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 PRELIMINARY INJUNCTION

HEARING DATE:

September 3, 2014

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I. INTRODUCTION

Defendants contest this Court's authority to stop them from requiring children—like ten-year-old J.E.F.M.—to proceed *pro se* in deportation cases where their lives may well be at stake. They argue first that Congress eliminated all federal court review over this challenge, and then that Congress intended to place children in the impossible situation of having to litigate *on their own* the claim that they are unable to litigate on their own. Fortunately, Supreme Court and Ninth Circuit caselaw construing the jurisdictional statutes refutes that view; this Court has authority to decide whether these children are entitled to fair hearings. *See* Section II.A.

On the merits, Defendants make almost no attempt to address the governing Due Process test for appointed counsel in civil cases, focusing instead on the fact that these children are not citizens. But the Ninth Circuit has applied the Due Process framework to immigrants, including children. *See* Section II.B. As to the statutory claim, Defendants cite cases establishing the general rule that immigrants are not entitled to appointed counsel in deportation cases. But this prior precedent does not address children's unique claims. Moreover, the statutory landscape has dramatically changed since those cases were decided because the Government itself now provides counsel for certain vulnerable immigrants, including some children. In any event, these cases only establish the general rule; they do not foreclose Plaintiffs' claim that children are different because they must have counsel to exercise the *other rights* guaranteed to them by the statute. The Court should adopt Plaintiffs' statutory construction in order to avoid the serious constitutional problems that Defendants' construction raises. *See* Section II.C.

Finally, the equitable factors overwhelmingly favor Plaintiffs. They seek a minimal intervention: an order requiring Defendants to allow them time to find the representation they so desperately need. Defendants never contest either the overwhelming evidence that these children face extreme harm if deported or the statistical proof that they have very little chance of presenting their claims without counsel. In contrast, Defendants' countervailing claims of harm are speculative.

For these reasons, the Court should grant this motion.

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II. LEGAL ARGUMENT

A. This Court Has Jurisdiction to Hear Plaintiffs' Claims.

Two principles of statutory construction must frame the Court's jurisdictional analysis. First, federal courts interpret jurisdictional statutes "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *See*, *e.g.*, *Webster v. Doe*, 486 U.S. 592, 603 (1988). Because Plaintiffs' claim is colorable, this Court should interpret the jurisdictional statutes to avoid deciding whether Congress could constitutionally eliminate all federal court review. Second, federal courts interpret statutes to avoid absurd results. *United States v. Lazarenko*, 624 F.3d 1247, 1251 (9th Cir. 2010). Because Defendants' position would compel the child Plaintiffs to litigate, *pro se*, their constitutional claim that they are unable to represent themselves *pro se*, this Court should reject it.

1. 8 U.S.C. § 1252(g) Does Not Bar Review of Plaintiffs' Claims.

Defendants' argument that § 1252(g) bars review over Plaintiffs' claims, Dkt. 51 at 7-10, is foreclosed by the limiting construction of that statute in *Reno v. Arab American Anti-Discrimination Committee*, 525 U.S. 471 (1999) [*AADC*], and controlling Ninth Circuit caselaw.

Section 1252(g) bars review over only "three discrete actions that the [Government] may take": the decisions to "commence proceedings, adjudicate cases, or execute removal orders." *AADC*, 525 U.S. at 482. *AADC* contrasted those unreviewable actions with others that the statute does not cover, including the decision "to reschedule [a] deportation hearing." *Id*. Here, Plaintiffs seek an order continuing their cases until they obtain legal representation, whether paid or *pro bono* – *i.e.*, an order requiring Defendants to "reschedule" their hearings. Because *AADC* construed the statute to permit *exactly* the relief Plaintiffs seek, § 1252(g) does not foreclose it. *See also Fornalik v. Perryman*, 223 F.3d 523, 532 (7th Cir. 2000) (noting that while petitioner "obviously wants [the] court to stop the execution of a removal order, that fact comes into the case only incidentally" and that § 1252(g) did not bar legal challenge to agency's denial of adjustment of status).

A line of Ninth Circuit cases interpreting § 1252(g) confirms Plaintiffs' view of *AADC*. The Ninth Circuit has held that § 1252(g) does not prohibit claims seeking to vindicate constitutional rights in matters related to removal proceedings, including claims challenging the imposition of a

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yearly cap on the number of people who could avoid deportation by obtaining relief from removal, *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1117-18 (9th Cir. 2001), and a challenge to the adequacy of the Government's notice procedures, *Walters v. Reno*, 145 F.3d 1032, 1051-52 (9th Cir. 1998). The claims in those cases were no less related to the decision to "commence proceedings, adjudicate cases, or execute removal orders" than the claims here. *See also Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1050 (C.D. Cal. 2010) (rejecting Defendants' contention that § 1252(g) barred review of plaintiffs' motion asking "to enjoin removal proceedings until plaintiffs are afforded adequate legal representation," because "if Plaintiffs prevail on their claims, they will only be entitled to legal representation to assist in their removal proceedings").[1]

Defendants also argue that Plaintiffs' claim is barred because the requested relief "will have the effect of enjoining Defendants from proceeding" indefinitely. Dkt. 51 at 9. But what "effect" the Court's order would have is entirely in Defendants' control. If they wish to proceed with Plaintiffs' cases, they could appoint them lawyers, as they have done already for many children. *See* Dkt. 24 at 20 n.9. In any event, that the "effect" of a court's order may affect the "three discrete actions" is irrelevant, because § 1252(g) only bars review of the actions themselves. *See AADC*, 525 U.S. at 482 (finding it "implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings"); *Walters*, 145 F.3d at 1052-53 (enjoining removal of class members notwithstanding § 1252(g)). The order Plaintiffs request would not bar Defendants from "adjudicat [ing] cases and execut[ing] removal orders" once Plaintiffs are represented. After this Court rules on Plaintiffs' claims, the immigration courts will be free to adjudicate their cases and execute any orders entered consistent with the Court's order.[2]

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[1] Although not controlling, *Franco* involved extensive, recent litigation of an appointed counsel claim raising the same jurisdictional issues that Defendants raise here (other than sovereign immunity). The *Franco* court repeatedly rejected those jurisdictional arguments, and Defendants did not appeal any of those orders.

[2] The cases Defendants cite all concern enforcement decisions that fall well within § 1252(g)'s express ambit. *See* Dkt. 51 at 9 (citing *Ali v. Mukasey*, 524 F.3d 145, 150 (2d Cir. 2008) (petitioners challenged DHS decision "to place them in removal proceedings"); *Moore v. Mukasey*, 2008 WL 4560619, *2 (S.D. Tex. Oct. 9, 2008) (same); *Tobar-Barrera v. Napolitano*, 2010 WL 972557, *2 (D.Md. Mar. 12, 2010) (challenge to decision to reinitiate dormant proceedings). To be clear, Plaintiffs do not contend that counsel must be appointed before Defendants commence proceedings. All but one of the Plaintiffs has already had proceedings commenced, and Plaintiffs would have no objection to the last Plaintiff—G.S.D. —being charged on before he obtains representation.

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2. Neither 8 U.S.C. § 1252(a)(5) Nor 8 U.S.C. § 1252(b)(9) Divests This Court of Jurisdiction to Hear Plaintiffs' Claims.

Defendants argue in the alternative that Plaintiffs' claims can be heard, but must be "consolidated" into review of their final orders of removal through the immigration courts and then the court of appeals under §§ 1252(a)(5) and 1252(b)(9), Dkt. 51 at 10, but this claim is meritless. Those provisions require consolidation only of claims challenging final orders of removal. Because Plaintiffs do not challenge final orders of removal, and because they could not present this claim as part of any challenge to a final order of removal, neither § 1252(a)(5) nor § 1252(b)(9) applies.

Section 1252(a)(5)'s plain text makes clear that it does not apply. It provides that a petition for review in the federal court of appeals is "the sole and exclusive means for judicial review of *an order of removal*." (emphasis added). But Plaintiffs have not received orders of removal and therefore cannot challenge them through this motion. They are not asking this Court to review an Immigration Judge's decision to order them removed. Rather, they seek legal representation during their removal hearings. Therefore, § 1252(a)(5) does not apply.[3]

While the language of § 1252(b)(9) is somewhat broader, courts have consistently read it to apply only to claims that seek review of removal orders, not claims (like those raised here) that arise independently from the removal order and cannot be reviewed through the petition for review of the removal order. The best example is *Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007), which Defendants themselves cite. Dkt. 51 at 11. The petitioner there filed a district court action raising an ineffective assistance of counsel claim against his (second) attorney, who had missed a jurisdictional filing deadline and thereby prevented Singh from obtaining his day in court. *Singh*, 499 F.3d at 973. The Ninth Circuit held that the district court had jurisdiction because "[b]y virtue of their explicit language, both §§ 1252(a)(5) and 1252(b)(9) apply only to those claims seeking judicial review of orders of removal." *Id.* at 978. Because the ineffective assistance of counsel that Singh allegedly suffered prevented him even from obtaining judicial review of his removal order, he could bring his

[3] To the extent this Court treats §1252(a)(5) as analogous to a typical administrative exhaustion provision, exhaustion here would be futile because the Board of Immigration Appeals ("BIA") does not recognize a right to appointed counsel in removal proceedings under any circumstances. *See El Rescate Legal Services, Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 747 (9th Cir. 1992) (recognizing futility exception to exhaustion); BIA Practice Manual, Section 2.3(a) (stating that "the government is not obligated to provide legal counsel" and recognizing no exceptions).

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claim in district court. *Id*. at 979 ("[A] successful habeas petition in this case will lead to nothing more than 'a day in court' for Singh, which is consistent with Congressional intent."); *see also Nadarajah v. Gonzales*, 443 F.3d 1069, 1075-76 (9th Cir. 2006) (holding that § 1252(b)(9) did not bar challenge to detention where "there is no final order of removal").[4]

Here, just as in *Singh*, adjudication of Plaintiffs' claims will simply preserve their ability to obtain judicial review of their removal orders (if in fact they are ordered removed). Once this Court resolves Plaintiffs' claims for appointed legal representation, the immigration courts will adjudicate Plaintiffs' cases, and Plaintiffs will still have one—and only one—opportunity to seek judicial review of any removal orders entered against them. *See Franco-Gonzales*, 767 F. Supp. 2d at 1045-46 (holding that § 1252(b)(9) did not bar legal representation claim).[5]

Finally, the Court should reject Defendants' reading of §1252(b)(9) because doing so would effectively bar Plaintiffs from ever obtaining federal court review of their claims. Defendants do not refute Plaintiffs' declarations establishing what should be obvious: that children like ten-year-old J.E.F.M. and his 13- and 15-year-old siblings lack the capacity to litigate their claims without legal representation. *See* Dkts. 26-29. Indeed, it is striking that although the immigration courts adjudicate thousands of deportation cases involving children each year, no petition for review of a final order of removal before the federal courts of appeals has ever addressed the claim raised here. An expert in the field who has represented hundreds of children for years cannot recall ever seeing a *pro se* child

[4] In reaching this conclusion, *Singh* relied on *INS v. St. Cyr*, 533 U.S. 289, 313 (2001), where the Court explained that "[§1252(b)(9)'s] purpose is to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals, but it applies only '[w]ith respect to review of an order of removal under subsection (a)(1).'" Other circuits have read §1252(b)(9) similarly in light of *St. Cyr*. *See, e.g.*, *Chehazeh v. Att'y Gen.*, 666 F.3d 118, 133 (3d Cir. 2012) ("Because Chehazeh is not seeking review of any order of removal – as there has been no such order with respect to him – § 1252(b)(9) does not preclude judicial review."); *Ochieng v. Mukasey*, 520 F.3d 1110, 1115 (10th Cir. 2008) (citing *Singh*, and holding that §1252(b)(9) would not apply because petitioner "would not be seeking review of an order of removal, but review of his detention"); *Madu v. Att'y Gen.*, 470 F.3d 1362, 1367 (11th Cir. 2006) ("Because section 1252(b)(9) applies only '[w]ith respect to review of an order of removal,' and this case does not involve review of an order of removal, we find that section 1252(b)(9) does not apply to this case.").

[5] Defendants suggest that *Singh* is distinguishable because here Plaintiffs seek to "preemptively" challenge their final orders of removal, Dkt. 51 at 11, but that is no more true here than in *Singh*, where the petitioner sought to raise an ineffective assistance claim, the ultimate goal of which was obviously to stop his deportation. Nor does it matter that *Singh*'s claim arose *after* the removal order in that case, whereas here the claim has arisen before any removal order may be entered. Nothing in *Singh*'s rationale turned on the timing at issue there. *See Franco-Gonzales*, 767 F.Supp.2d at 1045 (citing *Kharana v. Chertoff*, 2007 WL 4259323, at *3 (N.D. Cal. Dec. 3, 2007) for proposition that *Singh* "did not limit its holding to situations where the ineffective assistance claim arose after the issuance of the removal order").

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appeal any issue even to the BIA, let alone the federal courts. Declaration of David B. Thronson [Dkt. 59], ¶20. An exhaustive search by Plaintiffs' counsel confirms this, as a review of several hundred cases using broad search terms reveals at most one case in which a child proceeding alone has obtained judicial review of *any* issue in a petition for review.[6] Courts have narrowly construed § 1252(a)(5) and (b)(9) under such circumstances. *See*, *e.g.*, *Lolong v. Gonzales*, 484 F.3d 1173, 1177 (9th Cir. 2007) (en banc) (deprivation of judicial forum would likely violate Suspension Clause); *Luna v. Holder*, 637 F.3d 85, 94-95 (2d Cir. 2011) (same).[7]

For these reasons, neither § 1252(a)(5) nor § 1252(b)(9) deprives this Court of jurisdiction.

3. Sovereign Immunity Does Not Bar Review of Plaintiffs' Claims.

Defendants argue that sovereign immunity bars Plaintiffs' claims, but Congress waived its immunity in all actions seeking nonmonetary relief from official misconduct when it amended the Administrative Procedures Act ("APA") in 1976. *See* 5 U.S.C. § 702 (claim against officers in official capacity "shall not be dismissed . . . on the ground that it is against the United States"); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989). Congress intended this waiver to extend to all actions, not just those brought under the APA. *Id.* Plaintiffs brought this lawsuit for nonmonetary relief against eight federal officials in their official capacities. Dkt. 1 at 6-7 ¶¶19-26; *id*. at 26 § VIII(b)-(c). Thus, 5 U.S.C. § 702 waives sovereign immunity.[8]

Plaintiffs need not have pleaded § 702 in their Complaint because it was "clear from the facts of this case, in which [plaintiffs are] suing [officials] of the United States and seeking non-monetary

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[6] *Renderos v. Gonzales*, 193 Fed. App'x. 720 (9th Cir. 2006) (unpublished). It is unclear from that memorandum whether the petitioner was under 18 or merely under 21. The results of this survey are consistent with reports from other legal services providers who could not recall any cases in which an unrepresented child successfully sought review of a removal order. Declaration of William O. Holston, Jr. [Dkt. 57], ¶13, Declaration of Jojo Annobil [Dkt. 61], ¶18.

[7] As the First Circuit recognized in *Aguilar v. U.S. ICE*, 510 F.3d 1 (1st Cir. 2007), "claims that cannot effectively be handled through the available administrative process" are excluded from § 1252(b)(9)'s purview. *Id.* at 11. This is because "[c]ourts long have recognized an exception to the exhaustion requirement for claims that are collateral to administrative proceedings," and "have been most willing to deem claims 'collateral' when requiring exhaustion would foreclose all meaningful judicial review." *Id.* at 12 (internal citations omitted). That is exactly the position of Plaintiffs here, whose claims cannot be "effectively handled" through the immigration courts. *See also Franco-Gonzales*, 767 F. Supp. 2d at 1045-46 ("Plaintiffs' unique circumstances withstand characterization as the same type of right-to-counsel claims that the First Circuit found are 'frequently' raised in removal proceedings.").

[8] Even before 1976, the Supreme Court recognized that district courts had jurisdiction to issue "injunctions against [a federal officer's] threatened enforcement of unconstitutional statutes." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 9.1, at 632 (6th ed. 2012) ("[T]he Supreme Court long has held that federal officers may be sued for injunctive relief.").

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relief, [that] § 702 provides a waiver of sovereign immunity." *Nat'l Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel*, 606 F.3d 780, 788 (D.C. Cir. 2010) (citations omitted). Where those facts exist, the failure to plead § 702 does not bar jurisdiction. *Cf. Nationwide Mut. Ins. Co. v. Liberatore*, 408 F.3d 1158, 1161-62 & n.2 (9th Cir. 2005) (holding that the failure to plead 28 U.S.C. § 1331 was not a jurisdictional defect where the complaint stated that resolution would require application of a federal statute). Although dismissal is not required, even if it were, it would not affect Plaintiffs' likelihood of success in this motion because the defect could be corrected by a simple amendment to the Complaint. *See id*. (citations omitted).[9]

B. Plaintiffs Are Likely to Succeed on the Merits of Their Claim that the Due Process Clause Requires Defendants to Ensure Legal Representation for Plaintiffs.

Defendants begin their response to the constitutional claim by asserting "the exclusive power of the political branches to decide which aliens may not enter the United States," Dkt. 51 at 14 (quotation omitted), but that power has nothing to do with this case. Plaintiffs do not ask this Court to grant them admission or to stop their deportations; they ask only that the Court ensure that the Government administer its deportation system according to constitutional constraints. *See Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (the "plenary power to create immigration law" "is subject to important constitutional limitations," and "Congress must choose a constitutionally permissible means of implementing that power") (citation and quotation marks omitted).[10]

Defendants then contend that the Due Process Clause cannot require appointment of counsel in immigration proceedings because "a removal proceeding is a purely civil action" and the "only explicit constitutional right to appointed counsel comes from the Sixth Amendment, which does not

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[9] Defendants assert that the Court lacks habeas jurisdiction because Plaintiffs are not detained. But the threat of deportation is itself a deprivation of liberty that triggers habeas protections. *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) ("some judicial intervention in deportation cases is unquestionably required by the Constitution.") (citations omitted).

[10] Courts have repeatedly applied procedural due process doctrine to determine the constitutional sufficiency of removal procedures. *See*, *e.g.*, *Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013) (en banc) (applying *Mathews* to find right to testify fully in removal proceedings); *V. Singh v. Holder*, 638 F.3d 1196, 1208 (9th Cir. 2011) (holding that "due process requires a contemporaneous record" of immigration bond hearings, citing *Mathews*); *Diouf v. Napolitano*, 634 F.3d 1081, 1090-91 (9th Cir. 2011) (applying *Mathews* to determine that immigrant detainees with final orders of removal require bond hearings); *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1034 (9th Cir. 2004) (finding violation of child's due process right to effective assistance of (retained) counsel in removal proceedings); *Walters v. Reno*, 145 F.3d 1032, 1042-45 (9th Cir. 1998) (requiring improved notice to obtain administrative waivers in document fraud cases, citing *Mathews*).

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apply in removal proceedings." Dkt. 51 at 14 (citing, *inter alia*, *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000) (citing *Castro-Nuno v. INS*, 577 F.2d 577, 578 (9th Cir. 1978), noting that "there is no constitutional right to counsel in deportation proceedings").[11] But Plaintiffs do not claim that deportation is punishment requiring counsel under the Sixth Amendment; instead they argue that *children* require counsel under the *Fifth* Amendment to ensure that they receive a fair hearing. Dkt. 24 at 8-9. Defendants completely ignore the line of cases addressing the circumstances in which the Due Process Clause requires appointed counsel in *civil* proceedings (that by definition do not involve punishment). *Compare id. with* Dkt. 51 at 14-16.

Most important, Defendants fail to address *Turner v. Rogers*, 131 S. Ct. 2507 (2011), in which the Supreme Court reiterated that appointed counsel may be required in certain civil proceedings, applied the test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and found no right to appointed counsel there in large part because of the simplicity of proceedings and because the opposing party in those proceedings was unrepresented. *Turner*, 131 S. Ct. at 2519-20. Defendants never explain how their position can be reconciled with *Turner*. *See* Dkt. 24 at 14-17.

Defendants do attempt to distinguish *In re Gault*, 387 U.S. 1 (1967), Dkt. 51 at 15, but they badly misread its holdings. Defendants cite *Allen v. Illinois*, 478 U.S. 364, 373 (1986), apparently for the proposition that *Gault*'s holding concerning counsel rested on the assumption that juvenile delinquency proceedings were criminal in nature because they constitute punishment. But the passage they cite concerns *Gault*'s holding on *self-incrimination*, not counsel; *Allen* nowhere addresses counsel at all—the petitioner there had counsel—and *Gault*'s discussion of counsel presumed that the proceedings were civil, not criminal. *See Gault*, 387 U.S. at 17.[12] Moreover, Defendants' attempt to cabin *Gault* disregards subsequent authority citing *Gault*'s holding on

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[11] Defendants also cite *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984), but *Lopez-Mendoza* addressed whether the Fourth Amendment exclusionary rule applied in immigration proceedings given that they are civil. It makes no mention of the right to appointed counsel.

[12] Defendants' confusion likely arises from the fact that *Gault* addressed various aspects of the juvenile delinquency process, including not only appointed counsel, but also, *separately*, the privilege against self-incrimination. *Compare id.* at 34-42 (counsel) *with id.* at 42-57 (confrontation and self-incrimination). In the latter section, *Gault* concluded that the privilege against self-incrimination protected juveniles facing interrogation, in part because they could be placed into adult criminal custody as a result of interrogation, *i.e.* punishment. *Id.* at 49-50. *Allen* later explained and limited *Gault*'s *self-incrimination* holding, concluding that the privilege attached in *Gault* because of the risk that juvenile offenders could be punished on the basis of their statements. Again, *Allen* said nothing whatsoever about *Gault*'s counsel holding.

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1 counsel, including *Turner* itself, 131 S.Ct. at 2516, as well as *Lassiter v. Dep't of Soc. Servs. of*
2 *Durham Cnty., N.C.*, 452 U.S. 18, 25 (1981) (relying on *Gault* in analyzing civil counsel claim).
3 Defendants also cite several cases describing the general rule that noncitizens facing
4 deportation have no right to appointed counsel, but none of them address whether a limited category
5 of vulnerable immigrants may require appointed counsel under the Fifth Amendment in order to
6 receive fair hearings. Dkt. 51 at 14-17. In fact, the few cases to consider that possibility have at least
7 left the question open. *See Escobar-Ruiz v. INS*, 787 F.2d 1294, 1297 n.3 (9th Cir. 1986) (stating in
8 *dicta* that "in specific proceedings, due process could be held to require that an indigent alien be
9 provided with counsel despite the prohibition of section 292") (citation omitted), *aff'd en banc*, 838
10 F.2d 1020 (9th Cir. 1988), *disapproved on other grounds*, *Ardestani v. INS*, 502 U.S. 129 (1991);[13]
11 *United States v. Torres-Sanchez*, 68 F.3d 227, 230-31 (8th Cir. 1995) ("in some circumstances,
12 depriving an alien of the right to counsel may rise to a due process violation"); *Aguilera-Enriquez v.*
13 *INS*, 516 F.2d 565, 568 & n.3 (6th Cir. 1975) (holding that "[w]here an unrepresented indigent alien
14 would require counsel to present his position adequately to an immigration judge, he must be
15 provided with a lawyer at the Government's expense" and recognizing that cases "appearing to set
16 forth a *per se* rule against providing counsel to indigent aliens facing deportation, rested largely on
17 the outmoded distinction between criminal cases (where the Sixth Amendment guarantees indigents
18 appointed counsel) and civil proceedings (where the Fifth Amendment applies)"); *United States v.*
19 *Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987) ("an alien has a right to counsel if the absence
20 of counsel would violate due process under the fifth amendment").[14]
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[13] The Government has since abandoned the interpretation of 8 U.S.C. § 1362 that *Escobar-Ruiz* presumed to be correct. *See* Dkt. 24 at 20 n.9.

[14] Defendants cite *United States v. Gasca-Kraft*, 522 F.2d 149, 152 (9th Cir. 1975), *abrogated on other grounds*, *United States v. Mendoza-Lopez*, 481 U.S. 828, 834 (1987), but it relies primarily on cases decided under the Sixth Amendment, not the Due Process Clause. Similarly, *Rios-Berrios v. INS*, 776 F.2d 859 (9th Cir. 1985), notes only that there is no right to appointed counsel under the Sixth Amendment. *Id.* at 862. The cases relied on in *Leslie v. Attorney General*, 611 F.3d 171, 181 (3d Cir. 2010), do not support the sweeping conclusion that the Fifth Amendment could never require counsel in any immigration proceedings. *See id.* (citing, *inter alia*, *Borges v. Gonzales*, 402 F.3d 398, 408 (3d Cir. 2005) (stating only that "[noncitizens] have a statutory right to counsel and a constitutional right to counsel based on the Fifth Amendment's guarantee of due process of law") (citations omitted). Similarly, *Montilla v. INS*, 926 F.2d 162, 166 (2d Cir. 1991), notes merely that there is no right to appointed counsel under the Sixth Amendment, and that the Fifth Amendment Due Process Clause and the INA guarantee the noncitizen a right to counsel of his or her choosing. *Montilla* says nothing about the narrow Fifth Amendment-based claim that Plaintiffs raise here.

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Defendants also rely on an unpublished decision from the Eastern District of Washington that rejected the claim here. Dkt. 51 at 16 (citing *Gonzalez-Machado v. Ashcroft*, No. 02-0066 (E.D. Wash. 2002) (Van Sickle, J.)). *Gonzalez-Machado* relied on Ninth Circuit cases holding that the Constitution does not require appointed counsel in immigration proceedings, all of which relied either on the Sixth Amendment or on the defunct reading of 8 U.S.C. § 1362. *Id.* at 10; *supra* n.13. The court recognized that none of those cases involved children, but ultimately ruled that the petitioner could not demonstrate that "the fundamental civil/criminal dichotomy that forms the basis for Ninth Circuit case law on this issue is no longer a valid analytical model or that the interests of juvenile aliens undermines the reasoning of those prior opinions when applied to children." *Id.* at 22. Importantly, the court acknowledged that the petitioner may well have won under a straightforward application of the civil appointed counsel doctrine, but concluded that Ninth Circuit immigration cases concerning adults—that rest on the civil/criminal distinction—precluded that result. *Id*. at 21-22 (petitioner's arguments would have "great force" if not for Ninth Circuit law); *id*. at 23 (child's vulnerability "may have proven determinative" if *Mathews* and *Gault* applied).

Even were *Gonzalez-Machado* correctly decided at the time—and Plaintiffs respectfully disagree that cases holding the Sixth Amendment inapplicable to adults facing deportation can resolve a Fifth Amendment claim on behalf of children—several subsequent developments have undermined it, including recent Ninth Circuit cases unambiguously applying *Mathews* in the immigration context, *supra* n.10; the focus on asymmetry of representation in *Turner*, Dkt. 24 at 12; the statements in *Jie Lin* regarding a child's due process right to counsel when facing deportation, *id*. at 19-20, and the Government's new position on the meaning of 8 U.S.C. § 1362, which it now implements by appointing counsel in some children's cases. Dkt. 1 at ¶¶41-44; Dkt. 24 at 20 n.9.

C. Plaintiffs Are Likely to Succeed on the Merits of Their Claim that the Full and Fair Hearing Requirement of the INA Demands that Plaintiffs Be Appointed Legal Representation in Their Immigration Proceedings.

Defendants' response to the statutory claim does not address Plaintiffs' central argument: the statute provides certain unenumerated procedural rights (like translation) where necessary to ensure that the enumerated ones can be exercised; and children cannot exercise the specifically-enumerated rights without counsel. *See* Dkt. 24 at 16-17 & n.8. Defendants make no attempt to explain how their

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position—that ten-year-old J.E.F.M. will have to present and cross-examine witnesses and argue his asylum case against a trained prosecutor—satisfies the requirement that he receive a "reasonable opportunity" to exercise the rights guaranteed by § 1229a(b)(4)(B). *Id.* at 17-19, 21-22. They also do not explain why the statute has to specifically mention counsel for children when it does not mention translation and certain discovery obligations, even though it protects those rights. *See id.* at 16-17.

Defendants instead rely on 8 U.S.C. § 1362 and 8 U.S.C. § 1229a(b)(4)(A), Dkt. 51 at 12-13, which provide that noncitizens in immigration proceedings 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; *see also* 8 U.S.C. § 1229a(b)(4)(A). However, they do not argue that those provisions affirmatively *bar* the appointment of counsel at Government expense. In fact, the Government has disavowed that view, both by word and deed. *See* Dkt. 24 at 20 n.9; Dkt. 59, ¶21.[15]

Rather, Defendants argue that these provisions embody Congress' judgment that *no provision* of the INA creates an affirmative obligation to provide counsel for *any* noncitizen in immigration proceedings, because reading *any provision* of the INA to require legal representation for *any group* of immigrants would somehow abrogate these specific provisions. Dkt. 51 at 13 (claiming that Plaintiffs' interpretation "would render meaningless the express language" of these provisions). But Defendants do not explain why the conclusion that counsel for children is necessary to vindicate their statutory rights would render the general rule meaningless. By their plain terms, § 1362 and § 1229a(b)(4)(A) embody the generally-applicable right of all noncitizens to be represented by counsel of their own choosing, but only at no expense to the Government.[16] There is no inconsistency between that claim and Plaintiffs' argument that a separate provision—§ 1229a(b)(4)(B), which ensures a "reasonable opportunity" to exercise certain enumerated rights—mandates appointment of

[15] Defendants candidly acknowledge that the Government "does not oppose the representation of minors in immigration proceedings, *even by appointment*." Dkt. 54-2 at 22 n.8 (emphasis added).

[16] This protection is significant in its own right, given that the Government does not recognize a right to counsel—even at one's own expense—in other types of immigration proceedings. *See, e.g.*, 8 C.F.R. § 292.5(b) (no right to representation at border inspection); *see also Gonzaga-Ortega v. Holder*, 736 F.3d 795, 801, 804 (9th Cir. 2013) ("Because Gonzaga was properly deemed an 'applicant for admission' pursuant to 8 U.S.C. § 1101(a)(13)(C)(iii), we conclude that 8 C.F.R. § 292.5(b) did not entitle him to counsel during primary or secondary inspection.").

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1 counsel for a limited subset of individuals in immigration proceedings who cannot otherwise
2 exercise the rights that provision guarantees them. *See* Dkt. 24 at 17-20.
3 Thus, only Plaintiffs' reading gives full effect to all of the INA's provisions, including those
4 providing children with rights they cannot exercise without legal representation. Defendants have
5 not established that Plaintiffs' interpretation is "plainly contrary to the intent of Congress," which
6 they would have to to force this Court to decide the substantial constitutional question that
7 Defendants' interpretation raises. *Ma v. Ashcroft*, 257 F.3d 1095, 1111 (9th Cir. 2001).[17]

8 **D. Plaintiffs Will Face Irreparable Harm if the Court Does Not Issue a Preliminary**
9 **Injunction.**

10 Defendants refute virtually none of Plaintiffs' harm evidence, including that they cannot
11 present their complex cases, will suffer harm even if not ordered removed at their next hearing, and
12 may well be killed if deported. *See* Dkt. 24 at 20-22 (outlining harm based on unrepresented children
13 pleading to charges, stating eligibility for relief, considering voluntary departure, or failing to
14 appear). They ignore the compelling, unrefuted statistical evidence of comparative success rates:
15 78% for represented children vs. 25% for unrepresented children in 2013, the last year for which
16 there is reasonably complete data. Dkt. 25-1 at 70. And they do not deny that Plaintiffs could face
17 the worst possible harm if deported. Dkt. 24 at 2-6 (describing extreme violence Plaintiffs face upon
18 return); *see also* Cindy Carcamo, *In Honduras, U.S. Deportees Seek to Journey North Again*, The
19 Los Angeles Times, Aug. 16, 2014, *available at* http://tinyurl.com/ll9bhrw ("'There are many
20 youngsters who only three days after they have been deported are killed, shot by a firearm,' said
21 Hector Hernandez, who runs the morgue in San Pedro Sula. 'They return just to die.'").
22 Defendants call this "speculative," Dkt. 51 at 21, but, sadly, the evidence refutes that claim.
23 Unrepresented children nationwide (including in Seattle and Los Angeles, where Plaintiffs have their
24
25 [17] None of the cases Defendants cite to support their reading of § 1362 and § 1229a(b)(4)(A) preclude the possibility of a
26 limited exception to the general rule, particularly given that the Government no longer treats those provisions as a bar to the appointment of counsel. For example, *El Rescate Legal Services, Inc. v. EOIR*, 959 F.2d 742, 749 (9th Cir. 1992)
27 rests on the premise that "the Attorney General cannot ensure protection of the alien's § 1252(b)(3) opportunities by appointing counsel," but in fact the Government can and now *does* appoint counsel for children, as Defendants
28 acknowledge. Dkt. 24 at 20 n.9; Dkt. 54-2 at 22 n.8. Similarly, *Escobar-Ruiz v. INS*, 838 F.2d 1020, 1028 (9th Cir. 1988), states only that § 1362 does not confer a right to appointment of counsel in immigration proceedings "for indigent aliens" as a general matter. It says nothing about children.

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hearings) are already facing these harms in expedited "rocket docket" proceedings that have prioritized the deportation of children.[18] Declaration of Erin Apte [Dkt. 62], ¶¶5-6 (IJ told *pro se* children in Seattle they must file for asylum and "speak for themselves" at second hearings); Declaration of Sonia Gutierrez [Dkt. 64], ¶9 (IJ told *pro se* children in Los Angeles that they would proceed without counsel at next hearing); Dkt. 57, ¶¶6-7 (IJ told *pro se* children in Dallas to find attorney in one week and complete asylum application in three days); Declaration of Tin Nguyen [Dkt. 63], ¶11 (IJ told *pro se* children in Charlotte to complete application for relief or take voluntary departure at next hearing); Declaration of Cheryl Pollman [Dkt. 58], ¶¶5-10 (*pro se* children in Dallas pled and took voluntary departure and removal order). Some have *already* been ordered removed *in absentia*—a fate far more likely for unrepresented children. *See* Dkt. 58, ¶¶5, 7; Dkt. 63, ¶¶8, 11; Dkt. 64, ¶6. This evidence more than satisfies the applicable standard for imminent harm. *See Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (affirming preliminary injunction where plainiffs faced "real possibility" of unlawful arrests).

The practices Defendants cite do nothing to ameliorate this harm, as the declarations above show. Defendants speculate that Plaintiffs will receive "reasonable" continuances (if they manage to appear for hearings), but concede that eventually they will have to proceed even if they remain *pro se*, whether now or in a few weeks. Defendants also rely on the "child-sensitive" OPPM Guidelines, but its "guidance and suggestions" are not mandatory, *see* OPPM at 2,[19] and whatever "case completion" protections it allegedly provides have been undermined by the rocket dockets. *Compare* Dkt. 51 at 20 (suggesting IJs may issue "continuances without undue concern for administrative deadlines" in children's cases), *with* Dkt. 62, ¶4; Dkt. 64, ¶7; Dkt. 57, ¶¶6-10.

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[18] *See* Press Release, Dep't of Justice Office of Public Affairs, Department of Justice Announces New Priorities to Address Surge of Migrants Crossing into the U.S. (Jul. 9, 2014), *available at* http://tinyurl.com/owgqhbk (linking to factsheet describing Government prioritization of recently-arrived unaccompanied children and families with children); Dkt. 57, ¶10 (IJ stated that they are under supervisory guidance requiring them to expedite cases); Declaration of Scott Bratton [Dkt. 60], ¶4 (describing expedited docket in Cleveland); Dkt. 61, ¶¶9-15 (in New York City); Randolph McGrorty, Letter to the Ed., *Unaccompanied Children Denied Due Process*, *Miami Herald*, Aug. 6, 2014, *available at* http://tinyurl.com/n83xpgv (describing planned expedited dockets in Miami).

[19] "The EOIR Guidelines are not binding on all judges, nor do judges follow them consistently." Center for Gender and Refugee Studies & Kids in Need of Defense, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* at 61 (Feb. 2014), *available at* http://tinyurl.com/navzkmw.

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Defendants also suggest that 8 C.F.R. § 1240.10(c), which precludes a child alone in court from conceding her removability, offers some meaningful protection. Dkt. 51 at 20. But, as Plaintiffs previously explained, governing law permits Immigration Judges to accept *factual admissions* from an unrepresented child that, taken together, establish the child's removability despite this regulation. *See* Dkt. 1 at 22. Immigration Judges often do just that. Dkt. 59, ¶13.

Defendants note that children can always appeal, Dkt. 51 at 20-21, but that promise is cold comfort to *pro se* children who could not litigate an appeal even if they had preserved a basis for doing so. Indeed, that *pro se* children cannot bring or defend against appeals is itself another reason why the existing system violates due process. *Chike v. INS*, 948 F.2d 961, 962 (5th Cir. 1991) (denial of opportunity to file brief to BIA constituted due process violation). *See also* Dkt. 59, ¶20 (expert with nearly twenty years of experience in field could not recall a single *pro se* appeal); *supra* at 6 n.6.

Finally, the "special" TVPRA provisions Defendants cite do nothing to mitigate the harm here. Dkt. 51 at 18-19. The statute's "enhanced" screenings apply only to Mexican and Canadian children at the border, not these Plaintiffs. 8 U.S.C. § 1232(a)(2). And none of the six Plaintiffs were provided either a lawyer or a child advocate (which in any event could not substitute for a lawyer) under the TVPRA. Dkt. 59, ¶18 (in the last eleven years, approximately 500 children received child advocates, and their role is distinct from lawyers); Dkt. 57, ¶12; Dkt. 61, ¶17. Similarly, that Plaintiffs can pursue asylum claims before USCIS does not prevent the harm. Plaintiffs' cases will remain pending in court and, even if the Immigration Judges grant them continuances while they await USCIS's decision, any denial would leave them once again having to defend themselves *pro se*. Nor will the fact that the TVPRA exempts the children from some bars to asylum somehow enable them to litigate their complex cases. Dkt. 51 at 19.

For all these reasons, Plaintiffs face irreparable harm. Dkt. 24 at 20-22.[20]

E. The Balance of Hardships and the Public Interest Strongly Favor Plaintiffs.

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[20] Plaintiff G.M.G.C. still faces imminent harm, even though the Immigration Judge in her case changed venue after this motion was filed, because past practice in Los Angeles shows that she could be scheduled for a hearing on very short notice. *See* Dkt. 34, ¶¶9-12.

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Defendants' contentions on the remaining equitable factors either ignore the evidence of harm to the Plaintiff children, *compare* Dkt. 51 at 21 (arguing no cognizable harm from initial hearings), *with* Dkt. 24 at 20-22 (showing harm from initial hearings), or speculate on the supposed harm to the Government. For example, they offer no evidence that providing lawyers for children (or more time to find them) will create an *additional* impetus, beyond the horrific violence they are already escaping, for other children to flee to the United States. Dkt. 51 at 22. And injunctive relief need not "permit and prolong a continuing violation of United States law;" the Government can always provide representation if it wants to move forward promptly with fair proceedings. *Id.*[21]

What is clear, however, is that the public interest in ensuring legal representation for children is both powerful and widely recognized, including by the Attorney General for the State of Washington, the Governor of California, a prominent Immigration Judge, and, oddly enough, Defendant Attorney General Holder himself. *See*, *e.g.*, Dkt. 24 at 23-24; Dkt. 46 at 5 (Amicus Brief, Washington State Attorney General); Press Release, Office of Governor Edmund G. Brown Jr., Governor Brown, Attorney General Harris and Legislative Leaders Announce Unaccompanied Minor Legislation (Aug. 21, 2014), *available at* http://gov.ca.gov/news.php?id=18658.

As Attorney General Holder stated in testimony to the Senate, "[i]t is inexcusable that young kids—. . . six-, seven-year-olds, fourteen-year-olds—have immigration decisions made on their behalf, against them, . . . and they're not represented by counsel. That's simply not who we are as a nation. It's not the way in which we do things." Dkt. 1 at 14.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant the motion.

Dated this 25th day of August, 2014.

[21] Defendants reference their interest in efficiency, Dkt. 51 at 23, but their own Judges have stated that representation increases efficiency. *See* Richard Gonzales, *A Top Immigration Judge Calls for Shift on "Fast-Tracking,"* Iowa Public Radio (Aug. 8, 2014), *available at* http://iowapublicradio.org/post/top-immigration-judge-calls-shift-fast-tracking (describing comments of IJ Dana Leigh Marks that fast-tracking children's case is clogging the system, and that "[t]he court system is extremely well-served when noncitizens who appear before us are represented by attorneys"). In contrast, the rocket docket is causing delays in other cases before the courts. *See*, *e.g.*, Dkt. 60, ¶¶4-5.

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