedited child and family dockets in immigration court and intensive diplomacy efforts and concerted deterrent strategies in Mexico and Central America, strategies that resulted in making it more difficult for children to reach the United States.[8]

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The Department of Homeland Security (DHS), a successor to the former INS, reported that 68,541 unaccompanied children were processed by CBP in the United States between October 1, 2013 and September 30, 2014, as compared to 38,759 in Fiscal Year (FY) 2013, a 77% increase.[9] Only two years earlier, in FY 2011, CBP apprehended a total of 15,701 children, the vast majority of whom came from Mexico.[10] Prior to FY 2012, an average of 7,000 to 8,000 unaccompanied children were detained and

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[6] 6 U.S.C. § 279(g).
[7] *See* U.S. Customs and Border Protection, *Southwest Border Unaccompanied Alien Children*, available here.
[8] See Marc R. Rosenblum, *Unaccompanied Child Migration to the U.S.: The Tensions Between Protection and Prevention*, Migration Policy Institute, April 2015, available here.
[9] *See* U.S. Customs and Border Protection, *Southwest Border Unaccompanied Alien Children*, available here.
[10] *See id*.

held in ORR shelters annually.[11] There has clearly been a marked increase over the past three years, and especially over the early summer months of 2014. Statistics from FY 2014 show these children are mostly from El Salvador (24%), Guatemala (25%), Honduras (28%) and Mexico (23%) and range in age from infants to 17 years.[12] Historically, the majority of these children have been between the ages of 15 and 17 and about three quarters of them have been boys; more recently, however, the number of younger children and girls has risen steadily. Statistics show that the recent drop in numbers reflect a decrease in children entering the country from El Salvador and Honduras, while children from Mexico and Guatemala continue to enter at the same rates as during the surge.[13]

Once children are apprehended by Border Patrol agents they are transported to a CBP processing station and held for hours or days in cells during processing. The Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) requires that CBP determine whether these children are unaccompanied within 48 hours and if deemed to be unaccompanied, transferred to ORR custody within 72 hours. In practice, especially during the height of the surge in 2014, the children were often held much longer, up to 15 days, or more, in multiple holding facilities. CBP communicates with ORR to identify a short-term placement for the children. Once a placement is confirmed, officers from Immigration and Customs Enforcement (ICE) transport the children from CBP stations to the ORR shelters. At the shelters the children are finally able to shower, rest, eat hot food, make phone calls and receive medical care, counseling, education and legal services. Legal service providers meet with the children and provide a "Know Your Rights" presentation and perform individual screenings within days of their arrival to the shelter. The screenings are used to make referrals to pro bono attorneys for children who are identified as eligible for legal relief.

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The TVPRA requires that children from non-contiguous countries be placed in removal proceedings before an Immigration Judge and provides that they have the right to apply for legal relief and receive counsel "to the greatest extent practicable." Children from contiguous countries (Mexico and Canada) can be immediately returned to their countries after a cursory screening by a uniformed Border Patrol agent. There have been proposals in Congress to extend this provision to children from non-contiguous countries, a proposal which is of great concern to the ABA and violates long-standing ABA policy to the contrary.[14] A confidential report from the United Nations High Commissioner for Refugees (UNHCR), leaked to the media, found these Border Patrol screenings to be woefully inadequate and concluded that they fail to protect Mexican children.[15] Furthermore, the UNHCR concluded that Border Patrol agents should not be charged with screening children for risks of trafficking, persecution or

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[11] *See* U.S. Department of Health and Human Services, *Administration for Children and Families, Office of Refugee Resettlement, Unaccompanied Alien Children Program*, May 2014, available here.
[12] *See* U.S. Customs and Border Protection, *Southwest Border Unaccompanied Alien Children*, available here.
[13] *See* Marc R. Rosenblum, *Unaccompanied Child Migration to the U.S.: the Tensions Between Protection and Prevention*, Migration Policy Institute, April 2015, p. 3, available here.
[14] *See* Standards For the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children In the United States, Section VIII, A, Adjudication of Claims of Children, American Bar Association Comm. on Immigration, Aug. 2004, available here.
[15] Vox, *The Process Congress Wants to Use for Child Migrants is a Disaster*, July 15, 2014, available here.

voluntariness of return.[16] According to the report, Border Patrol agents simply don't know what to look for to determine if a child is being victimized or what to do if he or she is being victimized.[17]

Historically, about 85% of unaccompanied children have been reunified with approved sponsors within an average of 35 days.[18] When the number of child migrants and refugees began to surge at the southwest border, accelerated reunification in as little as 7 days without access to traditional legal screenings began occurring. Children are released to sponsors within the United States. Some sponsors are the parents of these children and others are extended family members or family friends. These children are in removal proceedings and the government contends they have no right to appointed counsel or *guardians ad litem*. They are reunifying in cities and states all over the United States. According to a recent report from ORR analyzing data from January through July 2014, the top six states for reunification include New York, Texas, California, Florida, Maryland and Virginia.[19] Looking more closely at this information by county, it is appears that the top six cities for reunification include Baltimore, Dallas, Houston, Miami, Los Angeles and New York.[20]

Once the children are reunified, there is no one agency coordinating their legal representation although a few non-profit groups run dedicated pro bono projects in some of the major cities. For example, Kids in Need of Defense (KIND), has offices in eight major cities including Baltimore, Washington DC, Boston, Houston, Seattle, Los Angeles, New York and Newark.[21] The Office of Refugee Resettlement recently awarded two additional non-profit agencies, the U.S. Committee for Refugees and the U.S. Conference of Catholic Bishops, with grants of over $2 million each for post-release legal services serving reunified children in removal proceedings throughout the country.[22] Additionally, in June 2014, the Department of Justice and the Corporation for National and Community Service announced "justice AmeriCorps" a grant program intended to enroll 100 lawyers and paralegals throughout the country to provide additional legal services to vulnerable children in removal proceedings who meet certain criteria.[23] At a February 2015 meeting between government officials, law firms and legal advocacy groups, the Deputy Director of the Executive Office for Immigration Review, shared statistics reflecting immigration courts with the highest number of UAC "surge" cases in the nation. The information revealed New York City as the court with the largest number of pending UAC "surge" cases, over 2,000, with Baltimore, Arlington, Miami, Houston and Los Angeles, following closely behind.[24] Again, only about one-third of these

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[16] *Id*.
[17] *Id*.
[18] *See* U.S. Department of Health and Human Services, Administration for Children and Families, Office of Refugee Resettlement, Unaccompanied Alien Children Program, *Fact Sheet*, May 2014, available here.
[19] Unaccompanied Children Released to Sponsors by State, Office of Refugee Resettlement, available here.
[20] Unaccompanied Children Released to Sponsors by County, Office of Refugee Resettlement, available here.
[21] *See* KIND's website here.
[22] *See* announcement here.
[23] *See*, Department of Justice press release here.
[24] White House meeting on February 3, 2015, information provided by EOIR Deputy Director Ana Kocur, courts with the largest UAC "surge" dockets, pending cases, both represented and unrepresented: New York City (over 2,000); Baltimore & Arlington (over 1,500); Miami, Houston and Los Angeles (over 1,400); Charlotte, New Orleans,

children are represented by counsel. In July 2014, several groups headed by the American Civil Liberties Union Foundation of Southern California came together to file a nationwide lawsuit challenging the lack of government appointed counsel on behalf of children in removal proceedings.[25] The lawsuit is currently pending. Legal representation and access to and by counsel are paramount issues of concern for the American Bar Association.

In response to the "surge" last summer, the Administration became determined to stem the flow of unaccompanied children and families entering the country from Central America and responded with a multi-pronged approach which includes expediting the processing of these children and families through the system; dedicating additional enforcement and detention resources; coordinating among all relevant federal agencies and engaging with foreign governments to discourage and deter illegal immigration to the United States.[26] American officials have been encouraging the Mexican and Guatemalan authorities to interdict youth and return them swiftly to their countries of origin. These efforts have apparently had a significant impact, since the number of unaccompanied children entering the United States at the Southwest border dropped sharply last year from a high of 10,622 in June to 2,424 in September.[27]

Current Situation of Detained Families at the Border

Beginning last year, the Administration also vastly changed the manner it treats the increasing numbers of families entering the United States, specifically women with children.[28] DHS reported that between October 1, 2013, and September 30, 2014, CBP apprehended 68,445 family units of mainly women with at least one child as compared to 14,855 in FY 2013, a 361% increase.[29] During fiscal year 2015, this number has also dropped significantly, by 30% compared to FY 2014. DHS reports that from October 1, 2014 through March 31, 2015, a total of 13,911 individuals in family groups entered the U.S. in comparison to 19,830 during the same period in FY 2014. Until last summer, these families would generally be placed in removal proceedings, released on their own recognizance and directed to appear in immigration court at a future date. In an effort to deter additional migration of family groups, in late June 2014, the government opened a new family detention facility at a federal law enforcement training center in Artesia, New Mexico, situated in a very remote and difficult-to-access area of the state, with the closest lawyers who could represent the detainees more than a three-hour drive away. Due in part

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Newark, Memphis, San Francisco (over 600); Boston and Orlando (over 500); Dallas (over 400); Atlanta and Chicago (over 300); Cleveland, Omaha, San Antonio, Philadelphia and Kansas City (over 200).

[25] *See* ACLU press release here.

[26] Written testimony of FEMA Administrator Craig Fugate, CBP Commissioner Gil Kerlikowske, and ICE Principal Deputy Assistant Secretary Thomas Winkowski for a Senate Committee on Homeland Security and Governmental Affairs hearing titled "Challenges at the Border: Examining the Causes, Consequences, and Responses to the Rise in Apprehensions at the Southern Border," July 9, 2014, available here.

[27] *See* Marc R. Rosenblum, *Unaccompanied Child Migration to the U.S.: The Tensions Between Protection and Prevention*, Migration Policy Institute, Executive Summary, April 2015, available here.

[28] Julia Preston, *As U.S. Speeds the Path to Deportation, Distress Fills New Family Detention Centers*, N.Y. Times, Aug. 5, 2014, available here.

[29] *See* U.S. Customs and Border Protection, *Southwest Border Unaccompanied Alien Children*, available here.

to major problems with conditions at this facility, it was closed in December of 2014 and the mothers and children were transferred to detention centers in South Texas.

In August 2014, ICE opened an additional family detention facility in Karnes City, Texas, and plane loads of women and children have been deported to Central America from family detention facilities with little or no due process. In December 2014, another family detention facility was opened in Dilley, Texas, 70 miles southwest of San Antonio, Texas, with plans to reach 2,400 beds in the near future. This would increase the number of newly-created beds for families to over 3,500 and require the deployment of additional Asylum Officers and Immigration Judges. Hearings at these facilities are held by videoconference presided over by judges in courtrooms who may be many hundreds of miles and several time zones away. The government may be represented by counsel located in alternative locations. The ABA expressly opposes video-conference hearings involving children and strenuously opposes denial of access to counsel and deprivation of due process rights.[30] The Karnes facility and the Dilley facility are both operated by private contractors, the GEO Group, Inc. and Corrections Corporation of America, respectively. The ABA President recently wrote a letter to DHS Secretary Jeh Johnson expressing concern over the recent expansion of immigration detention, including the detention of women and children seeking asylum.[31]

DHS initially insisted on continued mandatory detention even after the families were found to have established a "credible fear" of return to their home countries, a determination indicating a significant possibility of qualifying for asylum or withholding of removal and permitting them to proceed with seeking relief before the immigration court.[32] The government persists in its contention that there is no right to counsel at either the "credible fear" interview or at a hearing before the immigration judge to review a negative "credible fear" finding. It also persists in its position that there is no right to appointed counsel at any stage of the immigration removal process.[33] For several months the government also strenuously opposed release on bond/parole making arguments that these women and children posed indirect national security risks by focusing enforcement resources away from more direct threats at the border. The government also resorted to a "no bond" policy as a deterrent effect to other potential migrant families. The ACLU Immigrant Rights Project and others filed a lawsuit challenging these practices on behalf of detained women and children who had passed a "credible fear" interview. On February 20, 2015, a U.S. District Court in the District of Columbia granted a preliminary injunction against the government for denying bond based on deterrence arguments in *RILR v. Johnson*. Since the issuance of this order, ICE has begun to issue bonds, generally set at $7,500 to $10,000, amounts the families often cannot pay.

cited in J. E.F.M. v. Lynch, No. 15-35738 archived on September 14, 2016

Reasons for the Recent Exodus

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[30] Standards For the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children In the United States, Section VIII (B)(2)(b), Adjudication of Claims of Children, ABA Comm. on Immigration, Aug. 2004, available here.
[31] ABA letter from President William Hubbard to DHS Secretary Jeh Johnson dated March 26, 2015, available here.
[32] 8 U.S.C. § 1225(b)(1).
[33] 8 U.S.C. § 1229(b)(3).

The vast majority of the children who arrived in the 2014 surge came from three countries: El Salvador, Honduras and Guatemala, a region in Central America known as the "Northern Triangle." In contrast, the number of children entering from Nicaragua is minimal and the number from Mexico has remained relatively constant over the past several years. Why have so many children left the Northern Triangle countries of Central America and for what reasons? The answers are complicated and varied; although there is no doubt that the extraordinarily high incidence of violence from gangs and international criminal organizations is a major factor.[34] Sonia Nazario, an award-winning journalist who has researched and written extensively on the conditions that spur Central American children to travel to the United States, wrote an Op-ed piece published in the New York Times claiming that violence, not poverty, is the main reason for the recent exodus of children.[35] When comparing the numbers of children arriving annually by nationality, it is clear that the decrease in numbers in FY 2015 is made up almost exclusively in a drop in arrivals of children from El Salvador and Honduras, but not Guatemala or Mexico.[36] This is an interesting observation that most likely has more to do with effective prevention, interdiction and deportation efforts in Central America and Mexico than any improvement in county conditions in El Salvador and Honduras.

Since 1989 the ABA has operated a pro bono project on the Texas/Mexico border called ProBAR, the South Texas Pro Bono Asylum Representation Project. ProBAR provides legal information and pro bono representation to indigent, detained adults and unaccompanied children in the Rio Grande Valley of lower South Texas. Many of the children represented by ProBAR describe having been assaulted, threatened and recruited by gangs or drug cartels and ordered to participate with these groups under the threat of death. Others have been extorted and ordered to pay large sums of money or they or their family members will be harmed or killed. Young girls are claimed as "girlfriends" by gang members and told they will be killed if they don't surrender. Children describe how gang members wait for them outside of their schools in order to recruit new members and/or charge regular "fees." Entire neighborhoods are controlled by rival gangs and innocent families and small business owners must pay a "war tax" or "rent" to the controlling gang. The authorities either cannot or will not control the gang violence and so the gangs have effectively gained control over large parts of these countries, especially poor, urban areas. While large numbers of children are targeted personally for gang violence, even those who have not been targeted fear they will be targeted in the future. Other children represented by ProBAR describe being victims of domestic violence, trafficking, exploitation and neglect. Some children leave their countries with the expectation of supporting their parents and siblings living in abject poverty back home; families may even mortgage the only home or piece of land they have to borrow the money for the child's trip. Currently, there are very few safety nets for vulnerable children in Central America and traveling to the United States is perceived as one of the only ways to escape danger, poverty and violence.

cited in L.F.M. v. Lynch, No. 15-35738 archived on September 14, 2016

[34] Frances Robles, *Fleeing Gangs, Children Head to U.S. Border*, N.Y. Times, July 9, 2014, available here:
[35] Sonia Nazario, Op-Ed., *A Refugee Crisis, Not an Immigration Crisis*, N.Y. Times, July 11, 2014, available here.
[36] Migration Policy Institute webinar March 31, 2015, …..

These Central American countries all were impacted by civil wars in the 1980s and 1990s and continue to be plagued with insecurity, impunity, devastated economies and a weak and corrupt law enforcement system. Honduras has one of the highest murder rates in the world, 90 murders per 100,000 residents, as compared to 5 murders per 100,000 residents in the United States and 15 per 100,000 residents in Chicago.[37] Honduras's second largest city, San Pedro Sula, where many unaccompanied children come from, has been dubbed the "world's murder capital" at 173 murders per 100,000 residents.[38] Meanwhile, in El Salvador, the two-year gang truce fell apart in 2014 and in March 2015 there were 481 reported homicides, more than 15 per day, positioning El Salvador to surpass Honduras as the deadliest peace-time country in the world.[39] Furthermore, economic conditions are dismal and the average salary for a professional is about $150 a month. As a result of these conditions and natural disasters including Hurricane Mitch in 1998 and an earthquake in El Salvador in 2001, many adults including parents fled for the United States seeking safety, protection and employment and have remained in the U.S. for 5, 10, or 15 years and more, working and sending money back home while their children are left behind, being raised by aging grandparents and other extended family members.

The failure of comprehensive immigration reform is another factor that has led to increased migration of children. Many Central American parents who came to the United States five, ten or fifteen years ago continue to live in the United States without legal status. The failed effort at immigration reform has caused some parents to lose hope that they will ever be able to travel back to their countries legally and out of desperation some have paid smugglers thousands of dollars to bring their children to the United States. Sometimes elderly caregivers in the home country can no longer properly care for the children or have passed away. Children without adequate adult supervision are often targets for gangs and drug cartels. In other cases, children decide it is time to leave on their own, determined to join their parents and U.S.-born siblings in the United States.

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The fact that it has become easier and quicker to reunify with family members is another factor that relates to the increase in numbers. Human smuggling is a lucrative business and smugglers are quick to recognize the patterns in detention and reunification policies and use them to their advantage. They portray "release on recognizance" or "reunification" as a "permiso," or "permit" to enter the United States, although the "reunification" process is only a temporary authorization to allow children to remain in the United States during the pendency of their removal proceedings. The children have no right to work and no automatic right to any permanent status. Children, like adults, who fail to appear for their removal proceedings will receive an *in absentia* removal order and eventually ICE will process their removal.

Access to Counsel and Due Process Concerns

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[37] Danny Vinik, *Honduras's Murder Rate is Six Times Worse Than Chicago's. How Can We Send Children Back to That*? New Republic, July 10, 2014, available here.
[38] *Id.*
[39] Marcos Aleman and Alberto Arce, *Homicides in El Salvador Reach Record as Gang Violence Grows*, Yahoo.com, April 9, 2015, available here.

While there are limited options for people to remain legally in the United States when they enter without authorization, it is widely understood that an individual is much more likely to prevail in immigration court if he or she is represented.[40] A recent study focusing on the success rates of children in removal proceedings demonstrated that 73% of represented children were granted the right to remain in the United States as compared to 15% of unrepresented children.[41] On the other hand, the Immigration Court system is so severely backlogged and under-resourced that it often takes years to complete a single case. Immigration Judges can carry a 2000+ annual case docket. Congress has continually funded increased enforcement efforts but has failed to increase resources needed to adequately adjudicate these cases in a timely and efficient manner. Currently, the adjudication system receives a paltry 2% of the resources dedicated to the national immigration enforcement budget.

Recently, as an additional effort to prioritize the processing of children's cases, the Executive Office for Immigration Review began to expedite the cases of unaccompanied children who were released from detention and reunified beginning in May 2014. These "rocket dockets" require children's cases to be set for an initial master calendar hearing within 21 days of release from detention. These expedited proceedings raise significant due process concerns and have resulted in confusion for the children and their families and problems related to proper notice and lack of access to counsel in immigration court.[42] While the initial master calendar hearings are required to be expedited, the Chief Immigration Judge recently clarified that the Immigration Judges are free to use their discretion to allow adjournments in subsequent hearings as necessary.[43]

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Legal Relief: Refugee or Immigrant?

There has been much debate in the media about whether these individuals are refugees or simply migrants. A refugee is someone who is outside of his or her country of nationality and is unable or unwilling to return 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.[44] An immigrant generally migrates for economic, family or other reasons. This distinction makes a difference because someone who meets the definition of refugee qualifies to be granted asylum, but besides asylum, there is very limited legal relief for migrants who enter the country without authorization.

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[40] *See* New York Immigrant Representation Study, *Accessing Justice the Availability and Adequacy of Counsel in Immigration Proceedings*, Dec. 2011, available here.
[41] *See*, Transactional Records Access Clearinghouse, *Representation for Unaccompanied Children in Immigration Court*, Nov. 25, 2014, available here.
[42] John Fritze, *Immigration Court Speeds Review of Cases Involving Children*, The Baltimore Sun, August 20, 2014, available here.
[43] *See,* Brian M. O'Leary, Chief Immigration Judge, Executive Office for Immigration Review, *Docketing Practices Relating to Unaccompanied Children Cases and Adult with Children Released on Alternatives to Detention Cases in Light of the New Priorities*, Mar. 24, 2015 available here
[44] 8 U.S.C. § 1101(a)(42)(A).

The UNHCR, in a recent report, found that 58% of the children interviewed in a 2013 study raised actual or potential legal protection concerns.[45] This signifies that more than half of the children have personal situations of danger, abuse or neglect that may make them eligible to apply for asylum or another form of relief such as the Special Immigrant Juvenile visa. This does not mean that 58% of the children will ultimately win legal relief. The United States does not always interpret its asylum laws as broadly as recommended by the UNHCR. It is difficult to win an asylum case, especially in the adversarial Immigration Court system (unaccompanied children have the right to apply for asylum before the Asylum Office in a non-adversarial process). Many of the gang cases are ultimately denied by Immigration Judges and Courts of Appeal, finding that they do not meet the legal standard for asylum. Again, in order to qualify for asylum an applicant must show that he or she suffered past persecution or has a well-founded fear of future persecution based on race, religion, nationality, political opinion or social group.[46] If someone presents a fear that is not based on one of these five protected grounds, it will be denied, even if credible. That is often what happens with many of the gang-based cases; they are found credible, but the judges hold that the fear is not based on one of the five protected grounds.

Some advocates have called for the granting of Temporary Protected Status (TPS) for Central Americans who are in the United States without authorization. TPS is a status designated by the executive branch to authorize a temporary stay in the United States due to ongoing armed conflict, a natural disaster or other extraordinary conditions that temporarily prevent foreign nationals from returning safely.[47] This would be one way to relieve the courts of having to adjudicate the majority of these cases and give people the opportunity to support themselves while they remain in the United States. Other advocates have argued for the creation of legal vehicles including humanitarian visas that would allow imperiled children with family in the United States to travel legally to the United States.[48]

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2. ABA Response: Past and Present

<u>Establishment of ABA Working Group on Unaccompanied Minor Immigrants</u>

In response to the increasingly compelling humanitarian situation occurring at the southwest border, in July 2014, the Commission on Immigration organized a tour for its members and ABA leadership to the Lackland Air Force Base in San Antonio, Texas, where 1,200 children were being held and processed for reunification.[49] ABA President William Hubbard and Past-President James R. Silkenat joined Commission Chair Christina Fiflis, Commission Director Meredith Linsky and thirteen others to visit this emergency facility as well as several traditional children's shelters and the San Antonio Immigration Court. Subsequently, in August 2014, President William Hubbard established a Working Group on Unaccompanied Minor Immigrants to address the urgent crisis presented by these children and to

[45] *See* United Nations High Commissioner for Refugees, *Children on the Run*, Mar. 2014, available here.
[46] 8 U.S.C. § 1158(b)(1).
[47] 8 U.S. C. § 1254a(b)(1).
[48] Donald Kerwin, *Why the Central American Child Migrants Need Full Adjudication of Their Protection Claims,* The Huffington Post, July 19, 2014, available here.
[49] As of August 2014, this facility is no longer being used to detain unaccompanied children.

mobilize the full resources, talent and experience of ABA members to meet this challenge. The Working Group is comprised of ABA members representing a broad cross-section of ABA sections, divisions, committees and commissions who are working to address this crisis. The Working Group is tasked with developing and implementing an immediate response to the need for trained lawyers to take on these immigration cases on a pro bono basis, as well as developing a collaborative and effective plan for how the ABA can contribute to coordination of the efforts among the various entities already committed to this issue and developing new service opportunities and resources as needed.

<u>ABA Background on Serving Immigrants and Asylum-Seekers on the Texas Border</u>

In 1989, the ABA, in collaboration with the State Bar of Texas (SBOT) and the American Immigration Lawyers Association (AILA), created ProBAR, the South Texas Pro Bono Asylum Representation Project, in Harlingen, Texas. This effort arose out of a response to a similar crisis when there were over 5,000 Central American adults and families detained in South Texas fleeing from war-torn nations in Central America and seeking safety and protection in the United States. At that time, the ABA, SBOT and AILA joined forces in order to recruit and train pro bono lawyers to represent detained Central American asylum-seekers in South Texas. Initially, the project was comprised of just one attorney and a volunteer paralegal. Today, ProBAR has almost 40 staff members in two offices in Harlingen that focus on providing "Know Your Rights" presentations, legal screening services and pro bono representation to adults and unaccompanied children in detention throughout the Rio Grande Valley.

In 2014, ProBAR served 10,403 detained unaccompanied children and 1,981 detained adults. In 2011, there were 369 beds for unaccompanied children in the Rio Grande Valley and each child was detained an average of 45 to 60 days. Today there are over 1,600 beds in South Texas, and children rotate in and out an average of every 7 to 30 days. ProBAR is charged with providing "Know Your Rights" presentations to detained children and adults, individual screenings and pro bono representation and referrals for those with identifiable relief. Approximately 90% of the children will be reunified with family or friends in the United States pending their hearings, but they must return to immigration court and defend against a removal order. They travel all over the United States in order to reunify and according to the government, have no right to appointed counsel in the immigration court process. If they don't return to immigration court when scheduled, they will receive an *in absentia* removal order.

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<u>ABA Project Serving Immigrants and Asylum-Seekers on the California Border</u>

In 2008, the ABA created the Immigrant Justice Project (IJP), a pro bono project located in San Diego, California. The mission of the IJP is to promote due process and access to justice at all levels of the immigration and appellate court system, through the provision of high-quality pro bono legal services for those in immigration proceedings in San Diego. The IJP serves both detained and non-detained individuals, and recruits, trains and mentors volunteer attorneys and law students to represent individual clients. IJP does not focus specifically on unaccompanied children, but does specialize in representing detainees with diminished mental capacity, asylum-seekers and others.

<u>ProBAR "Know Your Rights" and Screening Video</u>

The Commission, through the ProBAR project, has produced multiple training videos for attorneys and paralegals who are serving unaccompanied children in the initial detention setting. Currently there are approximately 100 shelters and foster care programs around the country with a total capacity of 7,284 beds where ORR holds children who are being processed for reunification. ProBAR staff members have years of experience providing specialized "Know Your Rights" presentations and screening services to detained children. In 2014, ProBAR staff filmed four videos related to working with Central American children. These videos are currently available at the Commission on Immigration website.[50]

ABA Advocacy Efforts

Additionally, the ABA is engaged in advocacy efforts with the Administration and Congress. The ABA has adopted numerous policies that address unaccompanied alien children.

In 2001, the ABA adopted a policy that urges: 1) government appointed counsel for unaccompanied children at all stages of immigration processes and proceedings: 2) creation within the Department of Justice of an office with child welfare expertise that would have an oversight role and ensure that children's interests are respected at all times; 3) that children in immigration custody who cannot be released to family or other sponsors should be housed in family-like settings, and not detained in facilities with or for juvenile offenders.

In 2004, the ABA adopted the Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States. These Standards were developed by the Commission on Immigration's predecessor entity and cover myriad issues related to specific rights of child respondents, representation of children, and the standards for the custody, placement and care of unaccompanied alien children, rights of children in custody and adjudication of child claims.

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On June 25th, 2014, Past President Silkenat submitted a statement to the Judiciary Committee of the U.S. House of Representatives regarding the surge of unaccompanied children.

On March 26, 2015, President William Hubbard sent a letter to DHS Secretary Jeh Johnson expressing concern about expansion of immigration detention, including detention of women and children seeking protection as refugees.

GPSolo/KIND Pro Bono Training Sessions

A significant effort to support legal representation of unaccompanied minors was commenced in June, 2011 when the ABA Board of Governors authorized GPSolo Division to partner with Kids in Need of Defense (KIND), a private non-profit that helps provide competent and compassionate legal counsel to unaccompanied minors in the US immigration system. The ABA-KIND partnership has developed over the years, with the ABA providing training venues, on-line resource materials and a pool of volunteers, and KIND matching up trained volunteers with cases, mentors and guidance.

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[50] The training videos are available here.

Since starting in 2011, the ABA-KIND partnership has trained lawyers in numerous cities, during stand-alone meetings conducted by ABA GPSolo, Tort Trial and Insurance Practice Section and Business Law Section. The ABA-KIND partnership website is hosted by GPSolo but is open to all and includes a free (open access) 2-hour CLE accredited webinar and 6 x ½ hour podcasts, along with written training materials: http://www.americanbar.org/groups/gpsolo/initiatives/kind.html. That site also has a short information video about KIND and a direct link to volunteer with KIND to take on a case. This partnership and more information from KIND is described in Laura Farber's January 2012 article for GPSolo Magazine, see:http://www.americanbar.org/publications/gp_solo/2012/january_february/chairs_corner_helping_kids_need_defense.html

3. **How to Help Now**

For ABA members and others who want to help now, there are a number of options:

Volunteer to Represent an Unaccompanied Child through the ABA Immigrant Child Assistance Network

If you would like to help by representing a child who is currently in removal proceedings, you can enroll at the ABA website at: www.ambar.org/ican. Attorneys who register will be matched with a legal service provider in their geographical area to be paired with a child client. Training videos and other resources are available at this site and at the ABA partner site www.UACresources.org.

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Volunteer with or Donate to ProBAR in Harlingen, Texas or the IJP in San Diego, California

ProBAR is in the process of hiring additional attorneys and paralegals for temporary and permanent assignments. If you or someone you know might be interested in a position, contact Kimi Jackson or Meghan Johnson listed below. At this time, ProBAR's Children's Project can only accept volunteers who are proficient in Spanish, can commit to staying at least one month and are available to help screen and represent children at one of the 15 shelters in the area. To contact ProBAR you may e-mail the Director, Kimi Jackson at kimi.jackson@abaprobar.org or the Manager of the Children's Project, Meghan Johnson at meghan.johnson@abaprobar.org. For more information visit ProBAR's Children's project website link: www.ambar.org/probarchildren.

If you do not meet the criteria to volunteer, you may still support this work by making a contribution to ProBAR or the IJP through the ABA's Fund for Justice and Education at the following link:

https://donate.americanbar.org/immigration

Attend Trainings on Representing Unaccompanied Minors Presented Throughout the Country

For a list of upcoming live trainings see the "Training" link at the Unaccompanied Children Resource Center website here. You can watch a six-part training entitled "The ABCs of Representing Unaccompanied Children in Removal Proceedings" at the Commission website here.

Volunteer to Represent Detained Families with the CARA Family Detention Pro Bono Project in San Antonio, Texas

Four organizations have recently come together to develop a pro bono program to provide representation to families detained by ICE in South Texas at the Dilley and Karnes family residential centers. These organizations include the Catholic Legal Immigration Network, American Immigration Council, Refugee and Immigrant Center for Education and Legal Services and American Immigration Lawyers Association. The project asks volunteers to commit to a week-long stay from Sunday through Friday. They are currently seeking volunteer attorneys through September 2015. For more information on this program click here.

Donate Toward Social Service Efforts

If you would like to donate toward serving those who have been released you can review the following websites of agencies that are providing support to newly arrived Central Americans in the Rio Grande Valley, the area where ProBAR is located.

La Posada Providencia, a shelter run by the Sisters of Divine Providence:
http://lppshelter.org/

The Sacred Heart Church in McAllen is serving released families:
http://sacredheartchurch-mcallen.org/immigrant-assistance/

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Share Your Ideas

The Commission and the Working Group are interested in working collaboratively with ABA entities and other stakeholders. Please feel free to contact us with your ideas and plans to address this compelling situation.

For more information, contact:

Christina Fiflis, Chair, ABA Commission on Immigration, christinafiflis@me.com

Meredith Linsky, Director, ABA Commission on Immigration, Meredith.Linsky@americanbar.org, 202-662-1006.

Mary Ryan and Christina Fiflis, Co-Chairs, Working Group on Unaccompanied Minor Immigrants, christinafiflis@me.com; MRyan@nutter.com.

N.Y. / REGION

Immigration Crisis Shifts From Border to Courts

By **LIZ ROBBINS** AUG. 23, 2015

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But the story they told of their turbulent past year revealed just how far from typical they have traveled.

In separate trips, the boys said, they left El Salvador to avoid being recruited by violent gangs and trekked across two countries. They were caught by United States Border Patrol agents in Texas in 2014 and sent to different detention centers for several weeks before being reunited in Elmont, N.Y., with their father, Arturo. They had not seen him in 10 years.

“That’s why I brought them one at a time,” Arturo said in Spanish at the Long Island offices of the boys’ immigration lawyer, “because if something happened to one, at least I would have the other.” The family requested that its last name not be used because of its legal status.

Like thousands of other children who fled the violence gripping several Central American countries, Brayan, now 16, and José, 15, arrived safely in the United States only to spend the next 13 months navigating the justice system to prove they have a right to stay.

They have missed many days of school to appear in federal immigration court and state family court, have helped their father complete a pile of paperwork taller than they are and have contended with bureaucratic requirements that seemed endless.

Last summer, President Obama declared a crisis along the border with Mexico in response to the tens of thousands of unaccompanied children coming into the country. Detention centers in Texas overflowed, prompting the federal Department of Homeland Security to open emergency shelters. Political tempers boiled over — Rick Perry, who was the governor of Texas, ordered 1,000 National Guard troops to defend the border. The Obama administration created a priority juvenile docket in immigration courts to speed up deportation proceedings.

One year later, the number of children arriving at the border has sharply decreased, in part because Mexico has been returning children to their home countries before they can reach the United States.

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But the crisis has not ended. It has simply shifted. It is playing out in courtrooms crowded with young defendants but lacking lawyers and judges to handle the sheer volume of cases. Thousands of children without lawyers have been issued deportation orders, some because they never showed up in court.

“The situation last summer was characterized as part of the overall immigration system being broken, and it’s taken us down the wrong policy path,” said Wendy Young, the president of Kids in Need of Defense, a national legal advocacy group. “This is not an immigration crisis; it’s a refugee crisis.”

About 84,000 children were apprehended at the Southwest border during the 2014 fiscal year and the first six months of the 2015 fiscal year, according to the Border Patrol. Of the 79,088 removal cases initiated by the government, 15,207 children had been ordered deported as of June, according to the Migration Policy Institute, a nonpartisan research group in Washington.

While a small percentage of children have been granted asylum, most are seeking relief from deportation by applying for special immigrant juvenile

status, federal officials said. And yet, rather than their claims being expedited, 69 percent of the children on the priority docket still have cases pending, statistics show.

The burden is far more difficult for children if they do not have a lawyer — a right not granted to defendants in immigration courts — especially because of the accelerated time frame the government established for their cases. After being released to a sponsor, usually a relative, they are on the clock: They are required to make their first court appearance within 21 days of the court's receiving their case to contest their deportation.

New York Advantage

By all accounts, there are legal advantages for child immigrants in New York City that do not exist in other parts of the country where they settled in large numbers, including Los Angeles, South Florida and the Houston area. Last summer, nonprofit agencies and pro bono lawyers formed a coalition at the federal court in Lower Manhattan, backed by $1.9 million in financing from the City Council and private philanthropy, to help those without lawyers.

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Elicia, 17, with her mother in the Bronx. Elicia was scheduled to be deported last year, but a lawyer won her special juvenile status. James Estrin/The New York Times

Although the Council said the coalition took on 648 cases of the 1,600 children screened at 26 Federal Plaza, not all were from the five boroughs and only those children in New York City were eligible for free assistance. Even then, only those who were most likely to win relief could be helped.

"We may have it a little under control in New York City," said Jojo Annobil, director of immigration for Legal Aid, "but it's not under control in Long Island," where, along with Westchester County and the lower Hudson Valley, large numbers of the children have also settled.

It is a disparity that underscores the contentious divide over what to do about the country's 11 million undocumented immigrants.

Federal officials defended their approach. Gillian Christensen, a spokeswoman for United States Immigration and Customs Enforcement, said the agency's lawyers work "with advocates for the children, to ensure

that these cases are processed in as expeditious and fair a manner as possible."

But Mark Krikorian, the executive director of the Center for Immigration Studies, a Washington research institute that supports tighter controls on immigration, said the process for asylum or special immigration status served as a "rationale for family reunification" and is inherently flawed.

"It's not that it should be more convoluted; it's that the standards should be higher," Mr. Krikorian said. "You've got family court judges deciding U.S. immigration policy."

Winding Path in Courts

On a recent day on the 14th floor of 26 Federal Plaza, lawyers bustled around with files, holding hushed and rushed conversations in Spanish with their clients. Inside the courtrooms, the judges presided like school principals; they praised some children for their good grades and implored those without lawyers to seek help on the 12th floor.

More than a dozen of the teenagers who came to New York City and Long Island recounted their hardships — adjusting to living with estranged parents, learning English, taking tests. They asked not to have their full names published because of their undocumented status.

cited in J. F.M. v. Lynch, No. 15-35738 archived on September 14, 2016

Of the two main paths to winning relief from deportation, asylum is the most straightforward, but also the most difficult to obtain. Children must persuade a federal asylum officer that they face life-threatening persecution based on race, religion, nationality or membership in a political or social group.

Because those cases are difficult to prove, many children instead seek relief under special immigrant juvenile status, provided they can show they were abused, neglected or abandoned by one or both parents.

The process requires going through three entities for approval: federal immigration court, state family court and the federal citizenship agency.

"It means that no one entity in the process can crack the whip or control the flow," said Lenni Benson, a professor and director of the Safe Passage Project at New York Law School, which mentors volunteer lawyers working on youth immigration cases.

Complex Journey

Brayan and José's case shows just how complex the journey can be.

They must prove to the family court that they cannot return to El Salvador because one parent abandoned them there. The court must also approve of their guardian — even if, as in the case of Brayan and José, the guardian is their father.

Their father, Arturo, must try to get consent to be the guardian from the boys' mothers — who he said each abandoned her son in El Salvador.

Different lawyers are handling different parts of the case. David Williams, 31, an immigration lawyer from the Central American Refugee Center, a nonprofit legal provider in Hempstead, N.Y., is preparing their case for federal court. He acted as a liaison for Janet Millman, who represented the brothers in family court in Nassau County and was appointed by the state's Attorneys for Children panel, which provides legal services for children in family courts.

cited in J. F.M. v. Lynch, No. 15-35738 archived on September 14, 2016

From left, José, Brayan and Arturo in their lawyer's office in Hempstead, N.Y. Andrew Renneisen for The New York Times

Mr. Williams and Ms. Millman tried to notify both mothers of their son's hearings. Neither woman responded from her last known address.

The judge then requested that they put advertisements in newspapers in the United States and in El Salvador, and provide copies of the papers. Still, there was no word from either mother.

Arturo, 44, also had to list every address he has had for the last 28 years so New York State, according to immigration lawyers, can investigate whether he has ever lived with a sex offender.

Although Arturo is an undocumented immigrant, the family court required that he be fingerprinted, along with other members of the household. And when one member moved, the entire household was required to be fingerprinted again.

"It's confusing," Arturo said, "and there are times that I've had to redo paperwork."

Finally, when the lawyers had submitted all of the documentation to the court and the family appeared in July, the judge postponed her decision because she had an unusually full caseload.

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Too Few Lawyers

Arturo, a car washer, was lucky to get a lawyer at the Central American Refugee Center. Had he arrived weeks later, the organization would have turned the family away because all four of the group's immigration lawyers had hit their maximum number of 40 cases.

"I don't want to sound coldhearted," said Patrick Young, the program director of the organization, "but we can't handle it."

Atlas: DIY, a community-based group serving immigrant children in Brooklyn, stopped taking clients three months ago. To make the most of her resources, the one lawyer on staff, Rebecca McBride, 30, must turn away children whose cases she deems too hard to win because they do not qualify for relief.

She took the case of Elicia, a 17-year-old from Honduras, soon after she was ordered deported in absentia last October.

"For me, it was all over," Elicia said in Spanish. "I didn't know if they were going to get me at home or at school."

When she arrived in July 2014, Elicia did not go to her immigration hearings because friends warned her she could be deported just by showing up in court. But Ms. McBride reopened the case and argued for Elicia to get special juvenile status because her father had neglected and abandoned her. With three days to spare, the judge terminated Elicia's deportation order.

For more than a year, Brayan and José lived in a similar limbo. It was still better than living in El Salvador.

"These two kids couldn't go to school, " Ms. Millman said. "They didn't know whether they were going to be dead the next day. Their life was worth not a whole lot. They came because they want to live."

Last week, a family court judge in Nassau County granted a special findings order, determining that both boys were eligible to receive special immigrant juvenile status.

But they are not in the clear. They still must submit an application for the status to the United States Citizenship and Immigration Services, which, if approved, would entitle them to permanent residency. On Sept. 9, an immigration court judge in Manhattan will rule on whether to cancel their deportation orders.

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"It is still a case that is not 100 percent won," Arturo said. "We still have to give it a little more effort."

Correction: August 25, 2015
An article on Monday about cases involving young immigrants and how they have overwhelmed the court system misstated, in some copies, the current status of two brothers who traveled from El Salvador to the United States in 2014. A Nassau County family court judge found that the facts were in order for the brothers, Brayan and José, to receive special immigrant juvenile status, but their application must be approved by the United States Citizenship and Immigration Services. The judge did not grant them special immigrant status.

David Gonzalez and Isvett Verde contributed reporting.

A version of this article appears in print on August 24, 2015, on page A13 of the New York edition with the headline: Immigration Crisis Shifts From Border to Courts. Order Reprints | Today's Paper | Subscribe

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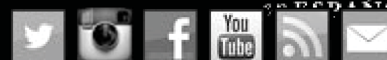

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FOR IMMEDIATE RELEASE Friday, September 12, 2014

Justice Department and CNCS Announce $1.8 Million in Grants to Enhance Immigration Court Proceedings and Provide Legal Assistance to Unaccompanied Children

cited in J. F.M. v. Lynch, No. 15-35738 archived on September 14, 2016

The Department of Justice and the Corporation for National and Community Service (CNCS), which administers AmeriCorps national service programs, has awarded $1.8 million in grants to increase the effective and efficient adjudication of immigration proceedings involving certain children who have crossed the U.S. border without a parent or legal guardian. The grants will be disbursed through justice AmeriCorps and will enable legal aid organizations to enroll approximately 100 lawyers and paralegals to represent children in immigration proceedings. The justice AmeriCorps members will also help to identify children who have been victims of human trafficking or abuse and, as appropriate, refer them to support services and authorities responsible for investigating and prosecuting the perpetrators of such crimes.

“The increasing numbers of unaccompanied children appearing in our immigration courts present an urgent challenge: how best to conduct immigration proceedings more efficiently while maintaining our commitment to following the procedures required by law and protecting the rights of these children.” said Attorney General Eric Holder. “We are addressing that challenge by using these funds to facilitate access to legal representation for some of the most vulnerable of these children. By increasing the number of represented children, we will enhance the resources available to both the children and the courts to better serve the administration of justice in all cases.”

“Young immigrant children often enter the U.S. after a long and dangerous journey,” said CNCS CEO Wendy Spencer. “This funding will enable organizations to engage AmeriCorps members in providing critical support for these children, many of whom are escaping abuse, persecution, or violence. As a result of this partnership, AmeriCorps will play a role in improving the effective and efficient adjudication of these very difficult cases.”

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Register, Apply for Permits, or Request Records

The grants were awarded to Equal Justice Works, Casa Cornelia Law Center, Catholic Legal Services of Miami, Legal Services of South Central Michigan, the Massachusetts Immigrant and Refugee Advocacy Coalition, the New York Immigration Coalition, and the University of Nevada Las Vegas. Their programs will serve children in immigration court locations in Atlanta, Baltimore, Boston, Charlotte, Chicago, Cleveland, Dallas, Denver, Detroit, El Paso, Las Vegas, Miami, New York, Phoenix, San Antonio, San Diego and Seattle after justice AmeriCorps members attend a national training program later this year. The training will include immigration laws and regulations applicable to unaccompanied children; immigration proceedings practice and procedure; ethics for professionals working with children and youths; and trauma-informed and culturally-appropriate models of interacting with unaccompanied children.

“After more than a year of planning, we are pleased to see justice AmeriCorps taking flight,” said Associate Attorney General Tony West, who oversaw the development and implementation of the program for the Department of Justice. “The justice AmeriCorps program will address several important goals: enhancing the efficacy and efficiency of our immigration courts; protecting vulnerable populations; and increasing national service.”

“With the awarding of these grants, the Executive Office for Immigration Review (EOIR) will see an increase in the representation of children in immigration court proceedings,” said EOIR Deputy Director Ana M. Kocur. “This public-private partnership is the realization of creative government thinking to increase efficiencies in the immigration courts.”

cited in J. E. F. M. v. Lynch, No. 15-35738 archived on September 14, 2016

For more information about the justice AmeriCorps program please visit: http://www.nationalservice.gov/programs/americorps.

The justice AmeriCorps program is a strategic partnership between the Department of Justice and the Corporation for National and Community Service to provide legal aid to vulnerable populations. This particular program responds to Congress’ direction to the Executive Office for Immigration Review “to better serve vulnerable populations such as children and improve court efficiency through pilot efforts aimed at improving legal representation.”

EOIR is an agency within the Department of Justice. Under delegated authority from the Attorney General, immigration judges and the Board of Immigration Appeals interpret and adjudicate immigration cases according to U.S. immigration laws. EOIR’s immigration judges conduct administrative court proceedings in immigration courts located throughout the nation. They determine whether foreign-born individuals—whom the Department of Homeland Security charges with violating immigration law—should be ordered removed from the United States or should be granted relief from removal and be permitted to remain in this country. The Board of Immigration Appeals primarily reviews appeals of decisions by immigration judges. EOIR’s Office of the Chief Administrative Hearing Officer adjudicates immigration-related employment cases. EOIR is committed to ensuring fairness in all of the cases it adjudicates.

The Corporation for National and Community Service is a federal agency that engages more than five million Americans in service through its AmeriCorps, Senior Corps, Social Innovation Fund and other programs, and leads the president's national call to service initiative United We Serve. For more information, visit: www.nationalservice.gov.

14-979

Topic:

Access to Justice

Access to Justice

Office of the Attorney General

Updated April 28, 2016

cited in J. F.M. v. Lynch, No. 15-35738 archived on September 14, 2016

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Executive Office for Immigration Review

FOR IMMEDIATE RELEASE Wednesday, October 22, 2014

EOIR's Office Of Legal Access Programs

cited in J.E.F.M. v. Lynch, No. 15-35738 archived on September 14, 2016

The Executive Office for Immigration Review's (EOIR) Office of Legal Access Programs (OLAP), formerly known as the Legal Orientation and Pro Bono Program, was established in April 2000 to improve access to legal information and counseling and to increase representation rates for foreign-born individuals appearing before the immigration courts and Board of Immigration Appeals (BIA). OLAP is responsible for administering the Legal Orientation Program, the Legal Orientation Program for Custodians of Unaccompanied Alien Children, and the BIA Pro Bono Project. OLAP also coordinates EOIR's Committee on Pro Bono, the Model Hearing Program, and other initiatives which improve access to legal services for individuals appearing before EOIR's tribunals.

Legal Orientation Program

Since 2003, EOIR has carried out the LOP to improve judicial efficiency in the immigration courts, and to assist detained individuals and others involved in detained removal proceedings to make timely and informed decisions. Under the LOP, EOIR contracts with non-profit organizations to provide group and individual orientations, self-help workshops, and pro bono referral services for detained individuals in removal proceedings. LOP is operational mainly at detention sites, but it also serves certain sites with non-detained individuals and certain family detention centers.

Independent analysis has shown that the LOP has positive effects on the immigration court process: detained individuals make better informed and more timely decisions and are more likely to obtain representation; and cases are completed faster, resulting in fewer court hearings, less time spent in detention and cost savings.

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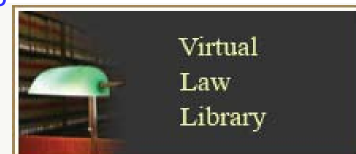
- Find Legal Representation
- Find an Immigration Court

OCIJ Practice Manual

BIA Practice Manual

Immigration Judge Benchbook

Forms



Legal Orientation Program for Custodians of Unaccompanied Alien Children

The Trafficking Victims Protection Reauthorization Act of 2009 tasked EOIR and the Department of Health and Human Services' Office of Refugee Resettlement to offer legal orientation presentations to the adult custodians of unaccompanied alien children in EOIR removal proceedings. The goals of the legal orientations include seeking to protect children from mistreatment, exploitation and trafficking, as well as increasing the appearance rates of these children in immigration court. In 2010, EOIR launched the LOPC to meet these goals and to help increase pro bono representation rates of unaccompanied alien children in immigration proceedings.

EOIR has contracted with non-profit partners to carry out the LOPC at 14 sites nationwide. The LOPC providers offer services similar to those provided under the LOP: general group orientations, individual orientations, self-help workshops, and assistance with pro bono referrals. Additionally, LOPC providers are able to assist with school enrollment and make referrals to social services to help ensure the well-being of the child. OLAP issues guidance to LOPC providers designed to assist them in identifying victims of mistreatment, exploitation, and trafficking; protecting the victims from further harm; and connecting the victims to needed social services.

cited in J. P. v. Lynch, No. 15-35738 archived on September 14, 2016

In addition, since 2013, the LOPC has operated the LOPC National Call Center to assist in making appointments for custodians at one of the LOPC provider locations, and to provide telephonic assistance to custodians who live outside the geographic areas in which LOPC is currently available. This telephonic assistance includes legal orientations on the immigration court process, as well as guidance in filing basic court forms, such as the change of address and motion to change venue.

BIA Pro Bono Project

In 2001, EOIR and non-profit agencies developed the BIA Pro Bono Project (the "Project"). Individuals in removal proceedings are generally not entitled to publicly-funded legal assistance and, as a result, many appear before the immigration courts and BIA without counsel. Agencies that provide legal services to immigrants can face many obstacles in identifying, locating and communicating with unrepresented individuals in time to write and file an appeal brief. The Project helps overcome such obstacles. Through the Project, OLAP assists in identifying certain cases based upon pre-determined criteria. Once cases are identified and reviewed, their summaries are then distributed by a non-profit agency to pro bono representatives throughout the United States. Volunteers who accept a case under the Project receive a copy of the file, as well as additional time to file the appeal brief.

A ten-year review of the BIA Pro Bono Project, completed in February 2014, demonstrated that the Project found counsel willing to accept the case for

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Juan P. Osuna
Director, Executive Office for Immigration Review

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703-605-1007

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703-305-0864

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RECORDS

87% of cases screened between 2002 and 2011. Additionally, those who were represented through the Project were more likely to have briefs filed with their appeals than pro se respondents. Most significantly, an analysis of the appeals before the Board between 2002 and 2011 showed those who were represented through the Project were more likely to obtain a favorable outcome in their cases than those who do not receive representation. This was particularly the case for individuals who were detained. Since the beginning of the Project, over 1,000 individuals have been represented by pro bono counsel.

FOIA Service Center
703-605-1297

Model Hearing Program

The Model Hearing Program is an educational program developed to improve the quality of advocacy before the court, as well as to increase levels of pro bono representation. Model hearings consist of small-scale "mock" trial training sessions held in immigration court and presented by immigration judges. The training sessions, carried out in cooperation with partnering bar associations and/or pro bono agencies, provide practical and relevant "hands-on" immigration court training to small groups of attorneys/law students with an emphasis on practice, procedure and advocacy skills. Participants receive training materials, may obtain Continuing Legal Education credit from the partnering organization, and commit to a minimal level of pro bono representation. Since June 2001, more than 60 model hearing training sessions have been held in immigration courts nationwide. The Model Hearing Program Training Manual contains detailed information on the content and structure of this program, as well as samples of past training sessions.

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Other Initiatives

Drawing on informational pamphlets developed by non-profit partners, throughout the nation's detention facilities, OLAP makes available 11 self-help guides. These guides, posted in English and Spanish, cover the most common forms of relief, as well as information about bond and an overview of immigration proceedings. The guides are generally accessible to detainees in the facility libraries and are available on the OLAP website as well.

Additional resources:

- American Bar Association Know Your Rights video
- LOP Cost Saving Analysis report

- EOIR -

The Executive Office for Immigration Review (EOIR) is an agency within the Department of Justice. Under delegated authority from the Attorney General, immigration judges and the Board of Immigration Appeals interpret and adjudicate immigration cases according to United States immigration laws. EOIR's immigration judges conduct administrative court proceedings in immigration courts located throughout the nation. They determine whether foreign-born individuals—whom the Department of Homeland Security charges with violating immigration law—should be

ordered removed from the United States or should be granted relief from removal and be permitted to remain in this country. The Board of Immigration Appeals primarily reviews appeals of decisions by immigration judges. EOIR's Office of the Chief Administrative Hearing Officer adjudicates immigration-related employment cases. EOIR is committed to ensuring fairness in all of the cases it adjudicates.

Executive Office for Immigration Review

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