

DAYCARE IN DETENTION: A CALL FOR THE OFFICE OF REFUGEE RESETTLEMENT TO PRIORITIZE THE SUBSTANTIVE DUE PROCESS RIGHTS OF DETAINED UNACCOMPANIED CHILDREN AT THE SOUTHWEST LAND BORDER

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INTRODUCTION

The Department of Health and Human Services (HHS) claims that its primary objective is to enhance the health and well-being of all Americans by providing effective health and human services to all people.¹ Although the field of “[h]uman [s]ervices” is broadly defined, administrative agencies, such as HHS, typically interpret the term as governmental services implemented nationwide to improve the quality of life for all persons.² In 1980, HHS pushed to expand the audience of people they provide services to by playing an integral role in the passage of the Refugee Act of 1980.³ The Refugee Act of 1980 required “the establishment of a procedure for an alien who meets the definition of a refugee to apply for and be granted asylum if physically present in the United States”⁴ Most notably, the Refugee Act

1. See OFF. OF REFUGEE RESETTLEMENT, <https://acf.gov/orr> [<https://perma.cc/F4UC-L2CZ>] (last visited Feb. 10, 2026) (“[Office of Refugee Resettlement (ORR)]’s mission is to promote health, well-being, and stability of refugees, unaccompanied alien children, and other eligible individuals and families, through culturally responsive, trauma-informed, and strengths-based services.”).

2. See *What Is Human Services*, NAT’L ORG. FOR HUM. SERVS., <https://www.nationalhumanservices.org/what-is-human-services/> [<https://perma.cc/ZR5C-J5YS>] (last visited Oct. 14, 2025) (“The field of Human Services . . . [has] the objective of meeting human needs through an interdisciplinary knowledge base, focusing on prevention as well as remediation of problems, and maintaining a commitment to improving the overall quality of life of service populations.”).

3. See *The Refugee Act*, OFF. OF REFUGEE RESETTLEMENT, <https://acf.gov/orr/policy-guidance/refugee-act> [<https://perma.cc/3CEZ-N42D>] (last modified Mar. 15, 2022); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

4. *Policy Manual: Chapter 1- Purpose and Background*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-7-part-m-chapter-1> [<https://perma.cc/7FE4-8GUC>] (last modified Sept. 26, 2025); see Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (“The term “refugee” means . . . any person who is outside the country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”); see also *Refugees and Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum>

of 1980 created a separate administrative agency under the umbrella of HHS called the Office of Refugee Resettlement (ORR).⁵ Further, the Refugee Act of 1980 afforded ORR the authority to facilitate and direct child welfare services, including services concerning the well-being and safety of unaccompanied refugee children identified within the United States.⁶ While ORR had some authority over the placement of unaccompanied refugee children entering the United States, Immigration and Naturalization Services (INS) retained primary jurisdiction over the transfer, placement, and protection procedures implemented concerning the rights of unaccompanied refugee children until 2002.⁷ At that time, Congress enlarged ORR's authority to serve unaccompanied children (UC) through the passage of the Homeland Security Act of 2002.⁸ While many agencies and organizations use the acronym "UC" to independently delineate unaccompanied children for purposes of legal analysis within the immigration field, it is important to recognize that these children have unique vulnerabilities when compared to other migrant designations, hence the need for UCs to be independently addressed through legislation.⁹ Furthermore, in the wake of the 9/11 terrorist attacks on the United States, the Homeland Security Act of 2002 "established specific homeland security responsibilities for the [Department of Homeland Security], which included sharing information among its own entities" and even shifted different national security responsibilities to various administrative

[<https://perma.cc/EA8N-BFNJ>] (last modified Sept. 19, 2025) ("Asylum status may be granted to aliens who: [m]eet the definition of refugee . . . ; [a]re not subjected to a mandatory bar; [a]re physically present in the United States or have arrived in the United States; and . . ." have filed all required forms and applications for asylum status).

5. See Refugee Act of 1980, Pub. L. No. 96-212, § 411(a), 94 Stat. at 111.

6. See *id.* § 412(2)(B)(ii) ("The Director shall attempt to arrange for the placement under the laws of the States of such unaccompanied refugee children, who have been accepted for admission to the United States, before (or as soon as possible after) their arrival in the United States.").

7. See *The Refugee Act*, *supra* note 3; *Unaccompanied Alien Children Bureau Fact Sheet*, OFF. OF REFUGEE RESETTLEMENT, <https://acf.gov/orr/fact-sheet/programs/uc/fact-sheet> [<https://perma.cc/J99Q-J6P4>] (last visited Oct. 11, 2025).

8. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. The Homeland Security Act of 2002 not only created the Department of Homeland Security (DHS), but it also "brought together [twenty-two] diverse organizations to help prevent terrorist attacks in the United States" in the wake of 9/11. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-03-1165T, HOMELAND SECURITY: INFORMATION SHARING RESPONSIBILITIES, CHALLENGES, AND KEY MANAGEMENT ISSUES (2003).

9. See *Unaccompanied Alien Children - 2025 Update*, F. TOGETHER (Apr. 2, 2025), <https://forumtogether.org/article/unaccompanied-alien-children-ucs-or-uacs-2025-update/> [<https://perma.cc/Z7QP-CL5Y>].

agencies.¹⁰ Thus, pursuant to the Homeland Security Act of 2002, all affairs “with respect to the care of unaccompanied alien children that were vested by statute in, or performed by, the Commissioner of Immigration and Naturalization [Services]” were thereby transferred to the custody and responsibility of ORR, under the umbrella of HHS.¹¹

While the Homeland Security Act of 2002 outlined the United States’ stance on various aspects of national security post-9/11, the Supreme Court chose to explicitly address the rights of *all* migrants present within the country long before this.¹² As held in *Shaughnessy v. United States*,¹³ the Court proffered that *all persons* within the United States, whether they are documented or undocumented migrants, are afforded certain due process rights under the Fourteenth Amendment.¹⁴ Thus, procedurally and substantively, “aliens who have once passed through [the United States’] gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”¹⁵ Decades after *Shaughnessy*, Congress addressed the care and custody of migrants identified within the United States through the implementation of the Trafficking Victims Protection Act of 2000 (TVPA), which served to equip the U.S. government with a “coordinated campaign to eliminate modern forms of slavery domestically and internationally.”¹⁶ In 2003 and 2005, Congress subsequently passed versions of the Trafficking Victims Protection Reauthorization Act (TVPRA), which further expanded the civil and criminal liberties afforded to trafficking victims within the United States.¹⁷ It was not until 2008, when Congress passed the William Wilberforce

10. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 8 and accompanying text.

11. 6 U.S.C. § 279(a).

12. See *Shaughnessy v. United States*, 345 U.S. 206 (1953).

13. 345 U.S. 206 (1953).

14. See *id.* at 212.

15. *Id.*; see Cong. Rsch. Serv., *Aliens in the United States*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C18-8-7-2/ALDE_00001262/ [<https://perma.cc/NW8Q-LT2X>] (last visited Feb. 10, 2026) (quoting *Shaughnessy*, 345 U.S. at 212) (“Eventually, the Supreme Court extended [due process] constitutional protections to all aliens within the United States, including those who entered unlawfully . . .”).

16. Key Legislation, U.S. DEPT OF JUST., <https://www.justice.gov/humantrafficking/key-legislation> [<https://perma.cc/US5W-E737>] (last modified Aug. 23, 2023); see Trafficking Victims Protection Act, Pub. L. No. 106-386, div. A, 114 Stat. 1464, 1466 (2000).

17. Compare Key Legislation, *supra* note 16 (“The Trafficking Victims Protection Reauthorization Act of 2003 . . . refined federal criminal provisions against trafficking . . . and created a civil remedy enabling trafficking victims to file lawsuits against their traffickers in federal district court.”), with Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875, 2880 (outlining the reporting requirements explicitly for trafficked persons after their identification within the United States and expanding the reporting

Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), that any amended TVPRA expressly identified and addressed the independent rights of UCs after they are identified within the United States.¹⁸ Although Congress has reauthorized several additional TVPRAs since 2008, TVPRA 2008 still serves as the sole piece of legislation to address the mandated framework and procedures that HHS and ORR must abide by when facilitating the transfer and detention of UCs today.¹⁹

TVPRA 2008 mandates that ORR follow a “least restrictive setting” framework when determining where a UC is placed for temporary detainment.²⁰ Under this framework, children are placed in different facilities, pending their deportation or temporary residency within the United States, on a “case-by-case basis.”²¹ In making such placements, TVPRA 2008 states that “the Secretary may consider [factors such as the child’s] danger to self, danger to the community, and risk of flight” when placing them in a temporary or long-term living arrangement.²² While a least restrictive setting framework under TVPRA 2008 seems as though it would prioritize the best interest of the UC, that has not proven to be the case when analyzing the conditions of UCs at the southwest land border held within detention facilities.²³ Although ORR states that its children-only detention facilities, sometimes referred to as influx care facilities or ICFs, ensure that UCs are provided with positive, welfare-building amenities, making it seem as though UCs are being properly treated while in detention, this is not always the case.²⁴ In actuality,

requirements initially directed in TVPA), and Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558, 3560–61, 3564–67 (specifying the amended reporting requirements for trafficked persons).

18. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044; *Key Legislation*, *supra* note 16 (stating that TVPRA 2008 was enacted in part to “expand[] the protections available within the T visa, and require[] that all unaccompanied alien children be screened as potential victims of human trafficking”).

19. See 122 Stat. 5044.

20. See 8 U.S.C. § 1232(c)(2)(A).

21. *Id.* § 1232(a)(2)(A).

22. See *id.* § 1232(c)(2)(A).

23. See *id.*

24. Compare *ORR Influx Care Facilities for Unaccompanied Alien Children*, OFF. OF REFUGEE RESETTLEMENT, <https://acf.gov/orr/fact-sheet/programs/uc/influx-care-facilities-fact-sheet> [<https://perma.cc/Q8B3-R2HX>] (last visited Oct. 11, 2025) [hereinafter *ORR Influx Care Facilities*] (stating that ICFs provide all UCs with 24-hour security, seven days a week and educational amenities such as “six hours of classroom education onsite every weekday”), with *Unaccompanied Immigrant Children Report Serious Abuse by U.S. Officials During Detention*, ACLU (June 11, 2014) [hereinafter *Children Report Serious Abuse*], <https://www.aclu.org/press-releases/unaccompanied-immigrant-children-report-serious-abuse-us-officials-during-detention> [[https://](https://www.aclu.org/press-releases/unaccompanied-immigrant-children-report-serious-abuse-us-officials-during-detention)

many UCs held in detention facilities at the southwest land border of the United States are suffering from facility overcrowding, medical neglect, starvation, and sexual assault under ORR's "supervision."²⁵ Thus, ORR's failure to protect UCs under its interpretation of the least restrictive setting directive has led to a violation of UCs' fundamental rights under the doctrine of substantive due process.²⁶

Many ICFs and detention facilities at the southwest land border are severely overcrowded, which can negatively impact UCs' physical, mental, and emotional well-being.²⁷ For example, whistleblowers have reported that some detention centers, such as the Fort Bliss detention facility located in Texas, can house over 10,000 UCs.²⁸ Likewise, the Southwest Key shelter, located in Brownsville, Texas, has the capacity to house 1,200 UCs; however, HHS has declined to report how many children are currently held within the facility, or if the agency is continuing to assign children there for temporary detention.²⁹ Within the past four years specifically, overcrowding in child-based detention facilities at the southwest land border has escalated the trend of neglect and abuse at these various large-scale sites, which has been confirmed by an increase in whistleblowers seeking to expose the reality of the living conditions within these facilities.³⁰ Synchronous to overcrowding concerns, many of these facilities that house detained UCs have also reported allegations of "COVID-19 and lice outbreaks, severe medical neglect, undercooked meals, sexual abuse, and rape."³¹

Notably, these alleged abuses call into question whether agencies, such as ORR and HHS, are truly prioritizing the fundamental substantive due process rights of UCs at the southwest land border and are actively ensuring that

perma.cc/GJ9T-G96X] (stating that there have been reports of "Border Patrol agents denying necessary medical care to children as young as five-months-old, refusing to provide diapers for infants, confiscating and not returning legal documents and personal belongings, making racially-charged insults and death threats, and strip searching and shackling children in three-point restraints during transport").

25. See *Understanding Child Detention in the U.S.*, IMMIGR. LEGAL RES. CTR. 3–5 (Nov. 2024), <https://www.ilrc.org/sites/default/files/2024-11/Child%20Detention%20Resource%20%28November%202024%29.pdf> [<https://perma.cc/HWK4-6DVX>].

26. See *infra* Part IV.B.

27. See *Understanding Child Detention in the U.S.*, *supra* note 25, at 4 and accompanying text.

28. See *Understanding Child Detention in the U.S.*, *supra* note 25, at 3–4.

29. See *id.* at 4; *Migrant Children Suffered 'Severe' Sexual Abuse Under Housing Provider's Care*, DOJ Says, PBS NEWS (July 18, 2024), <https://www.pbs.org/newshour/nation/migrant-children-suffered-severe-sexual-abuse-under-housing-providers-care-doj-says> [<https://perma.cc/5NZJ-2ST6>].

30. See *Understanding Child Detention in the U.S.*, *supra* note 25, at 4.

31. *Id.*

these children are treated fairly and humanely.³² Thus, although substantive due process rights are not explicitly outlined in the Constitution, they are commonly identified as individual fundamental rights and are considered to be implied under the framework of the Fourteenth Amendment.³³ After the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*,³⁴ the future of all individual substantive due process rights is uncertain.³⁵ The Court's analysis in *Dobbs* relied heavily on precedent established in *Washington v. Glucksberg*,³⁶ which held that unenumerated substantive due process rights must be "deeply rooted in this Nation's history."³⁷ Consequently, the Court's application of *Glucksberg*'s substantive due process rationale in *Dobbs* resulted in a 6–3 decision establishing that there is not a federal fundamental right to abortion.³⁸

The holding in *Dobbs*, along with the Court's overarching substantive due process analysis, calls into question citizens' long-afforded right to privacy, which breeds uncertainty as to what other unenumerated "fundamental" rights may be under threat of governmental interference.³⁹ When shifting the focus back towards migrant children, the question remains as to which fundamental rights UCs are constitutionally afforded while in detention, and further, how TVPRA 2008's least restrictive setting framework impacts these rights.⁴⁰ Although individual substantive due process rights are not explicitly enumerated, surely children in detention facilities at the southwest land border have certain fundamental rights that ensure they have safe living conditions, free from abuse and severe neglect.⁴¹

32. See *Children Report Serious Abuse*, *supra* note 24 and accompanying text.

33. See Maddy Cittadino, *Dobbs v. Jackson: The Overturning of Roe v. Wade and its Implications on Substantive Due Process*, SYRACUSE L. REV. LEGAL PULSE (June 30, 2022), <https://lawreview.syr.edu/dobbs-v-jackson-the-overturning-of-roe-v-wade-and-its-implications-on-substantive-due-process/> [https://perma.cc/H2P9-3AA3] (stating that "[t]hrough various opinions, the Court has recognized a right of personal privacy, which has been extended to other activities such as inter-racial marriage, procreation, contraception, family relationships, and child rearing").

34. 142 S. Ct. 2228 (2022). The Supreme Court decision in *Dobbs* subsequently overturned the long-standing precedent in *Roe v. Wade*, concerning the federal regulation on a woman's right to have an abortion. See *Roe v. Wade*, 410 U.S. 113 (1973).

35. See *Dobbs*, 142 S. Ct. at 2331 (Breyer, Sotomayor & Kagan, JJ., dissenting).

36. 521 U.S. 702 (1997); see also *Dep't of State v. Munoz*, 144 S. Ct. 1812, 1821–22 (2024) (reaffirming and applying the substantive due process analysis established in *Glucksberg*).

37. *Glucksberg*, 521 U.S. at 720–21 (citations omitted).

38. See *Dobbs*, 142 S. Ct. at 2284.

39. See *id.* at 2260, 2301–02.

40. See *infra* Part IV.

41. See *infra* Part IV.B.

Part I of this Comment discusses ORR's explicit role outlined under TVPRA 2008 in facilitating the transfer and placement of UCs throughout the detention process at the southwest land border.⁴² Part II evaluates ORR's broad authority to regulate the substantive due process rights of UCs under TVPRA 2008's least restrictive setting directive.⁴³ Part III analyzes the violation of substantive due process rights in a post-*Dobbs* world and assesses how ORR's least restrictive setting framework impacts UCs' substantive due process rights while in detention.⁴⁴ Part IV provides a brief recommendation suggesting that ORR reinterpret its current least restrictive setting directive under TVPRA 2008, and implement a "most prudent means" framework instead.⁴⁵

I. ORR'S DUTY TOWARDS UNACCOMPANIED CHILDREN UNDER TVPRA 2008

A. *Who Qualifies as an "Unaccompanied Child?"*

Although various administrative agencies and non-governmental organizations differ on the definition of who or what is a UC, most generally recognize that a UC is a "minor—under the age of 18—who has arrived in the [United States] or at the border without a parent or guardian and without legal status."⁴⁶ While this classification is often referred to by different terms, such as unaccompanied alien child, unaccompanied minor, etc., this Comment will refer to them as UCs or, more simply, children.

Although TVPRA 2008 primarily outlines the rights afforded to victims of trafficking, it also serves as the first piece of legislation to address children entering or identified within the United States without the supervision of a parent or legal guardian.⁴⁷ Moreover, although the acronym "UC" is often utilized to independently identify unaccompanied children for immigration-related policy, it is important to remember that these are children, separated from their loved ones, all alone in a new country.⁴⁸ Thus, although the stated goal of TVPRA

42. See *infra* Part I.

43. See *infra* Part II.

44. See *infra* Part III.

45. See *infra* Part IV.

46. See *Fact Sheet: Unaccompanied Alien Children (UACs)*, NAT'L IMMIGR. F., <https://immigrationforum.org/wp-content/uploads/2020/11/Fact-Sheet-Unaccompanied-Migrant-Children.pdf> [<https://perma.cc/9RVB-23KZ>] (last visited Mar. 4, 2026).

47. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, 5074 (codified as amended at 8 U.S.C. § 1232).

48. See *Unaccompanied Alien Children - 2025 Update*, F. TOGETHER (Apr. 2, 2025), <https://forumtogether.org/article/unaccompanied-alien-children-ucs-or-uacs-2025-update/> [<https://perma.cc/JR5H-A5A7>].

2008 is “to enhance [domestic and legal] efforts of the United States to prevent trafficking in persons . . . ,” perhaps TVPRA 2008 also addresses the legal rights of UCs because of their similarly vulnerable position as children.⁴⁹

Further, it is estimated that around 75–80% of children arriving alone at the U.S.-Mexico border (southwest land border) are victims of human trafficking, which may also explain UCs’ specific distinction within TVPRA 2008.⁵⁰ However, although TVPRA 2008 inherently addresses child trafficking victims, it is important to note that other push factors that are unrelated to trafficking may drive UCs to flee their home country, such as violent crime, gang violence, economic insecurity, abuse, or a need to flee persecution.⁵¹ Nevertheless, TVPRA 2008 aims to protect all of these children because they are just that—children who are alone, vulnerable, and unprotected within a country that is foreign to them.⁵² Regardless of the origin of their specific designation within TVPRA 2008, the harrowingly vast number of UCs identified at the southwest land border within recent years certainly highlights their need for legislative protection, whether they are victims of trafficking or simply children who have been separated from their families throughout the migration process.⁵³

There are various reasons as to why children may travel to the United States or remain in the country without a parent or legal guardian to accompany them.⁵⁴ The majority of UCs “are placed into ORR care because they were apprehended by immigration authorities while trying to cross the [southwest land] border; [while] others are referred [to ORR] after coming to the attention of immigration authorities at some point after crossing the border.”⁵⁵ Nearly all UCs entering the United States are traveling from Mexico or Central American countries, primarily from Guatemala, Honduras, and El Salvador, making the southwest land border a hotspot for UC identification and apprehension.⁵⁶

49. See 8 U.S.C. § 1232.

50. See *Fact Sheet: Unaccompanied Alien Children (UACs)*, *supra* note 46.

51. See *id.*

52. See *id.*

53. See *Southwest Land Border Encounters (By Component)*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters-by-component> [<https://perma.cc/8LNV-B9XD>] (last modified May 15, 2026); *infra* notes 57–61 and accompanying text.

54. See *Fact Sheet: Unaccompanied Alien Children (UACs)*, *supra* note 46.

55. *Unaccompanied Alien Children Bureau Fact Sheet*, OFF. OF REFUGEE RESETTLEMENT, <https://acf.gov/orr/fact-sheet/programs/uc/fact-sheet> [<https://perma.cc/42BV-EWRP>] (last visited Mar. 4, 2026).

56. See *Country of Origin*, OFF. OF REFUGEE RESETTLEMENT, <https://acf.gov/orr/uac/country-origin> [<https://perma.cc/CRE7-JQWQ>] (last visited Mar. 4, 2026).

Thus, a vast majority of U.S. Customs and Border Protection (CBP) encounters with undocumented persons, particularly UCs, occur at the southwest land border of the United States.⁵⁷ According to CBP, the southwest land border encompasses the land boundary between Mexico and the United States, specifically at the southern borders of Texas, New Mexico, Arizona, and California.⁵⁸ Notably, CBP is the parent authority of U.S. Border Patrol (USBP), which is largely responsible for the apprehension of undocumented individuals who are identified within the United States.⁵⁹ Although USBP fiscal year statistics illustrate that the number of UC encounters at the southwest land border has decreased from 2023 to 2025, current data demonstrates that there is still a significantly large number of UCs located at the border, making it difficult to consider this slight decrease in UC encounters as overall progress in managing the crisis.⁶⁰ In fiscal year 2024, USBP identified 99,704 UCs at the southwest land border, underscoring the prevalence of the issue.⁶¹

B. ORR's Stated Directive

After being apprehended by the Department of Homeland Security (DHS), children who are unaccompanied by parents or legal guardians and who do not have legal citizenship in the United States “are transferred to the care and custody” of HHS and ORR.⁶² From there, ORR is “*legally required* to provide for the care and custody of all unaccompanied alien children referred to ORR until they are placed with a vetted sponsor, usually a parent or relative, while their immigration cases proceed.”⁶³ The influx of children being identified alone at the border is vast; according to ORR, in fiscal year 2024, 98,356 UCs were referred to its care and custody after being initially

57. See *Southwest Land Border Encounters (By Component)*, *supra* note 53 (stating that there was around a 56% decrease in UC encounters at the southwest land border between fiscal year 2023 and fiscal year 2025).

58. See *id.*

59. See HILLEL R. SMITH, CONG. RSCH. SERV., LSB10559, U.S. CUSTOMS AND BORDER PROTECTION'S POWERS AND LIMITATIONS: A PRIMER 1 (2021).

60. See *Southwest Land Border Encounters (By Component)*, *supra* note 53.

61. See AUDREY SINGER, CONG. RSCH. SERV., IN12457, THE BIDEN ADMINISTRATION'S REVISED PROCLAMATION AND FINAL RULE, “SECURING THE BORDER” 2 (2024).

62. See *ORR Influx Care Facilities*, *supra* note 24 (stating that ORR considers unaccompanied children to be any child who is age seventeen and under and does not have legal citizenship within the United States).

63. *Id.* (emphasis added).

placed by DHS.⁶⁴ However, it is important to address that under TVPRA 2008, HHS and ORR do not, and cannot, play a role in the detention or placement of UCs prior to DHS referral of the UCs to their custody.⁶⁵

After being transferred to the care and custody of ORR, UCs are traditionally referred to detention in one of ORR's 171 "influx care facilities" (ICFs), located across twenty-four states.⁶⁶ ICFs are detention facilities that house boys and girls, from the ages of thirteen to seventeen, while they await immigration proceedings or placement in a more permanent home.⁶⁷ Although ORR states that it maintains custody and care of all UCs while they are held in these detention facilities, ORR has not explicitly outlined what its agents do to serve as a liaison for UCs while they are placed in detention.⁶⁸ However, ORR does indicate that the ICFs themselves are required to provide services for each UC in their care, such as proper physical care and maintenance, appropriate medical care, an individualized needs assessment, educational services, and more.⁶⁹ Although this may be a stated directive for these facilities, certainly not all UCs being held in ICFs and detention facilities along the southwest land border have access to these services and programs.⁷⁰

C. TVPRA 2008's Five-Step Process for Detention

Under TVPRA 2008, governmental agencies, such as DHS, HHS, and ORR, are directed to abide by a five-step process to control the influx of UCs crossing into the United States at the southwest land border.⁷¹ Moreover,

64. See *Referrals*, OFF. OF REFUGEE RESETTLEMENT, <https://acf.gov/orr/uac/referrals> [<https://perma.cc/74G8-7VDG>] (last visited Jan. 15, 2026) (noting that ORR stated that in fiscal year 2024, exactly 98,356 UCs were referred to its care and custody, while the USBP claimed that in fiscal year 2024, it encountered 99,704 UCs at the southwest land border of the United States); see also SINGER, *supra* note 61 and accompanying text (stating that if accurately reported, these statistics help illustrate that the vast majority of UCs within the United States are apprehended at the southwest land border, rather than anywhere else within the country); *Southwest Land Border Encounters (By Component)*, *supra* note 53.

65. See *ORR Influx Care Facilities*, *supra* note 24.

66. See *id.*

67. See *id.*

68. See generally *ORR Unaccompanied Children Bureau Policy Guide: Section 7*, OFF. OF REFUGEE RESETTLEMENT, <https://acf.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-7#7.5> [<https://perma.cc/3S7B-CM3Q>] (last modified Feb. 27, 2025) (omitting standards for UC liaisons).

69. See *id.*

70. See *ORR Influx Care Facilities*, *supra* note 24 and accompanying text.

71. See *Unaccompanied Children at the Southwest Border*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/archive/unaccompanied-children> [<https://perma.cc/LQ4Z-2DRE>] (last modified May 15, 2023).

while TVPRA 2008 outlined this five-step directive to apply to *all* UCs entering the United States, HHS and ORR were specifically directed to utilize this model to mitigate the risks associated with an influx of UCs at the southwest land border.⁷² The five-step directive is outlined as follows:

Step 1: Identification

Step 1 begins with the UC being identified at the U.S. border or located somewhere within the country, unaccompanied by a parent or legal guardian.⁷³ Once the UC is identified, they will then undergo an initial health screening and immigration status screening process.⁷⁴ This immigration status screening's stated purpose is to initiate the UC's eventual removal proceedings.⁷⁵

However, under TVPRA 2008, the standard afforded for the care and custody of a UC depends on the UC's specific country of origin, which is initially identified in this step.⁷⁶ Thus, if a CBP officer determines that a UC is from a "contiguous country," special screening rules are automatically enacted.⁷⁷ According to TVPRA 2008, "contiguous countries" are countries such as Mexico and Canada.⁷⁸ The TVPRA 2008 requires that:

CBP personnel screen unaccompanied children from contiguous countries within 48 hours of apprehension to determine if the following are true: the child 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 of being trafficked upon return to [their] country of nationality or last habitual residence; the child does not have a fear of returning to [their] country of nationality or last habitual residence owing to a credible fear of prosecution; and the child is able to decide independently to return voluntarily to [their] country of nationality or last habitual residence.⁷⁹

Under this first step, as outlined by TVPRA 2008, "[i]f CBP determines that all three of the above statements are true about a [UC] from a contiguous country . . . the [UC] must return to [their] home country."⁸⁰

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.*

76. *See* WILLIAM A. KANDEL, CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 6–7 (2024).

77. *See id.*; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5075 (codified as amended at 8 U.S.C. § 1232).

78. *See* KANDEL, *supra* note 76, at 6; *see also* Pub. L. No. 110-457, § 235, 122 Stat. at 5074.

79. KANDEL, *supra* note 76, at 8; *see* 8 U.S.C. § 1232(a)(2)(A).

80. KANDEL, *supra* note 76, at 8.

Step 2: Notification

After the UC's initial screening and intake is completed, each department or agency involved in identifying and apprehending the UC is required to notify HHS and ORR.⁸¹ TVPRA 2008 states that under the "notification" step:

Each department or agency of the Federal Government shall notify the Department of Health and Human [S]ervices within 48 hours upon—(A) the apprehension or discovery of an unaccompanied alien child; or (B) any claim or suspicion that an alien in the custody of such department or agency is under 18 years of age.⁸²

Step 3: Transfer

Following the "notification" process, any department or agency of the federal government that has a UC under its custody "shall transfer the custody of such child to the Secretary of [HHS] not later than 72 hours after determining that such child is an unaccompanied . . . child."⁸³ After the UC is identified and transferred to the care of HHS, they are then moved to a temporary "multi-agency center where HHS provides medical check[s], immunizations, and [a more permanent] shelter assignment."⁸⁴ Within this stage, TVPRA 2008 gives HHS, in consultation with the Secretary of Homeland Security, the broad discretion to "develop procedures to make a prompt determination of the age of an alien, which shall be used by the Secretary of Homeland Security and the Secretary of Health and Human Services for children in their respective custody."⁸⁵ Thus, after the transfer of the UC to HHS custody, TVPRA 2008 directs that "[a]t a minimum, these procedures shall take into account multiple forms of evidence, including the non-exclusive use of radiographs, to determine the age of the unaccompanied alien."⁸⁶

Step 4: Detention

Under Step 4, ORR is required to ensure that a UC "be promptly placed in the *least restrictive setting* that is in the best interest of the child. In making such placements, [ORR] may consider [the UC's] danger to self, danger to

81. See *id.* at 10; 8 U.S.C. § 1232(b).

82. § 1232(b)(2).

83. § 1232(b)(3).

84. *Unaccompanied Children at the Southwest Border*, *supra* note 71; see U.S. COMM'N ON CIV. RIGHTS, TRAUMA AT THE BORDER: THE HUMAN COST OF INHUMANE IMMIGRATION POLICIES 51 (2019) ("If parents cannot be released with [their] children, the children are treated as unaccompanied children and transferred to the custody of the Department of Health and Human Services, Office of Refugee and Resettlement.").

85. 8 U.S.C. § 1232(b)(4).

86. *Id.*

the community, and risk of flight.”⁸⁷ Once the UC arrives at their assigned shelter, the UC will remain in that shelter until a sponsor is identified to overtake care and custody of the UC, pending their immigration proceedings.⁸⁸

Step 5: Placement

Finally, in Step 5, the UC is placed with a relative who has legal citizenship within the United States, or they are placed with a sponsor in the country, pending the outcome of the UC’s immigration proceedings.⁸⁹ Based on the UC’s country of origin, gender, age, and other considerations, sponsorship and long-term placement is determined on a case-by-case basis.⁹⁰

While most of these steps are explicitly outlined under TVPRA 2008, it is also important to note that some specific regulations within each step were created by DHS, in coordination with the Federal Emergency Management Agency (FEMA), as an administrative directive to coordinate a governmental response to the UC influx crisis within the United States.⁹¹ Thus, federal agencies, like DHS and ORR, have the administrative authority to issue rules which outline the agency’s interpretation of federal statutes.⁹² By doing so, agencies explain how they will exercise their discretion over statutory law, and further describe how their agency creates its policies in connection with said law, or how they are choosing to interpret it.⁹³ Generally, “[f]ederal law sets out the processes agencies must follow when they formulate, amend, or repeal rules,” which is referred to as notice-and-comment rulemaking.⁹⁴ As established in the Administrative Procedure Act (APA), agencies are required “to provide public notice and opportunity for comment before they issue such rules.”⁹⁵ While the notice-and-comment process creates opportunities

87. § 1232(c)(2)(A) (emphasis added).

88. See *Unaccompanied Children at the Southwest Border*, *supra* note 71.

89. See *id.*

90. See *id.*; see also DEP’T OF HEALTH & HUM. SERVS., RESIDENTIAL (LONG TERM FOSTER CARE) SERVICES FOR UNACCOMPANIED CHILDREN 7 (2022) (stating that ORR considers the following factors when making long-term placement decisions: “[UC’s] mental, emotional, behavioral, and physical health needs; [UC’s] ability and commitment to live in a family and community-based setting; [UC’s] age; the availability of an appropriate placement that meets the [UC’s] needs; on a case-by-case basis . . .”).

91. See *Unaccompanied Children at the Southwest Border*, *supra* note 71.

92. See ACUS, IIB-014, NOTICE-AND-COMMENT RULEMAKING: INFORMATION INTERCHANGE BULLETIN (2021), <https://www.acus.gov/sites/default/files/documents/IIB014-Rulemaking.pdf> [<https://perma.cc/CW5M-9JYZ>].

93. See *id.*

94. *Id.*

95. ANDREW S. COGHLAN, CONG. RSCH. SERV., R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING (2025).

for more active community participation in rulemaking, it is also quite extensive.⁹⁶ Thus, when conducting notice-and-comment proceedings, agencies must (1) issue notice of proposed rulemaking; (2) provide opportunity for public comment; (3) consider those comments and develop a final rule or amendment; and (4) publish the final rule in the *Federal Register*.⁹⁷ Consequently, the notice-and-comment rulemaking process allows administrative agencies to interpret existing statutory law in furtherance of the agency's administrative policies and goals.⁹⁸ Thus, when analyzing the traditional notice-and-comment guidelines in connection with ORR's authority to develop, interpret, and implement its agency-wide policies, it is imperative to recognize that DHS and ORR have the power to interpret what a least restrictive setting means under TVPRA 2008 with respect to the placement of UCs.⁹⁹

II. ORR'S BROAD AUTHORITY UNDER THE LEAST RESTRICTIVE SETTING FRAMEWORK

A. *What Does Least Restrictive Setting Mean?*

Under TVPRA 2008, ORR is directed to assist in placing UCs in detention facilities by utilizing a least restrictive setting framework.¹⁰⁰ Under this framework, a UC "in the custody of the Secretary of Health and Human Services shall be promptly placed in the *least restrictive setting* that is in the best interest of the child."¹⁰¹ Although this framework, on its face, seems as though it would benefit UCs in detention because it focuses on the "best interest of the child," the lack of uniformity in this standard leaves room for ORR to rationalize UCs' placements in a way that is not conducive to each UC's true best interest.¹⁰² This assertion is supported by the fact that at detention facilities and ICFs at the southwest land border, "many children are not able to speak to their parents, hug their siblings who are also in custody, or know when they will be released, and there are a troubling number of allegations of abuse."¹⁰³ Nonetheless, TVPRA 2008 stipulates that "[i]n making such placements, the [HHS] Secretary may consider [factors such as

96. See ACUS, *supra* note 92.

97. *Id.*; see 5 U.S.C. § 553.

98. See ACUS, *supra* note 92.

99. See *id.*; *infra* Part II.C.

100. See 8 U.S.C. § 1232(c)(2)(A); *supra* text accompanying note 20; 6 U.S.C. § 279(b)(2)(A).

101. 8 U.S.C. § 1232(c)(2)(A) (emphasis added); see 6 U.S.C. § 279(b)(2)(A).

102. 8 U.S.C. § 1232(c)(2)(A); see 6 U.S.C. § 279(b)(2)(A).

103. U.S. COMM'N ON C.R., *supra* note 84, at 57.

the UC's] danger to self, danger to the community, and risk of flight."¹⁰⁴ Further, DHS and ORR's broad authority to interpret the least restrictive setting standard within TVPRA 2008 can open the door to fundamental rights violations within these facilities.¹⁰⁵ When statutes, like TVPRA 2008, allow for a lack of uniformity in agency standards, it can create leeway for agencies to treat UCs differently and rationalize their placement in detention facilities, which may not truly serve "the best interest of the child," as the act intended.¹⁰⁶

This lack of uniformity in agency-wide policy is largely impacted by the barebones placement requirements set forth by TVPRA 2008.¹⁰⁷ According to TVPRA 2008, "[t]he placement of a [UC] in a secure facility shall be reviewed, at minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted."¹⁰⁸ Prior to placing a UC within a detention facility pending their immigration proceedings, TVPRA 2008 establishes that a UC may not be transferred to one of these facilities, or placed with a sponsor, until HHS determines that the facility or "proposed custodian is capable of providing for the child's physical and mental well-being."¹⁰⁹ While, in theory, the precautions listed within TVPRA 2008 would provide ORR with a mandate to place a UC in the least restrictive setting possible, that is not the reality of the situation concerning ORR's placement of UCs at the southwest land border.¹¹⁰ Thus, even if the implementation of a least restrictive setting framework was intended to promote the welfare of UCs within the United States, it appears that ORR's interpretation of this framework requires further analysis and substantial reframing.¹¹¹

104. 8 U.S.C. § 1232(c)(2)(A); see 6 U.S.C. § 279(b)(2)(A).

105. See *infra* Part IV.B.

106. 8 U.S.C. § 1232(c)(2)(A); see 6 U.S.C. § 279(b)(2)(A); Eric Berger, *Constitutional Conceits in Statutory Interpretation*, 75 ADMIN. L. REV. 479, 505 (2023) (discussing the delegation of broad authority to administrative agencies when interpreting statutes).

107. See *infra* notes 112–114 and accompanying text.

108. 8 U.S.C. § 1232(c)(2)(A).

109. § 1232(c)(3)(A).

110. See *infra* Part IV.B; see also Julia Halloran McLaughlin, *Do the Right Thing: A Call upon Congress to Enhance the Rights of Unaccompanied and Undocumented Mexican Children Under the TVPRA*, 17 FLA. COASTAL L. REV. 1, 9–11 (2016) (stating that Mexican UCs at the southwest land border receive disparate and less robust TVPRA protection than UCs from other regions of the world, after identified within the United States).

111. See *infra* Part IV.

B. *Implications of ORR's Broad Authority*

Because ORR's least restrictive setting framework is broad and each UC's placement is determined on a case-by-case basis, it is a near certainty that there will be inconsistencies in how ORR enforces TVPRA 2008's provisions.¹¹² Allowing ORR to place UCs in different facilities or in various situations—deportation, detention, prison, etc.—based on the discretion of particular ORR and HHS officials creates a lack of uniformity when addressing whether such placements are truly in each child's best interest.¹¹³ When agencies are given the authority to interpret ambiguous statutes, it creates a higher likelihood for injustice to occur and for certain fundamental rights to be violated.¹¹⁴ Because TVPRA 2008 is the first piece of federal legislation to address and outline the specific process that HHS and ORR must go through to ensure that they fairly and safely assess the placement of UCs, there is also a lack of legislative precedent to guide the agencies.¹¹⁵ Thus, the ambiguous nature of TVPRA 2008, along with the lack of legislative precedent concerning the rights and procedure for detainment of UCs within the United States, allows different ORR agents to subjectively determine what a least restrictive setting for a UC may be.¹¹⁶

Further, ORR lacks a uniform standard of care, leading agents to place UCs in temporary detention facilities and ICFs on a case-by-case basis.¹¹⁷ This kind of statutory ambiguity, illustrated through the case-by-case application of the least restrictive setting standard, allows for agents to have vast

112. See 8 U.S.C. § 1232(c)(2)(A).

113. See *id.*

114. See Eli Nachmany, *Deference to Agency Expertise in Statutory Interpretation*, 31 GEO. MASON L. REV. 587, 595–97 (2024) (“While agencies’ scientific and policymaking or political expertise may help inform the interpretive expertise . . . of statutory law, “[c]ourts engaging in statutory interpretation are attempting to get the law *right*.”). Courts have an interpretive expertise that is paramount in expounding statutory law, perhaps more so than agencies, which illustrates the notion that a court would likely interpret TVPRA 2008’s “least restrictive setting” framework to elicit a more uniform and just application within the U.S. Department of Health and Human Services (HHS) and ORR. See *id.* at 596–97; 8 U.S.C. § 1232(c)(2)(A).

115. See *Unaccompanied Alien Children: A Primer*, BIPARTISAN POL’Y CTR. (July 21, 2014), <https://bipartisanpolicy.org/blog/unaccompanied-alien-children-primer/> [<https://perma.cc/7WVS-2UBX>]. While the Homeland Security Act of 2002 was the first piece of legislation to address “unaccompanied alien children,” it did not outline their rights explicitly, or determine what the federal government must do to ensure their safe and secure temporary placement. See *id.* Thus, TVPRA 2008 was the first true piece of legislation to illustrate a framework concerning how UCs should be treated while under the care and custody of ORR. *Id.*

116. See COGHLAN, *supra* note 95, at 15.

117. See 8 U.S.C. § 1232(a)(2)(A); 6 U.S.C. § 279(b)(2)(A).

authority over these children's individual rights because TVPRA 2008 is not explicitly clear as to what power ORR is afforded, and what policies it is legally entitled to enforce.¹¹⁸ With regards to detained UCs at the southwest land border, TVPRA 2008's ambiguity is of serious concern because the least restrictive setting framework allows agents to decide what least restrictive means for each respective child.¹¹⁹ Allowing ORR officials to place UCs in detention facilities on a case-by-case basis inherently invites subjectivity into the placement process, which may lead to agents determining UC placements based on their own personal biases, without factoring in the child's best interest in accordance with the TVPRA 2008.¹²⁰ Accordingly, TVPRA 2008's efforts through its statutory language to ensure that all UCs are placed in the least restrictive setting possible are not always actualized.¹²¹

The discretion given to ORR agents has led to various harrowing and inhumane stories concerning the reality of UCs' detention. For example, according to child testimony and an ACLU investigation, "H.R., a seven-year-old boy, was severely developmentally disabled and suffering from acute malnourishment when he was apprehended, but CBP held him in custody for approximately five days without any medical treatment."¹²² In another instance, "D.G., a 16-year-old girl, was detained with adults. When CBP officials searched D.G., they violently spread her legs and touched her genital area forcefully, making her scream."¹²³ M.R.'s story is no different than so many other UCs before her: she was "a 15-year-old girl, [who] traveled from Guatemala with her two-year-old son. Both M.R. and her son became sick while in CBP custody, but M.R.'s requests for medical attention were ignored or dismissed for approximately five days, until she and her son were finally taken to a hospital."¹²⁴ Finally, "C.S., a 17-year-old girl, was detained in a *hielera* (freezer) in wet clothes. Her clothes did not dry for three and a half days due to the frigid temperature in the holding cell."¹²⁵ In her specific detention conditions, "[t]he only drinking water available to C.S. came from the toilet tank, and the bathroom was situated in plain view of all other detainees with a security camera mounted in front of it."¹²⁶ Surely, these

118. See Nachmany, *supra* note 114, at 588–89 (discussing the importance of agencies expertise and knowledge when interpreting the particular terms of a law or statute).

119. See 8 U.S.C. § 1232(c)(2)(A).

120. See *id.*; Nachmany, *supra* note 114 and accompanying text.

121. See *Children Report Serious Abuse*, *supra* note 24.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

instances of cruelty and abuse are not conducive to a least restrictive setting placement as required by TVPRA 2008, regardless of how ORR and its affiliated agencies may interpret said framework.¹²⁷

These atrocious detention conditions are not only indicative of the treatment of older UCs at the southwest land border; in 2019, it was reported that at least nine infants, all under the age of one, were placed within a DHS detention facility in Dilley, Texas, with a lack of access to medical care that is necessary at such an early stage of life.¹²⁸ Other reports claimed that the children interviewed at some of these facilities stated they had inadequate access to food and water.¹²⁹ Accordingly, one child being held in a detention facility at the southwest land border reported: “[detention facility staff] would give us a little water bottle for the day, and sometimes the next day, they wouldn’t give [a water bottle] to us until the afternoon.’ Another child explained, ‘[the officers] told [us] to drink from where we washed our hands [in] the bathroom.’”¹³⁰ Because detention conditions similar to the settings described above are not uncommon, it is clear that TVPRA 2008’s least restrictive setting framework is being misapplied or potentially completely disregarded by ORR.¹³¹

Stories such as H.R.’s, D.G.’s, M.R.’s, and C.S.’s illustrate how statutory ambiguity may largely lead to a lack of victim protection.¹³² Similarly, ORR’s broad discretion in the placement of UCs may lead to a disregard for UCs’ statutory rights during their immigration proceedings.¹³³ Overall, there are many potential negative implications that affect the fundamental rights afforded to UCs through ORR’s current interpretation of TVPRA 2008’s least restrictive setting framework.¹³⁴ When analyzing the impact of a piece of legislation that creates a framework based upon a least restrictive setting of individuals’ placement, it is imperative to question the potential implications of such an ambiguous baseline standard, especially when it is subject to agency interpretation.

127. See Nachmany, *supra* note 114 and accompanying text.

128. See U.S. COMM’N ON CIV. RIGHTS, *supra* note 84, at 57–58.

129. See AMS. FOR IMMIGR. JUST., DO MY RIGHTS MATTER?: THE MISTREATMENT OF UNACCOMPANIED CHILDREN IN CBP CUSTODY 14 (2020).

130. *Id.*

131. See *supra* notes 122–128 and accompanying text.

132. See Kelly R. Fitzgerald Valiev, *Lack of Victim Protection in the Enforcement of the Trafficking Victims Protection Act*, 10 TEX. A&M J. PROP. L. 193, 210 (2024).

133. See Irene Scharf, *Robbing Special Immigrant Juveniles of their Rights as US Citizens: The Legislative Error in the 2008 TVPRA Amendments*, 30 BERKELEY LA RAZA L.J. 40, 50–51 (2020); see also U.S. COMM’N ON C.R., *supra* note 84, at 76 (stating that if ORR federal funding from the Vera Institute of Justice is cut in the future, “children as young as infants will be forced to represent themselves in asylum proceedings”).

134. See *infra* Part IV.B.

III. THE VIOLATION OF UCS' SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE LEAST RESTRICTIVE SETTING FRAMEWORK

A. *Substantive Due Process Post-Dobbs*

Because the future of many fundamental rights is at stake following the Supreme Court's holding in *Dobbs*, it is paramount to analyze *Dobbs*' impact on UCs' fundamental rights to safety, protection, legal representation, and due process.¹³⁵ As held in *Shaughnessy*, all persons within the United States, whether they are documented citizens or undocumented people, have certain due process rights under the Fourteenth Amendment.¹³⁶ That being said, ORR's current interpretation and implementation of TVPRA 2008's least restrictive setting framework encroaches upon the fundamental substantive due process rights of unaccompanied migrant children, regardless of their immigration status.¹³⁷

Under the Fourteenth Amendment's Due Process Clause, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law"¹³⁸ The Due Process Clause of the Fourteenth Amendment "spawned judicial construction of two distinct concepts, one substantive, one procedural."¹³⁹ Substantive due process rights are generally recognized as fundamental individual rights that are not subject to governmental interference or regulation, although they are not explicitly enumerated in the Constitution.¹⁴⁰ While the Fourteenth Amendment's Due Process Clause addresses due process protections against state governmental interference, the Fifth Amendment affords the same protection, but in relation to the federal government.¹⁴¹ That being said, just because some rights are not enumerated within the Constitution does not mean that individuals are not afforded those rights.¹⁴² Ultimately, the Due Process Clause "has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and

135. *See id.*

136. *See Shaughnessy v. United States*, 345 U.S. 206, 213–15, 218 (1953).

137. *See supra* notes 122–127 and accompanying text.

138. U.S. CONST. amend. XIV, § 1.

139. Elizabeth Price Foley, *Dobbs and the Future of Substantive Liberties*, 64 SANTA CLARA L. REV. 159, 160–62 (2024).

140. *See id.*; *Substantive Due Process*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/substantive_due_process [<https://perma.cc/6AKP-SYTY>] (last visited Jan. 16, 2026).

141. *See Substantive Due Process*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/due_process [<https://perma.cc/7MXY-2NYM>] (last visited Jan. 16, 2026).

142. *See id.*

‘implicit in the concept of ordered liberty.’”¹⁴³ Throughout the last few decades, the Supreme Court has consistently held that substantive due process rights have included certain liberties such as the right to privacy, the right to interracial and LGBTQ+ marriage, and, until recently, the right to abortion and birth control-related healthcare.¹⁴⁴

One of the hallmark Supreme Court decisions that federally cemented the substantive due process right to privacy was articulated in *Roe v. Wade*.¹⁴⁵ The Court set a historic precedent in *Roe*, establishing that, under the Fourteenth Amendment’s doctrine of substantive due process, a woman is federally entitled to have an abortion within the first trimester of her pregnancy, consistent with her unenumerated right to privacy.¹⁴⁶ However, in the controversial Supreme Court case, *Dobbs v. Jackson Women’s Health Organization*, the majority rejected its *Roe* analysis,¹⁴⁷ which established that the doctrine of substantive due process was a solid legal framework that afforded women their privacy right to abortion under federal law.¹⁴⁸ Moreover, while the Court’s holding in *Dobbs* is undoubtedly controversial in the national political sphere due to its impact on state and federal abortion access, it is equally important to examine the Court’s reasoning for overturning *Roe*, its monumental impact on substantive due process rights, and its effect on the unenumerated rights of all people, including UCs.¹⁴⁹

The rationale behind the Court’s decision in *Dobbs* is best demonstrated through its strict interpretation of substantive due process rights as analyzed in *Washington v. Glucksberg*.¹⁵⁰ The *Dobbs* majority relied heavily on *Glucksberg*’s

143. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (citation omitted).

144. See Foley, *supra* note 139 and accompanying text; *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015); *Roe v. Wade*, 410 U.S. 113, 152–54 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

145. See 410 U.S. 113, 152–54 (1973).

146. See *id.* at 129 (stating that the right to an abortion is a “right in the concept of personal ‘liberty’ embodied in the Fourteenth Amendment’s Due Process Clause; or in personal, marital, familial, or sexual privacy said to be protected by the Bill of Rights . . .”).

147. See *Dobbs*, 142 S. Ct. at 2242.

148. See *id.* at 2301 (Thomas, J., concurring) (stating that “‘substantive due process’ is an oxymoron that ‘lack[s] any basis in the Constitution’”); *id.* at 2302–03 (“The nature of the purported ‘liberty’ supporting the abortion right has shifted yet again. Respondents and the United States propose no fewer than three different interests that supposedly spring from the Due Process Clause.”).

149. See Parker J. Wilkson, *The Danger of Dobbs: Substantive Due Process, Fundamental Rights, and a Critique of the Theory of Historical Tradition*, 35 UNIV. FLA. J.L. & PUB. POL’Y 197, 207–08 (2025).

150. See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (holding that: “[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and

substantive due process analysis when holding that “the ‘established method of substantive-due-process analysis’ requires that an unenumerated right be ‘deeply rooted in this Nation’s history and tradition’ before it can be recognized as a component of the ‘liberty’ protected in the Due Process Clause.”¹⁵¹ Thus, in overturning *Roe*, the *Dobbs* Court, specifically in Justice Clarence Thomas’s concurrence, called into question all unenumerated rights that were once held to be “fundamental” under the overarching doctrine of substantive due process.¹⁵²

Based on the majority holding in *Dobbs*, Justice Thomas’s concurrence asserts that due process does not at all prevent government from regulating certain “fundamental” liberty interests.¹⁵³ Through questioning “whether other constitutional provisions guarantee the myriad rights that our substantive due process clause have generated,” Justice Thomas explicitly calls for the reexamination of all other “fundamental rights” established through substantive due process analyses.¹⁵⁴ Because Thomas’s concurrence elicits debate around the future of substantive due process liberties, previous Supreme Court cases concerning the right to interracial and LGBTQ+ marriage, contraceptives, and other privacy-related constitutional issues are potentially under attack, given that their provision was also afforded using a pre-*Dobbs* substantive due process analysis.¹⁵⁵ Because UCs are entitled to due process of law while they are detained in the United States, they are also afforded certain liberties under the doctrine of substantive due process.¹⁵⁶

tradition,’ . . . [and that have] a ‘careful description’ of the asserted fundamental liberty interest” (citations omitted)).

151. *Dobbs*, 142 S. Ct. at 2260.

152. *See id.* at 2327 (Breyer, Sotomayor & Kagan, JJ., dissenting) (stating that the majority’s holding is inconsistent with stare decisis and “has ‘vindicated [the] principle’ over and over that . . . ‘there is a realm of personal liberty which the government may not enter . . .’” (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847, 849, 851 (1992))).

153. *See id.* at 2301–02 (Thomas, J., concurring) (stating that “[b]ecause the Due Process Clause does not secure *any* substantive rights, it does not secure a right to [an] abortion”); *see also* Wilkson, *supra* note 149, at 209 (discussing how the Court departed from earlier precedent).

154. *See Dobbs*, 142 S. Ct. at 2301–02, 2304 (Thomas, J., concurring) (“Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.”).

155. *See id.* at 2301; *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015); *Roe v. Wade*, 410 U.S. 113, 152–54 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

156. *See Shaughnessy v. United States*, 345 U.S. 206, 218 (1953).

B. UCs' Substantive Due Process Rights Post-Dobbs

In a post-*Dobbs* world, it is unclear which personal rights and liberties are truly considered to be “fundamental,” and thus are not subject to governmental interference.¹⁵⁷ However, some fundamental rights are undisputed, even if they are not specifically enumerated in the Constitution, such as one’s freedom to be treated humanely when detained in governmental custody.¹⁵⁸ When analyzing substantive due process rights post-*Dobbs*, it is critical to assess how the unenumerated rights of UCs, in connection with ORR’s interpretation of the least restrictive setting framework, are impacted by the Supreme Court’s strict scrutiny-based application of substantive due process.¹⁵⁹ Because ORR has failed to establish a baseline for what the least restrictive setting framework must do to support UCs throughout their detention, children are often placed in situations that violate their fundamental rights when under ORR’s custody and care.¹⁶⁰

ORR’s current interpretation and implementation of TVPRA 2008’s least restrictive setting framework encroaches upon UCs’ fundamental substantive due process rights.¹⁶¹ Although *Shaughnessy* holds that even undocumented persons who enter the United States illegally are entitled to certain procedural and substantive due process rights while they remain within the country, ORR’s interpretation of TVPRA 2008’s least restrictive setting framework ensures that UCs’ substantive fundamental rights are nevertheless overlooked when analyzed using a mock strict scrutiny analysis.¹⁶² Through analyzing the elements that courts assess when running a strict scrutiny analysis in an effort to determine the constitutionality of a regulatory scheme or act, it is clear that TVPRA 2008’s least restrictive setting framework fails the precedented test.¹⁶³ In establishing whether substantive due process rights have been violated, the Supreme Court has historically used a strict scrutiny

157. See Wilkson, *supra* note 149, at 208.

158. See Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN L. & POL’Y REV. 159, 160–61 (1990).

159. See 8 U.S.C. § 1232(c)(2)(A); 6 U.S.C. § 279(b)(2)(A); *supra* text accompanying note 151; *Dobbs*, 142 S. Ct. at 2260.

160. See *Understanding Child Detention in the U.S.*, *supra* note 25, at 3.

161. See *supra* notes 121–127 and accompanying text.

162. See *Shaughnessy v. United States*, 345 U.S. 206, 213, 215 (1953); *infra* notes 173–175; *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny [<https://perma.cc/UNS5-WG5K>] (last visited Mar. 4, 2026) (stating that when performing a mock strict scrutiny analysis on the constitutionality of an act of law, “the government must show that its actions were ‘narrowly tailored’ to further a ‘compelling government interest,’ and that they [used] the ‘least restrictive means’ to further that interest”).

163. See *Strict Scrutiny*, *supra* note 162.

analysis to determine whether there was (1) a “compelling [government] interest” in violating said rights; and (2) whether the practices utilized were “narrowly tailored” to that governmental interest.¹⁶⁴ When utilizing a mock strict scrutiny analysis to address whether the actual implementation of the TVPRA 2008’s least restrictive setting framework violates UCs’ substantive due process rights, it is clear that it does: (1) there is a compelling governmental interest in regulating the influx of migrants entering the United States at the southwest land border, especially when those migrants are UCs; however (2) the subjective placement standards utilized by the ORR are not adequately narrowly tailored to meet those interests.¹⁶⁵ Thus, under this mock analysis, ORR’s interpretation of TVPRA 2008’s least restrictive setting framework does not give agents the authority to overlook the fundamental substantive due process rights of UCs.¹⁶⁶ Because under the Constitution all persons are given specific due process rights, developing a standard focused upon anything other than the necessity to preserve those rights is somewhat worrisome.¹⁶⁷ Thus, TVPRA 2008’s utilization of a framework where the term “restrictive” is used as a baseline—even if it is meant to promote non-restriction—is concerning.¹⁶⁸

Although each administrative agency involved in the TVPRA 2008’s five-step process for placement of a UC is legally required to do its part in placing

164. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (assessing, largely for the first time, a “compelling state interest”); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 101–02 (1972) (assessing whether a practice is “narrowly tailored” to a legitimate government interest).

165. *See generally Shaughnessy*, 345 U.S. at 212–15 (demonstrating that there is a compelling governmental interest in addressing the substantive due process rights of undocumented migrants within the United States); *Sherbert*, 374 U.S. at 406 (explaining that a compelling state interest rather than a “rational relationship to some colorable state interest” is required to justify infringement on one’s rights); *Mosley*, 408 U.S. at 101–02 (suggesting that the Equal Protection Clause requires that statutes affecting substantial government interests must be narrowly tailored to their legitimate objectives).

166. *See Sherbert*, 374 U.S. at 406 (considering whether there was a compelling state interest in enforcing the provisions of a statute in such a way that justified an infringement on the appellant’s constitutional liberties); *Mosley*, 408 U.S. at 101–02 (assessing whether a statute that affected an individual’s First Amendment rights was narrowly tailored to comply with the amendment’s legitimate objectives); 8 U.S.C. § 1232(2)(A).

167. *See Shaughnessy*, 345 U.S. at 206. Not to say that the Court’s strict scrutiny analysis is flawed, as utilized in *Sherbert* and *Mosley*, but it should be noted that assessing whether a government interest is necessarily “compelling” and “narrowly tailored” is somewhat subjective, and oftentimes dependent on the justices’ political majority within a given era. *See Sherbert*, 374 U.S. at 406; *Mosley*, 408 U.S. at 101–02.

168. *See infra* Part V.A, at 40.

the child in the least restrictive setting possible, this is simply not the reality.¹⁶⁹ UCs are often treated inhumanely and systematically have their substantive due process rights violated at the southwest land border by CBP, DHS, HHS, and ORR agents due to the agencies' ineffective interpretation and implementation of the least restrictive setting framework.¹⁷⁰ As illustrated in C.S.'s case, where she was forced to drink water from the toilet to survive, clearly ORR's current interpretation of the least restrictive setting standard is not properly implemented to ensure that all UCs' fundamental rights are upheld.¹⁷¹ Similarly, detention stories like 15-year-old M.R.'s, wherein she and her infant's request for medical attention was denied for days, demonstrate how ORR's interpretation of this framework is ineffective overall in protecting the liberties afforded to all persons, including undocumented migrants, under the Due Process Clause.¹⁷²

Moreover, while DHS has made general statements regarding the strict crackdown on immigration into the United States under the Trump Administration, agencies such as CBP and ORR have been silent on the treatment of detained UCs at the southwest land border.¹⁷³ Further, the subjectivity of the least restrictive setting framework in connection with President Trump's strict immigration policy allows ORR and CBP officials to avoid issuing statements regarding the alleged fundamental rights violations of UCs.¹⁷⁴ The result of this widespread agency silence is the continuous violation of UCs' substantive due process rights while they are held in detention facilities at the southwest land border.¹⁷⁵

While there are some whistleblowers who report these substantive due process violations when they see or hear of them occurring to UCs in detention facilities along the southwest land border, there has been little change

169. See *supra* Part II.C; *Children Report Serious Abuse*, *supra* note 24.

170. See *supra* notes 122–127 and accompanying text; *Children Report Serious Abuse*, *supra* note 24.

171. See *Children Report Serious Abuse*, *supra* note 24 and accompanying text; *supra* text accompanying notes 124–126.

172. See *Children Report Serious Abuse*, *supra* note 24 and accompanying text; *supra* text accompanying note 124.

173. See *Statement from a DHS Spokesperson in Directives Expanding Law Enforcement and Ending the Abuse of Humanitarian Parole*, DEP'T OF HOMELAND SEC. (Jan. 21, 2025), <https://www.dhs.gov/news/2025/01/21/statement-dhs-spokesperson-directives-expanding-law-enforcement-and-ending-abuse> [<https://perma.cc/H83Z-G5LQ>] (“The Biden-Harris Administration abused the humanitarian parole program to indiscriminately allow 1.5 million migrants to enter our country. This was all stopped on day one of the Trump Administration. This action will return the humanitarian parole program to its original purpose of looking at migrants on a case-by-case basis.”).

174. See *id.*

175. See *supra* text accompanying note 161.

within ORR to resolve these grievances.¹⁷⁶ Thus, ORR and its affiliated agencies must begin to place UCs' fundamental rights at the forefront of their analysis when assessing how to interpret and implement statutory laws, like the TVPRA 2008, in connection with agency policies.

IV. RECOMMENDATION

A. *Introducing a Most Prudent Means Standard*

Today, it is unreasonable for agencies to rely on TVPRA 2008 as the sole framework for addressing UCs within the United States, given that the United States reinterprets its immigration policies every few years, as the economy, politics, and societal norms regarding migration and national security continue to evolve. Because national immigration policy is constantly evolving, administrative agencies such as HHS and ORR must recognize that legislation, like TVPRA 2008, which regulates the custody and care of UCs, is in dire need of reinterpretation in 2026. Therefore, the first step in coming to an agency-wide solution regarding the protection of substantive due process rights of detained UCs at the southwest land border is through recognizing that TVPRA 2008 needs to be (1) reauthorized¹⁷⁷ or (2) reinterpreted by the administrative agencies that rely on it the most.¹⁷⁸ This recommendation will focus on the latter, suggesting ORR's reinterpretation of TVPRA 2008's least restrictive setting framework.

In order to combat detained UCs' rights violations at the southwest land border, ORR must reinterpret the least restrictive setting directive under TVPRA 2008 to focus on what it can do to help protect UCs' rights by developing a most prudent means framework, instead.¹⁷⁹ Under a most prudent means standard, agents will be forced to determine UC placement according to an objective standard, rather than utilizing a subjective case-by-case framework.¹⁸⁰ Utilizing an objective, most prudent means framework will prove to be more effective and realistic in the placement of UCs and the

176. See *Children Report Serious Abuse*, *supra* note 24.

177. See *Key Legislation*, *supra* note 16 and accompanying text; see also note 17 and accompanying text. Although TVPRA has been reauthorized three times since the passage of the TVPRA 2008, none of the newer versions of TVPRA have addressed how administrative agencies should handle UCs when under their custody and care. See *Unaccompanied Alien Children: A Primer*, *supra* note 115. The only mention of the treatment and rights of the UCs under TVPRA was in TVPRA 2008. See *id.*; *supra* note 17 and accompanying text.

178. See *supra* text accompanying note 111.

179. See *Understanding Child Detention in the U.S.*, *supra* note 25, at 5–6 (recommending that ORR develop a “best interest” framework for UC detention placement standards).

180. See *id.* at 5–7; 8 U.S.C. § 1225(b)(1).

protection of their fundamental rights while under the care of ORR because it will assess each child's situation uniformly, while still showing good judgment and careful restraint when determining placement.¹⁸¹ Prudence itself is defined as "skill and good judgment in the management of affairs [through using] caution or circumspection as to danger or risk."¹⁸² Adopting such a framework which is centered upon the need for caution and good judgment is what sets a most prudent standard apart from the rest, offering an objective and carefully calculated placement plan for each UC.¹⁸³ Although a most prudent means framework has not been utilized by an administrative agency thus far, creating such a standard based on the caution and protection of UCs' fundamental rights would invite considerable benefits. While various non-governmental organizations have recommended that ORR develop a "best interest" framework regarding UC placement, utilizing a most prudent means framework would be more realistic.¹⁸⁴ A best interest framework requires vast subjectivity and places significant attention on individualized treatment/placement based on the specific child.¹⁸⁵ Adopting such a subjective framework may lead to the same ambiguity issues that arise under the current least restrictive setting directive, specifically concerning a lack of uniformity in the standard of care afforded to all children.¹⁸⁶ Further, even the language utilized in the most prudent means standard, rather than a least restrictive setting standard, will create an emphasis on agency carefulness and consideration when determining UC placement.¹⁸⁷ Through reinterpreting TVPRA 2008's least restrictive setting framework into a framework that focuses more on what ORR can do to encourage the successful and safe transfer of UCs, it will force ORR to reassess what fundamental rights UCs have and how their rights are affected by temporary detention.¹⁸⁸ Reinterpreting the least restrictive setting framework into a most prudent means framework will allow ORR to put the best interest of the UCs at the forefront of their policy, as they state in their agency mission, and as directed by the explicit

181. See *Understanding Child Detention in the U.S.*, *supra* note 25, at 5–8; *supra* text accompanying notes 112–116.

182. *Prudence*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/prudence> [<https://perma.cc/634E-W8UM>] (last visited Dec. 18, 2025).

183. See *Understanding Child Detention in the U.S.*, *supra* note 25, at 5–8.

184. *Id.* at 5–6.

185. See *id.*

186. See *supra* text accompanying notes 102–104.

187. See *Understanding Child Detention in the U.S.*, *supra* note 25, at 5–6.

188. See *id.* at 6–11. Unlike any other framework, adopting a most prudent means framework will encourage more scrutiny in assessing agency action when determining the placement of UCs. See *id.*

language in TVPRA 2008.¹⁸⁹ Thus, a most prudent means framework would prove to be more effective and uniform than either a least restrictive setting or best interest framework, while simultaneously emphasizing the importance of thoughtfulness and care when determining UC placement.¹⁹⁰

B. Amendment of the Least Restrictive Setting Standard Through Traditional Rulemaking Procedure

Change within administrative agencies does not necessarily have a fast-paced course of action; true change within agencies as large as ORR and HHS takes time and patience. Moreover, it is important to recognize that there may be potential setbacks with implementing a most prudent means reinterpretation due to the recent precedent established in *Loper Bright Enterprises v. Raimondo*,¹⁹¹ overruling *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁹² *Loper Bright* overruled the long-standing *Chevron* deference doctrine, establishing that now when an agency's statute is ambiguous, courts need not defer to the agency's own interpretation of that statute.¹⁹³ Instead, courts have the authority to interpret an ambiguous statutory provision as the court sees fit.¹⁹⁴ In terms of ORR reinterpreting TVPRA 2008's least restrictive setting framework, under *Loper Bright*, courts have the ability to completely disregard a new most prudent means standard, even if ORR asserts that its interpretation reflects the statute's meaning.¹⁹⁵ Thus, although an ORR reinterpretation of its framework may solve UC substantive due process concerns in the short term, it is important to recognize that courts may reject said interpretation, assuming anyone would have standing to

189. See 8 U.S.C. § 1232(c)(2)(A) (stating that HHS and the ORR will use the least restrictive setting framework throughout the UC's placement and detention process to always pursue detention avenues which benefit the best interest of the minor child).

190. See *Understanding Child Detention in the U.S.*, *supra* note 25, at 5; 8 U.S.C. § 1232(c)(2)(A); *supra* text accompanying notes 112–116.

191. 144 S. Ct. 2244 (2024).

192. 467 U.S. 837 (1984); *Loper Bright Enters.*, 144 S. Ct. at 2273 (overruling *Chevron*).

193. See *Loper Bright Enters.*, 144 S. Ct. at 2273; Michael R. Blumenthal, Douglas W. Charanas, James William Sandy, & David B. Waxman, *The End of Chevron Deference: What Does It Mean, and What Comes Next?*, AM. BAR ASS'N (Aug. 16, 2024), https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-august/end-chevron-deference-what-does-it-mean-what-comes-next/ [https://perma.cc/Q9Z3-FT25].

194. See *Loper Bright Enters.*, 144 S. Ct. at 2273.

195. See *id.* at 412–13 (noting that courts “need not” defer to an agency's interpretation of a statute “simply because the statute is ambiguous”).

challenge it.¹⁹⁶ Nonetheless, in order to see true improvement and protection of detained UCs' substantive due process rights at the southwest land border, ORR must reinterpret its least restrictive setting placement framework into a more optimal and UC-focused most prudent means framework. Although courts would no longer give agencies *Chevron* deference under *Loper Bright* when determining what a least restrictive setting is, ORR nonetheless has the authority to develop an interpretation that would provide more uniformity in the day-to-day placement of UCs.¹⁹⁷ With such power, ORR can and should implement a most prudent means framework as soon as possible through notice-and-comment rulemaking.

As previously noted, through the notice-and-comment rulemaking process, “[f]ederal law sets out the processes agencies must follow when they formulate, amend, or repeal rules.”¹⁹⁸ The notice-and-comment rulemaking process is especially impactful when administrative agencies reinterpret an existing law or implement a new policy because it allows the agency to explain the legal authority behind its new rule and encourages opportunities for public participation.¹⁹⁹ Thus, going through the traditional notice-and-comment process to implement a most prudent means framework would be significantly beneficial to ORR and detained UCs around the country for various reasons. First, by undergoing the formal rulemaking process, agencies may rely on recommendations from experts in the field of immigration and juvenile law.²⁰⁰ The formal notice-and-comment process would therefore encourage ORR to consult expert opinions that are especially relevant to the issue of UCs' fundamental rights while in detention.²⁰¹ Consequently, expert recommendations would further encourage ORR to develop a framework that supports the specific needs of detained UCs.²⁰² Second, and perhaps most crucial, is that implementing this new standard through notice-and-comment—rather than an informal agency policy shift—would make it significantly more difficult for administrative agencies and individually biased ORR agents to uproot these UCs' lives.²⁰³ By enacting a standard through the notice-and-comment process, it not only ensures that ORR

196. *See id.* It must be kept in mind that the current conservative Supreme Court might also not be hospitable to such an interpretation of TVPRA 2008.

197. *See id.*

198. *See* ACUS, *supra* note 92.

199. *See id.*

200. *See id.*

201. *See id.*

202. *See* OFF. OF THE FED. REG., A GUIDE TO THE RULEMAKING PROCESS, <https://uploads.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf> [<https://perma.cc/PQT5-AEHJ>] (last visited Apr. 7, 2026).

203. *See* ACUS, *supra* note 92.

employees abide by that standard, but also that other affiliated agencies respect the policy that is developed.²⁰⁴ Further, the implementation of a most prudent means framework through the formal notice-and-comment rule-making process is necessary to ensure that ORR, and its affiliated agencies, are unable to overlook the fundamental rights of detained UCs.²⁰⁵

C. *Implementation of the Most Prudent Means Standard*

In developing a most prudent means standard, ORR should begin to focus on UCs' well-being earlier in the five-step process,²⁰⁶ developing and explicitly outlining ORR's legal obligations in helping UCs feel safe, know their rights, and not be subject to dangerous detainment environments.²⁰⁷ Moreover, ORR should ensure that during the initial steps of screening, Steps 1 and 2,²⁰⁸ UCs are cared for by mental health professionals and that they have adequate support and assistance from language interpreters—if needed—throughout each step of their placement process.²⁰⁹ By ensuring that UCs have access to these resources at the southwest land border, ORR will truly be putting the best interests of the children at the forefront of their placement framework. Additionally, providing these resources will help ensure that all UCs are not only safe throughout every stage of their detention, but that they also have an open line of communication to verbalize any trauma, suspicious activity, or violation of rights that they have endured.²¹⁰ Likewise, it is necessary during Step 1 that UCs are matched with an adult to whom they can report any abuse and express their placement or detainment concerns.²¹¹ Whether these adults are employed by ORR or freelanced from a third-party governmental agency, they should be required to be mandatory reporters of any abuse. Consequently, implementing an administrative hiring policy as described would be a prime example of extending rights of the UCs through a most prudent framework because it provides them with access to resources that will help ensure that their fundamental rights are being sustained.²¹² Thus, in matching each UC with an adult, ORR can combat any human

204. *See id.*

205. *See id.*

206. *See supra* Part II.C.

207. *See generally Understanding Child Detention in the U.S.*, *supra* note 25, at 3–5 (noting that ORR's reliance on large congregate detention facilities exposes children to unsafe jail-like conditions, including sexual abuse, medical neglect, and psychological harm).

208. *See supra* Part II.C.

209. *Id.*

210. *See supra* notes 170–174.

211. *See supra* Part II.C.

212. *Id.*

rights violations that take place during the initial stages of the identification process, even if those violations are perpetrated by officers of other administrative agencies such as DHS, HHS, and others.²¹³ Finally, during the latter stages of the five-step process, Steps 3, 4, and 5, UCs should have access to legal representation before and during their placement in a detention facility.²¹⁴ Through ORR mandating that each UC has met with a legal representative *at least once* before their detainment, ORR can ensure that it is following a most prudent means framework by allowing the UC to consult an attorney instead of having to face their immigration proceedings and be processed in a detention facility alone.²¹⁵ This representative can ensure that the UC has all necessary forms and papers, documentation, and the attorney's contact information before they are met with the reality of detention—and eventually transferred for immigration proceedings. However, it is important to note that the number of pending immigration cases within immigration courts has reached an all-time high in recent years.²¹⁶ Although the backlog of immigration cases has increased, so have “unprecedented levels of migration across the U.S.-Mexico border by migrants—often seeking asylum”²¹⁷ That being said, in June of 2024, DHS created new policies at the southwest land border to control the influx of migration and limit access to asylum status, which has led to a decline in immigration-related filings and created some slowing of the backlog.²¹⁸ Nonetheless, immigration judges are still hearing immigration cases from fiscal year 2023, meaning that they are still burdened by an overwhelming calendar.²¹⁹

In summary, much interagency development and change must be enacted to truly ensure that UCs are placed in the best possible temporary detention situation, once identified within the United States. The challenges in carrying out TVPRA 2008's placement and detention procedures do not give agencies the right to violate the fundamental, substantive due process rights of UCs held in detention facilities at the southwest land border.²²⁰ Agencies such as ORR must begin to honor their mission to protect and serve vulnerable populations, such as refugees and UCs, and begin to enact real agency-

213. See *Children Report Serious Abuse*, *supra* note 24 (describing a complaint filed against DHS asserting violations at all stages of intake and custody by CBP agents).

214. See *supra* Part II.C; *Understanding Child Detention in the U.S.*, *supra* note 25, at 3.

215. See *Understanding Child Detention in the U.S.*, *supra* note 25, at 3.

216. See HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., IN12463, IMMIGRATION COURTS: DECLINE IN NEW CASES AT THE END OF FY2024, at 1 (2024).

217. *Id.*

218. See *id.*

219. See *id.*

220. See *supra* Part IV.B.

wide change in their standards, which currently allow for such injustice to occur.²²¹ While notable change takes time, time is not a privilege that many UCs being held in detention at the southwest land border have, so policy reinterpretation must begin today.

CONCLUSION

Immigrants who are detained and placed in detention facilities within the United States are afforded certain due process rights under the Fifth Amendment of the Constitution, and the allocation of those rights is not dependent on whether a migrant is a minor or an adult, documented or undocumented.²²² Even though this is federal law in the United States, many migrants at the southwest land border are not provided with such care, especially children who are unaccompanied by a parent or legal guardian.²²³

ORR is legally required to ensure that it places UCs in the “least restrictive setting that is in the best interest of the child” when determining their temporary placement within the United States, pending their immigration proceedings.²²⁴ Regardless of ORR’s obligation to treat UCs with respect, and at the bare minimum, with their due process rights, UCs at the southwest land border are placed in notoriously inhumane detention facilities, with officers refusing to provide them with the most basic care.²²⁵ This phenomenon is indirectly caused by the ambiguity within TVPRA 2008 and the subjectivity of the least restrictive setting framework.²²⁶ Although the Supreme Court’s recent due process rulings have undoubtedly affected which rights are fundamental under the doctrine of substantive due process, UCs at the southwest land border certainly have the right to be safe from disease or sexual and physical abuse, and to be properly fed and cared for.²²⁷ Today, it is unclear whether those rights are protected under ORR’s implementation of TVPRA 2008’s least restrictive setting framework.

To remedy this humanitarian crisis occurring at the southwest land border, ORR must reinterpret its least restrictive setting framework into a framework that addresses the most prudent means applicable to each UC

221. See OFF. OF REFUGEE RESETTLEMENT, *supra* note 1 (noting that the mission of the Office of Refugee Resettlement is “to promote the health, well-being, and stability” of UCs, along with other migrant groups located within the United States).

222. See *Shaughnessy v. United States*, 345 U.S. 206, 212 (1953).

223. See *supra* notes 27–31 and accompanying text.

224. 8 U.S.C. § 1232(c)(2)(A); see 6 U.S.C. § 279(b)(2)(A).

225. See *supra* Part IV.B.

226. See 8 U.S.C. § 1232(c)(2)(A); *supra* note 120 and accompanying text.

227. See *supra* Part IV.B.

throughout their placement and detention process.²²⁸ By adopting a new most prudent means standard, ORR and its affiliated agencies will be forced to prioritize providing detained UCs with their substantive due process rights, rather than rationalizing placing them in dangerous detention settings, under the subjectivity of TVPRA 2008's least restrictive setting framework.²²⁹

228. *See id.*

229. *See Understanding Child Detention in the U.S., supra* note 25; 8 U.S.C. § 1232(c)(2)(A).