

NO FAIR DAY

The Biden Administration's
Treatment of Children
in Immigration Court

UCLA School of Law
**Center for Immigration
Law and Policy**

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TABLE OF CONTENTS

Acknowledgements 1

Executive Summary 2

Background 3

I. What is happening to children in immigration court under the Biden administration? 5

A. Inside children's immigration court proceedings 5

B. Children often face immigration court proceedings without a lawyer 8

C. Thousands of unrepresented children have been ordered removed *in absentia* 10

II. The Biden administration's treatment of children in immigration court is unlawful 12

A. *In absentia* removal orders against unrepresented children are unlawful 12

B. Children have a right to legal representation in removal proceedings 15

III. Recommendations 18

A. The Biden administration should prohibit *in absentia* removal orders against unrepresented children 18

B. The Biden administration should terminate the Dedicated Docket 20

C. The Biden administration should ensure legal representation for all unrepresented children in removal proceedings 20

Conclusion 22

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EXECUTIVE SUMMARY

This white paper provides a comprehensive assessment of the Biden administration's treatment of children facing removal in immigration court. While much attention has rightly been given to the Biden administration's border and asylum policy, less attention has been paid to child-specific policies in immigration court. This matters both because tens of thousands of removal orders have been issued against children during the Biden administration, and because children's cases present unique legal issues—including most obviously that children generally bear little, if any, legal responsibility for the situations in which they find themselves.

We find that the Biden administration took important steps at the outset to protect children in ways the prior administration did not. The decision to exempt children from the border expulsion policy known as Title 42 was particularly significant in this respect. However, for children who were permitted to enter the system and ordered to appear for proceedings in immigration court, the Biden administration has largely continued the policies of previous administrations. Those policies have utterly failed to protect the rights of children in court.

These failures are all the more striking because they have continued even as the administration has signaled support for the principle that children deserve legal representation in immigration court as a matter of basic fairness. Department of Homeland Security Secretary Mayorkas—the nation's foremost immigration enforcement official—has repeatedly stated that he does not believe children can receive fair removal hearings without legal representation, even as prosecutors under his purview have proceeded with thousands of such hearings and obtained thousands of removal orders against unrepresented children through those grossly unfair processes.

The administration's policies toward children in immigration court have far-reaching impacts. In the first five months of Fiscal Year 2022, almost one third of all new cases in immigration court involved children, including tens of thousands of children under the age of five.¹ Some of these children are “unaccompanied” because they arrived

¹ TRAC, *One-Third of New Immigration Court Cases Are Children; One in Eight Are 0-4 Years of Age* (Mar. 17, 2022), <https://trac.syr.edu/immigration/reports/681/>.

alone, while others are in “consolidated proceedings” with their families. The immigration system, and the Biden administration, has failed both. Many of these children proceeded without counsel, and a huge number of children have been ordered removed for failure to appear.

We explain why these two policies—the imposition of *in absentia* removal orders against unrepresented children and the failure to provide counsel—are unlawful, and we provide recommendations for how the Biden administration can remedy this crisis.

BACKGROUND

President Biden campaigned on promises to “immediately end Trump’s assault on the dignity of immigrant communities” and to build a fair and humane immigration system.² The Biden administration took an important—albeit largely symbolic—step towards doing so by signaling its intentions to treat children differently in its first proposed immigration bill. Released on the day of Biden’s inauguration in 2021, the proposed legislation included a provision that would authorize funding for counsel for children facing removal proceedings (as well as in certain other situations) “when necessary to ensure the fair and efficient resolution of their claims.”³

While most observers rightly predicted that this bill was dead on arrival, the Biden administration also took concrete early action to address some of the most egregious harms of the Trump administration’s policies towards children specifically, including establishing a task force to reunite parents and children who had been separated,⁴ and exempting children from the Title 42 expulsion order.⁵ The latter led to thousands of children entering the federal government’s custody and then the immigration court system as unaccompanied minors.⁶ For a time, the Biden administration also exempted an increasing number of families from its summary expulsion policies, after which it created a specialized “Dedicated Docket” to adjudicate their cases in an expedited fashion.⁷

The combined effect of these policies has been to allow hundreds of thousands of children who fled persecution and other extreme hardship—whether alone or with their families—to enter and seek

2 Rev, Joe Biden Speech Transcript August 6: National Association of Latino Elected Officials Conference (Aug. 6, 2020), <https://www.rev.com/blog/transcripts/joe-biden-speech-transcript-august-6-national-association-of-latino-elected-officials-conference>.

3 U.S. Citizenship Act of 2021, H.R. 1177, 117th Cong. § 292(c)(1) (2021); see also White House, *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System* (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/>.

4 White House, *Executive Order on the Establishment of Interagency Task Force on the Reunification of Families* (Feb. 2, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-the-establishment-of-interagency-task-force-on-the-reunification-of-families/>.

5 87 Fed. Reg. 15243 (2022); see also CDC, *Title 42 Termination with Respect to Unaccompanied Noncitizen Children* (Mar. 12, 2022), <https://www.cdc.gov/media/releases/2022/s0311-title-42-termination.html>.

6 See U.S. CBP, *CBP Releases March 2022 Monthly Operational Update*, <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-march-2022-monthly-operational-update> (Encounters of unaccompanied children increased 18 percent, with 14,167 encounters in March compared with 11,984 in February); Camilo Montoya-Galvez, *Nearly 130,000 unaccompanied migrant children entered the U.S. shelter system in 2022, a record*, CBS NEWS (Oct. 14, 2022), <https://www.cbsnews.com/news/immigration-unaccompanied-migrant-children-record-numbers-us-shelter-system/>.

7 U.S. Dep’t of Just. & U.S. Dep’t of Homeland Sec., DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings (May 28, 2021), <https://www.justice.gov/eoir/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings>. In May 2023, the Biden administration reversed course on its policy of exempting families from summary exclusion proceedings by announcing a new “Family Expedited Removal Management” (FERM) program, See U.S. Immigration and Customs Enforcement, *ICE announces new process for placing family units in expedited removal* (May 10, 2023), <https://www.ice.gov/news/releases/ice-announces-new-process-placing-family-units-expedited-removal>. Children in family units subject to this program almost never see the inside of a courtroom. Instead, they are subject to rapid removals following an expedited credible fear interview within weeks of their arrival to the United States. See <https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2023-08/NIJC-policy-brief-FERM-August-2023-FINAL.pdf>.

safety in the United States, for which this administration should be applauded, particularly when compared to its predecessor's approach.⁸

Thousands of unrepresented children have been denied due process and ordered deported—usually for failing to come to court.

However, the treatment of children by this administration's immigration courts has proven disastrous. Under the Biden administration's watch, in immigration courts across the country, thousands of unrepresented children have been denied due process and ordered deported—usually for failing to come to court, even though they have no control over whether they do so. The harms imposed by those removal orders have already been felt in thousands of children's cases, rendering them vulnerable to exploitation in the labor market and placing them at great risk for deportation and related harms that will follow them long after the Biden administration ends.⁹

The Biden administration is aware of this denial of justice. Over the past two years, the UCLA Center for Immigration Law and Policy (CILP) and others have engaged in sustained research, public education, and advocacy—making the government aware of the scale of the crisis and offering concrete solutions.¹⁰ But the Biden administration has failed to act.¹¹

This white paper offers a comprehensive look at the Biden administration's failure to protect children in immigration court. It explains how the administration's well-intentioned efforts to provide children and certain families access to the court system, coupled with the administration's failure to ensure they have legal representation, has produced a massive due process crisis in the immigration court system. It then explains why two related practices—the imposition of *in absentia* removal orders against unrepresented children who are not brought to court and the failure to provide counsel to children—violate the Fifth Amendment to the U.S. Constitution and the

⁸ In 2021, U.S. Border Patrol apprehended over 600,000 children, including both accompanied and unaccompanied children. TRAC, *Growing Numbers of Children Try to Enter U.S.* (Jun. 28, 2022), <https://trac.syr.edu/immigration/reports/687/>.

⁹ See, e.g., Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. TIMES (Feb. 23, 2023), <https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html>.

¹⁰ See, e.g., Letter from Ahilan Arulanantham, Theo Angelis, Talia Inlender, Stephen B. Kang, Kristin Macleod-Ball, Karolina J. Walters, Matt Adams, Carmen G. Iguina Gonzalez, Kristen Jackson, Kevin Lapp & David Thronson to Alejandro Mayorkas, Secretary of Homeland Security (Jun. 2, 2021) (on file with UCLA CILP); Letter from Ahilan Arulanantham, Theo Angelis, Talia Inlender, Stephen B. Kang, Kristin Macleod-Ball, Karolina J. Walters, Matt Adams, Carmen G. Iguina Gonzalez, Kristen Jackson, Kevin Lapp & David Thronson to Alejandro Mayorkas, Secretary of Homeland Security (Jun. 25, 2021) (on file with UCLA CILP); Letter from 106 legal service providers, court observers, and allied organizations to Merrick B. Garland, Attorney General, Alejandro N. Mayorkas, Secretary of Homeland Security & Betsy Lawrence, Deputy Assistant to the President for Immigration Domestic Policy Council (Oct. 5, 2022), <https://www.aila.org/advo-media/aila-correspondence/2022/letter-to-administration-expressing-grave-concerns>; Letter from Ahilan Arulanantham, Talia Inlender, Matt Adams & Kristin Macleod-Ball to Lucas Guttentag & Margy O'Herron (Apr. 10, 2023) (on file with UCLA CILP); Letter from 106 legal service providers, court observers, and allied organizations to Merrick B. Garland, Attorney General, Alejandro N. Mayorkas, Secretary of Homeland Security & Betsy Lawrence, Deputy Assistant to the President for Immigration Domestic Policy Council (Jun. 22, 2023), https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/Dedicated_Docket_Response_to_DOJ_Letter.pdf.

¹¹ On November 1, 2023, legislation was introduced to create a specialized docket for unaccompanied children, with proposed provisions including specially trained personnel, child participation protocols, and coordination with legal and social service organizations. See Immigration Court Efficiency and Children's Court Act of 2023, H.R. 6145, 118th Cong. (2023), available at <https://goldman.house.gov/sites/evo-subsites/goldman.house.gov/files/evo-media-document/bill-text-childrens-court-act-of-2023-.pdf>. We explain below why there is insufficient evidence to suggest that such a docket—absent an assurance of legal representation and protection from the issuance of *in absentia* orders—would address the due process concerns identified in this paper.

federal immigration laws. And, finally, it provides recommendations for how the Biden administration can both fix these problems prospectively and take steps to remedy the crisis created by the policies of the last three years. Specifically, it urges the Biden administration to categorically prohibit the issuance of *in absentia* removal orders against unrepresented children; adopt policies to ensure that such orders are not enforced; terminate the Dedicated Docket; and ensure that all children in removal proceedings have legal representation.

I. WHAT IS HAPPENING TO CHILDREN IN IMMIGRATION COURT UNDER THE BIDEN ADMINISTRATION?

The problems described in this paper have existed in law for a long time, and in practice on a large scale since at least 2014—when the numbers of unaccompanied children in immigration proceedings more than doubled.¹² Indeed, while the Biden administration gave thousands of children access to the immigration court process during the pandemic, once those children got to immigration court, they faced the same unfair processes that have existed for decades, including since well before 2014. Just as they were under the Obama and the Trump administrations, children are still ordered to appear in immigration court and represent themselves—against trained government prosecutors—if they have no lawyer to represent them, and just as before they are ordered removed when they fail to appear, without any inquiry into whether they should be held responsible for not being present.

A. Inside children's immigration court proceedings

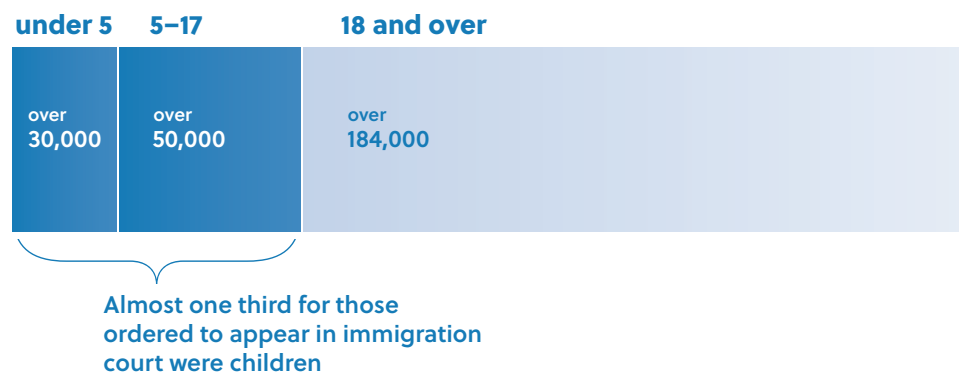
In order to understand the nature of the crisis facing children in immigration court, it is helpful to understand how removal proceedings involving children work in practice. This section provides that critical context, laying out what a child confronts in immigration court.

¹² See TRAC, *Unaccompanied Juveniles – Immigration Court Deportation Proceedings*, <https://trac.syr.edu/phptools/immigration/juvenile/>.

Children may be ordered to appear in immigration court alone (unaccompanied) or with members of their family (in consolidated proceedings). Until now, unaccompanied children facing immigration court under the Biden administration have not been placed on a unique docket. This may change with recent proposals to create a specialized docket for unaccompanied children with more “child-appropriate procedures.”¹³ By contrast, under the Biden administration, children in consolidated proceedings are often placed on the “Dedicated Docket,” an accelerated immigration court that operates in eleven cities for families seeking asylum who have recently arrived via the southern border.¹⁴ The Biden administration aims to resolve cases on the Dedicated Docket within 300 days, significantly faster than the average four-and-a-half-year wait for asylum cases in immigration court.¹⁵

During the Biden administration, tens of thousands of children have been ordered to appear in immigration court, either alone or in consolidated proceedings. In the first five months of Fiscal Year 2022, almost one third of all Notices to Appear (NTAs) were issued against children.¹⁶ Between October 2021 and February 2022, DHS issued over 80,000 NTAs against children under the age of 18, over 30,000 of whom were under the age of 5.¹⁷

If a child fails to appear in court, an immigration judge almost always issues an *in absentia* removal order, making the child immediately subject to deportation and other harsh consequences (described in Section I.C below).¹⁸



If a child appears in court, the child bears the burden of proving that they should be allowed to remain in the United States under a legal

13 See Immigration Court Efficiency and Children's Court Act of 2023, H.R. 6145, 118th Cong. (2023), available at <https://goldman.house.gov/sites/evo-subsites/goldman.house.gov/files/evo-media-document/bill-text-childrens-court-act-of-2023-.pdf>. The last specialized docket for unaccompanied children was a much-criticized “rocket docket” initiated by President Obama. See, e.g., Jennifer Chan, *Rocket Dockets Leave Due Process in the Dust*, NATIONAL IMMIGRANT JUSTICE CENTER (Aug. 11, 2014) <https://immigrantjustice.org/staff/blog/rocket-dockets-leave-due-process-dust>. That docket had disastrous consequences, with nearly 40,000 unaccompanied children ordered removed without counsel, almost all for failure to appear. See TRAC, *Juveniles—Immigration Court Deportation Proceedings*, <http://trac.syr.edu/phptools/immigration/juvenile/> (last visited Nov. 7, 2023). Notably, the current proposal for an unaccompanied children's docket differs from the Obama-era model insofar as the new proposal does not seek to accelerate proceedings. However, because it falls short of ensuring legal representation for unaccompanied children and offers no protection against *in absentia* removal orders, it is unlikely to solve the serious due process problems described in this paper.

14 U.S. Dep't of Just. & U.S. Dep't of Homeland Sec., DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings (May 28, 2021), <https://www.justice.gov/eoir/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings>.

15 TRAC, *A Mounting Asylum Backlog and Growing Wait Times* (Dec. 22, 2021), <https://trac.syr.edu/immigration/reports/672/>.

16 TRAC, *One-Third of New Immigration Court Cases Are Children; One in Eight Are 0-4 Years of Age* (Mar. 17, 2022), <https://trac.syr.edu/immigration/reports/681/>.

17 Unfortunately, significant gaps in data prevent us from knowing more about this population of children. We know that at least one quarter of the children in removal proceedings were assigned to the Dedicated Docket as part of a family group, and that at least 4 percent were assigned to the juvenile docket, but the status of the remaining 71 percent remains unknown due to unreliable government tracking systems. *Id.* at Table 1, Table 2.

18 8 U.S.C. § 1229a(b)(5); 8 C.F.R. § 1003.26.

regime that has been described as “second only to the Internal Revenue Code in complexity.”¹⁹ In theory, the child has the right to make legal arguments and the right to present evidence on their behalf.²⁰ But making such arguments requires a sophisticated understanding of immigration law and procedure. Indeed, the legal avenues most often available for children to remain safely in the United States— asylum and Special Immigrant Juvenile status (SIJS)—are among the most complex in the immigration system.

Many children in immigration proceedings have fled persecution in their home countries and are therefore eligible for asylum. To be granted asylum, the child must show that they meet the definition of a refugee: a person outside their country of origin who has suffered past persecution or has a well-founded fear of persecution—by a government actor or a non-State actor that the government is unable or unwilling to control—on account of their race, religion, nationality, political opinion, or membership in a particular social group.²¹ This involves proving, at minimum, ten distinct elements, most of which require an in-depth explanation of current and historical socio-political conditions in the child’s home country.²² The definition of a “particular social group”—the most commonly argued ground in children’s asylum cases—has been the subject of intense litigation and is constantly evolving.²³ The child may also be required to provide evidence to corroborate their claim, or document their attempts to obtain it and show why evidence was not reasonably available to them.²⁴ And in many cases, the child will have experienced trauma, which has an enduring impact on their ability to understand and communicate their past experiences and fears and compounds the complexity of the process.²⁵

The SIJS process is perhaps even more complex than asylum, and for procedural reasons entirely inaccessible to unrepresented children. Huge numbers of unaccompanied children—and, in many states, children in consolidated proceedings with one parent—are eligible for SIJS, a form of relief Congress created to provide protection for immigrant children who have been abandoned, neglected, or abused by one or both parents.²⁶ However, obtaining SIJS involves a multi-step process that requires litigation in state court, proceedings before USCIS, and at times litigation in immigration court. First, in

19 *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) (quotations omitted).

20 8 U.S.C. § 1229a(b)(4)(B); *cf.* 8 U.S.C. § 1232(c)(5); 8 U.S.C. § 1232(a)(5)(D).

21 See INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

22 See Brief of Center for Gender & Refugee Studies as Amicus Curiae in Support of Petitioner, Dkt. 84 at 8–9, No. 16–73801, *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019).

23 See Brief of Center for Gender & Refugee Studies as Amicus Curiae in Support of Petitioner, Dkt. 84 at 11–16, No. 16–73801, *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019); *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 214–17 (BIA 2014).

24 See Brief of Center for Gender & Refugee Studies as Amicus Curiae in Support of Petitioner, Dkt. 84 at 16–17, No. 16–73801, *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019); 8 U.S.C. § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii).

25 See Brief of Center for Gender & Refugee Studies as Amicus Curiae in Support of Petitioner, Dkt. 84 at 2–7, No. 16–73801, *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019).

26 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11.

state court, the child must request that the court issue findings to establish that the child satisfies the statutory SIJS requirements.²⁷ After the state court issues the SIJS findings, the child must file an I-360 petition before USCIS.²⁸ Only after that petition is granted can the child seek adjustment of status in immigration court, a process that also involves navigating complex regulations and statutes.²⁹

If the child is unsuccessful in their application for relief—or does not apply for relief, as is the case for every child who fails to appear in court—the Immigration Judge almost always enters a removal order against the child. Children ordered removed then face the prospect of deportation to a country from which they may have fled for their lives.

B. Children often face immigration court proceedings without a lawyer

Children routinely face these complex and high-stakes proceedings alone against a trained government attorney, without a lawyer to defend them. Unlike criminal defendants and children charged with juvenile delinquency, children in immigration court have no recognized right to a government-appointed attorney.³⁰ If the child cannot afford an attorney—which is almost always the case—the government gives the child (or their family member) a list of pro bono legal service providers.³¹ The government has also long funded such providers through grants administered primarily by the Department of Health and Human Services. But, as a whole, the legal service provider community simply does not have the capacity to represent the thousands of children placed in removal proceedings each month, forcing many children to appear in court without a lawyer.³²

During the Biden administration, approximately half of the thousands of children in immigration court proceedings have been unrepresented. According to EOIR data—which has previously been shown to overestimate representation rates³³—about half (51%) of the over 44,000 families with pending cases on the Dedicated Docket are unrepresented.³⁴ Those numbers vary significantly by location: in Denver, approximately 70 percent of families are unrepresented.³⁵ According to EOIR data, 38 percent of families on the Los Angeles

27 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11.

28 See USCIS Policy Manual, Volume 6, Part J, <https://www.uscis.gov/policy-manual>.

29 See, e.g., 8 U.S.C. § 1255(a), (h); 8 C.F.R. § 205.1.

30 A lawsuit asserting this right was dismissed by the Ninth Circuit on jurisdictional grounds. *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016). But see *C.J.L.G. v. Barr*, 622 F.3d 622, 639 (9th Cir. 2019) (Paez, J., concurring) (“I would recognize a due process right to counsel for indigent children in removal proceedings.”)

31 See Dep’t of Justice, List of Pro Bono Legal Service Providers, <https://www.justice.gov/eoir/list-pro-bono-legal-service-providers>.

32 See, e.g., TRAC, *Despite Efforts to Provide Pro Bono Representation, Growth Is Failing to Meet Exploding Demands* (May 12, 2023), <https://trac.syr.edu/reports/716/>; Rick Jervis, *Migrant Children Pushed Through Immigration Court Alone as Activists Scramble to Provide Legal Help*, USA TODAY (Mar. 20, 2021), <https://www.usatoday.com/story/news/nation/2021/03/20/bidens-border-crisis-children-appearing-immigration-court-alone/4724575001/>; TRAC, *Children: Amid a Growing Court Backlog Many Still Unrepresented* (Sep. 28, 2017), <https://trac.syr.edu/immigration/reports/482/>. This problem is not new. See Rebecca Kaplan, *For unaccompanied immigrant children, a shortage of lawyers*, CBS NEWS (Aug. 7, 2014), <https://www.cbsnews.com/news/for-unaccompanied-immigrant-children-a-shortage-of-lawyers/>. To this day, a disclaimer on the list acknowledges the shortage, warning that “[a]lthough the providers on this list offer pro bono (free) legal representation, they may not have the capacity at this time to accept new cases.” List of Pro Bono Legal Service Providers (July 2023), <https://www.justice.gov/eoir/file/probonofulllist/download>.

33 Supplemental Declaration of Dr. Susan B. Long in Support of Plaintiffs’ Motion for Summary Judgment, Dkt. 362 at 5–6, Case No. 2:14-cv-01026-TSZ, *F.L.B. v. Lynch*, 180 F.Supp.3d 811 (W.D. Wash. 2016).

34 EOIR Adjudication Statistics, Dedicated Docket Representation Rates, https://www.justice.gov/d9/pages/attachments/2022/05/26/28a_dd_representation_rates.pdf (Oct. 1, 2023) (last visited Dec. 8, 2023).

35 EOIR Adjudication Statistics, Dedicated Docket Summary by Hearing Location, https://www.justice.gov/d9/pages/attachments/2021/09/27/6a_dedicated_docket_report_by_hearing_location.pdf (Oct. 2, 2023) (last visited Dec. 8, 2023).

Dedicated Docket are unrepresented;³⁶—a detailed study of the first five months of the Docket put that number at 70 percent.³⁷ For unaccompanied children, recently-released EOIR data shows that 44% of the over 57,000 unaccompanied children whose cases are currently pending in immigration court do not have a lawyer.³⁸

Representation Rates for Dedicated Docket Families

51% Unrepresented

Represented

Representation Rates for Unaccompanied Children

44% Unrepresented

Represented

Unsurprisingly, studies have repeatedly found that having legal representation has a dramatic impact on outcomes in immigration court for children. Even for adults, noncitizens without legal representation are much less likely to be granted relief.³⁹ According to analysis conducted in 2015, unrepresented unaccompanied children were at least five times more likely to be ordered removed than represented children.⁴⁰ From FY 2005 to FY 2017, unaccompanied children with legal representation were more than seven times more likely than unrepresented unaccompanied children to receive an outcome that allowed them to remain in the United States.⁴¹ More recent statistics from the Dedicated Docket show a similar picture: on the Los Angeles Dedicated Docket, as of February 2022, over 96 percent of those who filed asylum applications had representation.⁴² On Boston's Dedicated Docket, not a single unrepresented person—child or adult—has been granted asylum.⁴³

³⁶ *Id.*

³⁷ Immigrants' Rights Policy Clinic, part of the Center for Immigration Law and Policy at UCLA School of Law, *The Biden Administration's Dedicated Docket: Inside Los Angeles' Accelerated Court Hearings for Families Seeking Asylum*, at 8 (May 2022), https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/Dedicated_Docket_in_LA_Report_FINAL_05.22.pdf [hereinafter Los Angeles Dedicated Docket Report].

³⁸ EOIR Adjudication Statistics, Current Representation Rates, https://www.justice.gov/d9/pages/attachments/2018/05/15/28_current_representation_rates.pdf (Oct. 12, 2023) (last visited Dec. 8, 2023).

³⁹ See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 76 (2015) (finding that in a six-year period, only 2% of immigrants without counsel in removal proceedings prevailed in their cases).

⁴⁰ Expert Report of Professor Susan B. Long, Dkt. 343-7 at 48, Case No. 2:14-cv-01026-TSZ, *F.L.B. v. Lynch*, 180 F.Supp.3d 811 (W.D. Wash. 2016).

⁴¹ Alyssa Snider & Rebecca DiBennardo, *Representation Matters: No Child Should Appear in Immigration Proceedings Alone*, Vera Institute of Justice, at 3 (Dec. 2021), <https://www.vera.org/downloads/publications/representation-matters.pdf>.

⁴² Los Angeles Dedicated Docket Report at 8.

⁴³ Harvard Immigration and Refugee Clinical Program et al., *Denial of Justice: The Biden Administration's Dedicated Docket in the Boston Immigration Court* (June 2023), at 14, https://harvardimmigrationclinic.org/files/2023/06/Dedicated-Docket-Report_FINAL.pdf [hereinafter Boston Dedicated Docket Report].

**Secretary Mayorkas acknowledged earlier
this year, “a nine-year-old child cannot navigate
the immigration system.”**

- 44 YouTube, *Looking Back and Looking Forward: Fifteen Years of Advancing Immigration Representation* at 30:00 (Mar. 9, 2023), <https://www.youtube.com/watch?v=N57XCYY7JYk>.
- 45 C-SPAN, *Justice Department Oversight* (Mar. 6, 2013), <https://www.c-span.org/video/?311311-1/justice-department-oversight> at 1:30:15 (in response to a question from Senator Al Franken, Attorney General Holder stated that "It is inexcusable that young kids, and you're right, 6, 7-year-olds, 14-year-olds, have immigration decisions made on their behalf against them . . . and they're not represented by counsel"); C-SPAN, *Justice Department Oversight Hearing* (Mar. 9, 2016) <https://www.c-span.org/video/?406201-1/justice-department-oversight-hearing&start=5129> at 35:20 (in response to a question from Senator Patrick J. Leahy, Attorney General Lynch stated that "in no way does the Department of Justice feel that children of that age or even frankly children even older can or should represent themselves individually"); Defendants' Response to Plaintiffs' Supplemental Brief in Support of Fourth Motion for Class Certification, Dkt. 289 at 4-5, Case No. 2:14-cv-01026-TSZ, *F.L.B. v. Lynch*, 180 F.Supp.3d 811 (W.D. Wash. 2016) (stating that "it would make more sense for the Main Class to be limited to children under the age of fourteen, as expert testimony suggests that children under the age of fourteen...share some cognitive features."); Defendants' Notice of Disclosure of Expert Reports, Dkt. 237-1 at ¶¶34-42, Case No. 2:14-cv-01026-TSZ, *F.L.B. v. Lynch*, 180 F.Supp.3d 811 (W.D. Wash. 2016) (suggesting that some children under the age of 18 may be able to represent themselves, but not affirmatively stating that children of any particular age are able to do so).
- 46 Deposition Transcript of Judge Jack H. Weil, Dkt. 250 at 69-70, Case No. 2:14-cv-01026-TSZ, *F.L.B. v. Lynch*, 180 F.Supp.3d 811 (W.D. Wash. 2016) ("I've taught immigration law literally to three year olds and four year olds. . . They get it. It's not the most efficient, but it can be done"); see also Jerry Markon, *Can a 3-year old represent herself in immigration court? This judge thinks so*, THE WASHINGTON POST (Mar. 5, 2016), https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html. Senator Patrick Leahy said he had never heard such a "stupid, stupid, stupid thing from a judge or anybody else." See C-SPAN, *Sen. Leahy: "I've never heard such a stupid, stupid, stupid thing from a judge"* (C-SPAN), YouTube (Mar. 9, 2016), <https://www.youtube.com/watch?v=uLKVBYUaK4>.
- 47 See, e.g., Petitioners' Opening Brief, Dkt. 17 at 2, 16, *Hernandez-Galand v. Garland*, 996 F.3d 1030 (9th Cir. 2021).
- 48 See American Immigration Council, *Children in Immigration Court: Over 95 Percent Represented by an Attorney Appear in Court* (May 16, 2016), <https://www.americanimmigrationcouncil.org/research/children-immigration-court-over-95-percent-represented-attorney-appear-court>.
- 49 On the LA Dedicated Docket, as of February 2022, 72.4% of removal orders were issued *in absentia*. LA Dedicated Docket Report at 1. On the Boston Dedicated Docket, as of August 2022, 72.6% of removal orders were issued *in absentia*. Boston Dedicated Docket Report at 6.
- 50 LA Dedicated Docket Report at 1-2.

It should be obvious that immigration court proceedings are far too complex for children to navigate without legal representation. As Secretary Mayorkas acknowledged earlier this year, "a nine-year-old child cannot navigate the immigration system."⁴⁴ Attorneys General under the Obama administration made similar statements, as had the government's own expert in litigation challenging the failure to provide counsel for children several years ago.⁴⁵ Prior to that concession, one supervisory immigration judge was extensively ridiculed for stating his view that he could teach three- and four-year-olds to understand immigration law and represent themselves in immigration court.⁴⁶ Yet, despite the obvious absurdity of that view, the Biden administration's immigration courts—like the immigration courts of all prior administrations—recognize no age below which children cannot proceed without a lawyer in court.

C. Thousands of unrepresented children have been ordered removed *in absentia*

Although the picture of a nine-year-old child attempting to litigate a deportation case in immigration court rightly evokes some mixture of shock and disbelief, the reality is that most unrepresented children never even get that far, because they are ordered deported for failing to appear. Because the Biden administration has failed to adopt protective measures for unrepresented children in removal proceedings, when an unrepresented child fails to come to court—something that is almost always beyond their ability to control—they will be ordered removed *in absentia* for failure to appear. Immigration judges sometimes order such children deported even when they have affirmatively excused the child's absence.⁴⁷ This problem overwhelmingly arises in the cases of unrepresented children, as the vast majority of represented children appear in court.⁴⁸

Under the Biden administration's watch, thousands of unrepresented children have been ordered removed *in absentia*. On both the Los Angeles and Boston Dedicated Dockets, as of February and August 2022 respectively, approximately 72 percent of all removal orders were issued *in absentia*.⁴⁹ In Los Angeles, almost half of those removal orders were issued against children under the age of eighteen, nearly two-thirds of whom were under the age of six.⁵⁰

On Boston's Dedicated Docket, almost half of the *in absentia* removal orders were issued against children under the age of twenty-one, many of whom were also under the age of six.⁵¹ In both cities, the vast majority of families and children ordered removed *in absentia*—86.6 percent in Los Angeles⁵² and 76.6 percent in Boston⁵³—were unrepresented.

Removal Orders for Dedicated Docket Families



Removal Orders for Unaccompanied Children



For unaccompanied children, the situation is similar, and perhaps even worse than on the Dedicated Docket. Immigration courts under the Biden administration ordered more than 13,000 unaccompanied children removed *in absentia* between Fiscal Years 2022 and 2023.⁵⁴ In Fiscal Year 2023 alone, 9,865 unaccompanied children were ordered removed, and the vast majority of those removal orders (86 percent) were issued *in absentia*.⁵⁵ While there is no currently available public data on how many of those children were unrepresented, historical patterns—along with low rate representation rates and high number of *in absentia* removal orders—suggest that the vast majority did not have a lawyer. According to analysis conducted in 2015, unrepresented unaccompanied children were *twenty times* more likely to be ordered removed *in absentia* than represented children.⁵⁶

**Immigration courts under the
Biden administration ordered more than
13,000 unaccompanied children removed
in absentia between Fiscal Years 2022 and 2023.**

51 Although the Boston Dedicated Docket Report does not break down the *in absentia* removal orders by age (beyond 21 and under), the fact that over half of all children on the Boston Dedicated Docket as of August 2022 were under the age of 6 suggests that many of the *in absentia* removal orders were issued against children under the age of 6. See Boston Dedicated Docket Report at 5–6, 9.

52 LA Dedicated Docket Report at 8.

53 Boston Dedicated Docket Report at 14.

54 EOIR Adjudication Statistics, UAC *In Absentia* Removal Orders, https://www.justice.gov/d9/pages/attachments/2018/11/02/23_uac_in_absentia_removal_orders.pdf (Oct. 12, 2023) (last visited Dec. 8, 2023) (listing a total of 8,491 *in absentia* removal orders in Fiscal Year 2023, and 4,607 *in absentia* removal orders in Fiscal Year 2022).

55 Of the 29,288 total decisions, 9,865 were removal orders and 8,491 of those removal orders (86%) were issued *in absentia*. EOIR Adjudication Statistics, UAC Statistics, https://www.justice.gov/d9/2023-12/31_uac_statistics.pdf (Oct. 12, 2023) (last visited Dec. 8, 2023).

56 Expert Report of Professor Susan B. Long, Dkt. 343–7 at 48, Case No. 2:14–cv–01026–TSZ, *F.L.B. v. Lynch*, 180 F.Supp.3d 811 (W.D. Wash. 2016).

These shocking numbers are a direct result of the system described above—a system that is neither necessary nor lawful.

II. THE BIDEN ADMINISTRATION'S TREATMENT OF CHILDREN IN IMMIGRATION COURT IS UNLAWFUL

The crisis described here is not inevitable. Rather, it is the direct result of illegal policies and practices of the Biden administration (and its predecessors).

The Fifth Amendment's Due Process Clause protects every person's right to a fundamentally fair immigration hearing.⁵⁷ Federal immigration laws similarly require a “full and fair hearing” for all people—including children—facing removal proceedings.⁵⁸ But children cannot get the full hearing to which the law entitles them when they are ordered removed for failing to appear before they can ever even get to court. Nor can they receive fair hearings when left to fend for themselves without a lawyer, even when they do manage to appear in court. Below, we explain why each of these practices is unlawful.

Making children face the ultimate consequence of the removal proceeding—a removal order—for failure to appear is contrary to the “basic concept of our system that legal burdens should bear some relationship to individual responsibility.”

A. *In absentia* removal orders against unrepresented children are unlawful

The issuance of *in absentia* removal orders against unrepresented children violates the Fifth Amendment's Due Process Clause for the simple reason that they penalize children for conduct that they cannot control.⁵⁹ Making children face the ultimate consequence of the removal proceeding—a removal order—for failure to appear

⁵⁷ U.S. CONST. amend. V; *Demore v. Kim*, 538 U.S. 510, 523 (2003) (citing *Reno v. Flores*, 507 U.S. 292, 306 (1993)). See also *Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013) (en banc).

⁵⁸ 8 U.S.C. § 1229a.

⁵⁹ See DOJ Letter (Apr. 10, 2023) at 2; Petitioners' Opening Brief, Dkt. 17 at 33, *Hernandez-Galand v. Garland*, 996 F.3d 1030 (9th Cir. 2021).

is contrary to the “basic concept of our system that legal burdens should bear some relationship to individual responsibility.”⁶⁰

Young children generally lack the capacity to comprehend that they are required to show up for court hearings on certain dates.⁶¹ Even if the child is mature enough to understand the importance of attending court on a given day, the vast majority of children cannot physically travel to a court without an adult to drive or accompany them: children generally cannot drive until at least age sixteen or use rideshare apps alone until they turn eighteen.⁶² And even public transport systems—which are unavailable in many parts of the country—have age limits.⁶³ Despite these obvious realities, immigration courts regularly impose the ultimate legal burden—a removal order—on children who bear no individual responsibility for failing to appear in court.

In virtually every other legal context, children are not held responsible for the acts or omissions of their parents or guardians.

Unsurprisingly, the immigration system is an outlier in this respect. In virtually every other legal context—including those most analogous to removal proceedings—children are not held responsible for the acts or omissions of their parents or guardians, including when it results in their failing to appear for legal proceedings.⁶⁴ The most obvious analogue to an *in absentia* removal order in the juvenile delinquency context would be the *in absentia* imposition of a juvenile adjudication (or “conviction”)—which almost uniformly does not exist. Instead, courts impose less severe consequences. A small minority of states allow trial *in absentia* under limited circumstances, but only when—as in all juvenile delinquency proceedings—the child is represented by a lawyer.⁶⁵ In most states, courts can issue a warrant.⁶⁶ In some states, a juvenile may even be held in contempt of court.⁶⁷ But these consequences fall far short of the ultimate consequence: a juvenile delinquency adjudication. The few courts that have considered the question of whether a juvenile can be

60 *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

61 See, e.g., *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1160 (9th Cir. 2004) (explaining that “minors generally cannot appreciate or navigate the rules of or rights surrounding final proceedings that significantly impact their liberty interests”); *J.D.B. v. North Carolina*, 564 U.S. 261, 272–73 (2011) (explaining that children “as a class” “lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them”).

62 Unaccompanied minors are prohibited from traveling with most transport network companies including Uber and Lyft. Uber, Requests from underage riders, <https://help.uber.com/driving-and-delivering/article/requests-from-underage-riders---?nodeId=43b84de6-758b-489e-b088-7ee69c749ccd> (instructing drivers to decline the ride request if they believe the person requesting the ride is under 18, to request that riders provide a driver's license or ID card for confirmation, and to “not start the trip, or allow a rider to ride if they are underage”); Lyft, Safety Policies, <https://help.lyft.com/hc/e/all/articles/115012923127-Safety-policies> (stating that a passenger must be 18 to sign up for Lyft, that a driver may ask the passenger to confirm their age, and that the driver will have to cancel the trip if the passenger is under 18). Uber recently opened “teen accounts” for children aged 13–17 in a limited number of cities. Uber, Teen accounts on Uber, <https://www.uber.com/us/en/ride/teens/>.

63 See Valeria Gomez, *Geography as Due Process in Immigration Court*, 23 WIS. L. REV. 1 (2023); see also Federal Transit Administration, May a transit entity set a minimum age limit for children riding without a parent or guardian?, <https://www.transit.dot.gov/may-transit-entity-set-minimum-age-limit-children-riding-without-parent-or-guardian>.

64 See, e.g., *St. Ann v. Palisi*, 495 F.2d 423, 425 (5th Cir. 1974) (holding that it violated Due Process to suspend children from school because their mother hit the school principal, and explaining that “under our system of justice punishment just [sic] be founded upon an individual's act or omission, not from his status, political affiliation, or domestic relationship”).

65 See *infra* Section II (B); 705 Ill. Comp. Stat. Ann. 405/5–625 (A court may commence the trial of a minor arrested for a felony who fails to appear “after the State has affirmatively proven through substantial evidence that the minor is willfully avoiding trial” and only if the absent minor is represented by counsel.); FL ST JUV P Rule 8.100 (If a child is present at the start of a juvenile proceeding and “during the progress of the hearing voluntarily absents himself or herself from the presence of the court without leave of the court,” the hearing can proceed “as if the child were present in court.”)

66 See, e.g., PA ST JUV CT Rule 364; N.Y. Fam. Ct. Act § 312.2; MN ST JUV DEL Rule 25.03; 705 Ill. Comp. Stat. Ann. 405/5–525; NJ R CH DIV FAM PT R. 5:20–3; OK R 14 DIST CT Part 8.

67 See, e.g., Wash. Rev. Code Ann. § 13.40.100; *S.P. v. State*, 985 So. 2d 651 (Fla. Dist. Ct. App. 2008).

prosecuted for failure to appear at juvenile delinquency proceedings have held that they cannot.⁶⁸ These cases reflect an understanding that children, unlike adults, are not responsible for ensuring their appearance at court, and should be treated more leniently.

In absentia removal orders against unrepresented children are unlawful regardless of whether the child is unaccompanied or in consolidated proceedings (like the Dedicated Docket) with an adult family member. This is because, again, the law should not hold a child responsible for the acts or omissions of their parents or guardians.⁶⁹ While a parent (or other adult family member) may bear some responsibility for the child's appearance, an adult's failure to act cannot lawfully justify issuing a removal order *against a child*, forcing the child themselves to bear the severe consequences of a removal order.⁷⁰ An *in absentia* removal order makes the child subject to physical deportation at any time.⁷¹ It is not appealable, and can only be rescinded if the child files a complex, time-sensitive and number-barred motion to reopen.⁷² Even if the child is not physically removed, they will face a host of future consequences including being deemed inadmissible to the country in the future,⁷³ ineligible for certain immigration benefits,⁷⁴ and facing potential criminal prosecution for unlawful reentry.⁷⁵

In other contexts, immigration law does not hold children responsible for their acts or omissions as minors, in conformity with the Due Process Clause. For example, immigration law exempts children from the unlawful presence bar: unlawful presence does not accrue prior to age 18.⁷⁶ This rule reflects a recognition that children are generally unable to control their geographic location and should not be held responsible for the acts or omissions of their parents or other adults. Immigration law also excuses all children under the age of 18 from the one-year filing deadline for asylum applications.⁷⁷ According to the regulations, the status of being an "unaccompanied minor" is a "legal disability" which excuses failure to file within one year.⁷⁸ Note that, in practice, these exceptions apply to *all* applicants under the age of 18, including those who are "accompanied."⁷⁹

68 See, e.g., *Int. of J.R.K.*, 643 S.W.3d 141 (Mo. Ct. App. 2022) (holding that a Missouri statute imposing criminal penalties for failure to appear at a criminal proceeding does not apply to the failure to appear at a juvenile proceeding); *In Int. of M.B.*, 217 Ga. App. 660, 662 (1995) (holding that a juvenile who failed to appear could not commit the crime of felony bail jumping, but stating that the juvenile court could issue an order that the child be taken into custody for failure to appear and that a petition alleging delinquency may be based upon the failure to appear); *Matter of Natasha C.*, 80 N.Y.2d 678 (1993) (holding that a New York bail jumping statute did not apply to juveniles who failed to appear at delinquency hearing).

69 See, e.g., *St. Ann v. Palisi*, 495 F.2d 423, 425 (5th Cir. 1974) (holding that it violated Due Process to suspend children from school because their mother hit the school principal, and explaining that "under our system of justice punishment just [sic] be founded upon an individual's act or omission, not from his status, political affiliation, or domestic relationship").

70 See Petitioners' Opening Brief, Dkt. 17 at 36–37, *Hernandez-Galand v. Garland*, 996 F.3d 1030 (9th Cir. 2021).

71 See 8 C.F.R. § 1241.1(e).

72 See 8 U.S.C. § 1229a(b)(5)(c); 8 C.F.R. § 1003.23(b)(4)(ii).

73 8 U.S.C. § 1182(a)(6)(B), (a)(9)(A).

74 8 U.S.C. § 1255(a).

75 8 U.S.C. § 1326.

76 8 U.S.C. § 1182(a)(9)(B)(iii)(I); but see *Rodriguez v. Mukasey*, 298 Fed. Appx. 306 (5th Cir. 2008) (finding that this exception applies only to unlawful presence under 8 U.S.C. § 1182(a)(9)(B), not to unlawful presence under 8 U.S.C. § 1182(a)(9)(C)).

77 8 U.S.C. § 1158(a)(2)(E).

78 8 C.F.R. § 1208.4(a)(5) (explaining that "extraordinary circumstances" which excuse the failure to file within the one-year period may include a "[l]egal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival.>").

79 *Matter of A-D-*, (BIA May 22, 2017) (unpublished).

B. Children have a right to legal representation in removal proceedings

For the relatively small percentage of unrepresented children who are able to appear, and whose cases therefore proceed in immigration court, the Constitution requires that they receive legal representation. The failure to ensure legal representation for all unrepresented children in removal proceedings violates the Due Process Clause of the Fifth Amendment.⁸⁰ The Due Process Clause protects every individual's right to a fundamentally fair removal hearing, and a removal hearing in which an unrepresented child is pitted against a government lawyer is fundamentally unfair.⁸¹

A removal hearing in which an unrepresented child is pitted against a government lawyer is fundamentally unfair.

The Supreme Court has repeatedly adopted special rules for children to protect their constitutional rights, in recognition that “children cannot be viewed simply as miniature adults.”⁸² Because children “lack the capacity to exercise mature judgement and possess only an incomplete ability to understand the world around them,” different interrogation rules apply for children.⁸³ Because children have an “under-developed sense of responsibility,” different sentencing rules apply to people who committed crimes when they were children.⁸⁴ And because children lack maturity and are more vulnerable to outside pressures, children cannot be sentenced to the death penalty⁸⁵ or mandatory life without parole.⁸⁶

The common-sense insight that children require special treatment has led to nearly universal agreement that children cannot receive fair hearings without counsel in virtually every other legal context.⁸⁷

Indeed, in the most analogous *civil* context, juvenile delinquency proceedings, children have a constitutional right to appointed counsel.⁸⁸ In holding that the Due Process Clause requires that the government provide counsel for children in juvenile delinquency

⁸⁰ See *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019) (en banc) (Paez, J., concurring); Third Amended Complaint—Class Action, Dkt. 207 at 46, Case No. 2:14-cv-01026-TSZ, *J.E.F.M. v. Holder*, 107 F.Supp.3d 1119, 1123 (W.D. Wash. 2015), *aff'd in part, rev'd in part sub nom. J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016).

⁸¹ See, e.g., *Flores-Chavez*, 362 F.3d at 1161–63 (holding that service on child was improper, and stating that “[f]or over one hundred years, our courts have held that [noncitizens] possess due process rights under the Fifth Amendment.”) (citing *Yamataya v. Fisher*, 189 U.S. 86 (1903)).

⁸² *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011).

⁸³ *Id.* at 273.

⁸⁴ *Montgomery v. Louisiana*, 136 S. Ct. 718, 726 (2016).

⁸⁵ *Roper v. Simmons*, 543 U.S. 551, 569.

⁸⁶ *Miller v. Alabama*, 567 U.S. 460, 470–71 (2012).

⁸⁷ See Petitioner's Opening Brief, Dkt. 29 at 22, *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019); see, e.g., *In re Gault*, 387 U.S. 1 (1967) (children in juvenile delinquency proceedings have a constitutional right to counsel); *Kent v. United States*, 383 U.S. 541, 561–62, 567–68 (1966) (children are entitled to counsel in civil proceedings seeking to transfer them to adult criminal courts); *In re Roger S.*, 569 P.2d 1286, 1296 (Cal. 1977) (requiring counsel for children in civil commitment proceedings).

⁸⁸ *In re Gault*, 387 U.S. 1 (1967).

proceedings, the Supreme Court explained that children need counsel in order “to cope with problems of law, to make skilled inquiry into the facts, to insist upon the regularity of the proceedings, and to ascertain whether [they have] a defense and to prepare and submit it.”⁸⁹

There is universal agreement that children cannot receive fair hearings without counsel in virtually every other legal context.

That reasoning undoubtedly applies with equal force for children in removal proceedings. The consequences of immigration proceedings are no less severe than the consequences of juvenile delinquency proceedings: while delinquency proceedings carry with them the “prospect of incarceration in a state institution until the juvenile reaches the age of 21,” immigration removal proceedings carry with them the prospect of indefinite, potentially permanent removal to a country where the child may fear extreme violence or death.⁹⁰

The Supreme Court’s doctrine involving the right to appointed counsel in civil cases confirms that Due Process requires legal representation for children in removal proceedings. The Court analyzes such cases by balancing three factors: (1) the nature of the private risk that will be affected; (2) the comparative risk of erroneous deprivation of that interest with and without additional or substitute procedural safeguards; and (3) the nature and magnitude of any countervailing interest in not providing additional or substitute procedural requirements.⁹¹ When assessing the probable value of counsel, the Court has also paid particular attention to the complexity of the proceedings, the asymmetry of representation, and whether substitute procedural safeguards could satisfy due process.⁹²

Any fair-minded application of those factors should require legal representation for children in immigration court. First, removal proceedings have extremely high stakes: children often face grave harm upon deportation, including, in the words of the Supreme Court, “poverty, persecution, even death.”⁹³ Second, counsel is critical to

⁸⁹ *In re Gault*, 387 U.S. 1, 36 (1967).

⁹⁰ *Id.* at 36–37.

⁹¹ *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Turner v. Rogers*, 564 U.S. 431, 444–45 (2011); see also *Oshodi v. Holder*, 729 F.3d 883, 894 (9th Cir. 2013) (en banc) (applying *Mathews* in the immigration context).

⁹² *Turner*, 564 U.S. at 447–48.

⁹³ *Bridges v. Wixon*, 326 U.S. 135, 164 (1945).

ensure that children obtain a fair hearing because—as illustrated by the evidence cited above—immigration law is notoriously complex. Children simply are unable to learn and apply immigration law and procedure to a degree that would enable them to litigate their own cases.⁹⁴ Third, the government's fiscal interests against providing counsel to children are counterbalanced by the fact that the government pays a trained prosecutor to litigate against the child in every case, and outweighed by the fact that providing counsel would advance two government interests: the effective and fair administration of the immigration laws, and the welfare of children living in the United States. Finally, the asymmetry of representation between a trained government attorney and a child bolsters the constitutional need to provide counsel.

The federal immigration statute likewise is best read to require that children be represented in immigration court. The immigration statute provides that all noncitizens in removal proceedings have the statutory right to a full and fair hearing, including a “reasonable opportunity to examine the evidence against [them], to present evidence on [their] own behalf, and to cross-examine witnesses presented by the government.”⁹⁵ Courts have recognized that this provision contains not only enumerated rights,⁹⁶ but also unenumerated rights⁹⁷ that are needed to vindicate the enumerated ones. Because of their age and associated cognitive limitations, children simply cannot exercise their right to a full and fair hearing without the assistance of counsel.

94 The Ninth Circuit has recognized those limitations as to service, explaining that “minors generally cannot appreciate or navigate the rules of or rights surrounding final proceedings that significantly impact their liberty interests.” *Flores-Chavez*, 362 F.3d at 1160.

95 8 U.S.C. § 1229a(b)(4)(B).

96 *Zolotukhin v. Gonzales*, 417 F.3d 1073, 1075 (9th Cir. 2005) (stating that 8 U.S.C. § 1229a(b)(4)(B) entitles a noncitizen “to a full and fair hearing of the [noncitizen]’s claims and a reasonable opportunity to present evidence on his or her behalf.”)

97 See *Matter of Tomas*, 19 I. & N. Dec. 464, 465–66 (BIA 1987) (holding that “[t]he presence of a competent interpreter is important to the fundamental fairness of a hearing”); *Bondarenko v. Holder*, 733 F.3d 899, 907 (9th Cir. 2013) (recognizing the existence of “the due process right to a timely production of [] adverse” evidence).

III. RECOMMENDATIONS

Since shortly after the Biden administration began, CILP and others have offered several concrete and immediate steps that the administration could take to address the unlawful treatment of children in immigration court. We lay out those recommendations again here, in the hopes that the administration will act swiftly to protect children facing removal proceedings. First, the Biden administration should prohibit the imposition of *in absentia* removal orders against unrepresented children. Second, the Biden administration should terminate the Dedicated Docket. Finally, the Biden administration should ensure legal representation for all unrepresented children in removal proceedings.

Importantly, these recommendations are distinct from recent efforts to create a specialized docket for unaccompanied children. Our focus is on the need to guarantee legal representation and end the use of *in absentia* removal orders against children who have no control over whether they come to court. Neither of those measures is included in recent proposals. For the reasons described above, both are essential to ensure the fair treatment of children in immigration court. And, while these recommendations could and should be adopted in any forthcoming unaccompanied children's docket, the protections we argue for here must extend to all children in immigration court—whether unaccompanied or in consolidated proceedings with their parents—in order to ensure due process for these children. In short, our recommendations remain as urgent as ever.

A. The Biden administration should prohibit *in absentia* removal orders against unrepresented children

The Biden administration should adopt a categorical rule that prohibits the imposition of *in absentia* removal orders against unrepresented children under a certain age. The most straightforward rule, with the greatest legal support, would be a categorical prohibition on *in absentia* orders against unrepresented children under the age of 18. This comports with the majority of legal precedent both within and outside the immigration context: “[t]he age of 18 is the point where society draws the line for many purposes between childhood and

adulthood.”⁹⁸ It is also consistent with the reality that children of all ages do not generally have the ability to control whether or not they appear in court, nor the maturity to appreciate the consequences of their failure to do so.

In the alternative, the Biden administration could consider adopting a categorical prohibition barring *in absentia* orders against unrepresented children under the age of 14, and a presumption disfavoring such orders against minors. This rule would align with the notice requirements in the immigration regulations, under which, for children under the age of 14, notice must be served upon the person with whom the child resides.⁹⁹ While it is not clear whether this rule would comply with the Due Process Clause, it would at least provide greater due process for more children than the current policy.

The simplest way to adopt such a rule could be through the Attorney General or his delegates at the Board of Immigration Appeals (“BIA”), who set precedent for the immigration courts. In *Matter of Gomez-Gomez*, the BIA upheld the *in absentia* removal order of an unrepresented eight-year-old girl, finding that notice to her was proper.¹⁰⁰ But *Gomez-Gomez* did not explicitly address whether that removal order comported with the Due Process Clause.¹⁰¹ More recently, the Board has repeatedly rescinded *in absentia* orders against young children in unpublished cases where the child failed to appear as a result of an error by their parent, suggesting that even it understands that there is no legal justification for issuing *in absentia* removal orders against children who bear no responsibility for their failure to appear.¹⁰²

The Biden administration should also adopt policies to ensure that existing *in absentia* removal orders against unrepresented children are not enforced. The Executive has substantial discretion over each stage of removal proceedings, including the execution of removal orders.¹⁰³ The Biden administration can and should use this discretion not only to decline to issue *in absentia* orders, but also to prohibit agency personnel from enforcing the thousands of existing *in absentia* orders that have been entered against unrepresented children in the past, including those issued against people who are now over age 18. Such a measure would require agents to screen outstanding

98 *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

99 8 C.F.R. § 103.8(c)(2)(ii). In the Ninth Circuit, the rule is more stringent, as that court read the regulations to require notice for all children under 18. See *Flores-Chavez*, 362 F.3d at 1156–57. Other circuits have declined to adopt its approach. See, e.g., *Lopez-Dubon v. Holder*, 609 F.3d 642 (5th Cir. 2010); *Llapa-Sinchi v. Mukasey*, 520 F.3d 897 (8th Cir. 2008).

100 *Matter of Gomez-Gomez*, 23 I. & N. Dec. 522 (BIA 2002) (en banc).

101 Although the Immigration Judge had found a due process violation, and the BIA stated that it “disagree[d]” with that assessment, the BIA decision does not provide any further explanation of how the removal order complied with the Due Process Clause. *Id.* at 528. The dissent similarly focused entirely on the relevant statutes and BIA caselaw, failing to address the fundamental issue of whether *in absentia* removal orders are constitutional. *Id.* at 528–532.

102 See, e.g., *In re C-J-B-F-*, (BIA Dec. 13, 2016) (unpublished) (rescinding *in absentia* order where respondent was 14 years old and in mother’s care at the time of hearing); *In re Jakeline Tatiana Mendez-Gonzalez*, (BIA Oct. 2016) (unpublished) (“In particular, we take into account the respondent’s young age at the time of the *in absentia* hearing and her mother’s statement that the respondent missed the hearing due to a calendaring error on the mother’s part.”)

103 See generally *Reno v. Arab American Anti-Discrimination Committee*, 525 U.S. 471, 483 (1999) (interpreting 8 U.S.C. § 1252(g), and finding that Congress intended that the Executive have substantial discretion over the “discrete acts of ‘commenc[ing] proceedings, adjudicate[ing] cases, [and] execut[ing] removal orders’”); see also *id.* at 484 (“To ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation.”) (quoting 6 C. Gordon, S. Mailman, & S. Yale-Loehr, *Immigration Law and Procedure* § 72.03[2][h] (1998)).

removal orders prior to executing them to ensure compliance with this rule.

B. The Biden administration should terminate the Dedicated Docket

The Biden administration should heed the call of advocates across the country and terminate the Dedicated Docket.¹⁰⁴ While the Biden administration's purported justification for the Dedicated Docket was to process cases of families with children both more "expeditiously" and "fairly,"¹⁰⁵ the result has been a due process disaster for the thousands of children placed in these fast-track immigration courts.¹⁰⁶ As described above, the Dedicated Docket has exacerbated the twin problems outlined in this white paper: Children's rights are daily violated in the Dedicated Docket's accelerated court hearings by the issuance of *in absentia* removal orders against unrepresented children and lack of legal representation. The Biden administration should end this failed program.

C. The Biden administration should ensure legal representation for all unrepresented children in removal proceedings

The federal government has a legal and moral obligation to ensure the representation of every indigent child facing deportation.¹⁰⁷

The Biden administration appears to agree, including provisions requiring appointed counsel for children facing deportation "when necessary to ensure the fair and efficient resolution of their claims" in its proposed Citizenship Act of 2021.¹⁰⁸ As the above legal analysis makes clear, counsel is *always* necessary to ensure the fair resolution of children's claims in immigration court. But while the bill has stalled in Congress, the administration need not wait for legislation to vindicate the principle it endorsed.

The Biden administration already has the tools to operationalize a legal representation program for children. Through its National Qualified Representatives Program (NQRP), the government already provides appointed counsel for detained immigrants found incompetent to represent themselves due to a serious mental disorder or

¹⁰⁴ See Letter from 106 legal service providers, court observers, and allied organizations to Merrick B. Garland, Attorney General, Alejandro N. Mayorkas, Secretary of Homeland Security & Betsy Lawrence, Deputy Assistant to the President for Immigration Domestic Policy Council (Oct. 5, 2022), <https://www.aila.org/advo-media/aila-correspondence/2022/letter-to-administration-expressing-grave-concerns>; Letter from 106 legal service providers, court observers, and allied organizations to Merrick B. Garland, Attorney General, Alejandro N. Mayorkas, Secretary of Homeland Security & Betsy Lawrence, Deputy Assistant to the President for Immigration Domestic Policy Council (Jun. 22, 2023), https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/Dedicated_Docket_Response_to_DOJ_Letter.pdf.

¹⁰⁵ Press Release, U.S. Dep't of Just. & U.S. Dep't of Homeland Sec., DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration hearings (May 28, 2021), <https://www.justice.gov/eoir/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings>.

¹⁰⁶ The Biden administration's use of expedited processes for families through its FERM program has had similarly disastrous consequences. As described *supra* note 7, that program results in rapid removal orders entered against families with children before they ever reach any immigration court. Advocates have rightfully called for an end to that program as well. See <https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2023-08/NJIC-policy-brief-FERM-August-2023-FINAL.pdf>.

¹⁰⁷ See Letter from Ahilan Arulanantham, Theo Angelis, Talia Inlender, Stephen B. Kang, Kristin Macleod-Ball, Karolina J. Walters, Matt Adams, Carmen G. Iguina Gonzalez, Kristen Jackson, Kevin Lapp & David Thronson to Alejandro Mayorkas, Secretary of Homeland Security (Jun. 2, 2021) (on file with UCLA CILP).

¹⁰⁸ U.S. Citizenship Act of 2021, H.R. 1177, 117th Cong. § 292(c)(1) (2021); see also White House, *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System* (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/>.

defect.¹⁰⁹ Since 2014, the government has also funded legal representation for some unaccompanied children in removal proceedings.¹¹⁰ It can and must do the same for *all* children.¹¹¹

We urge the administration to adopt the concrete recommendations laid out in this paper: prohibit the issuance of in absentia removal orders against unrepresented children; terminate the Dedicated Docket; and ensure legal representation for all children in removal proceedings.

While the Biden administration may claim that lack of resources precludes ensuring the provision of legal representation for all children in removal proceedings, that is not true. The administration already has the authority to defer adjudication of children's cases—both unaccompanied and in consolidated proceedings—until such time as legal representation can be secured.¹¹² In any case, a lack of funds cannot overcome the mandates of the Due Process Clause. The answer simply cannot be to plow ahead against children facing removal proceedings alone.

¹⁰⁹ See Dep't of Justice, National Qualified Representative Program (NQRPP), <https://www.justice.gov/eoir/national-qualified-representative-program-nqrp>; *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG, 2013 WL 36744923 (C.D. Cal. Apr. 23, 2013).

¹¹⁰ See AmeriCorps, *Justice AmeriCorps Legal Services for Unaccompanied Children*, <https://americorps.gov/funding-opportunity/justice-ameri-corps-legal-services-unaccompanied-children>; see also Kirk Semple, *Youths Facing Deportation to Be Given Legal Counsel*, N.Y. TIMES (Jun. 6, 2014), <https://www.nytimes.com/2014/06/07/us/us-to-provide-lawyers-for-children-facing-deportation.html>.

¹¹¹ While the government's newly-launched "Access EOIR" Initiative provides counsel for certain unaccompanied minors in a limited number of cities, this program is insufficient to meet the needs of the thousands of children it is placing in removal proceedings each month. See Dep't of Justice, *EOIR Announces "Access EOIR" Initiative* (Sep. 28, 2021), <https://www.justice.gov/eoir/pr/eoir-announces-access-eoir-initiative>.

¹¹² 8 C.F.R. § 1003.0(b)(1)(ii).

CONCLUSION

Despite taking some strong symbolic and practical steps in its early days, the Biden administration has failed children in immigration court under its watch. In the last three years, Immigration Judges have issued removal orders against tens of thousands of children in violation of basic due process principles. Though the administration has not enforced most of those removal orders, nothing will stop a future administration from doing so without ever providing those children a fair day in court.

But there is time to reverse course. We urge the administration to adopt the concrete recommendations laid out in this paper: prohibit the issuance of *in absentia* removal orders against unrepresented children; terminate the Dedicated Docket; and ensure legal representation for all children in removal proceedings. To do so would make real the Biden administration's promise of a fair and humane immigration system for children.