Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

F.L.B., a minor, by and through his Next Friend, Casey Trupin, et al.,

Plaintiffs,

v.

LORETTA E. LYNCH, Attorney General, United States, et al.,

Defendants.

No. 2:14-cv-01026

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
September 2, 2016

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INTRODUCTION

After over two years of litigation, Plaintiffs have failed to provide any factual or legal basis for obtaining a judicial decree declaring that three separate acts of Congress[1] are unconstitutional and that named Plaintiffs and the classes they purport to represent are constitutionally entitled to appointed counsel at taxpayer expense during their civil removal proceedings. Summary judgment in Defendants' favor is compelled for the following reasons.

First, Plaintiffs have not produced evidence of a named Plaintiff or class member who has been erroneously ordered removed on the merits while unrepresented. At the same time, several former Plaintiffs have obtained relief from removal without taxpayer-funded counsel. Second, Plaintiffs have not cited a single case to support their argument that aliens in civil removal proceedings have a constitutional right to taxpayer-funded counsel where imprisonment is not at issue. Third, assuming arguendo that some subset of aliens possess a liberty interest in remaining in the United States, Plaintiffs have not shown that aliens apprehended at a port of entry or at or near the border are entitled to a heretofore unrecognized right to counsel at taxpayer expense. Fourth, Plaintiffs have failed to show that the totality of the efforts that Defendants have undertaken to protect the interests of minors in removal proceedings are insufficient to ensure that minors can obtain a fair hearing even if unrepresented. Fifth, a judicial declaration of a right to appointed counsel would (1) undermine the Government's currently successful efforts to procure *pro bono* counsel for many minors; and (2) create either a potentially expensive new taxpayer liability or, if Congress continues to decline to fund counsel for minors, substantially interfere with Department of Homeland Security's (DHS) duty to enforce the immigration laws by removing individuals who lack legal authorization to remain in the United States.[2] Summary judgment should be granted in Defendants' favor.

[1] 8 U.S.C. §§ 1229a(b)(4)(A), 1232(c)(5), 1362.

[2] Additionally, the jurisdictional bar at 8 U.S.C. § 1252 should prevent this case from proceeding in the District Court. Rather than bringing a case through the regular order that Congress intended in the event that a minor had actually lost their case in immigration court while unrepresented, the parties must now move forward in litigation seeking to determine the possibility that hypothetical minors might be denied due process based solely on opinion testimony and inapposite statistics rather than being able to review a minor's actual removal order to determine the fairness of the outcome.

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ARGUMENT

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Rule 56 mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Plaintiffs may no longer rely on their pleadings and speculative statements—they must provide *facts* to support their position. *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081–82 (9th Cir. 1996) ("[M]ere allegation and speculation do not create a factual dispute for purposes of summary judgment.").

I. Plaintiffs Lack Standing To Bring Their Procedural Due Process Claim.

As an initial matter, Plaintiffs fail to carry their burden of demonstrating a live case or controversy for Article III purposes as to any named Plaintiff or the class as a whole. To date, not a single named Plaintiff has suffered the alleged harm that Plaintiffs' counsel have argued since July 2014 to be widespread and guaranteed to befall Plaintiffs—that they would be forced to proceed on the merits of their immigration proceeding before an Immigration Judge (IJ) or be ordered removed without counsel.

To establish standing, Plaintiffs must have suffered an injury in fact that is both fairly traceable to Defendants' challenged conduct and likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Even where a class has been certified, at least "one named Plaintiff must meet the standing requirements," and the absence of any named plaintiff with standing means that the class itself lacks standing. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979 (9th Cir. 2011). Alleged injuries to unnamed, putative class members are irrelevant to the standing analysis, *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999), and cannot rescue the case from dismissal if the named plaintiffs lack standing, *see B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999).

Where, as here, Plaintiffs premise their claim for declaratory relief on predicted future injury—that their removal proceedings will not be fundamentally fair absent the provision of

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counsel at taxpayer expense—Plaintiffs must demonstrate that this "threatened injury [is] certainly impending," *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013), as of the date of the complaint, *see Flores v. Huppenthal*, 789 F.3d 994, (9th Cir. 2015). Mere "[a]llegations of possible future injury" without more are insufficient, *Clapper*, 133 S. Ct. at 1147, and "[w]hen considering any chain of allegations for standing purposes," courts reject "as overly speculative those links which are predictions of future events" "as well as predictions of future injury that are not normally susceptible of labelling as 'true' or 'false.'" *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015). On summary judgment, Plaintiffs may not rely on allegations of injury, *Dep't of Comm. v. U.S. House of Rep.*, 525 U.S. 316, 329 (1999), but must set "forth by affidavit or other evidence specific facts" necessary to establish standing. *Clapper*, 133 S. Ct. at 1149.

Under these standards, no named Plaintiff carries his summary judgment burden of demonstrating through affidavit or otherwise "specific facts" demonstrating actual or certainly impending harm as of the date of the Complaint with respect to their immigration proceedings. Indeed, as explained *supra*, not a single named Plaintiff proffers a single, plausible allegation of imminent injury. Nor could they: *no* named Plaintiffs have been ordered removed after appearing alone at their removal proceedings or have even been required to proceed on the merits of her case without counsel. *Supra* pp. 8-22. Rather, each individual's proceedings, to date, have resulted in that Plaintiff receiving continuances to allow time to locate counsel, actually securing counsel following a continuance, and/or ultimately receiving relief or protection from removal.

Given that cognizable injury cannot occur at "some indefinite time in the future," *Lujan*, 504 U.S. at 564, n.2, it cannot be that the speculative possibility that a named Plaintiff might one day have to proceed on the merits of his case or be ordered removed without an attorney—when all evidence submitted thus far undeniably demonstrates that has not happened and is unlikely to occur—creates certainly impending injury as of the date of the Complaint. *Id.* at 569 n.4. "Allegations of possible future injury do not satisfy the requirements of Article III." *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1294 (D.C. Cir. 2007). In more than two years, Plaintiffs have failed to adduce facts demonstrating a certainly impending injury for any named Plaintiff. The speculative possibility that someday in the future—months, if

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not years from now—a named Plaintiff might appear without counsel at proceedings, and might have her case decided on the merits without receiving a continuance or relief from removal, and then might be ordered removed by an IJ is wholly insufficient to meet the necessary evidentiary showing that such an eventuality was certainly impending as of the date the complaint was filed. *See, e.g.*, *Clapper*, 133 S. Ct. 1147; *Schmier v. U.S. Ct. of Appeals for the Ninth Cir.*, 279 F.3d 817, 822 (9th Cir. 2002); *Thompson*, 2005 U.S. Dist. LEXIS 33630 at *12. Because Plaintiffs fail to adduce any competent evidence concerning any individualized harm that they have suffered or is certainly impending, no named Plaintiff has standing to pursue this action; thus, the class itself lacks standing and must be dismissed. *See B.C.*, 192 F.3d at 1264.[3]

II. Due Process Requires Appointed Counsel Only Where Incarceration is At Risk.

The Fifth Amendment states that "[n]o person shall be … deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. It does not expressly mention any right to counsel to protect these interests, unlike the Sixth Amendment, which provides such a right in criminal prosecutions. *See* U.S. Const. amend. VI. Unsurprisingly, therefore, the Supreme Court has found a due process right to appointed counsel only in those cases where, "if [an indigent litigant] loses, he may be deprived of his physical liberty." *Turner v. Rogers*, 564 U.S. 431, 442-43 (2011); *accord Lassiter v. Dep't of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18, 25 (1981); *In re Gault*, 387 U.S. 1, 41 (1967). Thus, there is no basis to suggest that due process requires counsel as a categorical matter in civil removal proceedings, which, even if they may lead to a foreign national's temporary inability to remain in the United States, do not result in a deprivation of personal physical liberty anywhere comparable to incarceration. *See Turner*, 564 U.S. at 442-43. Further, because the Fifth Amendment applies, the inquiry is always whether, on a "case-by-case basis," *Barthold*, 517 F.2d at 691, "the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case," *see Lopez v. I.N.S.*, 775 F.2d 1015, 1017 (9th Cir. 1985)—an individualized inquiry provided in the

[3] Even if some subset of the named Plaintiffs suffered injury, it would only be appropriate to tailor a remedy as to that narrow subset of individuals---i.e., "commensurate with the . . . specific violations." *Casey*, 518 U.S. at 357. As in *Casey*, the record here presents a "patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief." *Id.* at 359. Specifically, there are no named Plaintiffs proceeding in immigration court in San Francisco, Arizona, Las Vegas, San Diego or Portland, and Plaintiffs have otherwise produced no evidence that minor aliens are being erroneously ordered removed on the merits in those jurisdictions.

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petition for review process, 8 U.S.C. § 1229(g), following exhaustion of administrative remedies. *See, e.g.*, *Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004).

A. Plaintiffs Have Not Established A Protected Liberty Interest

The Fifth Amendment's Due Process Clause provides procedural protections in governmental adjudications which deprive individuals of "liberty" or "property" interests. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Procedural due process "is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334 (internal quotations omitted). The inquiry considers: (1) the private interest affected; (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. *Id.* at 335.

As a threshold matter, the Court need reach the balancing inquiry determining what process is due only if Plaintiffs first establish a constitutionally protected liberty interest. *See Wilkinson v. Austin*, 545 U.S. 209, 221 (2005); *Bd. of Regents v. Roth*, 408 U.S. 564, 569–70 (1972). However, no cognizable liberty interest exists with respect to discretionary forms of relief from removal. *Tovar-Landin v. Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004) (citing *Munoz v. Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003)). Thus, Plaintiffs have no cognizable liberty interest to the extent they assert a claim for asylum, *see I.N.S. v. Abudu*, 485 U.S. 94, 105 (1988), or voluntary departure, 8 U.S.C. § 1225(a)(4); *Tovar-Landin*, 361 F.3d at 1167. Adjustment of status, which any plaintiff who has obtained Special Immigration Juvenile (SIJ) status must seek to remain permanently in the United States, is also discretionary. *Abudu*, 485 U.S. at 105. Therefore, only claims to entitlement to *nondiscretionary* forms of relief contained in the class definition—*i.e.*, withholding of removal, *Turcios v. INS*, 821 F.2d 1396, 1398 (9th Cir. 1987); and Convention Against Torture (CAT) protection, *Cole v. Holder*, 659 F.3d 762, 770 (9th Cir. 2011)—can give rise to classwide protected liberty interests, assuming eligibility is established.

B. Plaintiffs' Interest Is Categorically at the Lowest End of the Spectrum.

The named Plaintiffs—and, by definition, all members of the class—have not been admitted into the country and are charged as inadmissible to the United States under 8 U.S.C.

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§ 1182. *See* 8 U.S.C. 1101(a)(13). As "applicants for admission," *see* 8 U.S.C. § 1225(a)(1), they are entitled to fewer protections under the immigration procedures than deportable aliens, *id.* § 1227, a group that includes aliens lawfully admitted who then fall out of lawful status by, for example, having their visa revoked, *id.* § 1227(a)(1)(B), or their lawful permanent resident status terminated, *id.* § 1227(a)(1)(D). *See Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094, 1097–98 (9th Cir. 2004). This distinction is constitutional because nonadmitted aliens are entitled to fewer due process protections in light of their lesser time in and connection to the territorial United States, *see id.*; *United States v. Verdugo–Urquidez*, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.") Further, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *see Alvarez-Garcia*, 378 F.3d at 1097–98.

This distinction is significant because Supreme Court pronouncements that removal constitutes a significant deprivation address deportation, *not* denial of admission. *See, e.g.*, *Costello v. I.N.S.*, 376 U.S. 120, 128 (1964) ("'[D]eportation is a drastic measure and at times the equivalent of banishment or exile . . . . It is the forfeiture for misconduct of a residence in this country.'") (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)); *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) (similar) *Galvan v. Press*, 347 U.S. 522, 530 (1954) (similar). As these cases indicate, deportation is a severe consequence because an alien stands to forfeit her residence in and possibly years of accumulated connections during previously lawful status in the United States. *See, e.g.*, *Costello*, 376 U.S. at 128; *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). However, non-admitted aliens who have only recently come to the country and are only allowed inside pending the outcome of their immigration proceedings, such as plaintiffs, lack the time and legal authorization to establish such relationships and material connections whose loss would make exit from the United States a deprivation. *See Plasencia*, 459 U.S. at 33; *Wilson v. Zeithern*, 265 F. Supp. 2d 628, 634–35 (E.D. Va. 2003). Aliens, such as plaintiffs, confronting possible removal due to inadmissibility face a categorically less severe deprivation,

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if any, than those who have been lawfully admitted and face deportation after establishing a life in the United States over the course of several years—the specific consequence that the Supreme Court has equated with banishment. *See, e.g.*, *Costello*, 376 U.S. at 128. Thus, at least one circuit has recognized that "an applicant for initial entry has no constitutionally cognizable liberty interest in being permitted to enter the United States." *Rafeedie v. I.N.S.*, 880 F.2d 506, 520 (D.C. Cir. 1989).

Further, courts have recognized, in the related landscape of alien detention, that an alien's due process liberty interest *vis a vis* her detention also depends on the strength of ther claim to relief from removal. *See, e.g.*, *Sierra-Tapia v. Reno*, No. 99-CV-986 TW(RBB), 1999 WL 803898, at *6 (S.D. Cal. Sept. 30, 1999) (citing *Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999)).[4] As one circuit has explained, the *Mathews* private interest factor does not assess "liberty in the abstract, but liberty in the United States by someone no longer entitled to remain in this country but eligible to live at liberty in his native land." *Parra*, 172 F.3d at 958. Such reasoning applies with even more force here, where the strength of a claim to relief from removal is clearly *more* intertwined with whether a procedural defect would result in an erroneous deprivation of mere denial of admission. For Plaintiffs who have not proffered evidence establishing potential eligibility for relief from removal or U.S. citizenship, their interest in appointed counsel, to defend a meritless claim, is substantially diminished. *See Sierra-Tapia*, 1999 WL 803898, at *6.[5]

Additionally, several named Plaintiffs—A.E.G.E., E.G.C., J.R.A.P., K.N.S.M., A.F.M.J., M.R.J., and L.J.M.[6]—are aliens encountered at a port of entry who had not entered the United

[4] This Court has implicitly recognized this in crafting the plaintiff class as comprising those with "potential eligibility" for relief from removal—as opposed to those simply "alleging" such entitlement—and/or those with a "colorable claim" to U.S. citizenship. *See* ECF No. 309.

[5] Additionally, an alien's lawful or unlawful presence within the United States impacts the degree of liberty interest she has in remaining here, as the Supreme Court has long recognized. *See Eisentrager*, 339 U.S. at 770. The liberty interest of nonadmitted aliens who sought to enter illegally "is more attenuated than that of an alien who has entered the country through official channels and been granted legal permanent resident status." *Wilson v. Zeithern*, 265 F. Supp. 2d 628, 633 (E.D. Va. 2003); *see also Jean v. Nelson*, 727 F.2d 957, 972 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985). No named plaintiff or class member has been lawfully admitted to the United States. Some—F.L.B., E.G.C., M.A.M., K.N.S.M., J.R.A.P.—attempted to enter the United States clandestinely without inspection. Any already marginal liberty interest these aliens possess, given their lack of admission, is further reduced by their clandestine entry and attempted unlawful presence. *See Rafeedie*, 880 F.2d at 520; *Wilson*, 265 F. Supp. 2d at 633.

[6] K.N.S.M. and J.R.A.P. were apprehended shortly after crossing the border, within the "arriving alien" statutory and regulatory scope. See 8 U.S.C. 1225(b)(1)(A)(iii); *see* Designating Aliens for Expedited Removal, 69 Fed. Reg.

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States. Precedent clearly establishes that aliens seeking entry at the border of the United States "stand[] on a different footing," and have no constitutional due process rights to greater procedural safeguards respecting their admission or removal than those granted by Congress. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *see Plasencia*, 459 U.S. at 32; *Angov v. Lynch*, 788 F.3d 893, 898 (9th Cir. 2015). The Government's decision not to detain them throughout their immigration proceedings but to parole them into the United States is irrelevant to and cannot alter their constitutional rights or legal status as aliens constructively held at the border. *See, e.g.*, *Zadvydas*, 533 U.S. at 693; *Leng May Ma v. Barber*, 357 U.S. 185, 188–190 (1958) (alien had not "entered" United States during period of parole pending admissibility). Their physical presence under parole is to assist in the adjudication of their immigration claims without the need for prolonged detention; they have not effected "entry" for constitutional purposes. *See Arango Marquez v. I.N.S.*, 346 F.3d 892, 895 (9th Cir. 2003). Even Plaintiffs appear to agree that parole pertains to detention status and is irrelevant to the procedure an alien receives in removal proceedings. *See* ECF 267 at 55-56. Such aliens have, if any, the lowest cognizable interest weighing in favor of additional procedures regarding their claims for admission given the longstanding limitation on constitutional procedural rights to aliens outside U.S. borders. *See Zadvydas*, 533 U.S. at 693; *Angov*, 788 F.3d at 898 & n.3.

Similarly, K.N.S.M. and J.R.A.P. were apprehended shortly after illegally crossing the border, within the "arriving alien" statutory and regulatory scope. *See* 8 U.S.C. § 1225(b)(1)(A)(iii); *see* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877-01, 48880 (Aug. 11, 2004). Although physically present, the fact that they entered illegally coupled with their presence for too short of a period of time to develop any ties or equities in the United States, *see Verdugo-Urquidez*, 494 U.S. at 271; *Jean v. Nelson*, 727 F.2d 957, 972 (11th Cir. 1984), means their status is "assimilated" to that of an alien stopped at the border for constitutional purposes. *See Mezei*, 345 U.S. at 212; *Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903) (distinguishing alien "who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population" from other

48877-01, 48880 (Aug. 11, 2004). Their status is assimilated to that of an alien stopped at the border for constitutional purposes. *See Mezei*, 345 U.S. at 212.

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aliens for due process purposes in deportation proceedings); *Ascencio-Rodriguez v. Holder*, 595 F.3d 105, 108 n.3 (2d Cir. 2010) ("alien not formally admitted to the United States, "[e]ven though physically present in the country, is treated as if stopped at the border and as having gained no foothold in this country). Their interest under *Mathews* is also at the lowest end of the cognizable spectrum.

C. The Named Plaintiffs Cannot Establish Strong Liberty Interests Or A Risk of Erroneous Deprivation Absent Appointed Counsel.

As the following undisputed material facts viewed in the light most favorable to Plaintiffs indicate, the first and second prongs of the *Mathews* analysis do not weigh in favor of Plaintiffs' claims.[7] Plaintiffs do not demonstrate that Defendants' procedural safeguards have failed them, that any concrete risk of risk of erroneous deprivation exists, or that any prejudice has accrued. [8]

1. F.L.B.

F.L.B., a seventeen year-old native and citizen of Guatemala, entered the United States on August 6, 2013. DHS served F.L.B. with a Notice to Appear (NTA) that charged him as an alien who had entered the United States without admission. Ex. A, at 1–3. He was designated an Unaccompanied Alien Child (UAC) and placed in Office of Refugee Resettlement (ORR) custody. ECF 312-1 at 1–2. F.L.B. remained in ORR custody for two months, after which he was released to the custody of a family friend living in Seattle, Washington. ECF 312-1 at 4–8.[9]

On October 23, 2015, while represented by an attorney from Columbia Legal Services(CLS), F.L.B. obtained an order of dependency from Washington State Superior Court,

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[7] These arguments are based solely on the sufficiency of the evidence provided in discovery in this case. Defendants are not prejudging the merits of Plaintiffs' admission claims given that they may adduce additional evidence in their individual proceedings in immigration court. Here, Plaintiffs have had an extended discovery period to present evidence that they face an erroneous deprivation if denied counsel, and have failed to do so.

[8] In their responses to class discovery requests, Plaintiffs include factual narratives pertaining to each named Plaintiff. Some contain new material not heretofore disclosed, despite Defendants' requests for this information during written discovery and at deposition. Class Response at 16-23. These signed narratives appear to be an attempt to bypass the examination their differing and non-responsive deposition answers underwent. The word limitations governing this motion prevent undersigned counsel from identifying each and every conflicting or unsupported assertion. To the extent that these responses conflict with this prior deposition testimony, they should be ignored for summary judgment purposes. *See Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009) ("The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." (quoting *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991)).

[9] Defendants have described F.L.B.'s stalled effort to obtain counsel for his removal proceeding based on his misunderstanding that he "found help at Northwest." ECF 312 at 3–5.

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placing him in the custody of K.C. ECF 299-1 at 79–83; ECF 207 at ¶ 83. At a May 20, 2015 immigration court hearing, the IJ noted that he had continued the case for eight months to permit F.L.B. to obtain counsel. ECF 299-1 at 17. F.L.B. had not obtained counsel for that hearing, but instead presented a letter from NWIRP indicating that he was a plaintiff in this suit. *Id.* at 18; ECF 312-2. In response to questions from the IJ, F. L.B. stated that (1) he was not a U.S. citizen and had no reason to believe that his parents or grandparents were U.S. citizens or lawful permanent residents, ECF 299-1 at 20-21. When the IJ asked why F.L.B. claimed to have a fear of returning to Guatemala, he replied: "If I go back, if I go back to, to Guatemala, there's too much violence there. I don't, I don't want to go back there. I, I want to, there's no work there, I want to go to school." *Id.* at 24. At his May 23, 2016 deposition, he testified that he left Guatemala voluntarily with his parents' knowledge because "[m]y family couldn't provide any more schooling for me, lots of violence, and lots of gangs and gang members." *Id.* at 44. He testified that he experienced harm from his father in Guatemala and that he received a single threat from a source he could not identify, during a time period that he also could not specify, sometime before he left Guatemala. *Id.* at 44–45. When asked whom he feared would harm him if returned to Guatemala, he replied, "I don't know," and the only feared harms he named were, "I could not go to school" and "the economy." *Id.* at 45–46.

At the close of the May 2015 hearing, the IJ informed F.L.B. that he would permit F.L.B. to file an asylum application, either with the IJ or with USCIS. ECF 299-1 at 39–40. The IJ continued F.L.B.'s case until August 17, 2016, to allow F.L.B. time to prepare his asylum application. *Id.* at 42. On July 6, 2016, the IJ continued F.L.B.'s case again until August 16, 2017, Ex. A, at 6., at which point FLB will be 18 years old. *See* ECF 299-1 at 19.

F.L.B. has not demonstrated prejudice from proceeding from his lack of appointed counsel in immigration proceedings and he will be 18 by the time he must next appear in immigration court. *See Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495 (9th Cir. 2007) ("a predicate to obtaining relief for a violation of procedural due process rights in immigration proceedings, an alien must show that the violation prejudiced him"). His interest in appointed counsel is low because, for the purposes of this motion, he has not demonstrated eligibility for

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U.S. citizenship or relief from removal. In the only particularized evidence of his immigration claims in the record—his deposition and immigration hearing—F.L.B. offered no evidence that he could be entitled to derivative citizenship through a relative. Further, F.L.B. failed to proffer objective record evidence demonstrating he experienced past persecution or has a well-founded fear of future persecution.[10] *See* 8 U.S.C. § 1101(a)(42); *Munoz v. Ashcroft*, 339 F.3d 950, 955 (9th Cir. 2003). Without more, the harms he describes are not causally related to his possession of a protected characteristic or membership in a particular social group.[11] *See id.* While F.L.B. may be eligible for SIJ status, such relief is not part of the class definition, and applying for adjustment to lawful permanent resident status on that basis is a discretionary benefit in which he lacks a cognizable liberty interest. *See Abudu*, 485 U.S. at 105.

Thus, because F.L.B. has failed to produce evidence of eligibility for any non-discretionary forms of relief from removal in which he has a cognizable liberty interest, the absence of appointed counsel does not risk erroneously depriving him of an interest in such relief.

2. Marvin Alex Aguilar Mendoza

Marvin Alex Aguilar Mendoza is an eighteen-year old native and citizen of Honduras who entered the United States without inspection on or about 2004. Ex. B, at 77–78. An immigration detainer was placed on him in August 2011; he was arrested for vandalism and then became involved in a physical altercation with rival gang members while in juvenile custody. *Id.* He was served with a NTA that charged him as inadmissible. *Id.* at 45. Aguilar Mendoza was released from DHS custody to his mother, Rosa Pedro, on September 27, 2011. *Id*. at 42, 61.

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[10] Plaintiffs have argued that his alleged abuse from his father could bring him under *Matter of A-R-C-G*, 26 I.&N. Dec. 388, 389–90, 95 (BIA 2014) (holding that "married women in Guatemala who cannot leave their relationship" constitute a particular social group (PSG) under 8 U.S.C. § 1101(a)(42)). However, F.L.B. is neither married nor female, and his testimony showed that he was able to leave any abuse by his father by relocating with his family's knowledge. The harms he specified fearing upon return—a poor economy and lack of educational opportunities, ECF 299-1 at 45-46—do not represent persecution on account of a statutory protected ground. *See Gormley v. Ashcroft*, 364 F.3d 1172, 1177–78 (9th Cir. 2004). Further, to the extent that F.L.B. now alleges being attacked (or having a family member attacked) in Guatemala, he does not indicate that this was due to his membership in a protected class, nor has he demonstrated that reporting such incidents to the police would have been futile. *See Rahimzadeh v. Holder*, 613 F.3d 916, 921 (9th Cir. 2010).

[11] Based on the evidence presented, F.L.B. also fails to show an entitlement to withholding, which has a higher standard than asylum. *See Gomes. Gonzale*s, 429 F.3d 1264, 1266 (9th Cir. 2005). Further, he fails to demonstrate eligibility for CAT protection because none of the harms as described amount to torture at the hands of the Guatemalan government. See 8 C.F.R. § 208.18(a)(1); *Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir. 2003).

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Because Aguilar Mendoza was a minor at the time, Ms. Pedro filled out a juvenile case sponsor worksheet and an I-134 Affidavit of Support to act as a sponsor and assume his custody. *Id.* at 148–51.

After initial master calendar hearing on October 9, 2012, *id.* at 117, and September 12, 2013, *id.* at 115, M.A.M.'s proceedings were continued multiple times until April 30, 2015.[12] *See id.* at 103–114. On April 1, 2015, Aguilar Mendoza submitted an I-360 petition for SIJ Status to USCIS with the assistance of an attorney. *Id.* at 4–16. Aguilar Mendoza had obtained a predicate order regarding eligibility for SIJ status from the Ventura Superior Court on January 21, 2014 with the assistance of an attorney from the Ventura County Public Defender's Office. *Id.* at 24. On May 13, 2015, Aguilar Mendoza's SIJ petition was approved.[13] ECF 270-1, at 25–27.

On October 15, 2015, Plaintiffs' attorney Kristen Jackson in writing informed the IJ that Aguilar Mendoza's SIJ petition had been approved. Ex. B, at 1. At the October 15, 2015 hearing, Ms. Pedro appeared on Aguilar Mendoza's behalf, who was in juvenile detention. The IJ gave Ms. Pedro an I-485 application to fill out. ECF 270-1 at 5–6. His proceedings were continued through April 28, 2016. Ex. B, at 95. At an April 28, 2016 hearing, Ms. Jackson submitted another letter, ECF 270-1, at 22–23, Ms. Pedro again appeared on behalf of her son; the IJ inquired about the status of the I-485 application that the IJ had given Ms. Pedro. Ms. Pedro stated that she had forgotten the form; the IJ gave her another I-485 to complete and adjourned the hearing until July 28, 2016. Ex. B, at 126–132.

In June 2016, Aguilar Mendoza was twice arrested on two separate misdemeanor charges. Ex. B, at 151–52; *see also* Calif. Penal Code §§ 484(a), 21310. He pled guilty to the charge of carrying a concealed dirk or dagger, pursuant to Calif. Penal Code § 21310; he is scheduled to be arraigned on September 29, 2016 for petty theft charge, pursuant to Calif. Penal Code § 484(a) . Ex. B, at 151–52. At Aguilar Mendoza's July 28, 2016, IJ hearing, Ms. Jackson submitted another letter, and Ms. Pedro said she had not completed his I-485 application. *Id.* at

[12] On May 7, 2014, Ms. Pedro filed a detailed motion to continue on behalf of her son due to his juvenile detention for an unrelated matter, without any apparent assistance of an attorney. Ex. B, at 29–34.

[13] *See* U.S. CITIZENSHIP & IMMIG. SERVS., "Special Immigrant Juveniles (SIJ) Status," https://www.uscis.gov/green-card/special-immigrant-juveniles/special-immigrant-juveniles-sij-status (last accessed August 6, 2016) for information about the SIJ program. Aliens with SIJ status can apply for lawful permanent resident status through filing an I-485 adjustment of status application. *See id.*; ECF 270-1 at 15–20.

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134–35; 139–40. The IJ continued the case until December 1, 2016, to permit Aguilar Mendoza to apply for adjustment of status once the new fiscal year begins in October. *Id.* at 140–41.[14]

Aguilar Mendoza has failed to adduce any evidence that he was prejudiced by lacking counsel in his immigration proceedings as a juvenile. *See Morales-Izquierdo*, 486 F.3d at 495. He has obtained continuance after continuance during his nearly four years in immigration proceedings, obtained counsel to successfully apply for SIJ status through USCIS, and has failed to set forth any evidence that his failure to apply for adjustment of status from May 13, 2015, the date his SIJ status was approved, up to his eighteenth birthday was, in fact, due to his lack of ability to obtain legal representation in his removal proceedings—especially when the record indicates that his mother has been present at his removal proceedings and has successfully filled out other immigration forms for the benefit of her son.[15] Further, in order to obtain permanent residency based on SIJ status, Aguilar Mendoza must file for adjustment of status, a discretionary form of relief in which he lacks a liberty interest. *See Munoz*, 339 F.3d at 954. He has also failed to set forth any viable alternative forms of relief from removal that he may have presented in his removal proceedings with the help of an attorney as a juvenile. Therefore, Aguilar Mendoza has failed to produce evidence indicating that he has suffered or will suffer any erroneous deprivation of a liberty interest absent appointed counsel.[16]

3. **K.N.S.M.**

K.N.S.M. is a ten-year-old native and citizen of Honduras who appears through her Next Friend and biological mother, Eloisa Sarahi Mejia Sevilla. On May 30, 2014, K.N.S.M. and her mother attempted to enter the United States illegally by wading across the Rio Grande. ECF 207 at 10; Ex. C, at 10-11. She and her mother crossed and were encountered by Border Patrol

[14] This Court has held that M.A.M. cannot serve as a class representative because he turned 18. ECF 322.
[15] The only reason Aguilar Mendoza is currently ineligible to apply for adjustment of status is because high demand for visas procured through SIJ status by Honduran citizens has for the first time triggered statutory requirements "implementing E4 and SR Application Final Action Dates for these countries, which will allow [DHS] to hold worldwide number use within the maximum allowed under the FY-2016 annual limits," and *not* due to lack of counsel. U.S. Citizenship & Immig. Servs., Visa Bulletin for May 2016, https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-may-2016.html (last accessed Aug. 6, 2016).
[16] In short, F.L.B. and Augilar Mendoza's cases have been handled the same way they would had the Court already entered a declaratory judgment in Plaintiffs' favor and absent additional Congressional funding for counsel—i.e., proceedings were continued until the minors could obtain counsel or relief or turn 18.

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slightly more than half-a-mile from the Eagle Pass, Texas Port of Entry and lacked valid entry documentation. Ex.C, at 15, 109. After being detained for approximately 24 hours, she and her mother were served with NTAs and released on recognizance; they now live in Ontario, California. Ex.C, at 77-76, 112-115.

K.N.S.M. has appeared with her mother in the Los Angeles, California immigration court on September 18, 2015; April 15, 2016; May 27, 2016; June 24, 2016. Ex.C, at 29-69,116-117. At K.N.S.M.'s first appearance and also at subsequent hearings, her mother received a list of free or low-cost legal providers. Ex. C, at 48-49, 55, 82, 85. K.N.S.M.'s mother has never contacted any of the legal services providers on this list. Ex. C, at 83. When asked if she tried to retain the ACLU to represent K.N.S.M. in removal proceedings, Ms. Mejia Sevilla declined to answer, asserting the attorney client privilege. *Id.* at 88.

The IJ has repeatedly continued the removal proceedings at the request or assent of K.N.S.M.'s mother so that she could find an attorney for her daughter. Ex.C, at 30–31, 34–35, 41–42, 50–51, 60–61. At the September 18, 2015, hearing, she said she spoke to a person among those mentioned by the IJ as individuals "who could advise," and this person "took [the mother's] information and told [her] that they would get in touch with [her]." Ex.C, at 83. She does not, however, remember the name of this person, and as of May 20, 2016, she had done nothing else to find an attorney for her daughter, relying solely on that unidentified person to "get back to [her]." *Id.* at 84; *see also id.* at 90 (testifying that she had not talked to anyone about how to hire an attorney for her daughter)). At her deposition, K.N.S.M.'s mother stated that she did speak to one attorney, but she found his request for a payment of $1,500 to be "a lot of money." Ex.C, at 61.

At her May 27, 2016, K.N.S.M. appeared with her mother once again, and the IJ provided her with a legal aid list. Ex.C, at 47–48. The IJ again asked K.N.S.M. and her mother about the efforts taken to obtain representation, and the IJ was handed a letter from the ACLU, informing the court of K.N.S.M.'s status as a plaintiff in this litigation. Ex.C, at 49–50. The IJ continued the proceedings to allow her more time to find and attorney. Ex.C, at 50. K.N.S.M. and her mother appeared at her June 24, 2016, immigration hearing. Ex.C, at 57. K.N.S.M. and her

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mother list had not obtained counsel for that hearing, but instead presented a letter from the ACLU indicating that she was a plaintiff in this suit. Ex.C, at 57–59. The IJ gave K.N.S.M. and her mother the legal aid list and encouraged them to try to find counsel.[17] Ex.C, at 57–60. The IJ continued the case until July 29, 2016. Ex.C, at 60.

On July 29, 2016, K.N.S.M. and her mother failed to appear at her scheduled immigration hearing. Ex.C, at 66–69. Ahilan Arulanantham, ACLU counsel in this action, appeared as a friend of the court, and indicated that he did not know the whereabouts of K.N.S.M. and her mother. Ex.C, at 67. He further indicated that he had attempted to reach out to K.N.S.M. and her mother "the last few days without success." Ex. C, at 68. The IJ noted that K.N.S.M. was a child dependent on her mother and set the matter over to give her another opportunity to appear. Ex.C, at 67.

K.N.S.M. not shown any prejudice from lack of counsel thus far in her removal proceedings, *see Morales-Izquierdo*, 486 F.3d at 495, nor that she or her mother have undertaken a good-faith effort to secure no or low-cost representation.[18] Further, there is no factual dispute that K.N.S.M. was apprehended shortly after illegally crossing the international border. She is an "arriving alien" who, for procedural due process purposes, is treated as though she remains at the border seeking admission into the United States. *See* ECF 229 at 7–8 & n.5; *Angov*, 788 F.3d at 898. As an attempted illegal entrant stopped just over the border without pre-existing connections to the United States, she is at the lowest rung of constitutional rights. *See Plasencia*, 459 U.S. at 33, *Johnson*, 339 U.S. at 770. As such, due process does not entitle her to wholly new procedures not provided for by Congress, *see id.*, such as appointment of counsel at Government expense. *See Angov*, 788 F.3d at 898 & n.3. The *Mathews* balancing test is simply inapplicable to K.N.S.M.'s counsel claim.

4. A.E.G.E.

A.E.G.E. is a four-year-old citizen and national of El Salvador who arrived at the United States without a parent at the Port of Eagle Pass, Texas, on April 13, 2014. Ex. D, at 2. As an

[17] The IJ noted that every minor appearing on his unaccompanied docket that morning, other than K.N.S.M., had counsel. Ex. C, at 59–60.

[18] To the extent that counsel for Plaintiffs can no longer locate K.N.S.M., declaratory relief in her favor would no longer be necessary or appropriate.

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unaccompanied minor, he was placed in ORR care and custody in San Antonio before being released to his mother. *Id.* at 11. DHS served A.E.G.E. with an NTA that charged him as an arriving alien. *Id.* At A.E.G.E.'s master calendar hearing on April 22, 2016, his mother presented the IJ with a letter from Plaintiffs' counsel saying that A.E.G.E. is a Plaintiff in this case and requesting that the IJ take no adverse action against him, although disclaiming responsibility for representing A.E.G.E. in his removal proceedings. *Id*. at 51–54. The IJ took no adverse action against A.E.G.E., *id.* at 52, informed A.E.G.E. and his mother of his right to retain counsel, presented him with a list of legal providers in the Los Angeles area, *id.* at 54, and continued his case until August 26, 2016, to provide him with an opportunity to obtain counsel, *id.* at 55. The IJ did not take pleadings from A.E.G.E. or his mother or otherwise proceed against him on the merits. In fact, when A.E.G.E.'s mother asked the IJ to set aside Plaintiffs' counsel's letter because she wished to find A.E.G.E. actual counsel, the IJ replied: "I certainly believe it's in your child's best interest to have an attorney. I would like to see him have an attorney. I would prefer him to have an attorney who is knowledgeable in immigration law, rather than you representing him. I will certainly never, and I repeat, never, have your child represent himself in these proceedings. I do not believe he could do so." *Id.* at 59.

According to A.E.G.E.'s Next Friend Ana Deutsch,[19] A.E.G.E.'s mother is a lawful permanent resident in the United States and his father lives in El Salvador. She said that she either did not know or did not think that A.E.G.E. had been persecuted in El Salvador based on his race or nationality, religion, political opinion, or due to possessing a particular characteristic or being a part of a particular social group. *Id.* at 99–100. Ms. Deutsch claimed A.E.G.E. was sent to the United States to be with his mother because his mother was afraid that his biological father, allegedly a gang member who had raped her, would try to kidnap A.E.G.E. *Id.* at 93–94. When asked why A.E.G.E.'s mother held this belief, Deutsch speculated that it could have been due to talk in the community and did not claim that any concrete threat of kidnaping had been made. *Id.* at 94. However, according to A.E.G.E's HHS case file, the HHS reviewer assigned to

[19] Because A.E.G.E. is young minor, Defendants took the deposition of Ms. Deutsch instead of A.EG.E. on July 16, 2016. However, Ms. Deutsch neither attends immigration court with A.E.G.E. nor helps him and his mother prepare for any appearances. Ex. D, at 62–115.

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monitor A.E.G.E.'s foster care and release stated that A.E.G.E.'s mother reported that she sent for A.E.G.E. because her sister, with whom he was staying, threatened her for money in connection with caring for him. *Id.* at 38.

Like the other named Plaintiffs, A.E.G.E. has failed to proffer evidence that he has been prejudiced due to lack of appointed counsel thus far in his immigration proceedings. *See Morales-Izquierdo*, 486 F.3d at 495. Rather, the IJ expressly took no adverse action, instead continuing the case so that his mother could look for counsel—which she indicated that she actively wished to do despite Plaintiffs' counsel involvement—and stated that he would never force A.E.G.E. to proceed unrepresented.

A.E.G.E. can also point to no record evidence objectively establishing potential eligibility for asylum or non-discretionary immigration relief. For example, his Next Friend offered no evidence that he has been persecuted on account of a protected ground,[20] and A.E.G.E. has not alleged or produced evidence that any threats from his father or aunt are on account of a statutorily protected ground and not merely criminal extortion, which, without more, cannot support an asylum claim. *See Zetino*, 622 F.3d at 1015–16. Therefore, A.E.G.E. also lacks support for a withholding claim, *see Gomes*, 429 F.3d at 1266, and there is no basis in the record suggesting he faced state-sponsored torture. Finally, there is no evidence that A.E.G.E. has a ripe claim for U.S. citizenship as a derivative of a parent or is eligible for any other non-discretionary forms of relief from removal in which he has a cognizable liberty interest. Accordingly, he too has failed to meet his burden at the summary judgment stage, especially given his status as an alien placed in removal proceedings after apprehension at a port of entry.

5. J.R.A.P.

J.R.A.P. is a six-year old citizen and national of Honduras. *See* Ex. E, at 3. Border Patrol agents encountered J.R.A.P., an unaccompanied child, at or near Hidalgo, Texas on October 1, 2013. Ex. E, at 2, 13. J.R.A.P. carried a slip of paper with the telephone number of his biological

[20] Her speculation that he came to the United States to escape potential kidnapping by his father has its only foundation in hearsay for which there is no valid exception. *See* Fed. R. Evid. 803, 804; *In re Sunset Bay Assocs.*, 944 F.2d 1503, 1514 (9th Cir. 1991). In contrast, the statement of A.E.G.E.'s mother in his HHS foster care report explaining that she summoned A.E.G.E. to the United States because her sister was extorting payments from her in return for taking care of A.E.G.E. in El Salvador is admissible under the hearsay exception for records of regularly conducted activity. *See* Fed. R. Evid. 803(6); *United States v. Childs*, 5 F.3d 1328, 1332 (9th Cir. 1993).

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mother, Ingrid Xiomara Perez Peralta ("Perez"). Ex. E, at 3,7-8. Perez, who had come to the United States illegally in 2009, when J.R.A.P. was a year old, resided in Florida with her partner and infant daughter. Ex. E, at 7-10. Perez planned and organized J.R.A.P.'s trip to the United States, for which she paid $2,000. Ex. E, at 14 -16. DHS served J.R.A.P. with an NTA that charged him as an alien who had entered the United States without admission. Ex. E, at 57-58.

As an unaccompanied minor, J.R.A.P. was transferred to the care and custody of ORR, which placed him in foster care in Brownsville, Texas before contacting and reunifying J.R.A.P. with Perez in Miami. Ex. E, at 9–16. In ORR custody, J.R.A.P. denied any mistreatment in his life or losing any family members or friends due to violence in Honduras. Ex. E, at 15-16. He does not fear returning to Honduras. Ex. E, at 40. Neither of J.R.A.P.'s biological parents has legal immigration status in the United States. According to Perez, J.R.A.P.'s biological father is a member of the "18" gang and is incarcerated in Honduras. Ex. E, at 39–41. When asked if she was afraid to go to Honduras, Perez first responded that she was not, but then stated that she was, because she was the mother of a gang member's child. Ex. E, at 40. The Government provided Perez a list of free and low-cost legal service providers who represent noncitizens in removal proceedings. Ex. E, at 26, 47. Perez has not retained any legal service provider to represent J.R.A.P. in removal proceedings. Ex. E, at 47. J.R.A.P., who is now eight years old, has had three immigration hearings in Miami, on October 1, 2015, March 3, 2016, and June 30, 2016. Ex. E, at 61–67, 71–74. Each time, an adult appeared on J.R.A.P.'s behalf, and J. T., a Cuban American Bar Association attorney, appeared as a friend of the court. Ex. E, at 38, 61–62, 66–67. The IJ continued the proceedings multiple times, now until January 12, 2017, permitting J.R.A.P. time to find counsel. Ex. E, at 80.

At Perez's deposition in this case, her counsel, Macleod-Ball, who also represents Plaintiffs in this case, instructed Perez not to answer questions regarding J.R.A.P.'s lack of legal representation in Immigration Court, including whether any legal service providers declined to represent J.R.A.P., and whether Perez asked Macleod-Ball or J.T. to represent J.R.A.P. in his removal proceedings. Ex. E, at 28-31, 36-38, 42-43. Perez admitted that she and McLeod-Ball talk on the telephone once every two weeks. Ex. E, at 42. Perez refused to answer questions

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intended to elicit foundational information regarding J.R.A.P.'s eligibility for relief and Perez's ability to retain counsel to represent J.R.A.P. and assist him herself in his removal proceedings herself, following her counsel's instruction to invoke the Fifth Amendment right against self-incrimination. Ex. E, at 23, 25, 32–36.

J.R.A.P. has failed to provide evidence that he has been prejudiced thus far by absence of government funded counsel, *see Morales-Izquierdo*, 486 F.3d at 495, and Thomas now appears to be providing him with *de facto* legal assistance. Further, Plaintiffs have not presented any evidence that J.R.A.P. is eligible for citizenship, nor that he has a viable claim for asylum, withholding of removal, CAT protection, or any form of non-discretionary immigration relief, for that matter. J.R.A.P. denies any past mistreatment or fear of returning to Honduras, and Perez denied that J.R.A.P. has any fear of returning there.[21] Plaintiffs also fail to supply evidence that Perez has applied for relief from removal from which J.R.A.P. could derivatively benefit.[22] Thus, Plaintiffs have failed to proffer any evidence that lack of appointed counsel would place J.R.A.P. at risk of an erroneously deprived interest.

. **6. A.F.M.J, M.R.J., and L.J.M.**

A.F.M.J., age twelve, L.J.M., age four, and M.R.J., age two ("the J siblings"), are natives and citizens of Mexico and appear through their Next Friend and biological mother, Maria Jesus Jimenez Mejia. Ex. F, at 1–3. On September 21, 2014, all four appeared at the border at San Ysidro and applied for admission. Ex. F, at 8-9, 1-18, 34, In a sworn interview with Border Patrol, Ms. Jimenez stated that: (1) she sought asylum; (2) she left Mexico because she was a single mother and separated from her husband; and (3) her main purpose for entering the United States was to seek employment so that she could support her family. Ex. F, at 15. She denied being harassed by any political group, threatened by organized crime, or any fear of returning to Mexico. Ex. F, at 15. All four were served with NTAs and charged as immigrants who at the time of application for admission were not in possession of valid entry documents. Ex. E, at 18–

[21] Without more, J.R.A.P. fails to present sufficient evidence to objectively support a claim to asylum based on mere familial relationship to a gang member. *See, e.g.*,*Gonzalez v. U.S. Att'y Gen.*, 820 F.3d 399, 404 (11th Cir. 2016); *Rodriguez v. U.S. Att'y Gen.*, 735 F.3d 1302, 1310-11 (11th Cir. 2013).

[22] Indeed, Perez entered the United States in 2009 and so if she applied for asylum now, her claim would likely be barred as untimely. *See* 8 U.S.C. § 1158(a)(2)(B); 8 U.S.C. § 1158(a)(2)(D).

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26. Ms. Jimenez is the lead respondent before the Immigration Court; the J siblings appear in consolidated proceedings with their mother. Ex. F, at 1320–1323. On September 23, 2014, DHS paroled each of them into the United States. Ex. F, at 28–36.

Ms. Jimenez first appeared in the San Francisco Immigration Court on December 3, 2014. Ex. F, at 37-57. K.D., a pro bono attorney, was present as a friend of the court and interviewed Ms. Jimenez and her children. Ex. F, at 37–38. On May 8, 2015, Ms. Jimenez appeared before an IJ in Seattle, who gave her a list of free and low-cost legal service providers, , and granted her a continuance to retain counsel. Ex. F, at 48–57. On June 23, 2015, Ms. Jimenez told the IJ she did not have counsel but had contacted and planned to meet with someone at NWIRP. Ex. F, at 66. The IJ granted Ms. Jimenez another continuance to retain counsel. Ex. F, at 60. At her October 28, 2015 hearing, Ms. Jimenez stated that she met with NWIRP but they "couldn't help her," Ex. F, at 66, and submitted an asylum application prepared by a staff attorney at NWIRP's Wenatchee office. *See* Ex. E, at 74, 88, http://www.nwirp.org/about-nwirp/staff (viewed August 7, 2016). The IJ scheduled a merits hearing on Jimenez's asylum claim for June 22, 2016. Ex. F, at 79.

On June 22, 2016, Jimenez appeared before the Seattle Immigration Court and told the IJ that she was unrepresented by counsel. Ex. F, at 123. The IJ stated that Jimenez had ample time to retain counsel and had waived her right to counsel. Ex. F, at 123. The IJ asked Jimenez if she had documentation that A.F.M.J.'s and L.J.M.'s father was a United States citizen, to which Jimenez responded that Plaintiffs' counsel Gloria Aldana Madrid, who is counsel to Plaintiffs in this case and who was also present in the courtroom, had such documents but was not her attorney. Ex. F, at 130–131. Jimenez admitted the allegations against her and conceded that she was removable as charged. The IJ continued the proceedings until December 20, 2016, Ex. F, at 140-141, and advised Jimenez to produce documentation of A.F.M.J.'s and L.J.M.'s father's U.S. citizenship and submit asylum applications for each child. Ex. F, at 135–141.

A.F.M.J., L.J.M., and M.R.J. have had the benefit of their mother and her quasi-counsel[23] thus far in their removal proceedings and have failed to show any prejudice accruing from the

[23] Although she denies that she is represented by counsel, an attorney has been present at each and every one of Jimenez's Immigration Court hearings and has been willing to speak to the Immigration Judge on Jimenez's behalf.

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lack of individual counsel. Plaintiffs further proffer no evidence showing that appointment of counsel at government expense would produce any material benefit to A.F.M.J., L.J.M., and M.R.J. in their removal proceedings. Ms. Jimenez claims that the father of A.F.M.J. and L.J.M. was a United States citizen, which would give rise to a colorable citizenship claim for the two children[24] but cannot demonstrate that lack of counsel has prevented from her from advancing this claim in their removal proceedings. Here, the IJ inquired into Ms. Jimenez's claims, revoked his finding of removability as to A.F.M.J. and L.M.M, and continued the case for Ms. Jimenez to gather evidence to support the citizenship claims. Ex. F, at 140-141. Nor have Plaintiffs produced any evidence that Jimenez and her three children are potentially eligible for relief from removal.[25] Plaintiffs have not provided any evidence that Jimenez's partner was targeted on account of a protected ground or that anyone would seek to harm her or her children in Mexico, which also undermines any potential withholding or CAT claims.

7. E.G.C.

E.G.C., age twelve, is a native and citizen of Mexico and a named Plaintiff in this case through his Next Friend, Sonia McLeod.[26] Ex. G at 1. On November 20, 2013, E.G.C., his mother, and two siblings appeared at the border at the Otay Mesa Port of Entry and applied for admission. *Id*. at 13-15. EGC was served with an NTA because he lacked valid entry authorization and paroled into the United States. *Id*. at 16-21.[27] E.G.C. currently lives with his grandmother. *Id*. at 23, 29, 50.

On June 23, 2016, E.G.C. claimed in Immigration Court that his father was in Mexico, *id*. at 33, although, on June 24, 2016, he stated in response to a written discovery request that his

[24] Defendants do not concede that A.F.M.J. and L.J.M. indeed have colorable derivative citizenship claims; despite having more than one dozen attorneys representing them in the instant case, they have not produced any documentary evidence establishing their paternity by the United States citizen Ms. Jimenez claims is their father.

[25] Jimenez submitted an asylum application—through which her children could derivatively benefit—but she did not meet the one-year time limit for asylum, 8 U.S.C. § 1158(a)(2)(B), and there is no evidence of the changed or exceptional circumstances that could exempt her from the time bar. See id. § 1158(a)(2)(D). Further, Jimenez is unlikely to establish the requisite nexus to a protected ground. Asylum is unavailable to victims of indiscriminate violence, unless they are singled out on account of a protected ground. *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151 (9th Cir. 2010).

[26] McLeod is a case manager at YouthCare, a non-profit organization. Ex. G at 7-8

[27] E.G.C.'s removal proceedings were initially consolidated with his mother's and siblings, but and some time before May 13, 2015, his mother and siblings returned to Mexico. Ex. G. at 55. E.G.C.'s proceedings were severed from theirs and transferred to Seattle. *Id*. at 53.

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father was deceased. *Id*. at 42. E.G.C. has appeared *pro se* before the Seattle Immigration Court twice, on December 17, 2015, and on June 23, 2016. *Id*. at 23-39. At least three adults have assisted him in attending his removal hearings and filing paperwork. *Id*. at 43 (stating that Roxana Rahmani and Lindsay Lennox, whose business address is identical to that of NWIRP, provided E.G.C. assistance); *id*. 9, 12 (McLeod's testimony that she observed E.G.C.'s hearing on June 23, 2016).

On December 17, 2015, E.G.C. submitted to the Immigration Court a letter from Matt Adams, Legal Director, NWIRP, stating that E.G.C. was a Plaintiff in the instant litigation and asking that the IJ not take any adverse action against E.G.C. *Id*. at 25, 59. When the IJ asked him who brought him to the Immigration Court that day, E.G.C. responded "with the person that is here." *Id*. at 24-25. When asked for the person's relationship to him, E.G.C. responded "nothing." *Id*. When the IJ asked E.G.C. who gave him the letter he presented to the Immigration Court, E.G.C. responded, "a person," and, when asked to identify the person, responded "Those are the free attorneys" and that he and his grandmother met with them. *Id*. at 25. The IJ granted E.G.C. a continuance until June 23, 2016 to retain counsel. *Id*. at 27. On June 23, 2016, E.G.C. next appeared, accompanied by unidentified individuals he stated were his friends. *Id*. at 30. The IJ continued E.G.C.'s proceedings until February 21, 2017l. *Id*. at 59.

E.G.C. has benefited from the assistance of Ms. McLeod, two individuals apparently associated with NWIRP, and NWIRP's legal director; and has provided no evidence of prejudice accruing from the lack of appointed counsel to represent him in his removal proceedings. *See Morales-Izquierdo*, 486 F.3d at 495. Further, E.G.C. has not claimed, much less provided evidence supporting, potential eligibility for relief from removal or U.S. citizenship.[28] Plaintiffs have not provided any evidence that E.G.C. or his father, assuming the truth of Plaintiffs' allegation, have been targeted on account of a protected ground or that anyone would seek to harm E.G.C. or any of his family members in Mexico. Indeed, his mother and siblings have

[28] Plaintiffs allege in their complaint that E.G.C.'s home environment in Mexico was abusive and that his father was kidnapped by a criminal organization and is presumed dead, Dkt. 207 at 37, and that E.G.C. left Mexico "because the country is very violent and for other reasons he both does not understand and is not aware of." Ex. G at 51-52. As noted earlier, asylum is not available to victims of indiscriminate violence, unless they are singled out on account of a protected ground, *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151 (9th Cir. 2010) which E.G.C. has not alleged, much less shown.

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returned there. E.G.C. has produced nothing to support his assertion of domestic abuse and would face a high burden to show that he could not reasonably be expected to relocate within Mexico to escape his heretofore unidentified abuser. *See Gonzalez-Medina v. Holder*, 641 F.3d 333, 338 (9th Cir. 2011).[29] Therefore, Plaintiffs have failed to proffer any evidence that lack of appointed counsel has placed or would place E.G.C. at risk of any erroneous deprivation of a liberty interest.

III. The Plaintiff Class Fails to Show that They Face A Risk of Erroneous Deprivation and that Existing Procedural Safeguards Are Inadequate.

Under *Mathews*, courts consider "the fairness and reliability of the existing . . . procedures, and the probable value, if any, of additional procedural safeguards." *Mathews*, 424 U.S. at 343. Courts look "to the process given [Plaintiffs] in this case, as well as the process generally given" to unrepresented minors in removal proceedings, and evaluate the likelihood of Defendants making a mistake. *Buckingham v. Sec'y of U.S. Dep't of Agr.*, 603 F.3d 1073, 1082 (9th Cir. 2010). This evaluation "'is flexible and calls for such procedural protections as the particular situation demands.'" *Mathews*, 424 U.S. at 334.

Here, Plaintiffs have provided insufficient evidence that they face a risk of erroneous deprivation and that existing procedural safeguards are inadequate to protect their interests or the interests of the Class and Subclass as a whole. *See Celotex Corp.*, 477 U.S. at 325. Plaintiffs do not offer any evidence that class members who show up to their hearings are being ordered removed at a meaningful rate in the Ninth Circuit, let alone that they were ordered removed *because* they lacked counsel.[30] To the contrary, the Immigration Courts in the Ninth Circuit have taken a number of steps to facilitate *pro bono* representation for all cases, including those involving children. *See generally* Ex. J., Declaration of Assistant Chief Immigration Judge (ACIJ) Amy C. Hoogasian; Ex. K, Declaration of ACIJ Rodin Rooyani. Partly as a result of these efforts, the representation rate for unaccompanied children who appear for their hearings at the San Francisco, Los Angeles, and Seattle Immigration Courts is exceedingly high. *See* Ex. J.

[29] E.G.C. has no cognizable liberty interest in asylum and his failure to show an entitlement to asylum or evidence of state-condoned torture means he similarly fails to show eligibility for withholding of removal or CAT relief.

[30] Indeed, there is no evidence that a single unaccompanied minor under 14 has been ordered removed in the Ninth Circuit while unrepresented.

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at ¶ 13; Ex. K at ¶ 10.

Moreover, the record indicates that the existing safeguards in place have thus far prevented any erroneous deprivation of the Named Plaintiffs' asserted procedural due process rights. This is because Defendants[31] have implemented several safeguards and initiatives geared toward protecting the interest of minors appearing in immigration court.

First, unrepresented aliens must be advised of their right to counsel at their own expense and the availability of free legal services. 8 C.F.R. § 1240.10(a)(1), (2). Immigration judges have discretion to grant continuances for good cause shown, 8 C.F.R. § 1003.29. The factual allegations and charges in the alien's Notice to Appear must be explained to the alien in non-technical language. 8 C.F.R. § 1240.10(a)(6). An IJ may not accept admissions from an unrepresented individual under the age of eighteen who "is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend . . . ." 8 C.F.R. § 1240.10(c).

Second, during the proceedings, IJs are required to ask questions designed to elicit testimony on possible avenues of relief available to the aliens before them and to provide the opportunity to make an application for forms of relief for which the aliens might be eligible. *See* 8 C.F.R. § 1240.11(a)(2). A due process violation may result if an IJ fails to notify an alien of all possible avenues of relief for which he is eligible. *See United States v. Lopez-Velasquez*, 629 F.3d 894, 897 & n.2 (9th Cir. 2010). With unrepresented alien, the IJ has the duty to "fully develop the record." *Jacinto v. INS*, 208 F.3d 725, 733-34 (9th Cir. 2000). Because aliens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their

[31] Plaintiffs have produced no evidence that HHS and its sub-agency ORR are responsible for causing the alleged constitutional violation that forms the basis for this action, and they should be dismissed as a matter of law. Although HHS and ORR have, in their administrative discretion, engaged in multimillion-dollar efforts to obtain paid representation for UACs, *see* ECF No. 207 at ¶¶ 66–67, the law would not mandate such payment. The TVPRA states that any representation efforts of HHS must be "consistent with section 292 of the Immigration and Nationality Act." 8 U.S.C. § 1232(c)(5). Section 292, in turn, provides that a person in removal proceedings "shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." 8 U.S.C. § 1362. The TVPRA is thus clear that HHS cannot be required to pay for representation. Any HHS efforts to obtain counsel are only "to the greatest extent practicable." 8 U.S.C. § 1232(c)(5). Determinations of what is practicable for the agency— based upon such factors as staffing, appropriations, and other administrative considerations—are generally committed to agency discretion. *See* 5 U.S.C. § 701(a)(2); *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). Plaintiffs fail to support a legal theory under which HHS and/or ORR violated any of their rights.

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expulsion from this country, it is critical that the IJ "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." *Id.* at 733 (internal quotation omitted).

Third, all IJs receive training on providing fair hearings for unrepresented children. ECF 238-1. IJs are provided with guidance and suggestions for adopting procedures to ensure that the child "understands the nature of the proceedings, effectively presents evidence about the case, and has appropriate assistance." *Id*. at 2. These procedures include making the courtroom more accessible, providing additional explanation of the process, and employing child-sensitive questioning techniques. *Id*. at 4–8. Further, IJs are encouraged to grant continuances to allow appropriate time for the child to secure representation or to allow the child to obtain relief through other channels. *Id*. at 8; Ex. J at ¶ 17 (describing use of continuances to obtain counsel and other procedural safeguards in Seattle and San Francisco immigration courts); Ex. K at 7 (same in Los Angeles court).[32] Indeed, the Office of the Chief Immigration Judge has made clear that "nothing in the priority scheduling of cases involving [unaccompanied children] . . . for a first master calendar should inhibit a judge's discretion to reset the case to obtain representation." ECF 238-2, Office of the Chief Immigration Judge, Docketing Practices Relating to Unaccompanied Children Cases (Mar. 24, 2015). IJs are also encouraged to explore whether a child would benefit from a change of venue and to grant such relief without requiring a formal motion. ECF 238-1 at 8.

Fourth, EOIR has issued guidance outlining how an IJ (in several jurisdictions in the Ninth Circuit) may employ the Friend of the Court model to, among other matters: (1) gather and convey basic information regarding the status of minor's cases, without compromising any issues regarding removability, (2) help the minor navigate courtroom procedures, (3) assist the minor in reviewing and filling out forms, and (4) facilitate the minor's attendance at hearings.[33] *See* ECF

[32] *See also* Office of the Chief Immigration Judge, Operating Policy and Procedures Memorandum 08-01 (2008) at 4, 8 available at https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/24/08-01.pdf. Plaintiffs allege that governmental and other pro bono efforts to provide minors with counsel fall far short of the demand for attorneys. *See* ECF 207 at 61-67. However, in the Seattle and San Francisco courts, for example, IJs cannot recall seeing a single unrepresented, unaccompanied minor ordered removed when they showed up for their hearing. Ex. J at ¶ 17.

[33] Friends of the Court are generally permitted in immigration court at the IJ's discretion pursuant to 8 C.F.R. § 1240.1(a)(1)(iv), which states that an IJ shall have the authority "[t]o take any other action consistent with applicable law and regulations as may be appropriate." *See* ECF 238-3 at 4. Indeed, all of the counsel for Plaintiffs have repeatedly availed themselves of this particular safeguard by sending letters to the immigration judges

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238-3, Office of the Chief Immigration Judge, The Friend of the Court Model for Unaccompanied Minors in Immigration Proceedings (Sept. 10, 2014).

Fifth, EOIR offers legal orientation presentations to the adult custodians of unaccompanied alien children (and often to the children themselves) in EOIR removal proceedings through its Legal Orientation Program for Custodians of Unaccompanied Children ("LOPC"). ECF 238-4, EOIR's Office of Legal Access Programs (Oct. 22 2014). The LOPC providers offer general group orientations, individual orientations, self-help workshops, and assistance with pro bono referrals that are designed to help increase pro bono representation rates of unaccompanied alien children in immigration proceedings. *Id*. To date, EOIR has contracted with non-profit partners to carry out the LOPC at 14 sites nationwide. *Id*. The LOPC also operates a national call center to assist custodians. *Id.* Available telephonic assistance includes legal orientations on the immigration court process and guidance in filing change of address forms and motions to change venue. *Id*.

Sixth, in accordance with the Trafficking Victims Protection Reauthorization Act ("TVPRA"), USCIS asylum officers have "initial jurisdiction over any asylum application filed by" an unaccompanied minor, which means that UACs have an opportunity to file for asylum in a non-adversarial process through USCIS, even if the UAC has been issued an NTA in immigration court. 8 U.S.C. § 1158(b)(3)(C). Finally, the government is promoting pro bono representation of children on a number of fronts. In June 2014, EOIR announced a partnership with AmeriCorps to enroll approximately 100 lawyers and paralegals to provide legal services to unaccompanied children in 24 immigration courts. Office of Public Affairs, June 6, 2014, *available at* http://www.justice.gov/opa/pr/justice-department-and-cncs-announce-new-partnership-enhance-immigration-courts-and-provide; http://joinjusticeamericorps.org/news/. Further, EOIR has encouraged facilitation of pro bono representation of children by, where possible, offering predictable scheduling to pro bono counsel and organizing wide-ranging training for pro bono counsel. *Id*.; *see also* ECF 238-1.

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presiding over the removal proceedings of the Named Plaintiffs not only informing the immigration judges of Plaintiffs' participation in the instant lawsuit, but also about facts relating to the Named Plaintiffs' removal proceedings. *See, e.g.*, ECF 312-4. Counsel for Plaintiffs have also directly appeared as a Friend of the Court in named plaintiffs' removal proceedings. Ex. C at 67-70.

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Finally, HHS, in accordance with the TVPRA as set forth in 8 U.S.C. § 1232(c)(5), is specifically funding programs supplying a total of $12,681,701.66 for attorneys for unaccompanied minors in immigration proceedings in Region B, which includes California; Nevada, Arizona, Washington, Oregon, Idaho, Alaska and Hawaii, for the current fiscal year. Dkt. 312-5, at 2. Those programs include: (1) pro bono representation to the greatest extent practicable, (2) direct representation to the greatest extent practicable, (3) screenings for legal relief and for human trafficking concerns, (4) Friends of the Court services where applicable, and (5) Know Your Rights presentations. *Id.* at 18. As applied here, for example, F.L.B., for example, contacted NWIRP, who appeared on the list of legal services providers given to F.L.B. at the outset of his removal proceedings. Ex. M at 16–17. A.F.M.J. and L.J.M. had their findings of removability revoked at their last hearing because the IJ inquired and learned about their potential citizenship claims. Ex. F at 139-143. All Named Plaintiffs have received continuances in their cases, preventing them from having to move forward to the merits in the absence of counsel. Further, several of the dismissed Plaintiffs in this case had their claims mooted out by finding counsel. *See, e.g.*, ECF 114 at 4 n.4.

Finally, minors' parents are permitted to and often attend immigration court and assist or speak for their child, and there is no due process requirement that *pro se* adults received counsel at Government expense. *See* 8 U.S.C. § 1229a(b)(4)(A). Even where an accompanied child is not pursuing derivative relief in a consolidated removal proceeding, the parent's presence may be sufficient to safeguard the child's interest. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (recognizing that it is parents who "make decisions concerning the care, custody, and control of their children."); *United States v. Casasola*, 670 F.3d 1023, 1029 (9th Cir. 2012) (recognizing that it is the right and duty of parents to make decisions regarding whether their children should be naturalized); *see also* ECF No. 289 at 8-9. Claims to relief from removal are highly factual questions. As a result, the parent's ability to relay sufficient information about their child's claim may provide the assistance necessary to help the child obtain relief.

IV. The Burden Placed on the Government Clearly Outweighs' Plaintiffs' Interest.

The third factor considers the "interest of the government in using the current procedures

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rather than additional or different procedures" and the fiscal and administrative cost of any additional procedures. *Landon*, 359 U.S. at 34. Critically, this factor functions more favorably to the Government in the immigration context than in other contexts:

> The Government's interest in efficient administration of the immigration laws at the border also is weighty. Further, it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature.

Id. Accordingly, in the immigration context, the court's role "is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy." *Id.* at 34–35. That the Due Process Clause is at issue in no way "qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens." *Galvan v. Press*, 347 U.S. 522, 531 (1954). Where, as here, Congress's authority is plenary and the court's role correspondingly deferential, the Government's interest may only be overcome where "the factors militating in favor [of the added procedure] are so extraordinarily weighty as to overcome the balance struck by Congress." *Weiss v. United States*, 510 U.S. 163, 177 (1994); *see Medina v. California*, 505 U.S. 437, 443 (1992).

Thus, Plaintiffs ask this Court to inappropriately "impos[e] deportation procedures" that supplant the political branches' exercise of their plenary authority over immigration matters, *see Landon*, 359 U.S. at 35, without any demonstration that they have suffered any prejudice as a class "so extraordinarily weighty" as to outweigh the sovereign interests and choices of the political branches. *See Perez-Funez v. District Director, INS*, 619 F. Supp. 656, 668–69 (C.D. Cal. 1985) (rejecting class action claim that minors have a "due process or statutory right to appointed counsel" under *Mathews*). [34]

Even assuming the Government was not entitled to a presumption that the burden factor favors it, the fiscal and administrative costs attendant to Plaintiffs' claim for relief are significant. As an initial matter, it is elementary under *Mathews* that "[t]he Due Process Clause does not

[34] In *Perez-Funez*, the Court took it for granted that a finding that aliens had a right to appointed counsel would unduly burden the Government, concluding that in the context of that case—which addressed the due process rights of minors during the voluntary departure process– "phone contact with a legal counselor, close relative, or friend prior to presentation of the voluntary departure form" was not unduly burdensome. 619 F. Supp at 667.

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require a State to adopt one procedure over another on the basis that it may produce results more favorable to the party challenging the existing procedures." *Heller v. Doe*, 509 U.S. 312, 332 (1993) (applying *Mathews*); *see Medina*, 505 U.S. at 47. Simply expressing displeasure with a set of procedures without evidence that they do not work, let alone that they in fact cause systematic constitutional deprivations, does not overcome the serious burden to the government an alternate set of procedures may entail. The number of unaccompanied alien children being apprehended continues to climb. U.S. Customs & Bord. Prot., Southwest Border Unaccompanied Alien Children Statistics FY 2016, https://www.cbp.gov/site-page/southwest-border-unaccompanied-alien-children-statistics-fy-2016.

That increase is reflected in the cost to EOIR of providing counsel to every unrepresented minor in presently pending removal proceedings in the Ninth Circuit, approximately 7,705 juveniles, which would cost the agency between $2,500 and $5,000 a minor, or roughly $19.3 million to $38.5 million. *See* Decl. of Steven Lang, ¶¶ 7-8. However, that estimate is largely under-inclusive, as it does not encompass the thousands of minors in removal proceedings in the Ninth Circuit who are represented in their current proceedings. *Id.* ¶ 8. Presently, there are approximately 10,880 represented minors with pending proceedings who secured counsel through pro bono programs and organizations, and through paid counsel. *Id.* An order requiring EOIR to fund counsel for all minors would necessarily decrease pro bono resources, as these organizations would likely shift scarce resources elsewhere, knowing that EOIR must pay for lawyers. *See id.*

Moreover, those minors paying for counsel out of pocket would likely opt for EOIR-funded counsel given the relatively high costs of private counsel. *Id.* Assuming minors formerly represented by pro bono or paid counsel availed themselves of appointed counsel as well, that would add, based on current estimates, another $27.2 million to $54.4 million in costs, or collectively $46.5 million to $92.9 million, the higher end of which amounts to over 22.1% of EOIR's entire, nationwide 2016 Congressional funding of $420.3 million. *See* EOIR, FY Budget Request at a Glance, *at* https://www.justice.gov/jmd/file/821961/download. Absent further appropriations from Congress—which Congress to date continues to decline to provide—these

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costs will require EOIR to shift resources from other mission critical areas and cripple EOIR's budget and its ability to effectively oversee the immigration courts. And of course if the decision somehow extended beyond the Ninth Circuit, that cost would increase significantly. This documented cost must weigh heavily in favor of the Government where Plaintiffs have failed to identify any meaningful number of minor aliens with meritorious claims who were nevertheless ordered removed due to lack of appointed counsel.

CONCLUSION

Summary judgment should be granted in Defendants' favor, dismissing Plaintiffs' case.

Dated: August 11, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of August 11, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

By: */s/ Joseph A. Darrow*
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