Nos.15-35738, 15-35739

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J.E.F.M, et al.,
Plaintiffs-Appellees,

v.

LORETTA LYNCH, Attorney General, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

No. 2:14-cv-01026-TSZ
The Honorable Thomas S. Zilly
United States District Court Judge

BRIEF OF THE AMICUS STATES OF WASHINGTON AND CALIFORNIA

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. IDENTITY AND INTEREST OF AMICUS CURIAE 2

III. ARGUMENT 4

A. Recognizing a Right to Counsel for Children in Immigration Removal Proceedings Comports with Modern Due Process Jurisprudence 4

B. The *Mathews* Factors Likely Require that Children Be Represented by Counsel in an Adversarial Immigration Proceeding Against the Federal Government 9

1. A Child's Liberty Interest Is Threatened in Immigration Proceedings 10

2. The Risk of Erroneous Deprivation Is High when Children Are Unrepresented in Deportation Proceedings 15

3. The Government's Fiscal and Administrative Burden Is Unclear 21

IV. CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Aguilera-Enriquez v. INS,
516 F.2d 565 (6th Cir. 1975) 8

Alanis-Bustamente v. Reno,
201 F.3d 1303 (11th Cir. 2000) 17

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502 U.S. 129 (1991) 14

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407 U.S. 25 (1972) 5

Baltazar-Alcazar v. INS,
386 F.3d 940 (9th Cir. 2004) 17

Bellotti v. Baird,
443 U.S. 622 (1979) 15

Bd. of Regents v. Roth,
408 U.S. 564 (1972) 12

Bridges v. Wixon,
326 U.S. 135 (1945) 13

Cafeteria & Rest. Workers Union, Local 473 v. McElroy,
367 U.S. 886 (1961) 4

Cash v. Culver,
358 U.S. 633 (1959) 16

Castro-O'Ryan v. INS,
847 F.2d 1307 (9th Cir. 1987) 19

Escobar Ruiz v. INS,
787 F.2d 1294 (9th Cir. 1986) 8

Flores v. Johnson,
No. 85-cv-4544-DMG (C.D. Cal. July 24, 2015) 10, 11

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149 U.S 698 (1893) 13

Gideon v. Wainwright,
372 U.S. 335 (1963) 5, 6

Griffin v. Illinois,
351 U.S. 12 (1956) 4

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332 U.S. 596 (1948) 8

In re Gault,
387 U.S. 1 (1967) .... passim

In re Marilyn H.,
5 Cal. 4th 295, 851 P.2d 826 (1993) 3

In re Sumey,
94 Wash. 2d 757, 621 P.2d 108 (1980)... 2

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564 U.S. 261 (2011) 15

Johnson v. Zerbst,
304 U.S. 458 (1938) 5, 6

Landon v. Plasencia,
459 U.S. 21 (1982) 12, 21

Lassiter v. Dep't of Soc. Servs.,
452 U.S. 18 (1981) 11, 21

Lok v. INS,
548 F.2d 37 (2d Cir. 1977)... 17

Magallanes-Damian v. INS,
783 F.2d 931 (9th Cir. 1986) 8

Massey v. Moore,
348 U.S. 105 (1954) 8

Mathews v. Eldridge,
424 U.S. 319 (1976) 9

May v. Anderson,
345 U.S. 528 (1953) 15

Mondaca-Vega v. Lynch,
808 F.3d 413 (9th Cir. 2015) 13

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259 U.S. 276 (1922) 12

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729 F.3d 883 (9th Cir. 2013) 9

Padilla v. Kentucky,
559 U.S. 356 (2010) 12

Palmer v. Ashe,
342 U.S. 134 (1951) 7

Parham v. J.R.,
442 U.S. 584 (1979) 10

Powell v. Alabama,
287 U.S. 45 (1932) 5, 6

Reno v. Flores,
507 U.S. 292 (1993) 10

Santosky v. Kramer,
455 U.S. 745 (1982) 17

Turner v. Rogers,
564 U.S. 431, 131 S.Ct. 2507 (2011) 7, 20

United States v. Campos-Asencio,
822 F.2d 506 (5th Cir. 1987) 8

United States v. Torres-Sanchez,
68 F.3d 227 (8th Cir. 1995) 8

Uveges v. Pennsylvania,
335 U.S. 437 (1948) 7

Vitek v. Jones,
445 U.S. 480 (1980) 12

Wade v. Mayo,
334 U.S. 672 (1984) 7, 15

Wong Yang Sung v. McGrath,
339 U.S. 33 (1950) 14

Zadvydas v. Davis,
533 U.S. 678 (2001) 11

Statutes

8 U.S.C. § 1101(a)(27)(J) 3

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Rules

Federal Rule of Appellate Procedure 29(a) 2

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I. INTRODUCTION

In this case, the federal government argues that an indigent child charged with removability in a federal immigration proceeding does not, as a matter of due process under the federal Constitution, have the right to be represented by appointed counsel at government expense. The federal government seeks a holding that no child may argue for a right to counsel unless they first exhaust their due process rights in immigration court, then raise those rights before the Board of Immigration Appeals and eventually in an individual petition for review of their removal order in the federal Court of Appeals.

Such a position is at odds with principles of ordered liberty and due process. It ignores the reality that indigent children are incapable of representing themselves in an adversarial immigration removal proceeding, let alone raising complex claims of due process or navigating federal administrative and appellate procedure. Further, in relying on a mistaken belief that the threat of criminal incarceration is a necessary condition for appointing counsel for children, the federal government overlooks the severe deprivation at stake when children are deported to the countries they may have affirmatively fled. The Court should affirm that the district court has jurisdiction to consider the merits of Plaintiffs-Appellees' constitutional claim.

An adversarial immigration system, which depends on the presentation of both sides of a case in a highly specialized area of law, demands that a child, standing alone, be represented by counsel. Although the federal government may argue that the appointment of counsel is unnecessary because "special protections" apply to juvenile immigration proceedings, these special protections do not place an indigent child on equal footing with the federal government when standing before an immigration court. An immigration proceeding is a highly complex, technical procedure requiring representation by a trained legal adviser who can securely guide the child through the maze of pitfalls into which the child might otherwise stumble. It is unlikely an immigration trial can be conducted fairly where an experienced lawyer represents the federal government and an indigent child has no lawyer at all.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The States of Washington and California submit this amicus brief under Federal Rule of Appellate Procedure 29(a) to ensure that every indigent child placed in immigration proceedings is guaranteed a right to counsel. The amici States have a *parens patriae* interest in the welfare of their children. *See In re Sumey*, 94 Wash. 2d 757, 764, 621 P.2d 108 (1980) (recognizing the "State's constitutionally protected *parens patriae* interest in protecting the physical and

mental health of the child"); *In re Marilyn H.*, 5 Cal. 4th 295, 307, 851 P.2d 826 (1993) ("[T]he welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect."). In fact, at least one form of immigration relief under federal law relies on a State's interest in the welfare of children. *See* 8 U.S.C. § 1101(a)(27)(J) (providing for "special immigrant juvenile" status where a State determines that "reunification with [one] or both of the immigrant's parents is not viable due to abuse, neglect, abandonment or a similar basis found under State law" and that it would not be in the child's "best interest" to return to the home country).

As *parens patriae*, the amici States are concerned that children residing within our State borders—especially those a State has already deemed to be dependent—will continue to be forced to represent themselves in immigration court, in proceedings where there is no other party arguing on behalf of the child and where the child's best interest is not the governing standard.[1] The

[1] *See* Memorandum from David L. Neal, Chief Immigration Judge, U.S. Dep't of Justice, to All Immigration Judges, Court Admin., Judicial Law Clerks, & Immigration Court Staff, Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (May 22, 2007), http://www.usdoj.gov/eoir/efoia/ocij/oppm07/07-01.pdf (hereinafter "EOIR Memorandum") (permitting judges to ease case standards and deadlines for children but explaining that "[t]he concept of 'best interest of the child' does not negate the statute or the regulatory delegation of the Attorney General's authority and cannot provide a basis for providing relief not sanctioned by law.").

amici States have a strong interest in the outcome of this case because the federal government places thousands of children in our States into immigration proceedings every year. Ensuring adequate representation for children in immigration removal proceedings is indispensable to the idea of fundamental fairness under law. Its denial is of grave concern to the amici States.

III. ARGUMENT

A. Recognizing a Right to Counsel for Children in Immigration Removal Proceedings Comports with Modern Due Process Jurisprudence

Due process has never been, and perhaps can never be, precisely defined. "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) (internal punctuation omitted). In fact, due process is, "perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society." *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring).

One of the most dramatic examples of due process absorbing social standards is the relatively recent recognition that implicit to an ordered liberty is—in certain circumstances—a right to court-appointed counsel. Over the last

century, the Supreme Court has recognized a right to counsel in a variety of contexts, both criminal and civil. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 73 (1932) (capital cases); *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (federal criminal prosecutions); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (state felony prosecutions); *In re Gault*, 387 U.S. 1, 41 (1967) (delinquency proceedings); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (state misdemeanor prosecutions when there is a potential loss of liberty). In so doing, the Court observed the "great emphasis on procedural and substantive safeguards" in our Constitution and laws and stated the right to counsel "may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Gideon*, 372 U.S. at 344. As such, it is an "obvious truth" that "in our adversary system . . . any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.*

Where children are involved, the due process right to appointed counsel is not confined to the criminal-justice context. In *Gault*, the Supreme Court held that children have a categorical due process right to court-appointed counsel in juvenile delinquency proceedings because delinquency "carr[ies] with it the awesome prospect of incarceration," 387 U.S. at 36-37, and that commitment for delinquency is "incarceration against one's will, whether it is

called 'criminal' or 'civil.'" *Id.* at 50. In so holding, the *Gault* Court observed that "the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present," *id.* at 21, and added that, "[d]epartures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness," *id.* at 18-19.

The Supreme Court has articulated a number of concerns that would weigh in favor of appointed counsel in this context. First, the Court has held court-appointed counsel is especially necessary where the underlying proceeding is lopsided. *See Gideon*, 372 U.S. at 344 (observing that "[g]overnments, both state and federal . . . spend vast sums of money to establish machinery to try defendants accused of crime"); *Powell*, 287 U.S. at 69 (noting that a criminal proceeding that pits an experienced prosecutor against a lay defendant with "no skill in the science of the law" is one-sided, and severely prejudices the defendant who "lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one"); *Zerbst*, 304 U.S. at 463 (finding it critical that "the prosecution [was] presented by experienced and learned counsel," while the defense was presented by an

"untrained layman"). Indeed, the Court considers lopsidedness whether the proceeding is criminal or civil. *See Turner v. Rogers*, 564 U.S. 431, 131 S. Ct. 2507, 2519 (2011) (declining to find a categorical right to counsel in a civil contempt proceeding where "the person opposing the defendant at the hearing [was] not the government represented by counsel" but another unrepresented party).

Second, where the defendant is especially vulnerable, a due process right to counsel is also recognized. *See Gault*, 387 U.S. at 36 (holding that a child "requires the guiding hand of counsel at every step in the [delinquency] proceedings") (citation omitted); *see also Wade v. Mayo*, 334 U.S. 672, 684 (1948) (holding where "incapacity is present," whether "by reason of age, ignorance or mental capacity," "the refusal to appoint counsel is a denial of due process"). Even before *Gideon*, a defendant's youth or mental disability often led the Supreme Court to overturn convictions for failure to appoint counsel. *See, e.g.*, *Uveges v. Pennsylvania*, 335 U.S. 437, 442 (1948) (holding that, where the defendant is "young and inexperienced," "the opportunity to have counsel . . . [is] a necessary element of a fair hearing"); *Palmer v. Ashe*, 342 U.S. 134, 135-37 (1951) (holding that "imbecility" and "mental abnormality" were enough to indicate that a boy charged with a crime did not have the

"qualities of mind or character" to ensure without a lawyer "an adequate and a fair defense"); *Massey v. Moore*, 348 U.S. 105, 108-09 (1954) ("No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court."). *See also Haley v. Ohio*, 332 U.S. 596, 600 (1948) (stating that an adolescent "needs counsel . . . on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him").

It is within this context—where the asymmetry of the proceeding, the vulnerability of the defendant, and the reality of the deprivation are paramount—that the district court should consider whether children have a due process right to counsel when faced with deportation.[2] In the amici States'

[2] Although this is an issue of first impression, several circuits, including the Ninth Circuit, have already noted in dicta that failure to appoint counsel in immigration proceedings could amount to a due process violation. *See Escobar Ruiz v. INS*, 787 F.2d 1294, 1297 n.3 (9th Cir. 1986) ("The fifth amendment . . . applies to immigration proceedings, and in specific proceedings, due process could be held to require that an indigent alien be provided with counsel . . . ." (quoting *Magallanes-Damian v. INS*, 783 F.2d 931, 933 (9th Cir. 1986)), *withdrawn*, 818 F.2d 712 (9th Cir. 1987); *United States v. Torres-Sanchez*, 68 F.3d 227, 230-31 (8th Cir. 1995) ("[I]n some circumstances, depriving an alien of the right to counsel may rise to a due process violation."); *United States v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987) (observing that "an alien has a right to counsel if the absence of counsel would violate due process under the fifth amendment"); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 n.3 (6th Cir. 1975) ("Where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the

view, the district court should determine whether counsel must be appointed when, in an adversarial setting, the respondent is an indigent child, facing deportation at the hands of the federal government. That a child may be detained or condemned to return to a country the child fled for lack of means to hire counsel likely violates due process.

B. The *Mathews* Factors Likely Require that Children Be Represented by Counsel in an Adversarial Immigration Proceeding Against the Federal Government

The amici States agree with the District Court below that Plaintiffs-Appellees' due process claims are not a facial challenge to federal law and should be analyzed under *Mathews v. Eldridge*, 424 U.S. 319 (1976). The *Mathews* framework requires courts to balance three factors: (1) the private interest affected by the Government action; (2) the risk of an erroneous deprivation of the interest through the procedures used, including the probable value of alternative safeguards; and (3) the Governmental interest at stake. *Id.* at 334-35. *See also Oshodi v. Holder*, 729 F.3d 883, 894-96 (9th Cir. 2013) (en banc) (applying *Mathews* to decide fairness of an immigration proceeding). The district court expressly "decline[d] to prematurely evaluate" the constitutional claim. ER 86. The Ninth Circuit should affirm the district court's

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Government's expense. Otherwise, 'fundamental fairness' would be violated.").

determination that it has jurisdiction over the constitutional claim so that this important legal question may be decided on the merits. Should the *Mathews* balancing occur, amici States contend all three factors will likely weigh in favor of appointed counsel.

1. A Child's Liberty Interest Is Threatened in Immigration Proceedings

A child's liberty interest in avoiding immigration detention and deportation weighs heavily on the *Mathews* scales. "[C]hildhood is a particularly vulnerable time of life and children erroneously institutionalized during their formative years may bear the scars for the rest of their lives." *Parham v. J.R.*, 442 U.S. 584, 628 (1979) (Brennan, J., concurring in part and dissenting in part). During the pendency of an immigration removal proceeding, before a final removal order is issued, the government may place a child in its "institutional" custody during the course of the immigration proceeding. *See Reno v. Flores*, 507 U.S. 292, 302 (1993) (holding the government had no obligation to consider a juvenile immigrant's "best interest" before placing the juvenile in institutional custody rather than with a private custodian). *See also* Order at 23, *Flores v. Johnson*, No. 85-cv-4544-DMG (C.D. Cal. July 24, 2015), ECF No. 177 (finding the federal government's policy of detaining all female-headed families results in the

detention of children). Additionally, certain children with a final order of removal who cannot be physically removed or safely released in the United States may be subject to prolonged detention. *See Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (holding a federal statute that allows for aliens who have been ordered removed to be detained beyond the removal period as constitutional).

For children, both immigration detention and "institutional custody" are largely identical to the detention that results from a delinquency adjudication. *See* Order at 15, *Flores v. Johnson*, No. 85-cv-4544-DMG (noting the federal government's failure to dispute evidence that its detention center "is a large block building" "designed to house adult male prisoners"). Immigration detention and "institutional custody" present as real a threat to a child's liberty interest as incarceration does in the criminal context. *See Gault*, 387 U.S. at 27 ("[H]owever euphemistic the title . . . an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated."). Indeed, the district court recognized that for some children "the potential effect of removal . . . might be the same *or worse* than incarceration." ER 90 (emphasis added). As such, the requirement that a child be presented with "at least a potential deprivation of physical liberty" is satisfied here. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 30-31 (1981) (creating a presumption against appointed

counsel in civil proceedings, but noting that it may be overcome in any given case by balancing the *Mathews* factors). *Cf. Vitek v. Jones*, 445 U.S. 480, 492-93 (1980) (recognizing a right to counsel when prisoners face transfer from a prison to a mental hospital even though no new deprivation of physical liberty is at stake).

Further, deportation implicates a child's liberty interest to not only "stay and live . . . in this land of freedom," but to "rejoin . . . immediate family" is a "weighty one." *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982) (noting the federal government must comply with due process when it seeks to exclude a legal permanent resident) (citation omitted); *see also Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (noting that a liberty interest includes not only the freedom from bodily restraint, but also freedom of action and freedom of choice). Given its potentially dire consequences, the U.S. Supreme Court has repeatedly acknowledged deportation itself threatens an immigrant's liberty interests. *See Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (observing that deportation may result "in loss of both property and life, or of all that makes life worth living"); *see also Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (holding that a failure to advise a defendant of the immigration consequences of a criminal plea violates the Sixth Amendment because deportation is a

"particularly severe penalty" and "is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specific crimes"); *Fong Yue Ting v. United States*, 149 U.S 698, 741 (1893) (Brewer, J., dissenting) ("[I]f a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."); *Mondaca-Vega v. Lynch*, 808 F.3d 413, 432 (9th Cir. 2015) (en banc) (Smith, J., dissenting) (noting the that "drastic deprivations" may follow "when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification").

The potential consequences of deportation are grave for all, but especially so for children. Deportation may result in the child returning to a country that will persecute him, or to the same grim conditions which led him to migrate initially. *See Bridges v. Wixon*, 326 U.S. 135, 164 (1945) (Murphy, J., concurring) (noting an immigrant's "[r]eturn to his native land may result in poverty, persecution and even death"). Indeed, in 2015, the U.S. Department of State characterized Mexico as "a source, transit, and destination country for men, women, and children subjected to sex trafficking and forced labor." U.S.

Dep't of State, Trafficking in Persons Report 244 (2015), http://www.state.gov/documents/organization/245365.pdf. At least eighty-three deportees from the U.S. have been reported murdered upon their return to Central America since January 2014. Sibylla Brodzinsky & Ed Pilkington, "US Government Deporting Central American Migrants to Their Deaths," The Guardian (Oct. 12, 2015), http://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america. One teenager was murdered in 2004 only seventeen days after being deported. Sergio De Leon, "Guatemalan Youth Slain 17 Days After Being Deported from U.S.", L.A. Times (May 9, 2004), http://articles.latimes.com/2004/may/09/news/adfg-deport9.

In sum, immigration proceedings "involve[] issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950), *superseded by statute as recognized by Ardestani v. INS*, 502 U.S. 129, 133 (1991). A child's interest in being free from the consequences of immigrant detention and deportation weighs heavily in favor of government-appointed counsel.

2. The Risk of Erroneous Deprivation Is High when Children Are Unrepresented in Deportation Proceedings

Greater due process protections are required when government proceeds against a child, who stands alone in the proceeding. "Children have a very special place in life which law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Unlike adults, children are wholly unable to represent themselves. *See, e.g., J.D.B. v. North Carolina*, 564 U.S. 261, 131 S. Ct. 2394, 2403-04 (2011) (the "legal disqualifications placed on children as a class . . . exhibit the settled understanding that the differentiating characteristics of youth are universal"); *Wade,* 334 U.S. at 684 (1948) (referring to youth as an "incapacity"); *Gault*, 387 U.S. at 36 ("The juvenile needs the assistance of counsel to cope with problems of law. . . ."). Children "possess only an incomplete ability to understand the world around them," *J.D.B.*, 131 S. Ct. at 2403, are "peculiar[ly] vulnerab[e]," and lack the ability "to make critical decisions in an informed, mature manner," *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (plurality op.). The constitutional rights of children cannot be equated to those of adults and legal theories in cases involving adults should not be "uncritically transferred to determin[e] . . . a State's duty towards children." *May*, 345 U.S. at 536 (Frankfurter, J., concurring).

The federal government argues that juvenile immigration proceedings provide other "special protections," short of appointed counsel, that sufficiently protect a child's due process rights. *See* Brief of Defendant-Appellants, Doc. No. 9 at 42-43 (citing the EOIR Memorandum). However, the mere existence of "special protections" does not "offset the disadvantages of denial of the substance of normal due process." *See Gault*, 387 U.S. at 21. Like the "special procedures" once forwarded by States in an effort to avoid providing counsel in juvenile delinquency proceedings, the federal government's special protections in immigration proceedings are more "rhetoric than reality." *Id.* at 24. Relaxed deadlines and other limited regulatory protections do not replace the need for court-appointed counsel in an adversarial proceeding where the opposing party is the federal government, a sophisticated party, represented by trained prosecutors, and the child stands alone.

The risk of erroneous deprivation for children is particularly significant given both the complexity of immigration law and the amount of discretion afforded its judges. *Cf. Cash v. Culver*, 358 U.S. 633, 637 (1959) (requiring court-appointed counsel "[w]here the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the

possible defenses thereto" render a proceeding without counsel "so apt to result in injustice as to be fundamentally unfair") (citation omitted). Although children may theoretically petition for immigration relief pro se, immigration laws are "second only to the Internal Revenue Code in [terms of] complexity." *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) (citation omitted); *see also Alanis-Bustamente v. Reno*, 201 F.3d 1303, 1308 (11th Cir. 2000) (stating "the issues [in immigration law] are seldom simple and the answers are far from clear"); *Lok v. INS*, 548 F.2d 37, 37 (2d Cir. 1977) (noting that the Immigration and Nationality Act bears a "striking resemblance . . . [to] King Minos's labyrinth in ancient Crete"). Children are doomed to fail where, as is true in immigration proceedings, the laws are rife with discretionary standards. *See, e.g.*, 8 U.S.C. § 1229b(b)(1)(D) (requiring that immigration judges consider whether removal would result in some "exceptional and extremely unusual hardship to the alien's spouse, parent, or child"). Children cannot be expected to navigate by themselves complex proceedings that simultaneously require them to master statutory law, administrative procedure, and the trial skills required to present effective witness testimony. *See Santosky v. Kramer*, 455 U.S. 745, 762 (1982) (noting that "proceedings [that] employ imprecise substantive standards" "magnify the risk of erroneous fact-finding").

It is, thus, unsurprising that when an attorney is absent, a child's chances of obtaining relief dramatically decrease. *See* Syracuse University, Transactional Records Access Clearinghouse ("TRAC"), *New Data On Unaccompanied Children in Immigration Court*, Table 4, http://www.trac.syr.edu/immigration/reports/359/ (showing 47 percent of children with attorneys were able to remain in the United States from 2005 to 2014, while only 10 percent of children without attorneys were able to do the same). In the State of Washington, the federal government has adjudicated the cases of 1,397 children since 2005, of which 912 children were represented by counsel. TRAC, *Juveniles—Immigration Court Deportation Proceedings*, http://trac.syr.edu/phptools/immigration/juvenile/ (Chart: Washington—Current Status (excluding pending cases)) (*last accessed on* March 9, 2016). Of the 912 cases where the child was represented children, 610 (66 percent) resolved in the child's favor, i.e., resolved in a way that permitted them to remain in this country.[3] *Id.* In contrast, of the 485 cases where the child was unrepresented, only 62 (or 12 percent) resolved in the child's favor.[4] *Id.*

[3] The following categories of outcomes were considered favorable to the child: "Grant Relief," "Pros. Discretion," "Terminate Proceedings," and "Other Closure." The "Removal Order" and "Voluntary Departure" categories of outcomes reflect children who were *not* permitted to remain in the country.

Attorneys are trained "to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [children] ha[ve] a defense, and to prepare and submit it." *Gault*, 387 U.S. at 36. This Court has previously observed that an attorney is "the *only* person who [can] thread the labyrinth [of immigration laws]." *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987) (emphasis added). In recognition of the importance of representation by an attorney, amici States have made efforts to provide children with counsel in immigration matters. Press Release, Washington State Office of the Attorney General, "AG Ferguson Hosts Meeting on the Need for Representation for Immigrant Children" (Sep. 15, 2014), http://www.atg.wa.gov/news/news-releases/ag-ferguson-hosts-meeting-need-representation-immigrant-children. In response to tens of thousands of children fleeing horrific violence and poverty in Central America, in 2014 and 2015 the California Attorney General's Office led a multi-sector response that secured

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See TRAC, *About the Data*, http://trac.syr.edu/immigration/reports/359/include/about_data.html.

[4] Data from California also bears this out. For example, in the 9,624 completed immigration removal cases in which children were represented, 7,628 (79 percent) resolved in the child's favor. TRAC, *Juveniles Immigration Court Deportation Proceedings*, http://trac.syr.edu/phptools/immigration/juvenile/ (Chart: California—Current Status (excluding pending cases)) (*last accessed on* Mar. 9, 2016). In contrast, of the 4,667 cases where the child was unrepresented, only 684 (or 15 percent) resolved in the child's favor. *Id*.

thousands of hours in pro bono work by private law firms to address the legal services gap for unaccompanied children across the state. *See* Sharon Bernstein, *California Attorney General Asks Lawyers to Help Immigrant Children*, Reuters (July 24, 2014), http://www.reuters.com/article/us-usa-california-immigration-idUSKBN0FU02020140725. In 2014, the California Attorney General's Office also sponsored state legislation that was signed into law that provided $3 million to qualified non-profits to provide legal services for unaccompanied minors. *See* Niraj Chokshi, *California Will Give Undocumented Immigrant Children $3 Million in Free Legal Services*, Wash. Post (Sept. 29, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/29/california-will-give-undocumented-immigrant-children-3-million-in-free-legal-services/. Despite all these efforts, however, the legal services gap remains extreme.

In sum, the risk of erroneous deprivation is great. Immigration proceedings fall within the category of cases that are so "unusually complex" that a child, with no legal capacity, "can fairly be represented only by a trained advocate." *See Turner*, 131 S.Ct. at 2511 (citation omitted).

3. The Government's Fiscal and Administrative Burden Is Unclear

Finally, while the federal government's interest in the "efficient administration of its immigration laws" must be considered when children are placed in immigration proceedings, *Landon*, 459 U.S. at 34, the fiscal and administrative burden of appointing counsel for indigent children is wholly unclear. Thus far, the federal government has not yet put forth data detailing the burden. As the district court recognized, although the "financial constraints and border-policing concerns" raised by the government "must play a role in any analysis," they have not yet been "sufficiently quantified or developed." ER 94.

While the district court should conduct a full *Mathews* balancing, a comparison of the immigration and criminal contexts suggests that the burden on the federal government may be *de minimis*. *See Lassiter*, 452 U.S. at 28 (noting governmental defendant admitted that the "potential costs of appointed counsel" was "*de minimis* compared to the costs in all criminal actions"). Providing counsel to indigent children in immigration proceedings would create a case load of as little as one-tenth of one percent of *Gideon*'s yearly burden on public defender offices nationwide. *Compare* Lynn Langton & Donald J. Farole, Jr., U.S. Bureau of Justice Statistics, Public Defender

Offices: 2007 Statistical Tables (June 7, 2010), http://www.bjs.gov/content/pub/pdf/pdo07st.pdf (showing that state and county-level public defender offices receive more than 5.5 million cases per year), *with* TRAC, *Juveniles–Immigration Court Deportation Proceedings* (indicating between 7,000 and 55,000 immigration cases per year involved juveniles and that 46 percent of juveniles appeared unrepresented).

Additionally, any burden caused by appointing counsel may be offset by concrete cost savings in the form of increased efficiency and administration of immigration laws. For example, representation could minimize the time children are detained before their cases are completed, which decreases the costs of immigration detention. *See* Press Release, Exec. Office for Immigration Review, U.S. Dep't of Justice, "New Legal Orientation Program Underway to Aid Detained Aliens" (Mar. 11, 2003), http://www.justice.gov/sites/default/files/eoir/legacy/2003/03/14/LegalOrientationProgramRelease0311.pdf (noting legal programs benefit individuals and reduce detention time); *see also* Press Release, Exec. Office for Immigration Review, U.S. Dep't of Justice, "EOIR's Legal Orientation Program" (May 15, 2008), https://www.justice.gov/eoir/press/08/LegalOrientationProgramEvalFactSheet051508.pdf (showing legal programs are effective in educating detainees and improving

court efficiency). Moreover, the assistance of counsel contributes to the orderly adjudication of immigration proceedings, thereby enhancing courtroom efficiency. *See* American Immigration Council, *Taking Attendance: New Data Finds Majority of Children Appear in Immigration Court* (July 29, 2014), http://www.immigrationpolicy.org/just-facts/taking-attendance-new-data-finds-majority-children-appear-immigration-court (finding children more likely to appear for hearings when represented by counsel than not).

The amici States share a *parens patriae* interest with the child in accurate and just decisions in immigration proceedings. The district court should determine if the appointment of counsel creates some fiscal or administrative burden on the federal government, and, if so, if such cost is outweighed by the risk of erroneously depriving a child of their significant liberty interest.

IV. CONCLUSION

This Court should affirm the lower court's decision retaining jurisdiction of Plaintiffs-Appellees' constitutional claims. We respectfully urge this Court to consider the history of due process protections for children in adversarial proceedings, along with the grave and serious nature of deportation, in considering this appeal.

RESPECTFULLY SUBMITTED this 11th day of March, 2016.

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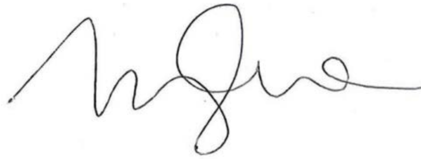

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the word limitations of Fed. R. App. P. 29(c)(7) because it contains 4,955 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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DECLARATION OF SERVICE

I hereby certify that on March 11, 2016, the forgoing document was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

Dated this 11th day of March, 2016.

ROBERT W. FERGUSON
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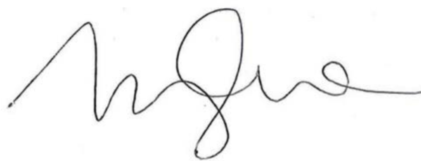

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