The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

J.E.F.M., a minor, by and through his Next Friend, Bob Ekblad; J.F.M., a minor, by and through his Next Friend, Bob Ekblad; D.G.F.M., a minor, by and through her Next Friend, Bob Ekblad; F.L.B., a minor, by and through his Next Friend, Casey Trupin; G.D.S., a minor, by and through his mother and Next Friend, Ana Maria Ruvalcaba; M.A.M., a minor, by and through his mother and Next Friend, Rosa Pedro; S.R.I.C., a minor, by and through his father and Next Friend, Hector Rolando Ixcoy; G.M.G.C., a minor, by and through her father and Next Friend, Juan Guerrero Diaz; on behalf of themselves as individuals and on behalf of others similarly situated,

Plaintiffs-Petitioners,

v.

Eric H. HOLDER, Attorney General, United States; Juan P. OSUNA, Director, Executive Office for Immigration Review; Jeh C. JOHNSON, Secretary, Homeland Security; Thomas S. WINKOWSKI, Principal Deputy Assistant Secretary, U.S. Immigration and Customs Enforcement; Nathalie R. ASHER, Field Office Director, ICE ERO; Kenneth HAMILTON, AAFOD, ERO; Sylvia M. BURWELL, Secretary, Health and Human Services; Eskinder NEGASH, Director, Office of Refugee Resettlement,

Defendants-Respondents.

Case No. 2:14-cv-01026-TSZ

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

HEARING DATE:

September 3, 2014

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I. Introduction

Defendants challenge class certification by focusing on the theoretical pitfalls arising from factual and legal differences amongst the Plaintiffs, but, tellingly, make no reference to these allegedly critical differences in their opposition to the preliminary injunction. There they address the merits of Plaintiffs' claims as though they rise or fall together, which in fact they do. The differences Defendants describe in their opposition to class certification are irrelevant to the common factual and legal claims raised here: that the Due Process Clause and a single provision of the immigration code entitle *all pro se* children in immigration proceedings to legal representation. Defendants also fail to address the wealth of authority certifying classes like this one, including nationwide challenges to illegal immigration enforcement practices. Those cases demonstrate "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of [this] litigation." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (citation omitted). *See* Section II.A.

Defendants argue that the Court cannot certify the proposed class because it contains some children who are "unaccompanied" as well as others who live with parents or guardians, and still others whose parents are in immigration proceedings with them. But all child class members are unrepresented by a lawyer in their immigration proceedings, and governing law makes clear that neither parents nor whatever protections are afforded to children designated as "unaccompanied" can serve as a substitute for legal representation. *See* Section II.B. Defendants also claim that the legal rights of these children vary based on their manner of entry or immigration status, but they do not vary with respect to the only right at issue here. Controlling law makes clear that all children have a right to a fair hearing under the same statutory and constitutional rules. *See* Section II.C.

Defendants make various other objections to class certification, but none are well taken in this case, which challenges Defendants' uniform nationwide practice of forcing children to defend themselves in immigration proceedings without legal representation. Most, if not all, of those children will never have the opportunity to present the claims asserted here absent class certification.

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II. Plaintiffs' Proposed Class Satisfies Federal Rule of Civil Procedure 23(a).

A. Controlling Ninth Circuit Law Has Required Certification of Classes Far More Disparate Than the Class Plaintiffs Propose Here.

Defendants' opposition largely ignores the large body of law certifying classes with differences far greater than those here, including nationwide classes challenging immigration enforcement practices. Plaintiffs address the relevance of the differences Defendants raise below, but a review of the differences found *insufficient* to defeat commonality, typicality, and adequacy in other cases bears mention at the outset. Several Ninth Circuit cases in the immigration context have emphasized that Rule 23 does not require that "'[a]ll questions of fact and law . . . be common to satisfy the rule.' . . . Nor does 'common' as used in Rule 23(a)(1) mean 'complete congruence.'" *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) (citations omitted). Those cases also make clear that classes can include named representatives and other class members with factual or legal differences so long as any separate defenses they may have do not "threaten to become the focus of the litigation," *id.* at 1124, and that any unique interests will be "fairly and adequately represented" so as to allow the Court to "ensur[e] practical and efficient case management" of the certified class. *Walters v. Reno*, 145 F.3d 1032, 1045 (9th Cir. 1998) (affirming certification of nationwide class challenging inadequate deportation notice procedures despite differences in Government's treatment of members and varying factual and legal status among plaintiffs); *Gete v. INS*, 121 F.3d 1285, 1300 (9th Cir. 1997) (vacating denial of class certification in part "[b]ecause we have concluded that the plaintiffs raise a number of substantial claims that go to the INS' procedures generally, rather than to the facts of any particular plaintiff's case"). *See also* Dkt. 2 at 8 n.3 (collecting cases).

Rodriguez is particularly instructive. A class of immigration detainees detained under different statutory regimes and holding varying legal status argued for a common procedural right: a bond hearing after six months' detention. 591 F.3d at 1112-14. The Ninth Circuit reversed the district court's denial of certification, acknowledging that members did not "raise identical claims," but finding that a common question (whether prolonged detention without a bond hearing generates serious constitutional concerns) "will be posed by the detention of every member of the class and their entitlement to a bond hearing will largely be determined by its answer." *Id.* at 1123, 1124.

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Here, *all* putative class members are *pro se* children in immigration proceedings who seek the same relief: legal representation. In *every* case Defendants contend that the children have no such right. That is "a common contention," and "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S.Ct. at 2551.

B. That Some Putative Class Members Are "Accompanied," However Defined, Does Not Undermine Commonality, Typicality, or Adequacy.

Defendants draw three distinctions concerning whether children are "unaccompanied" in order to undermine commonality, typicality, and adequacy, but those distinctions are irrelevant for purposes of the common claim presented here. Dkt. 54-2 at 10-11, 13-14.

First, Defendants argue that the class is not cognizable because "unaccompanied" class members are subject to different rules than "accompanied" ones under the TVPRA.[1] *Id*. at 10-11. However, they never dispute that all children—whether "accompanied" or not—are subject to the same fair hearing rules under 8 U.S.C. § 1229a and the Due Process Clause. They also do not argue that the provisions they cite governing "unaccompanied" children provide for appointed counsel.[2]

Defendants point to several provisions of the TVPRA, but they have no bearing on the central issue in this case: whether *pro se* children must receive legal representation for their removal hearings to be fair. They cite provisions that govern the screening and detention of children *before* they are put in removal proceedings or custodial placements, which are obviously irrelevant. Dkt. 51 at 18-20; Dkt. 54-2 at 10-11. *See, e.g.*, 8 U.S.C. § 1232(b) (combatting trafficking); 1232(c)(3) ("Safety and suitability assessments"). They also reference a provision permitting the appointment of "child advocates" in a narrow class of cases, but the tiny number of advocates appointed under this

[1] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235, Pub. L. No. 110-457, 122 Stat. 5044, 5074-5082 (codified as amended at 8 U.S.C. § 1232).

[2] Although irrelevant to certification, because both sides agree that the representatives and the class include children who are and are not "unaccompanied" under the TVPRA, Defendants err in their description of that group. "Unaccompanied alien child" is defined at 6 U.S.C. § 279(g)(2). That designation generally attaches to children prior to their transfer to Office of Refugee Resettlement custody, and those who are subsequently reunified with parents are still, under some circumstances, treated as "unaccompanied." *See, e.g.*, Ted Kim, Acting Chief, Asylum Division, U.S. Citizenship & Immigration Services (USCIS), *Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children*, at 1-2 (May 18, 2013), *available at* http://1.usa.gov/1pZk4k2. *See also* Lisa Seghetti, Alison Siskin & Ruth Ellen Wasem, Congressional Research Service, *Unaccompanied Alien Children: An Overview*, at 9 (2014) (reporting approximately 85% of children in ORR custody are reunified with family).

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system serve only to advocate for the best interest of the child, *not* to represent the child in court. 8 U.S.C. § 1232(c)(6); *see also* Dkt. 59, Decl. of David B. Thronson ¶ 18 (noting that only a "very small percentage of children are appointed such an adovcate"); Dkt. 61, Decl. of Jojo Annobil, Esq. ¶ 17 (noting only one child advocate appointed to child represented by The Legal Aid Society in New York in 11 years of practice); Dkt. 57, Decl. of William O. Holston, Jr., Esq. ¶ 12 (noting no recollection of child advocate being appointed in two years practicing before the Dallas Immigration Court). Defendants do cite one provision concerning "access to counsel," but it provides only that the Secretary of Health and Human Services (HHS) shall ensure access to counsel for unaccompanied alien children "to the greatest extent practicable." 8 U.S.C. § 1232(c)(5). This too is irrelevant: both sides agree it does not mandate counsel, Dkt. 54-2 at 10, and a child for whom the HHS arranges counsel is not a class member. Defendants also assert a legal difference based on 8 C.F.R. § 1240.10(c), *id.* at 11, but that regulation affords no meaningful protection to children, Dkt. 59 ¶ 13, and certainly does not so alter the landscape as to defeat commonality, *see* Dkt. 1at 22.[3] Most important, the TVPRA, the regulations, and any other provisions Defendants rely on have failed all class members equally in the only way that matters: they have not resulted in appointed legal representation for any of them. That central reality supports commonality and affirms the adequacy of Plaintiffs as class representatives.

Second, Defendants assert a fundamental difference between those class members who are "without a parent or legal guardian in the United States" and those who are not. Dkt. 54-2 at 14. But Defendants do not explain why it matters whether a child lives with a parent or guardian. Nor do they cite evidence for their assertion that children "in the custody of a parent cannot fairly argue they lack 'intellectual and emotional capacity' . . . to the same extent as class members without a parent

[3] Defendants err in describing the scope of that provision as well. It applies to children regardless of whether they are "unaccompanied" under 6 U.S.C. § 279(g)(2)(C), so long as the child appears alone in court. 8 C.F.R. § 1240.10(c). Defendants allude to "additional special protections accorded to unaccompanied alien children," Dkt. 54-2 at 10-11 (citing Dkt. 51 at 18-20), but the only additional "protection" outside of the TVPRA and 8 C.F.R. § 1240.10(c) they have discussed are the OPPM Guidelines, some of which apply to all children, even if "accompanied by a parent or guardian," *see* David L. Neal, Chief Immigration Judge, U.S. Department of Justice, Executive Office for Immigraiton Review, *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, at 4 (May 22, 2007), and therefore cannot defeat class certification.

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or legal guardian," *id.*, or explain why the extensive caselaw that Plaintiffs cite on this issue is somehow limited to children living apart from their parents. *See* Dkt. 2 at 13-17 (discussing, *inter alia*, five Supreme Court cases recognizing the capacity constraints on children by virtue of their age and its attendant limitations). Moreover, the right to appointed counsel in juvenile delinquency cases applies regardless of whether a child resides in their parent's care, no doubt in part because the Supreme Court specifically rejected the argument that the presence of a parent could mitigate the harm caused by children having to proceed *pro se* in *Gault*. *In re Gault*, 387 U.S. 1, 41-42 (1967) (child had right to counsel in juvenile delinquency proceedings in light of capacity limitations despite actively-involved parent); 18 U.S.C. § 5034 (assignment of counsel in federal juvenile delinquency cases proceeds without reference to whether child lives with parent). *See also* Dkt. 61 ¶ 16 ("In my experience supervising cases involving children in immigration proceedings, I have seen that children—regardless of whether they currently are in the custody of a family member—are a vulnerable population with special needs.").

Defendants' brief could also be read to argue that children who live with parents or other guardians are atypical because those adults could act as legal representatives, *see* Dkt. 54-2 at 14, but that claim is likely foreclosed in light of the Ninth Circuit's application of the law governing the rights of minors in general federal litigation to the immigration context in *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1025 (9th Cir. 2004) ("[T]he right of minors to competent counsel is so compelling that we have joined other circuits in holding that 'a guardian or parent cannot bring a lawsuit on behalf of a minor in federal court without retaining a lawyer.'") (citing *Johns v. County of San Diego*, 114 F.3d 874, 876-77 (9th Cir. 1997) (interpreting Fed. R. Civ. P. 17(c) to bar parent from representing child)). Defendants lost virtually the same argument, after extensive litigation, in the context of people with serious mental disorders in *Franco-Gonzales v. Holder*, 828 F. Supp. 2d 1133, 1144-46, 1146 n.11, 1147 (C.D. Cal. 2011) (finding parent of mentally incompetent immigrant could not serve as legal representative despite "earnest desire to assist his son"); *Franco-Gonzalez v. Holder*, 2013 WL 3674492, *9 (C.D. Cal. Apr. 23, 2013). *Franco* cited various problems that also undermine the notion that parents could essentially represent their children, including the possibility of

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unrecognized conflicts of interest between parents and children, the inability of the system to hold parents accountable for ineffective assistance, and the fact that many children could not consent to representation by a parent. 828 F. Supp. 2d at 1144-46. In any event, Defendants advance this objection only in opposition to class certification—not the preliminary injunction—which further demonstrates that it is not sufficient to defeat commonality, typicality, or adequacy.

Third, Defendants make much of the scenario in which an "accompanied" child is in consolidated proceedings with a parent, Dkt. 54-2 at 11, 19, as though children in that situation are mere appendages to their parents and therefore in a fundamentally different position from other putative class members. But the child in such situations has her own charging document, and—if she loses—her own removal order with its attendant consequences. No rule requires that she seek the same relief as her parent, and no rule requires parents to assert all (or any) defenses for their children in consolidated proceedings. Defendants concede that some children will have different claims for relief than their parents, *id*. at 11, and this is not uncommon. *See* Dkt. 59 ¶ 17; *see also Matter of Mejia-Andino*, 23 I. & N. Dec. 533, 537 (BIA 2002) (IJ correctly terminated proceedings for failure to follow service requirements for minor); Dkt. 1 at 9 (discussing Special Immigrant Juvenile Status); USCIS Asylum Division, *Asylum Officer Basic Training Course: Guidelines for Children's Asylum Claims*, at 11-12 (2009), *available at* http://1.usa.gov/1txAxgm ("children may face child-specific persecution").

Finally, even a child whose claims are identical to her parent's—a fact that could be known only if that child were adequately screened by counsel—is nevertheless her own "person" under the statute and Due Process Clause. Defendants appear to assume that parents can adequately represent their childrens' interests in such cases, but this ignores the potential for conflicts with the parent with whom proceedings are consolidated. For example, a parent may lack the resources to care for a child and prefer that the child return to her country of origin, despite a shared legal claim and the child's desire to remain in the United States. Similarly, a parent may not wish to disclose difficult facts that form the basis for shared eligibility for relief under laws that protect victims of gender-based violence or other crimes. *See* Dkt. 59 ¶ 17; *see also* Dkt. 1 ¶ 33 (discussing U Visa); USCIS, Asylum

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Division Training Programs, *Female Asylum Applicants and Gender-Related Claims*, at 20-21 (Mar. 12, 2009), *available at* http://1.usa.gov/1nvi8ec. A child in this situation is no less in need of legal representation to assure a fair hearing than any other.

Defendants also describe a range of potential collateral effects arising from situations where children receive attorneys while their parents in consolidated proceedings do not, but their concerns are misplaced, and in any event have no effect on whether these children share claims common to the class. *See* Dkt. 54-2 at 10-11, 19-20. Most obviously, nothing would prevent a child who wins her case from leaving the country if her parents lose and the family wishes to remain united. *See* Dkt. 59 ¶ 19. Nor would provision of legal representation to children undermine family unity, as Defendants suggest. *Id.* In fact, the opposite effect is more likely, for children in proceedings consolidated with their parents where both relief and interests align, the presence of counsel for the child will enable the parent to benefit from the clear identification of relief and presentation of facts on the child's behalf. And, of course, for the vast majority of children—whose parents are *not* in proceedings—legal representation will significantly *increase* their chances of remaining in their parents' care. For example, legal representation is absolutely essential if Plaintiffs G.M.G.C., G.D.S., M.A.M., and S.R.I.C. are to have any possibility of remaining with their parents who reside lawfully in this country. *See, e.g.*, Dkt. 1 ¶¶ 61-79; Dkt. 2 at 7.

For all of these reasons, children in consolidated proceedings, like all other *pro se* children in immigration court, can assert the common claim that they are entitled to legal representation in order to receive a full and fair hearing.

C. Any Differences in Constitutional Status Between Class Members Are Insufficient to Defeat Commonality, Typicality, or Adequacy.

Defendants next argue that the different constitutional rules applicable to different class members—based on their manner of entry and immigration status—preclude a finding of commonality or typicality. Dkt. 54-2 at 12-13, 15. Again, if those differences were as significant as Defendants claim, one would have expected them to be highlighted in their merits briefing. But, tellingly, Defendants never argue in opposition to the preliminary injunction that some of the Plaintiffs have weaker claims than others. *Compare* Dkt. 54-2 at 7 n.5 (asserting that four of the six

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plaintiffs seeking preliminary relief have fewer constitutional rights) *with* Dkt. 51 at 12-17 (analyzing statutory and constitutional claims of all of them together). Any asserted constitutional differences between the Plaintiffs do not justify denying class certification.

1. The Class Members Share a Common Statutory Claim.

As a threshold matter, Defendants' argument has no bearing on the common *statutory* question that Plaintiffs seek to address. All the Plaintiffs claim a statutory right, as children, to legal representation in proceedings before an Immigration Judge. One statute—8 U.S.C. § 1229a—governs all such proceedings. *See* Dkt. 24 at 15-16. While Defendants' argument may have had more merit before 1996, when the immigration laws provided for "exclusion" proceedings for individuals stopped at the border and "deportation" proceedings (with more procedural protections) for people who had entered the United States, Congress has since eliminated that distinction in favor of one set of procedures for all individuals appearing before an Immigration Judge. *See United States v. Lopez-Gonzalez*, 183 F.3d 933, 934 & n.4 (9th Cir. 1999) (noting that the 1996 laws eliminated the distinction between deportation and exclusion to create "removal proceedings").[4]

While Plaintiffs do rest their statutory argument in part on the doctrine of constitutional avoidance, *see* Dkt. 24 at 15, it does not follow that the strength of Plaintiffs' statutory claims varies based on any supposed differences with respect to their constitutional rights. Both the Supreme Court and the Ninth Circuit have repeatedly held that statutes must be construed to avoid constitutional problems even if those problems do not arise as to all individuals whom they govern. In *Clark v. Martinez*, 543 U.S. 371 (2005), the Supreme Court held that an immigration detention statute had to be construed to avoid constitutional problems arising from its applicability to individuals who had entered the United States, even though the petitioner had not entered, because "[t]he operative language of § 1231(a)(6) . . . applies without differentiation to all [] categories of

[4] Congress has provided for summary removal procedures for the deportation of some classes of immigrants, including some children, but those proceedings do not take place before Immigration Judges, and therefore children subject to such procedures are not part of the putative class. *See* 8 U.S.C. § 1225(b) (creating "expedited removal" for individuals arriving with no facially valid documents who express no credible fear of persecution), § 1228(b) (creating "administrative removal" for non-lawful permanent residents convicted of aggravated felonies), § 1231(a)(5) (creating "reinstatement of removal" for individuals who return in violation of a prior removal order).

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aliens that are its subject." *Id.* at 378; *see also Nadarajah v. Gonzales*, 443 F.3d 1069, 1076-78 (9th Cir. 2005) (same, for statute governing asylum seekers stopped at border, lawful permanent residents, and noncitizens who had entered the United States).

Here, as Defendants acknowledge, the putative class includes individuals who have entered the United States, including some who are lawfully present and have lived here for many years, like Plaintiff G.D.S. *See* Dkt. 1 ¶ 61; Dkt. 54-2 at 15. Thus, this Court must construe § 1229a the same way as to all Plaintiffs, regardless of whether the individuals governed by the statute have different underlying constitutional rights. The Ninth Circuit has applied this rule to require the certification of classes that include individuals who have entered the United States and those who have not. *Rodriguez*, 591 F.3d at 1123-24.[5]

2. All Class Members Have a Constitutional Right to a Fair Hearing.

Although a single statutory question that admits of a common answer suffices to establish commonality, *see Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013) (explaining that "[s]o long as there is 'even a single common question,' a would-be class can satisfy the commonality requirement" (quoting *Dukes*, 131 S. Ct. at 2556)), Plaintiffs would satisfy the commonality requirement even if they had pled only their constitutional claim. While in various contexts courts have recognized differences in the constitutional status of noncitizens depending on their manner of entry and status in various contexts, in the only context that matters here—the right to a fair hearing for children in removal proceedings—two Ninth Circuit cases establish that the same basic due process right to a fair hearing applies to *all* children in the putative class, regardless

[5] *See also Franco*, 2013 WL 3674492 at *12-13 (certified class action including noncitizens stopped at border, construing detention statutes to require bond hearing after six months of detention); *Ali v. Ashcroft*, 213 F.R.D. 390, 395, 409 (W.D. Wash. 2003) (certifying nationwide class of "[a]ll persons in the United States who are subject to orders of removal, expedited removal, deportation or exclusion to Somalia" in part because "[t]he question at the center of the case is a discrete statutory issue identical to all members of the class") *aff'd*, 346 F.3d 873, 889 (9th Cir. 2003), *vacated on other grounds*, 421 F.3d 795 (9th Cir. 2005); *Perez-Funez v. District Director, INS*, 611 F. Supp. 990, 994 (C.D. Cal. 1984) (certifying nationwide class of "[a]ll persons who claim to be under eighteen years of age . . . who are not accompanied by either of their natural or lawful parents at the time of being taken into custody [by INS]."); *cf. Gete v. INS*, 121 F.3d 1285, 1300 (9th Cir. 1997) (vacating denial of class certification in part "[b]ecause we have concluded that the plaintiffs raise a number of substantial claims that go to the INS' procedures generally, rather than to the facts of any particular plaintiff's case," where one named plaintiff had been stopped going through customs station while another had entered the United States before apprehension).

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of their manner of entry or present immigration status.[6]

Jie Lin involved a child *who had not entered* the United States. 377 F. 3d at 1019-20 (child found in airport restroom shortly after flight arrived); *see also* Dkt. 24 at 19-20 (arguing that *Jie Lin* strongly suggests that children are entitled to appointed counsel). There, the court applied due process law (not specific to the immigration context) concerning a child's right to litigate in federal court, and made a number of references to a child's right to due process in removal proceedings. *See* 377 F.3d at 1025, 1033. Although the analysis in *Jie Lin* is largely fatal to Defendants' argument against commonality based on status, they do not address it.

Further, even with respect to adult noncitizens who have not entered the United States, the Ninth Circuit has held that they too are protected by the Due Process Clause. As the en banc Ninth Circuit emphatically stated in *Oshodi v. Holder*, 729 F.3d 883 (9th Cir. 2013) (en banc), "*every individual* in removal proceedings is entitled to a full and fair hearing." *Id*. at 889 (emphasis added). For support, *Oshodi* cited cases involving individuals who had entered the United States and those who had not, thus reinforcing that the procedural rights in this particular context are the same for both groups. *See id*. at 889-90, 893-94 (citing *Colmenar v. INS*, 210 F. 3d 967, 968 (9th Cir. 2000) (individual "entered the United States" before applying for asylum)); *id*. at 891 (citing *Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 532 (7th Cir. 2005) (applicant "detained . . . when she attempted to reenter the United States")). *Oshodi* applied the *Mathews* balancing test and in so doing concluded that the immigrant there had a right to testify fully at his hearing. *Id*. at 894-96; *see also* Dkt. 24 at 9 (arguing that children are entitled to legal representation under *Mathews*).

[6] Plaintiffs dispute Defendants' characterization of the constitutional status of children "apprehended shortly after crossing the border." Dkt. 54-2 at 7 n.5, 12. While Plaintiffs J.E.F.M., J.F.M., and D.G.F.M. appear to have been stopped prior to entry, the other Plaintiffs, including S.R.I.C., have "entered" the United States for purposes of the "entry fiction" doctrine. "Entry" under that doctrine requires only that the immigrant cross the U.S. border free from official restraint. *United States v. Pacheco-Medina*, 212 F.3d 1162, 1163-64 (9th Cir. 2000). While Defendants cite two cases in their attempt to categorize Plaintiff S.R.I.C. as not having "entered," Dkt. 54-2 at 12-13, both cases involve individuals who never entered the United States at all, and neither alters the longstanding rule that the Due Process Clause protects individuals who have entered, "even [those] whose presence in this country is unlawful, involuntary, or transitory." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). In any event, as both parties agree that the proposed representatives and the class include some children who have "entered" for purposes of that doctrine and some who have not, and as Defendants do not argue that any of the child Plaintiffs should be denied preliminary injunctive relief on this basis, there is no need to address the issue at this time.

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Jie Lin and *Oshodi* comport with cases from other circuits that analyze the procedural protections available to individuals who have not entered the United States. *See, e.g.*, *Rodriguez Galicia*, 422 F.3d at 538-40; *Abdulai v. Ashcroft*, 239 F.3d 542, 545, 549 (3d Cir. 2001) (citing *Mathews* to hold that "[d]espite the fact that there is no constitutional right to asylum, aliens facing removal are entitled to due process" in case of noncitizen who had not entered the United States); *Marincas v. Lewis*, 92 F.3d 195, 203-04 (3d Cir. 1996) (construing statute and regulations governing asylum claims presented by stowaways to require basic procedural protections, including translation and hearing before neutral judge); *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984) (same, for Haitian refugee who arrived by boat and conceded that he had not entered).

Defendants' argument to the contrary relies not on cases involving either children or asylum seekers, but instead on old Supreme Court cases involving different issues. Defendants cite *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), for the general proposition that noncitizens who have not "entered" have only those due process rights guaranteed by statute, but *Mezei* itself involved a challenge to prolonged detention on the basis of secret evidence raising national security concerns, *id*. at 208-09, and subsequent cases have questioned its validity even in the detention context. *See, e.g.*, *Rosales-Garcia v. Holland*, 322 F. 3d 386, 413-15 (6th Cir. 2003) (en banc) (holding that *Mezei*'s rule, if broader than its particular facts, has been "fatally undermined" by subsequent due process cases).[7]

In any event, all the cases on which Defendants rely long pre-date the Ninth Circuit's decisions in both *Oshodi* and *Jie Lin*, each of which involve the particular procedural context at issue here. Defendants' authorities do not establish that children who have not "entered" the United States cannot claim the protection of the Due Process Clause, and they certainly do not establish that claim with sufficient strength to defeat certification under Rule 23.[8]

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[7] Defendants also cite *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), but the dicta they cite states only that noncitizens who have not entered have no constitutional right to be admitted. *Id*. Plaintiffs do not ask this Court to rule on their right to lawful admission or their right to remain. They seek only to obtain a fair hearing where an Immigration Judge can decide those questions. *Landon*'s holding does not contradict Plaintiffs' claim; the Court ruled that returning lawful permanent residents who had not entered the United States were nonetheless entitled to due process and analyzed that claim under *Mathews*. *Id*. at 34-35.

[8] If the Court were nonetheless inclined to conclude that the child Plaintiffs who have not "entered" the United States are

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D. All Proposed Named Representatives Are Adequate Under Rule 23.

Defendants make several adequacy arguments specific to certain class representatives, in particular G.D.S. and S.R.I.C. Dkt. 54-2 at 14-16, 21. These arguments are meritless. Even if not, they would justify only removing them as representatives, not denying certification. Defendants note that G.D.S. has lawful status and is not unaccompanied, *id.* at 15, 20, but these facts give him no greater or lesser right to legal representation for a fair hearing. *See* Sections II.B. & II.C, *supra*. He faces the same harm as every other class member: lack of appointed legal representation in his immigration proceedings. Defendants also state that he has not yet been served an NTA, Dkt. 54-2 at 15, but acknowledge that "[ICE] issued a detainer for G.D.S., advising that he faces removal proceedings." *Id.* at 6. In addition, Defendants argue that Plaintiff S.R.I.C. will turn 18 before his next hearing. *Id.* at 21. Regardless of when he turns 18, he has the same claim as other proposed representatives prior to that date, Dkt. 24 at 5-6, and the mootness of his claim would not prevent him from continuing as a class representative. *Amador v. Baca*, CV 10-1649 SVW JEM, 2014 WL 1679013, at *8 (C.D. Cal. Mar. 12, 2014). Defendants also suggest that a delay would harm him and perhaps others like him, but the ultimate relief Plaintiffs seek would not require a child to endure unending continuances and stale claims; it would require Defendants to appoint counsel for all children, including those 17 years old, who cannot obtain their own legal representation. *See infra* note 13. Defendants also argue that some unspecified Named Representatives are governed by different legal regimes, but this is insufficient to defeat adequacy, just as it is for commonality and typicality. *Rodriguez*, 591 F.3d at 1125. Finally, Defendants cite *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626-27 (1997), Dkt. 54-2 at 20, but there is no fixed sum of relief to apportion here, like the fund in *Amchem*, and the relief sought for each class member is the same.

E. The Court Should Certify the Class Nationwide Because It Challenges Uniform Federal Immigration Practices and Policies.

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entitled to lesser constitutional protections in this context, the proper remedy would be to create a subclass for both sets of children and leave for the merits stage an evaluation of whether their due process claims lead to different results. *See, e.g.*, *Marisol A. v. Giuliani*, 126 F.3d 372, 379 (2d Cir. 1997) (ordering subclassing to account for differences in certified class of children); *Duchardt v. Midland Nat'l Life Ins. Co.*, 265 F.R.D. 436, 442 (S.D. Iowa 2009) ("Subclassing sometimes represents a workable solution to differences in substantive law."). While Plaintiffs do not believe such a result is necessary, J.E.F.M., J.F.M, and D.G.F.M. could serve as representatives of the subclass who have not "entered," and G.M.G.C., M.A.M., and G.D.S., at a minimum, could serve as representatives of the subclass who have "entered."

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Defendants argue against certifying a nationwide class, but the Supreme Court authority they cite recognizes nationwide certification as proper where, as here, "nationwide relief is . . . appropriate," and in fact upheld a nationwide certification in that very case. Dkt. 54-2 at 16.[9] Courts have found nationwide certification proper where (1) no other similar cases are currently pending in other jurisdictions and (2) the plaintiffs are challenging a nationwide policy or practice. *Clark v. Astrue*, 274 F.R.D. 462, 471 (S.D.N.Y. 2011) (certifying nationwide, and rejecting federal government's "apparent preference for litigating a single issue in multiple circuits"); *Morrell v. Harris*, 505 F. Supp. 1063, 1068-69 (E.D. Pa. 1981) (same, and rejecting argument that court should permit different rulings by different courts where case involved single nationwide policy).

Those considerations and others strongly counsel in favor of nationwide certification here. Defendants cite no other similar pending litigation (and Plaintiffs know of none), and they point to no difference in material caselaw across the circuits, perhaps because so much of the law Plaintiffs rely on comes from the Supreme Court. In any event, no circuit court has addressed the central questions in this case, and the underlying statutory and constitutional law is largely uniform. Defendants argue that a nationwide class is improper because all Named Plaintiffs reside in the Ninth Circuit, Dkt. 54-2 at 16, but they cite no authority identifying this as an impediment.[10] Defendants cite one case rejecting nationwide certification, but it involved material differences across different geographic regions.[11] *Id.* at 15-16. Moreover, Defendants never mention the several nationwide class actions Plaintiffs cite, including some from this district, that challenged nationwide

[9] *Califano v. Yamasaki*, 442 U.S. 682, 702-03 (1979), affirmed a nationwide class, finding that (1) "[n]othing in Rule 23… limits the geographcial scope of a class action," (2) "a nationwide class [is not] inconsistent with principles of equity jurisprudence, since the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class," and (3) "is committed … to the sound discretion of the district court."

[10] Plaintiffs chose not to take on more Named Plaintiffs from elsewhere largely for case management reasons, but it is undisputed that there are children throughout the country who are in the same situation. If the Court deems it necessary Plaintiffs can readily amend the Complaint to add Named Plaintiffs from other parts of the country.

[11] *Shvartsman v. Apfel*, 1997 WL 573404 (N.D. Ill. 1997), involved factual differences dependent on geography. The class claims were based on INS "processing delays," but "[t]he time lag between filing an application and the interview varie[d] widely, depending on the INS district office handling the application." *Id.* at *4. The Seventh Circuit upheld the district court's decision to limit the class because of "the range in INS processing delays across different geographic regions," as well as Plaintiffs' primary reliance on Seventh Circuit law. 138 F.3d 1196, 1201 (7th Cir. 1998). No such geographic differences in fact or law are present here. *United States v. Mendoza*, 464 U.S. 154 (1984), was not a class action and said nothing about class certification, nationwide or otherwise.

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immigration enforcement practices. The rationales of those cases apply equally here. *See* Dkt. 2 at 8 (citing, *inter alia*, *Gorbach v. Reno*, 181 F.R.D. 642, 644 (W.D. Wash. 1998) (certifying class despite litigation in another circuit where "anything less tha[n] a nationwide class would result in an anomalous situation allowing the INS to pursue denaturalization proceedings against some citizens, but not others, depending on which district they reside in")).[12]

Finally, denial of nationwide certification would likely spawn copycat litigation in some but not all parts of the country where children are affected, leading to grossly inefficient use of judicial resources while simultaneously ensuring that some children never have the opportunity to present the serious constitutional and statutory challenges raised here. *See* Dkts. 30-32, 34, 57-58, 60-64 (describing affected children in California, Virginia, Texas, Ohio, New York, Washington, and North and South Carolina). The Court should certify a nationwide class so as to avoid that unjust result. *Cf. Rodriguez*, 591 F.3d at 1123 (certifying class in part due to "the severe practical concerns that would likely attend [plaintiffs] were they forced to proceed alone.").

F. Class Members Seek a Uniform Remedy.

Defendants argue at some length that the Court could not order a uniform remedy even if Plaintiffs prevailed, but this argument rests on confusion about the relief sought and the remedies available. Defendants assert that "certification and injunctive relief places the Court in the untenable position of fashioning fragmented remedies," Dkt. 54-2 at 15 n.6, and further, that the "only obvious remedy" that would not violate the statute would be to require "automatic"continuances for every child under 18. *Id*. at 17. But this claim again assumes that the Government cannot pay for counsel in removal proceedings, which is no longer the Government's position or practice, Dkt. 24 at 20 n.9. In any case, if and when Plaintiffs move for final injunctive relief, the relief they request will be an order requiring appointed counsel for all children in immigration proceedings who cannot obtain their own legal representation. *Cf. Franco*, 2013 WL 8115423, at *1 (ruling on summary judgment

[12] Other nationwide class actions for immmigration claims include *Walters*, 145 F.3d at 1045 ("What makes the plaintiffs' claims suitable for a class action is the common allegation that the INS's procedures provide insufficient notice.") and *Perez-Funez*, 611 F. Supp. at 1001 ("[T]here is little need to allow adjudication by different courts in different factual contexts, because the factual context will never change, regardless of the forum.").

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that Defendants "are hereby enjoined from pursuing further immigration proceedings against these Sub-Class One members unless, within 60 days of their having been identified by an Immigration Judge as a Sub-Class One member, such individuals are afforded Qualified Representatives").[13]

III. Plaintiffs' Proposed Class Satisfies Rule 23(b)(2).

Finally, Defendants argue that Plaintiffs do not challenge "a policy or practice of the Government that is generally applicable to them as a class." Dkt. 54-2 at 21-24. Yet, it is undisputed that Defendants have a practice—refusing to provide appointed counsel—that uniformly applies to all class members (*i.e.*, *pro se* children in immigration proceedings). Defendants quibble with whether their policy "force[s]" children to appear *pro se*, *id*. at 22 n.8, but this just rehashes their defense on the merits. Plaintiffs have established that Defendants place thousands of children into removal proceedings, that those children are required to attend hearings (on pain of *in absentia* removal), *see* 8 U.S.C. § 1229a(b)(5)(A), and that they uniformly interpret the immigration laws so as not to require appointed counsel, even for children. Dkt. 54-2 at 22. These facts are sufficient to establish that Defendants have "acted or refused to act on grounds that apply generally to" this class of unrepresented children. Fed. R. Civ. P. 23(b)(2); *see Rodriguez*, 591 F.3d at 1125 ("'Class certification under Rule 23(b)(2)' requires that 'the primary relief sought is declaratory or injunctive.' The rule does not require us to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them.").

IV. Conclusion

For these reasons, Plaintiffs respectfully request that the Court grant their Motion for Class Certification.

Dated this 25th day of August, 2014.

[13] Plaintiffs sought a lesser form of relief—a requirement that Immigration Judges grant continuances to allow children to find counsel—in the preliminary injunction context to address an immediate need to maintain the status quo while the parties litigate this case. *See supra* at 14 (citing Dkts. 30-32, 34, 57-58, 60-64). But if and when they have the opportunity to seek final injunctive relief from the Court, they will seek relief analogous to that granted by the court in *Franco*.

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2014, I electronically filed the foregoing, along with the supporting declarations and exhibits, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

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