DIFFERENT PASSPORTS, DIFFERENT DUE PROCESS: A CASE FOR ENSURING PROPER SERVICE OF PROCESS FOR IMMIGRANT CHILDREN

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"The bosom of America is open to receive not only the opulent and respected stranger, but the oppressed and persecuted of all nations and religions; whom we shall welcome to a participation of all our rights and privileges."
–George Washington[1]

"No one puts their children in a boat unless the water is safer than the land."
–Warsan Shire[2]

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[1] George Washington, *From George Washington to Joshua Holmes, 2 December 1783*, NATIONAL ARCHIVES, https://founders.archives.gov/documents/Washington/99-01-02-12127 (last visited Jan. 22, 2020).

[2] WARSAN SHIRE, *Conversations About Home (At the Deportation Centre), in* TEACHING MY MOTHER HOW TO GIVE BIRTH (2011).

I. INTRODUCTION

Due process of law, though a constitutional right for all people and integral to the survival of a just democracy, is not equally administered to all. This is especially true for immigrants, who often receive less due process in removal proceedings than they would in other judicial proceedings. Removal proceedings, often referred to as immigration proceedings (and formerly known as deportation proceedings), take place in administrative courts run by the Executive Office for Immigration Review ("EOIR") under the Attorney General of the United States, commonly referred to as Immigration Courts.[3] First, this Note will examine

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[3] Immigration and Nationality Act § 101(b)(4), 8 U.S.C. § 1101(b)(4) (2018). As a general note, removal proceedings under section 240 of the Immigration and Nationality Act apply to non-citizens already present in the United States. *See* Immigration and Nationality Act § 102, 8 U.S.C. § 1102 (2018) (stating that "the provisions of this chapter relating to . . . the removal of aliens shall not be construed to apply to nonimmigrants"). Removal proceedings under section 235 of the Immigration and Nationality Act apply at ports of entry before an arresting officer

how implementing the Immigration and Nationality Act ("INA") leaves immigrant children particularly vulnerable to not receiving proper service of process in removal proceedings. Then, this Note will analyze the current law surrounding service on minors in removal proceedings and explore proposed solutions to ensure proper service. The issues discussed in this will be based on, and were inspired by, the following the story of John and Sammy.[4]

John took his seven-year-old son Sammy on the long, treacherous journey from their country of origin in Central America to the United States. They were fleeing ethnic persecution and hoped to have a better life in the United States. As many immigrants do, John and Sammy crossed the U.S.-Mexico border near El Paso, Texas. Soon after, they were apprehended by a U.S. Customs and Border Patrol ("CBP") Officer and taken to a CBP station The CBP officer asked John why he and Sammy had come to the United States. John replied that he was threatened with death in his country of origin and feared returning there.[5] John said that the CBP officer told him he would go to jail for a few months and then be deported but his son would not go with him. The officer said John and Sammy would not be able to see each other until Sammy turned eighteen. They put John and Sammy into a cell for the night. Their greatest fear—that they may never see one another again—was about to feel hauntingly real.

During the middle of the night, a CBP officer took John out of the cell and transferred him to a detention center while Sammy was asleep. Sammy was left alone in the cell and would soon awake to his reality for the next few months: separation from his father—the only person he knew in the United States. The next day, the Department of Homeland Security ("DHS") issued a Notice to Appear ("NTA") in removal proceedings to Sammy, who felt very alone and very terrified. An accompanying form indicates that the NTA, written only in English, which Sammy did not know

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and are outside the scope of this article. *See* Immigration and Nationality Act §§ 234–235, 8 U.S.C. § 1224–1225. (2018).

[4] Interview with John, in Los Angeles, Cal. (Sept. 24, 2018). To protect their identities and maintain confidentiality, I have used pseudonyms and paraphrased the story of John and Sammy.

[5] While outside the scope of this Note, the statute dictates that the U.S. Customs and Border Patrol officer should have interviewed John to see if he had a credible fear of persecution interview and thereby might be eligible for asylum. *See* Immigration and Nationality Act § 235(b)(1)(B)(ii) ("If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum."); Immigration and Nationality Act § 235(b)(1)(B)(v) (defining "credible fear of persecution" as a significant possibility the interviewee could establish eligibility for asylum).

at all, was explained to Sammy in Spanish. Unbeknownst to John, Sammy was taken to an Office of Refugee Resettlement ("ORR") shelter thousands of miles away on the East Coast of the United States. Were it not for the assistance of a local legal aid organization in the U.S. that took Sammy on as a pro bono client, an Immigration Judge ("IJ") likely would have ordered Sammy removed from the United States while not present in removal proceedings, referred to as an *in absentia* removal order. Fortunately, a class action injunction (and eventual settlement agreement) in a U.S. District Court ordered and facilitated eventual reunification of Sammy and John and put a pause on Sammy's removal proceedings.[6]

But the troubling fact remains that Sammy, a minor, was served with a notice to appear in removal proceedings without any adult present or any adult to also receive service. As a result, there was no adult to explain to the minor what the proceedings would entail and ensure that the minor would be able to attend the proceedings. More troubling is that under current law, the federal government can serve many minors outside the Ninth Circuit without a parent or guardian present and without providing the same information to the minor's parent or guardian.[7]

The regulations for immigration enforcement dictate that the government can serve minors between the ages of fourteen to seventeen directly without any need to serve their parent or legal guardian.[8] This is equally true for immigrant children who have just crossed the border as it is for immigrant children who have been in the United States for many years.[9] However, there are many reasons and ways to ensure that minors receive the same service of process in removal proceedings that they, and U.S. citizen children alike, receive in other judicial proceedings.[10]

This Note seeks to ensure that immigrant children receive the due process of law that they are entitled to receive, as the Supreme Court has held due process rights apply to citizens and non-citizens in the United

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[6] Ms. L. v. U.S. Immigration and Customs Enf't, 18cv0428 DMS (MDD) (C.D. Cal. 2018) (order granting plaintiff's motion for classwide preliminary injunction). John and Sammy were ordered reunited as part of a judge's order in *Ms. L*. Interview with John, *supra* note 4.

[7] *Compare* Llapa-Sinchi v. Mukasey, 520 F.3d 897 (8th Cir. 2008) (affirming that service to a fourteen-year-old defendant at the time of notice without additional notice on a responsible adult was proper), *with* Flores-Chavez v. Ashcroft, 362 F.3d 1150 (9th Cir. 2004) (holding that serving a fifteen-year-old defendant who was released to custody of an adult relative responsible for defendant's appearance at deportation hearing without serving the adult was not a proper notice).

[8] 8 C.F.R. § 103.8(c)(2)(ii) (2019).

[9] *See id.*

[10] *See, e.g.*, FED. R. CIV. P. 4(g) (serving a minor or an incompetent person).

States.[11] While this problem concerns all who reside in the United States, it principally concerns children's safety and well-being —thousands of children are currently being deported without fair trials because they do not know how to navigate U.S. removal proceedings without a parent or guardian. This is particularly true as many unaccompanied children arrive at the U.S.-Mexico border to reunite with a family member currently in the United States.[12] More broadly, some Court of Appeals' reasoning in support of immigration service regulations undermines the natural and legal rights of all people in the United States, including U.S. citizens.

II. BACKGROUND

Recent articles and notes have discussed current challenges and issues facing minors in removal proceedings in the United States but they have not discussed service of an NTA on minors at length. This Note will specifically focus on the DHS's service of NTAs on minors in removal proceedings.

A. WHO ARE THE IMMIGRANT CHILDREN?

Immigrants were born in a foreign country, have since come to the United States, but have not naturalized as U.S. citizens.[13] Immigrants have historically come to the United States from all corners of the world, a trend that continues to this day.[14] Many immigrants today come from Mexico, India, China, Philippines, and Central America.[15]

In 2014, immigrants comprised around thirteen percent of the United States population.[16] As of 2014, the total number of immigrants has more

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[11] U.S. CONST. amend. X. *See also* Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.").

[12] *Migrant Children in the US: The Bigger Picture Explained*, BBC (July 2, 2019), https://www.bbc.com/news/world-us-canada-44532437.

[13] Naturalization is the process by which non-citizens apply for and become U.S. citizens. *See Citizenship Through Naturalization*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/us-citizenship/citizenship-through-naturalization (last visited Feb. 9, 2020).

[14] *Immigration Timeline*, THE STATUE OF LIBERTY-ELLIS ISLAND FOUND., https://www.libertyellisfoundation.org/immigration-timeline (last visited Feb. 9, 2020).

[15] *Immigrant Children*, CHILD TRENDS (Dec. 28, 2018), https://www.childtrends.org/indicators/immigrant-children.

[16] Steven A. Camarota & Karen Zeigler, *Immigrants in the United States*, CTR. FOR IMMIGRATION STUDIES (Oct. 3, 2016), https://cis.org/Report/Immigrants-United-States.

than doubled since 1990, tripled since 1980, and quadrupled since 1970.[17] The reasons immigrants come to the United States are nearly as numerous as the numbers of immigrants themselves, but usually fall into familiar categories called either "push" or "pull".[18] "Push" causes are so named because they are seen as pushing people out of their country of origin. Common examples of push causes include fear of harm, lack of economic opportunities, natural disasters, poor standard of living, lack of freedom, and social factors.[19] "Pull" causes are so named because they are reasons that attract people to a specific country or region of the world.[20] Common "pull" factors include stability in a variety of forms, increased freedoms, better or more plentiful economic and educational opportunities, higher standard of living, social factors, and reuniting with family.[21] Put simply, "pull" has to do with a feeling of wanting to improve your circumstances, "push" has to do with a feeling of needing to leave.

Many immigrant children have a sibling or a relative who is a U.S. citizen.[22] Others know a relative, friend, or neighbor who has already immigrated from their home country to the United States.[23] Some, like people often known as the DREAMers,[24] have spent most of their lives living in the United States and do not know a life in any other country.[25] Others have recently arrived at or between one of more than 300 ports of entry into the United States, and are just beginning to learn about life in the

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[17] *See id.* ("The immigrant population in 2014 stood at 42.4 million . . . the foreign-born population in 2014 has more than doubled since 1990, tripled since 1980, and quadrupled since 1970, when it stood at 9.6 million.").

[18] Juan Ramos, *Push and Pull Factors of Migration*, SCIENCE TRENDS (Nov. 24, 2017), https://sciencetrends.com/politics-economics-influence-push-pull-factors-migration.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *See* BBC, *supra* note 12.

[23] *See, e.g.*, RAFAEL ALARCÓN, IMMIGRANTS OR TRANSNATIONAL WORKERS?, THE SETTLEMENT PROCESS OF MEXICANS IN RURAL CALIFORNIA 6–10 (California Institute for Rural Studies, 1997), http://www.cirsinc.org/publications/farm-labor?download=30:immigrants-or-transnational-workers-the-settlement-process-among-mexicans-in-rural-california (discussing migration and settlement patterns of immigrants).

[24] The Deferred Action for Childhood Arrivals program offered temporary protection from deportation without a pathway to citizenship for the beneficiaries, often referred to as DREAMers. *See* Caitlin Dickerson, *What Is DACA? And How Did It End Up in the Supreme Court?*, N.Y. TIMES (Nov. 12, 2019), https://www.nytimes.com/2019/11/12/us/daca-supreme-court.html.

[25] Alicia Parlapiano & Karen Yourish, *A Typical 'Dreamer' Lives in Los Angeles, Is from Mexico and Came to the U.S. at 6 Years Old*, N.Y. TIMES (Jan. 23, 2018), https://www.nytimes.com/interactive/2017/09/05/us/politics/who-are-the-dreamers.html.

United States.[26] Immigrant children are more likely to live in poverty than non-immigrant children.[27] The states with the largest immigrant populations are California, Texas, New York, Florida, New Jersey, and Illinois.[28]

For the purposes of this Note, the discussion of immigrant children is limited to its legal definition for service of an NTA.[29] In addition, an immigrant child is defined as a person under the age of eighteen currently present in the United States who is not a U.S. citizen and could potentially be summoned to appear in removal proceedings in an Immigration Court. Their current immigration status in the United States has no bearing on our analysis.

B. SERVICE ON MINORS GENERALLY

While the specific requirements may vary between courts and jurisdictions, due process of law requires providing a proper service of process to individuals with a hearing before a court or tribunal. As Justice Powell explained in *Mathews v. Eldridge*, "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[30] In *Mathews*, the U.S. Supreme Court used a three factor test to determine the appropriate level of procedural due process in an administrative case: (1) private interest affected by the current procedure; (2) the risk of erroneous deprivation of the interest and the value of additional/alternative procedural safeguards; and (3) the government's interest in utilizing the existing procedure.[31] Further, the U.S. Supreme Court in *Mullane* has set forth the general elements of notice "in any proceeding": (1) that it is reasonably calculated to reach interested parties and (2) reasonably conveys to interested parties all relevant information.[32]

Although there are no universal requirements or guidelines that

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[26] *At Ports of Entry*, U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/border-security/ports-entry (last updated Apr.2, 2018).

[27] *See* CHILD TRENDS, *supra* note 15. ("A higher proportion of first-generation immigrant children live in poverty (households with incomes below the federal poverty level) than either second-generation immigrant children or non-immigrant children.").

[28] Camarota & Zeigler, *supra* note 16.

[29] 8 C.F.R. § 103.8(c)(2)(ii) (2019). If a Respondents has or obtains U.S. citizenship, the Respondent may no longer be removed from the United States and Department of Homeland Security would have no jurisdiction for removal proceedings. *See* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

[30] Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

[31] *Id.* at 335.

[32] Mullane v. Cent. Hannover Bank & Trust Co., 339 U.S. 306, 314 (1950) (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

specifically pertain to service on minors across all proceedings, federal and state rules of civil procedure have certain guidelines to ensure proper service on minors. The Federal Rules of Civil Procedure mandate that service on a minor be carried out following state law for serving a summons or like process.[33] For example, the California Code of Civil Procedure requires giving a copy of the summons and complaint to a parent, guardian, conservator, or similar fiduciary, or, if no such person can be found with reasonable diligence, to any person having the care or control of such minor or with whom he resides or by whom he is employed, and to the minor if he is *at least* twelve years of age.[34] Interestingly, the California Code takes an extra step to ensure a minor is properly served: if the minor is at least twelve years old, service is required on both the minor and the parent or guardian.[35] Even if the minor is of suitable age and discretion, service is only proper if the parent, guardian, or other suitable adult also receive a copy.[36]

Federal and state juvenile criminal proceedings also provide due process protections for proper service. For example, California, Missouri, and Tennessee require a minor's parent or guardian to be issued a summons when the minor receives a notice to appear in court.[37] In addition, as with service for civil proceedings, even if the minor is of suitable age and discretion, service for criminal proceedings is only proper if the parent or guardian also receives a copy.[38] This incentivizes parents to appear along with their juvenile dependent at the proceedings, as their child's failure to comply with a summons can result in their child being convicted with a

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[33] FED. R. CIV. P. 4(g).

[34] CAL. CIV. PROC. CODE § 416.60 (Deering 2019).

[35] *Id.*

[36] *Id.* The Federal Rules of Civil Procedure also mandate that service on an adult can be proper when "a copy of [the complaint and summons is left] at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there." FED. R. CIV. P. 4(e)(2)(B).

[37] CAL. WELF. & INST. CODE § 658(a) (Deering 2019) ("the clerk of the juvenile court shall issue a notice, to which shall be attached a copy of the petition, and he or she shall cause the same to be served upon the minor, if the minor is eight or more years of age, and upon [both of the parents and any guardian of the minor]."); MO. SUP. CT. R. 114.01(b), (c) (2019) ("The summons shall direct that the juvenile be present at the hearing and, unless the court orders otherwise, require the juvenile's parents, guardian or custodian to appear at the hearing and ensure the presence of the juvenile . . . . Service of summons upon a juvenile under this Rule 114.01 shall be made personally if the juvenile has attained the age of 12 years or, if that age has not been attained, upon the juvenile's parent, guardian or custodian."); TENN. R. JUV. P. 103(b) (2019) ("The court may endorse upon the summons an order directing the parents, guardian or other custodian of the child to appear personally at the hearing and directing the person having custody, possession or control of the child to bring the child to the hearing.").

[38] CAL. WELF. & INST. CODE § 658(a) (Deering 2019); *accord* MO. SUP. CT. R. 114.01(b), (c) (2019); TENN. R. JUV. P. 103(b) (2019).

misdemeanor or felony.[39] An arrest warrant may be issued against parents or guardians who fail to appear at the proceeding of their juvenile dependent.[40]

C. DUE PROCESS CONCERNS REGARDING SERVICE ON MINORS IN REMOVAL PROCEEDINGS

Removal proceedings take place in front of an IJ in Immigration Courts. IJs are appointed by the U.S. Attorney General to determine if a non-citizen is either inadmissible under INA § 212(a) or deportable under INA § 237(a).[41] Respondents in removal proceedings are allowed to be represented by counsel at no expense to the government.[42] The rules governing Immigration Courts are found largely in the INA and the Immigration Court Practice Manual published by EOIR.[43] An IJ's ruling may be appealed to the Board of Immigration Appeals ("BIA").[44] BIA rulings may be appealed to the Federal Circuit Courts of Appeals.[45] It is important to note that because Immigration Courts are housed in the Executive Branch, they are subject to intense politicization and the policy

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[39] CAL. PENAL CODE § 1320 (Deering 2019).

[40] CAL. WELF. & INST. CODE § 660.5(g)(1) (Deering 2019); *accord* MO. SUP. CT. R. 114.01(b), (c) (2019).

[41] Immigration and Nationality Act § 240(a)(2), 8 U.S.C. § 1229a(a)(2) (2018). The Immigration and Nationality Act uses the term "alien" to refer to non-citizens. *See id.* This Note refrains from using that term as it is dehumanizing.

[42] Immigration and Nationality Act § 292, 8 U.S.C. § 1362 (2018). However, although immigration law has not had its *Gideon v. Wainwright* moment yet, many state and local actors have invested in programs seeking to increase the rate of represent removal proceedings. *See, e.g.*, *L.A. Justice Fund*, CALIFORNIA COMMUNITY FOUNDATION, https://www.calfund.org/lajusticefund/ (last visited Mar 4, 2019) ("Launched in 2017, the L.A. Justice Fund has granted $7.4 million to increase access to legal representation and counsel to individuals and families dealing with deportation and removal proceedings in Los Angeles County. The Fund seeks to reinforce a safety net that is pro-family, pro-economic growth and pro-civil and human rights. The L.A. Justice Fund is a partnership with Los Angeles County, the City of Los Angeles, the Weingart Foundation and the California Community Foundation (CCF). Cities across the country have duplicated this innovative cross-sector approach."); *see also* Gideon v. Wainwright, 372 U.S. 335 (1963) (ruling that states are required to provide an attorney to defendants in criminal cases who are unable to afford their own attorneys under the Sixth Amendment of the U.S. Constitution).

[43] EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL (2018), https://www.justice.gov/eoir/page/file/1084851/download.

[44] 8 C.F.R. §§ 1003.1(d)(3)(i)–(ii) (2019); *see also* Matter of M-R-A-, 24 I. & N. Dec. 665, 675 (B.I.A. 2008) ("[The Board of Immigration Appeals] review[s] findings of fact by an Immigration Judge under the clearly erroneous standard of review, but . . . may review de novo questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges.").

[45] *See generally* Immigration and Nationality Act § 242(b), 8 U.S.C. § 1252(b) (2018).

whims of the administration.[46]

Removal proceedings are initiated when the DHS files an NTA with EOIR.[47] DHS (or anyone delegated to do so under the discretion of the Secretary of Homeland Security) then serves the NTA on the person to be placed in removal proceedings, known as the Respondent.[48] As with all documents submitted to EOIR, the NTA "must include a certificate showing [proper] service on the opposing party."[49] Service can be either in person or by certified mail to the Respondent's "last known address."[50] Notably, the NTA must designate the specific time or place of the noncitizen's removal proceedings.[51] A Respondent who fails to attend his or her removal proceedings after the proper issuance of an NTA is ordered removed *in absentia* by the IJ.[52] To remove a Respondent *in absentia*, the government only needs to show that notice was provided and removability was established.[53] The INA section on *in absentia* removals does not mention any evaluation of the Respondent's eligibility for different forms of relief from removal for humanitarian or other reasons.[54] There are only a few ways to rescind an *in absentia* removal order: contesting that service was

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[46] *See, e.g.*, 1 AMERICAN BAR ASSOCIATION, 2019 UPDATE REPORT REFORMING THE IMMIGRATION SYSTEM 6–7 (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf [hereinafter ABA 2019] ("This is a critical moment in the administration of justice within our immigration system. Systems that were already strained by lack of legislative reform and inconsistent policies are now at the breaking point. In the current environment, policies have been put forth that seek to limit access to asylum, counsel, and the courts themselves. There is little regard for the human cost of detention and deportation. While enacting policies that more closely adhere to a fair and humane interpretation of the immigration laws could do much to reverse these problems, there is little question that legislation is necessary to return balance and due process to the system").

[47] Immigration and Nationality Act § 239(a), 8 U.S.C. § 1229 (2018).

[48] *Id.*; *see also* 8 C.F.R. § 1003.13 (2019) ("Service means physically presenting or mailing a document to the appropriate party or parties.").

[49] 8 C.F.R. § 1003.14(a) (2019) (stating that the NTA must indicate the specific Immigration Court in which the NTA is being filed and in which the proceedings will take place).

[50] Matter of M-R-A-, 24 I. & N. Dec. 665, 671 (B.I.A. 2008) (citing Matter of Grijalva, 21 I. & N. Dec. 27, 37 (B.I.A. 1995) (superseded by statute on other grounds as stated in Patel v. Holder*,* 652 F.3d 962, 968 n. 4 (8th Cir. 2011)) ("In *Matter of Grijalva* . . . we held that a Notice of Hearing sent by certified mail to the alien's last known address is sufficient to establish by clear, unequivocal, and convincing evidence that the alien received 'written notice' of the deportation hearing . . . .").

[51] Immigration and Nationality Act § 239(a)(1)(G)(i), 8 U.S.C. § 1229(a)(1)(G)(i) (2018); *see also* Matter of M-R-A-, 24 I. & N. Dec. at 668.

[52] Immigration and Nationality Act § 240(b)(5)(A), 8 U.S.C. §1229a(b)(5)(A) (2018).

[53] *Id.*

[54] Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 218 (2017).

never affected, or that an individual was not able to appear because the individual was in detention.[55]

While the President may suspend certain classes of foreigners from entering the United States under INA § 212(f),[56] non-citizens in the United States are afforded greater protections than foreigners outside the United States.[57] Additionally, the U.S. Supreme Court has held "it is well established that the Fifth Amendment entitles aliens to due process of law in [removal] proceedings."[58] Further, the BIA has cited and followed the general elements of notice outlined in *Mullane* in removal proceedings.[59]

The INA itself is silent on serving NTAs on minor Respondents.[60] Corresponding regulations provide that, for minors under fourteen, service of the NTA shall be made upon the person with whom the minor resides.[61] The regulations also provide that whenever possible, the service be made on the "near relative, guardian, committee, or friend."[62] Unlike service in state civil and juvenile proceedings, the BIA has held service of an NTA on a minor fourteen years of age or older at the time of service is effective, even though notice was not also served on an adult with responsibility for the minor.[63] The BIA, however, allows for an adult to be served, holding that nothing in the regulations or precedents precludes the Department of Homeland Security, as a matter of policy or practice, from also serving an adult when a minor is between the ages of fourteen and seventeen.[64]

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[55] *Id.* at 219 (citing 8 U.S.C. § 1229a(b)(5)(C)(ii)).

[56] Immigration and Nationality Act § 212(f), 8 U.S.C. 1182(f) (2018).

[57] *See* East Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838, 859 (N.D. Cal. 2018) (stating that "[n]o court has ever held that § 1182(f) 'allow[s] the President to expressly override particular provisions of the INA.'") (quoting Trump v. Hawaii, 138 S. Ct. 2392, (2018)). Immigration and Nationality Act, which authorizes the President to suspend aliens from entering the United States, does not authorize the President to impose a penalty on aliens already present within United States through categorical denial of eligibility for asylum. Immigration and Nationality Act § 212(f).

[58] Reno v. Flores, 507 U.S. 292, 306 (1993). When *Reno v. Flores* was written, removal proceedings were called deportation proceedings. *Id. See also* Fong Yue Ting v. U.S., 149 U.S. 698, 761 (1893) (Fuller, J. dissenting) ("The due process clause of the Fifth Amendment mandates that any person residing in the country be given an opportunity to challenge a deportation order in a judicial hearing.").

[59] *See* Matter of C-R-C-, 24 I. & N. Dec. 677, 679 (B.I.A. 2008).

[60] Llanos-Fernandez v. Mukasey, 525 F.3d 79, 82 (2nd Cir. 2008).

[61] 8 C.F.R. § 103.8(c)(2)(ii) (2019).

[62] Matter of Mejia-Andino, 23 I. & N. Dec. 533, 536 (B.I.A. 2002) (finding that service of an NTA on Respondent's uncle was improper where no effort was made to serve it on Respondent's parents, who apparently lived in the United States).

[63] Matter of Cubor-Cruz, 25 I. & N. Dec. 470, 473 (B.I.A. 2011).

[64] *Id.*

The BIA has also found service proper when DHS mailed an NTA to the last address provided by his or her parent, with whom the Respondent was residing.[65] When DHS seeks to re-serve a respondent to effect proper service of a notice to appear that was defective under the regulatory requirements for serving minors under the age of 14, the BIA has held that a continuance should be granted for that purpose.[66] Serving a Respondent or Respondent's parents who appear at their proceedings despite improper service does not constitute proper service as service must be affected (as noted in the accompanying certificate indicating the opposing party or their counsel has been served) before the NTA is filed with the Court.[67]

D. CIRCUIT SPLIT ON HOW TO SERVE MINORS BETWEEN THE AGES OF FOURTEEN AND SEVENTEEN

With respect to regulations on how to implement a statute, the implementing "agency's interpretations are entitled to deference and are 'controlling unless plainly erroneous or inconsistent with the regulation.'"[68] There is currently a split amongst different federal circuits on whether an adult also needs to be served when serving a minor between the ages of fourteen and seventeen with an NTA. The Eighth and Fifth Circuits have upheld the BIA's ruling that service is still effective where an adult was not also served in the cases of respondents aged fourteen and seventeen.[69] Judge Melloy, writing for the Eighth Circuit in *Llapa-Sinchi*, referencing a handful of state statutes that allow for minors to be served, reasoned that because minors "can be responsible for their own legal status and can waive their constitutional rights," serving fourteen- to seventeen-year-old Respondents does not violate their due process rights.[70] Thus, the Eight Circuit held in *Llapa-Sinchi* that "[i]t is therefore logical for the regulations to provide that minors entering the country illegally can be

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[65] Matter of Gomez-Gomez, 23 I. & N. Dec. 522, 528 (B.I.A. 2002).

[66] Matter of W-A-F-C-, 26 I. & N. Dec. 880, 882–83 (B.I.A. 2016); *accord* Matter of E-S-I-, 26 I. & N. Dec. 136, 146 (B.I.A. 2013).

[67] 8 C.F.R. § 1003.14(a) (2019).

[68] Llanos-Fernandez v. Mukasey, 525 F.3d 79, 82 (2nd Cir. 2008) (quoting Auer v. Robbins*,* 519 U.S. 452, 461 (1997)).

[69] Llapa-Sinchi v. Mukasey, 520 F.3d 897, 899–900 (8th Cir. 2008) (finding fourteen-year-old Respondent's due process rights were not violated by fact that adult was not served with notice of removal); see Lopez-Dubon v. Holder, 609 F.3d 642, 645–47 (5th Cir. 2010) (noting B.I.A.'s reliance on the holding in *Llapa-Sinchi* that service on a seventeen-year-old minor Respondent does not violate due process, the rejection of *Flores-Chavez*, and concluding for itself that service on a seventeen-year-old minor Respondent does not violate due process).

[70] Llapa-Sinchi, 520 F.3d at 900.

responsible for receiving notice regarding their court proceedings and yet also provide that minors may need assistance from adults to obtain basic necessities."[71]

Judge Melloy's reasoning in *Llapa-Sinchi* rests on a slippery slope and misguided assumptions. Concluding that a person is not initially entitled to any given right because that person is capable of waiving that right is potentially dangerous. If any right waivable by an individual is deemed not necessary to begin with, why have rights at all? While it is uncertain if the Eight Circuit would apply the reasoning in *Llapa-Sinchi* to U.S. citizens under the age of eighteen, such an analysis should not be broadly applied to anyone regardless of citizenship status.

Judge Melloy specifically reasons that minors "entering the country illegally can be responsible for receiving notice regarding their own court proceedings."[72] However, it is unclear if he intended this to solely apply to minors who entered the country illegally.[73] Would the Eighth Circuit apply its decision in *Llapa-Sinchi* to minors who properly declared a fear of returning to their country and were advised to apply for asylum regardless of their documentation or lack thereof? Judge Melloy appears to be making a broad assumption that all minor Respondents in removal proceedings have entered the country illegally. Such an assumption is, at best, misguided. Many people in removal proceedings enter the United States with proper legal documentation or to seek asylum, which does not require legal documentation; many remain in the United States legally during their removal proceedings.

On the contrary, in *Flores-Chavez v. Ashcroft*, the Ninth Circuit held that a fifteen-year-old Respondent was entitled to reopen removal proceedings after he failed to appear at the hearing and was ordered deported in absentia because the adult relative, who presumed to take responsibility for the Respondent's appearance at his deportation hearing, did not receive adequate the Notice of Hearing and Order to Show Cause in violation of the due process rights.[74] The Ninth Circuit reasoned that because minors in immigration detention or a shelter are released to an

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[71] *Id.* at 901.

[72] *Id.*

[73] *Id.* In *Llapa-Sinchi*, the Eighth Circuit said: "We decline Llapa-Sinchi's invitation to adopt a per se rule that service to minors alone always violates the constitution." *Id.* at 900. This seems to indicate that serving a minor alone may violate the Constitution. *Id.* Although the Eighth Circuit does not say legal immigration status was a factor in determining that due process was not violated, there does seem to be some factor beyond Llapa-Sinchi's age that made the court decide that service of process was adequate in this situation. *See id.*

[74] Flores-Chavez v. Ashcroft, 362 F.3d 1150, 1155 (9th Cir. 2004).

adult, it would be inconsistent for the minor to be served with the NTA.[75] The Ninth Circuit also pointed out the arbitrariness of the cutoff age of fourteen set by the government.[76]

Judge Wardlow, writing for the Ninth Circuit in *Flores-Chavez*, applied the *Mathews* test to due process rights at issue.[77] *Mathews* considers three factors in determining the level of due process necessary: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[78] Under *Mathews*, the court must balance the affected interests to see "whether the administrative procedures provided here are constitutionally sufficient."[79] The Ninth Circuit in *Flores-Chavez* concluded that the Respondent's interest in removal proceedings is clearly "one of grave importance"; the risk of error is high in cases that are not heard on the merits and a juvenile respondent needs an adult to navigate removal proceedings; and the burden on the government is minor and actually promotes government efficiency.[80] Because the minor's liberty, and often life, are at issue in EOIR proceedings, regardless of their immigration status upon entering the U.S., the government should be deferential to the Fifth Amendment's stronger due process of law protection. The due process concerns present here should lead us to lean more closely to the Ninth Circuit's ruling in *Flores-Chavez*. Should the issue come before The Supreme Court, having The Supreme Court making the same ruling as the Ninth Circuit in *Flores-Chavez* would be perhaps the most sustainable way to ensure a parent or guardian is served with an NTA for minor Respondents between fourteen and seventeen years of age.

For minors who are in either ORR custody or otherwise in detention apart from their parents, service issued against a minor under fourteen years

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[75] *Id.* at 1156.
[76] *Id.* at 1157–60.
[77] *Id.* at 1160 (citing Mathews v. Eldridge, 424 U.S. 319, 332 (1976)).
[78] *Id.* at 1160–62.
[79] *Id.* at 1160 (quoting Mathews, 424 U.S. at 334).
[80] *Id.* at 1161–62 ("[I]t is to the INS's great benefit to have as many juveniles as possible attend their hearings, thus avoiding the expenditures of time and money in locating those ordered deported *in absentia.* Furthermore, the incidental burden incurred by the INS is minimal when compared both with the minor's interests in understanding his rights and responsibilities and in appearing at his immigration proceedings, and with the likely effectiveness of proper notice to the responsible adult in achieving those ends.").

of age may be made properly on the director of a facility in which the minor is detained.[81] Assuming the minor has been properly and legally placed in detention, the analysis in the preceding paragraph is also applicable to minors in detention. This is because having those in custody of detained minors between fourteen and seventeen receive notice will make the detained minor more likely to appear at their hearing. This is particularly true when the minor requires the assistance or permission of the detention facility to attend his or her hearing.

E. PROSECUTORIAL DISCRETION ON WHETHER OR NOT TO ISSUE A NOTICE TO APPEAR

The Department of Homeland Security's Office of Chief Counsel ("OCC"), the government prosecutor in immigration cases, files NTAs with EOIR.[82] Like prosecutors in criminal cases, DHS prosecutors, referred to as trial attorneys, have prosecutorial discretion over which cases to pursue. In the immigration context, prosecutorial discretion is a decision by ICE officials "not to assert the full scope of the enforcement authority available to the agency in a given case."[83] ICE officials also have discretion on how to pursue cases and, notably, advise their DHS colleagues on service to Respondents.[84]

Under the Trump administration, Tracy Short, U.S. Immigration and Customs Enforcement's Principal Legal Advisor, has encouraged DHS to increase its efforts to place more immigrants in removal proceedings.[85] In an internal DHS policy memorandum, Short outlined that prosecutorial discretion should be considered only in four specific circumstances.[86] Further, the memorandum also relieves DHS of its prosecutorial duty to

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[81] Matter of Amaya, 21 I. & N. Dec. 583, 585 (B.I.A. 1996); *see also* 8 C.F.R. § 103.5a(c)(2)(ii) (2019).
[82] 8 C.F.R. § 1003.14(a) (2019).
[83] Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel, (June 17, 2011), at 2, https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.
[84] *Id.*
[85] *See* Memorandum from Tracy Short, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, to All OPLA Attorneys (Aug. 15, 2017), https://assets.documentcloud.org/documents/4996339/18100807.pdf.
[86] *Id.* at 5–6 (directing that "Member or Immediate Relative of a Military Service Member," "Clearly Approvable and Meritorious Benefit Applications," "Extraordinary Humanitarian Factors," and "Significant Law Enforcement Benefit" categories "may merit careful consideration").

check their email for requests of prosecutorial discretion from a Respondent's attorney or concerned community member.[87]

F. SPECIAL PROTECTIONS AND CONCERNS OF CHILDREN IN REMOVAL PROCEEDINGS

Because children in removal proceedings face special concerns, the Trafficking Victims Protection Reauthorization Act ("TVPRA") affords special protections to minors who are not together with their parents,[88] referred to as unaccompanied minors ("UACs").[89] For example, the TVPRA contains measures to ensure children are not vulnerable to human trafficking, eliminates the one year bar for asylum applications for minors, and provides Special Immigrant Juvenile Status ("SIJS") as a form of relief for minors fleeing abuse, neglect, abandonment or something similar in their country of origin.[90] Another key provision dictates that unless a minor is represented by "an attorney or a legal representative, a near relative, legal guardian, or friend," an Immigration Judge cannot accept a child's admission of removability.[91] However, this protection does not extend to the *in absentia* removal of minors.[92] As a result, whether TVPRA protections go far enough is debatable.

The current importance of proper service on minors in removal proceedings can be underscored by the increase in the number of minors removed *in absentia*.[93] As of February 20, 2020, minors, whose case began in Fiscal Year 2017 through 2019,[94] that was ordered removed *in absentia*

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[87] *Id.* at 4 n.6 ("OPLA will no longer required to moniotor or use email inboxes dedicated solely for the submission of requests for prosecutorial discretion.").

[88] *See* 22 U.S.C. §§ 7101–7114 (2018).

[89] A child may be classified as "unaccompanied" if the child even if the child is separated from the parents under a family separation order. *See, e.g.*, Lisa Riordan Seville & Hannah Rappleye, *Trump Admin Ran 'Pilot Program' for Zero Tolerance at Border in 2017*, NBC NEWS (June 29, 2018), https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616.

[90] 8 U.S.C. § 1101(a)(27)(J) (2018).

[91] 8 C.F.R. § 1240.10(c) (2019). However, an Immigration Judge can use statements or testimony from an unrepresented child to find the child removable. *See* 8 C.F.R. § 1003.42 (2019).

[92] Immigration and Nationality Act § 240(b)(5)(A), 8 U.S.C. § 1229a(b)(5)(A) (2018).

[93] Juveniles – Immigration Court Deportation Proceedings, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, https://trac.syr.edu/phptools/immigration/juvenile (last visited Feb. 20, 2020).

[94] About the Data, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, https://trac.syr.edu/phptools/immigration/juvenile/about_data.html (noting that the federal government's fiscal year runs from October 1 to September 30).

are as follows: 12,702 in 2017, 40,664 in 2018, and 46,978 in 2019.[95] This increase is due in part to the number of minors in removal proceedings increasing from 62,013 in 2017 to 393,694 in 2019.[96] This is also due in part to over half of all minors (549,449 unrepresented out of 1,016,204 total) whose cases have begun since Fiscal Year 2005 in deportation proceedings without legal representation.[97] The proportion of unrepresented minors has risen to 68 percent in 2019,[98] suggesting that access to representation has not kept pace with the rise in children in deportation proceedings.

The rise in minors removed *in absentia*, however, is also a due process concern. Many respondents, including children, in removal proceedings lack legal representation.[99] It is especially critical that children receive proper service in removal proceedings. A 2014 analysis showed that 92.5% of represented children appeared at their immigration court hearings, while only 27.5% of unrepresented children did so.[100] Thus, it can be inferred children would be less likely think to seek legal representation without proper notice of their rights.

Additionally, minors in removal proceedings in the United States lack protection of international treaty. United Nations Convention on the Rights of the Child ("CRC") is said to be the "uncontested primary normative standard in relation to children's rights."[101] The CRC declares that the best interests of the child shall be a primary consideration in all judicial proceedings involving children.[102] However, even the countries that have

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[95] TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, About the Data, *supra* note 93. To see the data, on the website, select "Absentia" for the left and center columns and "Fiscal Year Case Began" for the right column. *Id.*

[96] *Id.* To see the data on the website, select "Fiscal Year Case Began" for all three columns. *Id.*

[97] *Id.* To see the data on the website, select "Fiscal Year Case Began" for the left and center columns and "Represented" for the right column. *Id.*

[98] *Id.* To see the data on the website, select "Fiscal Year Case Began" for the left and center columns and "Represented" for the right column. Click "2019" in the left column, then divide the number from "Not Represented" (217,393) in the right column by "All" (393,694) in the same column to get 68 percent.

[99] *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 24 (2015) (finding that 37 percent of adults and 55 percent of children in immigration removal proceeding received representation from 2007 to 2012).

[100] *Taking Attendance: New Data Finds Majority of Children Appear in Immigration Court*, AM. IMMIGRATION COUNCIL (July 29, 2014), https://www.americanimmigrationcouncil.org/research/taking-attendance-new-data-finds-majority-children-appear-immigration-court.

[101] UNICEF & U.N. HIGH COMM'R FOR HUMAN RIGHTS REG'L OFFICE FOR EUROPE, JUDICIAL IMPLEMENTATION OF ARTICLE 3 OF THE CONVENTION ON THE RIGHTS OF THE CHILD IN EUROPE (2012) at 7 [hereinafter UNICEF].

[102] G.A. Res. 44/25, Convention on the Rights of the Child, at 2 (Sept. 2, 1990), https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf (stating "[i]n all actions

ratified the CRC often struggle to implement children's rights in the context of migration, as national immigration laws often do not adopt a child rights perspective, and national child protection laws often miss the specific concerns and nuances related to immigrant children.[103] Indeed, systems and laws tend to view immigrant children first as foreigners who do not benefit from the full set of rights afforded to citizens, and only secondly as children with basic human rights who require special protections due to their dependency and developmental capacity.[104] Because the United States is the only country yet to ratify the United Nations Convention on the Rights of the Child ("CRC"), United States has no legal obligation to put the best interest of the immigrant children as the primary consideration in removal proceedings.[105]

III. ANALYSIS AND APPLICATION

Given the large number of *in absentia* removals of minors, the importance of ensuring proper service on minors in removal proceedings should not be understated. Further, the Fifth Amendment entitles Respondents in removal proceedings to due process, which includes proper service.[106] The Supreme Court held that service is proper if it is (1) reasonably calculated to reach interested parties and (2) reasonably conveys to interested parties all relevant information.[107]

A. SERVING THE PARENT OR GUARDIAN OF A MINOR IN REMOVAL PROCEEDINGS IS PROPER SERVICE

Serving the parent or guardian of a minor Respondent is reasonably calculated to reach interested parties. Because more than 85 percent of Respondents in Immigration Court rely on interpreters, immigrant parents

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concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" in article 3 § 1).

[103] UNICEF, *supra* note 101, at 11.

[104] INT'L ORG. FOR MIGRATION, CHILDREN ON THE MOVE 2–3 (2013), http://publications.iom.int/bookstore/free/Children_on_the_Move_15May.pdf.

[105] United States is the only signatory country yet to ratify the Convention on the Rights of the Child. *See* Status of Ratification Interactive Dashboard, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, https://indicators.ohchr.org (last updated Jan. 7, 2020).

[106] Reno v. Flores, 507 U.S. 292, 306 (1993).

[107] Mullane v. Cent. Hannover Bank & Trust Co., 339 U.S. 306, 314 (1950).

and children alike may not sufficiently understand the NTA.[108] However, adults are more likely to adhere to the NTA than minors because adults recognize legal responsibilities better than minors.

The NTA reasonably conveys all relevant information, including information about the nature of the proceedings, charges against the Respondent, that the Respondent may be represented by counsel, the time and location of the proceedings, and consequences for failure to appear.[109] The parent or guardian will likely pass along all relevant information to the child and take the minor Respondent to the proceedings. Thus, all interested parties are more likely receive all the relevant information when DHS serves the parent or guardian with the NTA.

B. FAILING TO SERVE THE PARENT OR GUARDIAN OF A MINOR IN REMOVAL PROCEEDINGS IS IMPROPER SERVICE

Serving an NTA on the children, but not on the parents or guardians, is improper service as it is not reasonably calculated to reach all interested parties, nor does it reasonably convey all relevant information to interested parties. This is particularly true in cases where a minor under fourteen is served without serving the parents or guardians. In fact, federal regulation requires "service [on minors under fourteen years of age] shall be made upon the person with whom the . . . minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend."[110] However, because children are not considered legal adults until at least 18,[111] service on parents or guardians should also be mandatory in cases in which minors are between fourteen and seventeen. Parents or guardians are undoubtedly an interested party in any court proceedings involving their children.[112] The interest of parent or guardian does not change whether the child is one or seventeen years old.

Serving an NTA on only a minor would put the burden on the minor to ensure that the parent or guardian receive a critically important event in

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[108] *See* APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 19 (2009), https://www.appleseednetwork.org/uploads/1/2/4/6/124678621/assembly_line_injustice-_blueprint_to_reform_americas_immigration_courts.pdf.

[109] *See* Immigration and Nationality Act § 239(a)(1)–(2), 8 U.S.C. § 1229(a)(1)–(2) (2018).

[110] Matter of Cubor-Cruz, 25 I. & N. Dec. 470, 471 (B.I.A. 2011) (quoting 8 C.F.R. § 103.8(c)(2)(ii) (2019)).

[111] *Age of Majority by State 2020*, WORLD POPULATION REVIEW (Feb. 17, 2020), http://worldpopulationreview.com/states/age-of-majority-by-state.

[112] *See, e.g.*, FED. R. CIV. P. 4(g); Mullane, 339 U.S. at 314.

the minor's life. Doing so unfairly and inefficiently shifts the government's responsibility to serve the minor's parent or guardian. Assuming that a minor would inform the parent or guardian of the removal proceedings is unlikely to be "reasonably calculated to reach interested parties."[113] It is also possible that a minor might choose not to share the information provided by the NTA or conceal the NTA from the parent or guardian for any number of reasons, namely immaturity.[114]

The government must reasonably convey all relevant information to parents or guardians. Even if a minor informs the parent or guardian of the NTA, there is no guarantee that the minor will convey all relevant information. It is possible that the minor might not convey all the relevant information to the parent or guardian for any number of reasons. Perhaps the minor might inform the parent or guardian of the time, date, and nature of proceedings, but neglect to mention the right to be represented by counsel during such proceedings.[115] The minor might also neglect to mention or fail to understand the consequence for failure to attend the proceedings[116]—a removal order *in absentia*—and thereby fail to convey the seriousness of the proceedings. In doing so, they would be less likely to have a parent or guardian involved in their case.

Further, while the Eight Circuit's argument in *Llapa-Sinchi* that minors between fourteen and seventeen can be responsible for their legal status by receiving service and appearing at court may apply in certain situations,[117] many minors are not mature enough. In fact, it would be more logical to presume that any individual who is legally under the care of any guardian (as all non-emancipated minors are) is not mature enough to receive service. The Eighth Circuit's reasoning in *Llapa-Sinchi* is flawed as it confuses a

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[113] Mullane, 339 U.S. at 314.

[114] J. D. B. v. North Carolina, 564 U.S. 261, 262 (2011) ("Children 'generally are less mature and responsible than adults,' . . . they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,' . . . and they 'are more vulnerable or susceptible to . . . outside pressures" than adults.'").

[115] Emily Ryo, *Representing Immigrants: The Role of Lawyers in Immigration Bond Hearings*, 52 L. & SOC'Y REV. 503, 522 (2018) (finding that represented respondents in removal proceedings are more likely to submit documents to the court, obtain the government's file on Respondent, and make legally relevant arguments). Further, "the positive relationship between legal representation and hearing outcomes also raises the possibility that perhaps even more important than what lawyers do, their mere presence in the courtroom might serve an important signaling function that advantages their clients." *Id.* at 505.

[116] J. D. B., 564 U.S. at 262.

[117] Llapa-Sinchi v. Mukasey, 520 F.3d 897, 900 (8th Cir. 2008) (suggesting that "minors can be required to navigate through the justice system and make decisions affecting their rights without running afoul of due process.").

minor Respondent of a suitable age's right to waive a certain constitutional right with either the minor Respondent's waiver of those constitutional rights.[118] It also may be based on the absurd notion that, Respondents, as non-citizen minors, in immigration cases are not entitled to the same due process rights as U.S. citizen minors in court proceedings. Such a notion would be held by the Eight Circuit despite the Supreme Court's holding that due process rights apply in Removal Proceedings,[119] and the BIA having cited and followed the general elements of notice outlined by the Supreme Court in *Mullane*.[120]

C. POLICY IMPLICATIONS OF SERVICE ON MINORS

Any Circuit Court ruling that different service of process rules for citizen and non-citizen minors are allowed is incompatible with precedent established by the Supreme Court in *Reno*, that due process rights apply in Removal Proceedings. In doing so, *Cubor-Cruz*'s interpretation of 8 C.F.R. 103.8(c)(2)(ii) creates a different legal system for service to citizen and non-citizen minors. Congress's power to treat citizens and non-citizens who are present in the U.S. differently is not strong enough to merit such unequal treatment. Further, changing the rules of service of process will not inhibit the U.S. federal government's plenary and sovereign right to control its borders or deport non-citizens.[121] It would only make their removal proceedings fairer for non-citizens, especially non-citizen minors.

Changing service of process requirements for non-citizen minors fourteen to seventeen years old would not unduly burden DHS. Most cases would require printing an additional copy of the NTA and serving one additional person (the parent or guardian) who very likely lives at the same address as the minor Respondent. Alternatively, serving NTA directly to the parent or guardian of minor Respondents would actually simplify service process and likely ensure that the minor is informed of the proceedings and

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[118] *See id.*

[119] Reno v. Flores, 507 U.S. 292, 306 (1993).

[120] *See* Matter of C-R-C-, 24 I. & N. Dec. 677, 679 (B.I.A. 2008).

[121] Even though such control over immigration is not expressly provided for in the Constitution, such powers have long been imputed to the federal government by the U.S. Supreme Court. *See* Fong Yue Ting v. U.S., 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."); Chae Chan Ping v. U.S., 130 U.S. 581, 606–07 (1889) ("The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments.").

assist the minor in attending the proceedings. Further, serving the parents of all minors is something that occurs in civil and juvenile criminal proceedings, so it is standard practice and could be easily adopted by DHS.

A parent or guardian is also better able to ensure their child attends their removal proceedings than a child would be on their own. Like all court proceedings, removal proceedings will likely occur during typical business hours from around 7:30 a.m. until 4:00 p.m.[122] Because children must attend school during most of these times[123] and need, at the very least, their parents or guardians to contact the school to excuse the absence[124], serving only minors is impractical. It is also possible that the parents or guardians will need to provide or arrange transportation for the minors to get to their removal proceedings as the children likely do not have own means to get to the Immigration Court.

The ease with which DHS can serve the parents or guardians of all minor Respondents far outweighs the difficulties and problems only serving the minors. Minors, who are unable to comprehend the NTA, or who do not tell their parent or guardian about the NTA, are likely to miss their court hearing and be ordered removed *in absentia* by an IJ. This would be particularly devastating because minors removed from the U.S. will be separated from family, even if only temporarily.

The movement of child migrants for a variety of reasons, whether voluntarily or involuntarily, within or between countries, with or without their parents or other primary caregivers, might place them at risk (or at an increased risk) of inadequate care, economic or sexual exploitation, abuse, neglect, and other forms of violence and human trafficking.[125] Non-citizens found removable from the United States, whether by a DHS officer at a port of entry or by an IJ at a removal hearing, are deported to their country of citizenship.[126] The same system applies to accompanied and

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[122] *See, e.g.*, Los Angeles – N. Los Angeles St. Immigration Court, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/los-angeles-n-los-angeles-st-immigration-court (last updated Jan. 22, 2020).

[123] Bryce Loo, *Education in the United States of America*, WORLD EDUC. NEWS & REVIEWS (June 12, 2018), https://wenr.wes.org/2018/06/education-in-the-united-states-of-america.

[124] *See, e.g.*, CAL. EDUC. CODE § 48205(a)(7) (Deering 2019) (requiring that the pupil's absence for court appearance should be requested in writing by the parent or guardian and approved by the principal or a designated representative).

[125] *Children on the Move*, TERRE DES HOMMES INT'L FED'N, https://www.terredeshommes.org/causes/children-on-the-move (last visited Feb. 21, 2019).

[126] *See Deportation*, USAGOV, https://www.usa.gov/deportation (last updated Oct. 9, 2018) ("[T]he receiving country of the person being deported must agree to accept them and issue travel documents before the U.S. Immigration and Customs Enforcement (ICE) carries out a removal order . . . . The majority of removals are carried out by air at U.S. government expense,

unaccompanied minors alike.[127] As Claudia Portela, the project coordinator of Salesian Father Chava soup kitchen in Tijuana, Mexico, where many Mexican citizens are deported to, says: "Deportation is like bereavement, it's a huge loss and if there's no help, the streets will take you."[128]

Thus, serving the parent or guardian of minors will get–minor Respondents to attend their removal proceedings with higher frequency. Further, in *Matter of Cubor-Cruz*, the BIA noted that DHS can still serve adults or guardians of children between the ages of fourteen and seventeen.[129] Accommodating the Trump administration's goal of processing immigration cases more quickly[130] should not come at the expense of proper service allowing minors to have their day in court. Hence, DHS should use reasonable efforts to serve an NTA on the parents or guardians of all children—minors who are under eighteen.

For families separated at the border under either the previous or the proposed future family separation policies[131], minors would be potentially removed independently of their parents. The risks of minors being deported on their own has been mentioned previously but merit repeating. If family separation policy is implemented again,[132] every effort should be made to

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although some removals may use a combination of air and ground transportation."); *see also ICE Air Operations*, U.S. IMMIGRATION & CUSTOMS ENF'T, https://www.ice.gov/factsheets/ice-air-operations (last updated July 7, 2016) ("Mexican nationals ordered removed from the United States travel on domestic flights from various U.S. cities to Southern tier cities such as San Diego, Calif. and Brownsville, Texas. They are then bused across the U.S.-Mexico border. Other foreign nationals ordered removed are flown from various U.S. cities or IAO hub cities such as Mesa, Ariz., San Antonio, Texas, Alexandria, La., and Miami, Fla., to Central and South America, and other countries.").

[127] *See* USAGOV, *supra* note 126.

[128] Nina Lakhani, *This Is What the Hours After Being Deported Look Like,* GUARDIAN (Dec. 12, 2017), https://www.theguardian.com/inequality/2017/dec/12/mexico-deportation-tijuana-trump-border); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) ("Deportation is always a harsh measure.").

[129] Matter of Cubor-Cruz, 25 I. & N. Dec. 470, 473 (B.I.A. 2011).

[130] *See generally* Laila Robbins, *Faster, Not Fairer: How Jeff Sessions is Crippling Immigration Courts*, BRENNAN CTR. FOR JUSTICE (June 22, 2018), https://www.brennancenter.org/Jeff-sessions-crippling-immigration-court ("Immigration judges must complete 700 cases per year regardless of the type of cases before them . . . . In short, quotas risk pushing immigration judges to prioritize speed—even at the cost of fair hearings.").

[131] *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration*, DEP'T OF JUSTICE (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions.

[132] Family separation policy has troubling legal, moral, and economic effects. *See, e.g.*, Kristina Davis, *San Diego Judge Officially OKs Family Separation Settlement; New Asylum Interviews Already Underway*, SAN DIEGO UNION TRIB. (Nov. 15, 2018, 12:45 PM), https://www.sandiegouniontribune.com/news/immigration/sd-me-asylum-families-20181115-

reunite parents or guardians and their children. If families are united, serving the parents or guardians would be proper. If the U.S. federal government cannot (or will not) reunite parents or guardians with their children, NTAs issued on the minor should be issued in accordance with the guidelines of serving on the UACs. In the next section, an expansion of rights for the UACs in removal proceedings will be discussed.

IV. PROPOSED SOLUTIONS

A. WHAT CAN WE LEARN FROM CIVIL AND CRIMINAL SERVICE ON JUVENILES?

Serving minors' parents or guardians until they reach eighteen may still seem redundant , particularly given the BIA precedent in *Cubor-Cruz* supporting otherwise.[133] However, due process rights can only be safeguarded when DHS properly serves the parent(s) or guardian(s) of all minor Respondents. The government serving a legally responsible adult in charge of a minor in addition to the minor properly ensures that the notice is reasonably calculated to reach interested parties. Likewise, the

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story.html ("After the children were forcibly separated from their parents, the trauma made it difficult for the parents to adequately communicate during their interviews with asylum officers . . . some 400 parents who were . . . deported without their children."); *see also* Caitlin Dickerson, *The Price Tag of Migrant Separation: $80 Million and Rising*, N.Y. TIMES (Nov. 20, 2018), https://www.nytimes.com/2018/11/20/us/family-separation-migrant-children.html; Daniel Mortiz-Rabson, *The Trump Administration Has Conducted 8,000 Family Separations, Violated International Law, Report Says*, NEWSWEEK (Oct. 11, 2018, 5:53 PM), https://www.newsweek.com/human-rights-violations-international-law-border-policy-cbp-dhs-trump-1165726 ("The investigators [of human rights abuses during the family separation of Summer 2018] describe a poorly coordinated interagency process that left distraught parents with little or no knowledge of their children's whereabouts.") (internal quotations omitted). Current indications from the Trump White House seem to indicate the family separation policy was the brainchild of former Attorney General Jefferson Sessions. *See, e.g.*, Holly Rosencrantz, *Kelly Says Sessions "Surprised" White House with Child Separation Policy*, CBS NEWS (Dec. 30, 2018), https://www.cbsnews.com/news/john-kelly-la-times-interview-says-sessions-surprised-white-house-with-child-separation-policy ("'What happened was Jeff Sessions, he was the one that instituted the zero-tolerance process on the border that resulted in both people being detained and the family separation,' [former White House Chief of Staff John Kelly] said. 'He surprised us.'"). However, given the continued anti-immigration rhetoric aimed at migrants from Central America, it would be highly naïve and imprudent to rule out the possibility of future family separations. Particularly in light of President Trump's willingness to shut down the federal government to try to get a wall built on the southern border, it seems that the current presidential administration is committed to discouraging immigration over the southern border. *See, e.g.*, *Trump Vows 'Very Long' Shutdown in Border Wall Standoff*, BBC NEWS (Dec. 21, 2018), https://www.bbc.co.uk/news/world-us-canada-46637638 ("'I hope we don't but we are totally prepared for a very long shutdown,' [President Trump] said.'").

[133] *See* Matter of Cubor-Cruz, 25 I. & N. Dec. 470.

government serving an NTA on the parent or guardian will instantly provide all relevant information to both interested parties: the parent or guardian and the child whom the parents will—in all likelihood—notify.

Serving minors and their parents or guardians until the minors reach eighteen is worth the extra effort to ensure that minors receive proper due process. Just like in criminal proceedings, the minor's life and liberty are at issue in removal proceedings. Therefore, DHS and EOIR should be deferential to the Fifth Amendment's procedural due process protections and require the same service of process on minors in removal proceedings that they would receive in criminal proceedings. This is particularly true given that many immigrants—both minors and adults—are often fleeing persecution or torture in their country of origin when they arrive at the United States.[134] Ensuring that Respondents are properly informed to attend the removal proceedings and advocate for themselves—that they should stay in the United States and/or that they should not be deported to their country of origin—will always lead to a more just outcome than a removal *in absentia*. Removal proceedings will also be more just because the minor Respondents will be able to argue their case better to the IJ with the help of their parent or guardian. Particularly for minor Respondents with little recollection of the country of origin or specific incidents that support an asylum claim, their parent or guardian will be pivotal in bringing more relevant facts—through both evidence and testimony—during removal proceedings.[135] Despite some IJs asserting that they are able to sufficiently explain the law to Respondents as young as three or four, [136] the IJ will be better equipped to make an informed and just decision with more clear and complete information from the Respondents.[137] Ensuring that a minor Respondent is able to present all relevant information into evidence will

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[134] NADWA MOSSAAD, OFFICE OF IMMIGRATION STATISTICS, REFUGEES AND ASYLEES: 2018. (Oct. 2019), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/refugees_asylees_2018.pdf (indicating 105,000 immigrants arriving to United States sought asylum).

[135] To that end, a difficulty in juvenile proceedings around the country can help offer a solution here. Some juvenile criminal proceedings take place during the evening to better allow both parents and children to attend. Because removal proceedings take place in the morning and afternoon, they likely have a similar problem identified by the American Bar Association in juvenile proceedings: "court officials are not focusing sufficient attention to the interactions of parents, their children, and the courts." AM. BAR ASS'N CTR. ON CHILDREN & THE LAW, PARENTAL INVOLVEMENT PRACTICES OF JUVENILE COURTS 6 (2001), https://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/full_report.authcheckdam.pdf.

[136] Home Box Office, *Immigration Courts: Last Week Tonight with John Oliver*, YOUTUBE (Apr. 1, 2018), https://www.youtube.com/watch?v=9fB0GBwJ2QA.

[137] 8 U.S.C. § 1158(b)(1)(B)(i) (2018).

also help minimize potential issues on appeal and will decrease the likelihood the BIA or a Federal Circuit Court has to remand the case back to the IJ for further development of the record.

Further, by providing proper notice to the parent or guardian of all minor Respondents, the minor Respondent is much more likely to seek and obtain legal representation. The importance of legal representation in removal proceedings, as with any court proceedings, should not be understated.[138] This is particularly true for minor Respondents.[139] Attorneys, even more so than a parent or guardian who likely did not receive training of the U.S. legal system, should be better at ensuring that all evidence presented to the court is relevant, and have the proper legal education and training to present legal arguments to best advocate for their client. As mentioned earlier, the mere retention of an attorney in removal proceedings increases the minor Respondent's likelihood of a positive outcome.[140]

Even though EOIR keeps a list of local organizations offering pro bono services for Respondents in removal proceedings, there are three primary reasons minor Respondents whose parent or guardian is served with an NTA are more likely to obtain legal representation. First, a parent or guardian is much more responsible than their minor dependents. They are more likely than their child to appreciate the gravity of the situation and to know that legal representation will be very helpful.[141] Second, a parent or guardian is much more likely to be able to find an attorney. If a parent or guardian does not know where they can find legal representation for their child, they may tap into their broader personal, professional, and social networks to seek help, and may have more freedom to go to an attorney's office as children usually have to be in school during workhours on weekdays. Finally, adults should be in a much better position to pay for legal representation than children. If adults are unable to afford an attorney, they are also more likely

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[138] *Hearing Before the S. Comm. on the Judiciary on "The Unaccompanied Alien Children Crisis: Does the Administration Have a Plan to Stop the Border Surge and Adequately Monitor the Children?" to Revise Docketing Practices Relating to Certain Priority Cases*, 114th Cong. 1 (2016) (statement of Juan P. Osuna, Executive Director, Executive Office for Immigration Review), https://www.justice.gov/sites/default/files/pages/attachments/2016/02/23/juan_p_osuna_testimony_02232016.pdf [hereinafter Osuna] ("The sharp increase in UAC arrivals in 2014 put unprecedented pressures on EOIR . . . . Cases involving minor respondents often can be adjudicated more efficiently with the assistance of counsel.").

[139] *Id.* at 4.

[140] Ryo, *supra* note 115, at 522.

[141] *See* J. D. B. v. North Carolina, 564 U.S. 261, 262 (2011).

to know about and seek out pro bono representation .[142] Additionally, because pro bono representation may be foreign to many minor Respondents, they may not understand this concept and fail to follow up on securing legal representation in the midst of already confusing, stressful hearings before the IJ.

B. HOW THE GOVERNMENT SHOULD SERVE MINOR RESPONDENTS IN EOIR PROCEEDINGS

The same type of service that applies to adult Respondents in removal proceedings should apply to the parent or guardian of minor Respondents. A sustainable way to ensure this happens would be for Congress to amend the INA and its implementing regulations to ensure the same service requirements apply to all Respondents under the age of eighteen. The NTA issued to minor Respondents can remain largely the same as it currently states the pertinent information needed to enact effective service of process. However, it should clearly state that the minor Respondent is currently in removal proceedings and the consequences of failing to appear would be removal *in absentia*. Moreover, it should state that the parent or guardian must ensure that the minor Respondent appear at all hearings.[143] Indeed, an American Bar Association ("ABA") study pointed out how critical parental involvement is for the juvenile criminal proceedings: "All professionals involved in the juvenile justice system should consistently and clearly inform parents, both fathers and mothers, and both custodial and non-custodial parents, about the importance of their involvement in their child's life and the positive role they can play in aiding their troubled child."[144]

While it is true that minor Respondents in removal proceedings are different than juveniles in criminal proceedings and thus parental involvement will likely also be different, the ABA study emphasizes the role parents can and should play in their child's legal proceedings, with specific materials provided to parents to help them understand their child's

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[142] Many public interest firms also offer "low bono" representation at a fraction of the cost charged by private immigration attorneys. These low bono programs often offer payment plans with little to no interest for the convenience of their low-income clients, many of whom are even burdened by the cost of low bono representation. *See, e.g.*, *Affordable Services Program*, ESPERANZA IMMIGRANT RIGHTS PROJECT, https://www.esperanza-la.org/programs-dr-asp (last visited Feb. 20, 2020).

[143] There is an exception for hearings the Immigration Judge expressly waives the minor's appearance, which happens most often for represented minors at Master Calendar Hearings after the minor Respondent's initial hearing before the Immigration Judge, such as a deadline for an in-court filing (for instance, an I-589 Application for Asylum in a defensive asylum case).

[144] AM. BAR ASS'N CTR. ON CHILDREN & THE LAW, *supra* note 135, at 8.

proceedings.[145] The ABA recommended that judges actively express the role parents can and should play in their child's legal proceedings to their parents.[146] However, the parent or guardian should be advised and encouraged to do this from the moment they and their child receive the NTA. They should be given material akin to that in the Legal Orientation Program for Custodians of Unaccompanied Minors , which helps the sponsor custodian of a UAC learn about removal proceedings, their importance, and the sponsor custodian's responsibilities.[147]

For in-person service, DHS should serve the parent or guardian of the minor Respondent, who will, in turn, ensure the Respondent attends the removal proceedings. If DHS encounters the minor Respondent but not his or her parent or guardian, DHS should inquire where the minor's parent or guardian is and seek to serve them. A possible alternative could exist where the minor or another person is of "suitable age and discretion . . . who resides [at the parent's dwelling]."[148] If the minor or other person receiving service is of suitable age and discretion, that person could give the NTA to the parent or guardian to whom the NTA is addressed. Unfortunately, "suitable age and discretion" has not been interpreted by federal courts. The BIA might hold that fourteen is a suitable age.[149] However, the inclusion of discretion in the Federal Rules of Civil Procedure should encourage us to look beyond age to determine the appropriateness of the minor receiving the NTA for the parent or guardian. A person's ability to understand what is

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[145] *Id.* at 10 ("Judges . . . should be more active in expressing to parents the importance of their becoming more involved in their child's life. Communication barriers with parents, such as their lack of understanding of the court process or language differences, should not be permitted to interfere with such critical parental interactions. As an aid in sharing this information, easy-to-understand written materials should be readily available for all parents that familiarizes them with the court process, their expected role during court proceedings.").

[146] *Id.* ("Judges . . . should encourage and promote evaluations of parenting skills programs, and of court-related parental involvement policies, to determine if they are effectively reaching parents, leading to improved parent-child relationships, and reducing juvenile recidivism.").

[147] Legal Orientation Program for Custodians of Unaccompanied Alien Children, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/legal-orientation-program-custodians-unaccompanied-alien-children (last updated Apr. 13, 2018) ("Specifically, the LOPC educates custodians on: The immigration court process and how it works[, t]he importance of the children's attendance at removal hearings and consequences of failure to appear[, t]he forms of immigration relief available to children in removal proceedings[, and t]he custodians' responsibility to protect the children from mistreatment, exploitation, and human trafficking.").

[148] FED. R. CIV. P. 4(e)(2)(B).

[149] *See, e.g.*, Matter of Cubor-Cruz, 25 I. & N. Dec. 470, 473 (B.I.A. 2011) (concluding that "personal service of a Notice to Appear on a minor who is 14 years of age or older at the time of service is effective, even though notice was not also served on an adult with responsibility for the minor").

being received should be non-dispositive.[150] However, the maturity level of the recipient should be a key factor, perhaps even more so than age. Thus, if the person with whom DHS seeks to leave the NTA is not old or mature enough to be entrusted with collecting the mail or other deliveries, service on that person should not be proper.

For service by mail, the BIA's analysis in *Matter of M-R-A-* can provide some guidance.[151] On one hand, NTAs mailed to the parent or guardian of minor Respondents by certified mail carry a strong presumption that service was proper.[152] NTAs mailed by regular mail, on the other hand, should carry a weaker presumption that service on the parent or guardian was proper.[153] In *M-R-A-*, the BIA found that the Respondent had not received notice of a change in the hearing date based on the fact that the Respondent had affirmatively applied for and would potentially be denied asylum if he did not appear at his proceedings.[154] However, the same standard should be employed in evaluating whether the NTA was received by the Respondent regardless of whether the Respondent is in removal proceedings for removal or because of an affirmative asylum application. That the Respondent in *M-R-A-* immediately sought to reopen his case after receiving the IJ's order of removal *in absentia*[155] should nevertheless remain a factor showing that the Respondent is acting in good faith. Indeed, the BIA notes that Respondent's "due diligence in promptly seeking to redress the situation" was a significant factor in determining he did not receive proper notice.[156]

C. PROPOSED SOLUTIONS FOR UNACCOMPANIED MINORS

Because UACs face specific challenges that minors with their parent

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[150] *See, e.g.*, Boston Safe Deposit and Trust Co. v. Morse, 779 F. Supp. 347, 350–51 (S.D.N.Y. 1991) (finding that service of process was valid even though housekeeper who picked up delivery lacked proper discretion to receive effective service due to limited English language skills because the person who answered bell and instructed her to receive delivery had sufficient discretion to make service valid).

[151] Matter of M-R-A-, 24 I. & N. Dec. 665, 675–76 (B.I.A. 2008).

[152] *Id.* at 675.

[153] *Id.* at 676 ("An Immigration Judge must carefully examine the specific facts and evidence provided in each case to determine whether a Notice to Appear or Notice of Hearing sent to a respondent by regular mail was properly addressed and mailed according to normal office procedures.").

[154] *Id* at 675.

[155] *Id.*

[156] *Id.* at 676 (this is the only factor the B.I.A. specifically notes as significant in its determination Respondent did not receive proper notice).

or guardian do not, ensuring proper service on UACs in removal proceedings will require some specific solutions. First, ORR should seek to expand sponsorship programs for UACs,[157] especially as the TVPRA dictates that ORR should seek for UACs to be "promptly placed in the least restrictive setting that is in the best interest of the child."[158]

A UAC with sponsors will be more likely to attend hearings because they will be living with someone mandated to take the minor to hearings.[159] If the UAC has legal representation, living with a sponsor may also increase the likelihood the UAC will meet with their attorney.

Minor Respondents, particularly UACs, will also be more likely to receive proper service and attend their proceedings if the minors' right to legal representation is expanded or made mandatory in removal proceedings. This will ensure minors without adult supervision to be represented. With legal representation, the minor Respondents would have a much greater ability to navigate complex administrative court proceedings.[160] The represented minor will also be more likely to attend the hearings.[161] In addition, "cases involving minor respondents often can be adjudicated more efficiently with the assistance of counsel."[162]

IJs not accepting an *in absentia* removal order of an unrepresented or unaccompanied minor could be analogous to IJs not being allowed to accept an admission of deportability from an unrepresented or unaccompanied minor.[163] In both instances, the minor is unrepresented and unaccompanied.

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[157] Sponsors and Placement, ADMIN. FOR CHILDREN & FAMILIES, https://www.acf.hhs.gov/orr/about/ucs/sponsors (last visited May 15, 2019) ("The settlement agreement in Flores v. Reno . . . , which is binding on the U.S. Government, establishes an order of priority for sponsors with whom children should be placed, except in limited circumstances. The first preference for placement would be with a parent of the child. If a parent is not available, the preference is for placement with the child's legal guardian, and then to various adult family members. ORR follows these requirements in making placement decisions.").

[158] 8 U.S.C. § 1232(c)(2)(A) (2018).

[159] Also, regardless of whether unaccompanied minors in Office of Refugee Resettlement are more likely to attend their removal proceedings, living with sponsors is better for the child's overall social development and cultural adjustment to the United States than living in an Office of Refugee Resettlement shelter. *See* DAVID MURPHY, MOVING BEYOND TRAUMA: CHILD MIGRANTS AND REFUGEES IN THE UNITED STATES 12 (2016), https://www.childtrends.org/wp-content/uploads/2016/09/Moving-Beyond-Trauma-Report-FINAL.pdf.

[160] *See, e.g.*, Ryo, *supra* note 115, at 522.

[161] AM. IMMIGRATION COUNCIL, *supra* note 100 (finding that 92.5 percent of represented children appeared at their immigration court hearings, while only 27.5 percent of unrepresented children did so).

[162] Osuna, *supra* note 138, at 3.

[163] 8 C.F.R. § 1240.10(c) (2019).

IJs and DHS should take reasonable steps to ensure the minor Respondent can consult with a parent or guardian and, ideally, an attorney who can help the minor logistically and legally. Having a parent or guardian involved will decrease the likelihood of a removal *in absentia* order. Having legal representation will make removal proceedings fairer. Moreover, having legal representation will also provide minors an advocate with the knowledge to contest, among other things, proper service.

D. INCORPORATE IMMIGRATION COURTS INTO THE FEDERAL JUDICIARY

Another way to ensure that Respondents, whether minors or adults, in removal proceedings receive the same due process a party to a federal lawsuit might receive would be to make immigration courts part of the "Article I" courts.[164] According to Hon. A. Ashley Tabaddor, President of the National Association of Immigration Judges, making immigration courts an Article I court would not only free immigration judges from the influence of the presidential administration, an essential depoliticization, but also "make administration more efficient and bolster the integrity of our immigration court system."[165] Judge Tabaddor also describes the housing of Immigration Courts in the Department of Justice as a fundamental flaw, "which essentially makes the court accountable to a prosecutor."[166] The ABA agrees, noting "the current system is irredeemably dysfunctional and on the brink of collapse."[167] In fact, the ABA made the same suggestion in 2010.[168] The ABA no longer views the current system of housing Immigration Courts in the Executive Branch as a viable option.[169]

A new model could be akin to bankruptcy court, an Article I Court, where the U.S. District Courts have original jurisdiction, but nearly always refer bankruptcy cases and proceedings to the bankruptcy court of that jurisdiction.[170] Bankruptcy courts decide all matters referred to them by the

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[164] *See, e.g.*, Ashley Tabaddor, Letter to the Editor, *An Independent Court Would Help Fix U.S. Immigration*, WALL STREET J. (Dec. 25, 2018), https://www.wsj.com/articles/an-independent-court-would-help-fix-u-s-immigration-11545750931.

[165] *Id.*

[166] *Id.*

[167] ABA 2019, *supra* note 46, at 15.

[168] AMERICAN BAR ASSOCIATION, REFORMING THE IMMIGRATION SYSTEM 28 (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf.

[169] ABA 2019, *supra* note 46, at 6.

[170] U.S. Bankruptcy Courts, FED. JUDICIAL CTR., https://www.fjc.gov/history/courts/u.s.-bankruptcy-courts (last visited Mar. 20, 2019).

U.S. District Courts.[171] The relevant sections of the INA and EOIR Practice Manual, informed and updated by relevant constitutional and federal procedural rules, could serve as the framework for the eventual Federal Rules of Immigration Procedure.

Being a part of the federal judicial branch would allow EOIR to properly check and balance the executive branch's power over immigration enforcement. While EOIR and ICE are agencies under Department of Justice and Department of Homeland Security, respectively, under the current system, prosecutors from EOIR and ICE both answer to the President. While it is entirely possible that the President will oversee both Departments in a fair and balanced manner, the founding fathers viewed checks and balances as an integral part of a young democracy trying to move away from a monarchic system.[172] Given that the Trump administration has been asking judges to process cases more quickly at the expense of for Respondent's due process rights,[173] making the immigration court independent will likely help to depoliticize removal proceedings.

E. EXERCISE APPROPRIATE PROSECUTORIAL DISCRETION

DHS Prosecutors have the power to serve a parent or guardian of all Respondents under the age of eighteen unilaterally with no required intervention from another government entity. This would be the simplest, most cost-effective solution. Given their broad prosecutorial discretion, DHS prosecutors could simply decline to prosecute a minor Respondent until DHS ensures the Respondent's parent or guardian has also received the NTA. More effective solution would entail ICE's Principal Legal Advisor issuing a policy memorandum to all officers with NTA issuance authority advising against the issuance of NTAs to minor Respondents whose parent or guardian has yet to be served. Unfortunately, as noted above, under the Trump administration, ICE's Principal Legal Advisor has actively encouraged DHS to increase its efforts and place more immigrants in removal proceedings and is unlikely to issue such a memorandum.[174]

V. CONCLUSION

Due process should apply equally to minor Respondents in removal

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[171] *Id.*
[172] *See* THE FEDERALIST NO. 51 (James Madison).
[173] *See, e.g.*, Laila Robbins, *supra* note 130; *see also* Davis, *supra* note 132.
[174] Memorandum from Tracy Short, *supra* note 85, at 1–2.

proceedings as it does for defendants in civil or criminal proceedings. Therefore, proper service on all minor Respondents under the age of eighteen in removal proceedings *must* be given to the Respondent's parent or guardian. The most sustainable ways to implement this change would be to make Immigration Courts an Article I court, for the Supreme Court to make the same ruling that the Ninth Circuit did in *Flores-Chavez*, or for the INA and its implementing regulations to be amended.

Failing to ensure due process protections to immigrant children will have a negative impact on more than just the minor in removal proceedings. The *in absentia* removal of a child tears apart families and communities in the United States, both citizen and non-citizen alike. Likewise, the reasoning used to support differential service of process for immigrant children has dangerous implications for the legal protection of minors (and potentially adults) of any legal status or country of origin. Finally, serving the parent or guardian of an immigrant child would not be burdensome to the DHS. Relative to the potential harm inflicted on a child ordered removed from the United States, serving the parent or guardian is much easier and better represents the constitutional ideals of the U.S.