Golden Gate University Law Review

Volume 52 | Issue 1 Article 1

November 2022

J.E.F.M. V. LYNCH: THE JURISDICTIONAL EXCLUSION OF LEGAL REPRESENTATION FOR IMMIGRANT CHILDREN

KOURTNEY SPEER

NOTE

J.E.F.M. V. LYNCH: THE JURISDICTIONAL EXCLUSION OF LEGAL REPRESENTATION FOR IMMIGRANT CHILDREN

*KOURTNEY SPEER**

The border crisis created what has been called a perfect storm in immigration courts, as children wind their way from border crossings to immigration proceedings. The storm has battered immigration courtrooms crowded with young defendants but lacking lawyers and judges to handle the sheer volume of cases.[1]

INTRODUCTION

In 2005, seventy unaccompanied immigrant children had pending cases in immigration court.[2] By 2017 the number of pending cases against unaccompanied minors had increased exponentially to 88,069.[3] Of the 2017 pending cases, 55,651 were filed in 2014.[4] J.E.F.M., the lead plaintiff, was one out of almost 90,000 children left to fend for themselves in this complex legal process.[5] Under controlling law and precedent, unaccompanied immigrant children do not have a right to court-

* J.D. Candidate, Golden Gate University School of Law, May 2022; B. A. History, Aurora University, Dec. 2018. Executive Articles Editor, *Golden Gate University Law Review*.

[1] J.E.F.M. v. Lynch, 837 F.3d 1026, 1039 (9th Cir. 2016) (McKeown J., concurring) (quotations omitted).

[2] TRAC IMMIGRATION, *Children: Amid a Growing Court Backlog Many Still Unrepresented*, (Sept. 28, 2017), https://trac.syr.edu/immigration/reports/482/.

[3] *Id.*

[4] *Id.*

[5] *See* Immigration Court Practice Manual, Chief Immigr. Judge, Exec. Off. for Immigr. Rev., to all Immigr. Judges, 1 (Nov. 13, 2020) (on file with U.S. Department of Justice), *available at* https://www.justice.gov/eoir/page/file/1258536/download.

appointed counsel during their legal removal proceedings.[6] Without the assistance of legal counsel, immigrant children as young as three years old must file legal documents, represent themselves in front of immigration judges against trained government lawyers, and establish complete records for their inevitable appeals.[7] Yet, there are reports of these young immigrant children climbing up on court room tables during their immigration proceedings.[8] Assistant Chief Immigration Judge, Jack Weil stated, "I've taught immigration law literally to three year olds and four year olds. It takes a lot of time. It takes a lot of patience. They get it. It's not the most efficient, but it can be done."[9] Despite the United States' structured and sophisticated legal system, which was developed to ensure justice, toddlers are expected to navigate one of the country's most complex laws—the Immigration and Nationality Act ("INA")—second only to the Internal Revenue Code in complexity.[10] Moreover, the section of the INA that addresses the judicial review of orders of removal, 8 U.S.C. § 1252, has not been amended since 2005,[11] despite the immense changes in the landscape of immigration law since then. Therefore, it is time to update the law.[12]

The concern of whether unaccompanied immigrant children have the right to counsel in their removal proceedings has long been deliberated by courts.[13] The United States Court of Appeals for the Ninth Circuit had an opportunity to address whether immigrant children do have a right to legal representation, in *J.E.F.M. v. Lynch.*[14] However, instead of resolving that issue, the court dismissed the case for lack of subject matter

---

[6] *Unaccompanied Immigrant Children*, NATIONAL IMMIGRANT JUSTICE CENTER, https://immigrantjustice.org/issues/unaccompanied-immigrant-children (last visited Aug. 9, 2021).

[7] *See* Weil, J., Dep. 69:8-70:24, J.E.F.M. v. Lynch, Ann Medis, Job no. 15047 (Oct. 15, 2015) (implying that because these children are provided training in immigration law that they are expected to file legal documents, represent themselves in front of an immigration judge against a government lawyer, and establish a complete record to have for an appeal.).

[8] Christina Jewett, *Immigrant Toddlers Ordered to Appear in Court Alone,* THE TEXAS TRIBUNE (Jun. 27, 2018) https://www.texastribune.org/2018/06/27/immigrant-toddlers-ordered-appear-court-alone/.

[9] Weil, J., Dep. 69:24-70:3, J.E.F.M. v. Lynch, Ann Medis, Job no. 15047 (Oct. 15, 2015).

[10] Castro-O'Ryan v. U.S. Dept. of Immigration and Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987) (quoting ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 107 (Greenwood Press, 1985)).

[11] 8 U.S.C § 1252 (2005). The last amendment came in 2005 under the REAL ID Act of 2005. *Infra* note 105.

[12] The Biden Administration recently proposed new legislation: the U.S. Citizenship Act of 2021. This act has the stated purpose of "restor[ing] humanity and American values to our immigration system." U.S. Citizenship Act H.R. 1177, 117th Cong. (2021).

[13] *Ninth Circuit Dodges Question of Right to Counsel for Kids in Immigration Cases*, NCCRC.ORG (May 2, 2019) http://civilrighttocounsel.org/major_developments/880.

[14] Lynch, 837 F.3d at 1026.

jurisdiction.[15] In *J.E.F.M.*, a group of undocumented immigrant children sued in the United States District Court for the Western District of Washington asserting a statutory and constitutional right to counsel[16] during their removal proceedings.[17] The district court reached a favorable decision on the merits for both claims asserted by the Children, finding that the court had proper subject matter jurisdiction to preside over the Children's right to counsel claims.[18] However, on appeal, the Ninth Circuit reversed the decision and declared that because the Children's claims were an "inextricable part" of the administrative process,[19] the claims must be exhausted and because the Children had not exhausted their claims, they were dismissed.[20]

The Ninth Circuit avoided the review of this paramount issue regarding legal representation for immigrant children because the court determined that the Children failed to exhaust their remedies as required by the INA, § 1252(b)(9) ("channeling provision") making it a non-final order, unreviewable by the Ninth Circuit.[21] Without subject matter jurisdiction, the court lacked authority to review the substantive issue.[22] However, in *J.E.F.M.*, the Ninth Circuit misapplied the INA exhaustion requirement[23] which left thousands of immigrant children without legal

[15] *Id.* This case was previously known as *J.E.F.M. v. Holder* then later known as *J.E.F.M. v. Whitaker.* Subject matter jurisdiction is jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or status of things. *Subject-matter jurisdiction,* BLACK'S LAW DICTIONARY (11th ed. 2019).

[16] The right to counsel refers to the constitutional right of a defendant to be represented and assisted by a lawyer in her defense. U.S. Const. amend. VI. The Sixth Amendment provides this right to defendants in federal prosecutions. *Id*. In civil cases, courts have routinely recognized a defendant's right to counsel exists only where the litigant may lose his physical liberty if he loses the litigation. Lassiter v. Dep't of Soc. Serv., 452 U.S. 18, 25 (1981).

[17] J.E.F.M. v. Holder, 107 F. Supp. 3d 1119, 1123 (W.D. Wash. 2015). A removal proceeding is the formal proceeding an immigrant goes through before being removed/deported. *Executive Office for Immigration Review, An Agency Guide*, U.S. DEP'T OF JUST. 1, 2 (Dec. 2017), https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download.

[18] Holder, 107 F. Supp. 3d at 1120.

[19] Immigration law is considered a hybrid between administrative law and constitutional law. Traditional administrative law is administered by administrative agencies created by Congress. Those administrative agencies often perform their own adjudicatory functions before a claim is sent to a federal court. *Administrative Law,* LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/administrative_law (last visited, Aug. 12, 2021).

[20] Lynch, 837 F.3d at 1033, 1038. The doctrine of exhaustion of administrative remedies requires a person challenging an agency's decision to first challenge that decision through the administrative avenues before seeking judicial review in a federal court. 33 Fed. Pract. & Proc. *Judicial Review* § 8363 (2d ed.) (database updated April 2021).

[21] 8 U.S.C. § 1252(b)(9).

[22] Lynch, 837 F.3d at 1038.

[23] In early 2020, a district court in Virginia ruled § 1252 subsection (g) unconstitutional but did not invalidate § 1252 in its entirety. Therefore, this article will focus on sections of § 1252 that have not been found to be unconstitutional. Joshua M. v. Barr, 439 F. Supp. 3d 632, 676 (E.D. Va. 2020).

representation during their removal proceedings. The practical effect of the Ninth Circuit's decision is that it forced the Children to exhaust the administrative process before raising their right to counsel claims with a district court.[24] The Ninth Circuit should have found that the district court had subject matter jurisdiction under the channeling provision, as the claim—a constitutional due process right to counsel—was collateral to, or outside of, the removal process and therefore not barred by the final order provision. Moreover, as a matter of fairness, requiring the Children to exhaust all administrative requirements and remedies limits their ability to appeal an unfavorable determination, because without proper representation they cannot fully develop the record for appeal. The Ninth Circuit's failure to reach the substantive issue was not only a missed opportunity to clarify the application of the INA removal proceeding requirements but also a detrimental failure to the thousands of children that were, and are, in desperate need of legal counsel.

Part I of this Note discusses the following: (1) the facts and procedural history of *J.E.F.M. v. Lynch*; (2) the Ninth Circuit's application and interpretation of 8 U.S.C. § 1252; and (3) a brief summary of Judge Berzon's dissent. Part II provides a brief overview of the current immigration process as it now stands and the history of immigration laws in the United States. Part III provides background information on the right to counsel and its application to removal hearings Finally, Part IV of this Note argues that the Ninth Circuit erred in its decision to dismiss the Children's claims for lack of subject matter jurisdiction and that immigrant children should have a right to counsel during their removal proceedings.

I. *J.E.F.M. v. Lynch*: The Finding of Improper Jurisdiction

In *J.E.F.M.*, the plaintiffs (the "Children") sued the United States claiming a statutory and constitutional right to appointed counsel in immigration proceedings.[25] In support of their claims, the Children argued that as minors they "lack[ed] the intellectual and emotional capacity of adults," but were still expected to appear for their complex immigration proceedings against educated attorneys without representation of their own.[26] The Children alleged they were unable to receive a "full and fair

[24] Lynch, 837 F.3d at 1029, 1038.
[25] Lynch, 837 F.3d at 1029.
[26] *Id.* at 1029-30.

opportunity" to identify defenses, seek relief, and establish an adequate record for appeal.[27]

In July 2014, the Children filed their complaint with the United States District Court for the Western District of Washington at Seattle.[28] The class of plaintiffs included eight children, who were younger than eighteen and who were unrepresented in their complex removal proceedings.[29] The Children in the class were in various stages of their own removal proceedings.[30]

The named plaintiff,[31] J.E.F.M.'s story illustrates the struggles experienced by each individual plaintiff.[32] J.E.F.M. was a ten-year-old boy from El Salvador.[33] J.E.F.M.'s father, a former gang member in El Salvador, converted to Christianity.[34] J.E.F.M.'s parents ran a rehabilitation center in El Salvador for young people who left or were trying to leave gangs.[35] Gang members threatened J.E.F.M.'s parents, and later killed his father and cousin.[36] J.E.F.M., his two siblings, and his mother witnessed his father's brutal murder right outside of their house in El Salvador.[37] J.E.F.M.'s mother feared for her life, and therefore, fled El Salvador, leaving her three children with their grandmother.[38]

---

[27] *See id.* at 1030 (identifying the complex appeals process that unaccompanied immigrant children would have to face, such as establishing an adequate record for appeal.).

[28] Complaint at 1 of Document 1, J.E.F.M. v. Holder, 107 F. Supp. 3d 1119 (W.D. Wash. 2015) (No. 2:14-cv-01026).

[29] The certified class pursuant to Federal Rules of Civil Procedure 23(b)(2) was, "All individuals under the age of eighteen (18) who: (1) are in removal proceedings, as defined in 8 U.S.C. § 1229a, within the boundaries of the Ninth Judicial Circuit, on or after the date of entry of this Order; (2) were not admitted to the United States and are alleged, in such removal proceedings, to be "inadmissible" under 8 U.S.C. § 1182; (3) are without legal representation, meaning (a) an attorney. . .; (4) are financially unable to obtain such legal representation; and (5) are potentially eligible for asylum under 8 U.S.C. § 1158, withholding of removal under 8 U.S.C. § 1231(b)(3), or protection under the Convention Against Torture, or are potentially able to make a colorable claim of United States citizenship. Order at 1-2, Holder, 107 F. Supp. 3d 1119.

[30] Within this class of children, some children did not have removal proceedings commenced against them while others were in ongoing removal proceedings. Holder, 107 F. Supp. 3d at 1123.

[31] Each class action suit has a class representative which is someone who sues on behalf of a group of plaintiffs in a class action. *Class Representative,* BLACK'S LAW DICTIONARY (11th ed. 2019).

[32] The seven other plaintiffs were as follows: (1) J.E.F.M.'s thirteen-year-old brother and fifteen-year-old sister; (2) a fourteen-year-old girl fleeing from El Salvador after being threatened and attacked by gangs; (3) a fifteen-year-old boy who was abandoned and abused in Guatemala; (4) a sixteen-year-old boy with special needs who escaped brutal violence from Honduras; and (5) a seventeen-year-old boy who fled gang violence from Guatemala. Complaint at 5.

[33] Complaint at 15.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

Several years later, gang members targeted J.E.F.M. and his siblings and told them they had to join the gang or else they too would be harmed.[39] It was at this point, around July, 2013, when J.E.F.M. and his two siblings fled El Salvador, entered the United States, and were apprehended by immigration officials.[40] J.E.F.M., like other unaccompanied immigrant children in the class, began navigating his legal immigration proceedings without representation.[41] Although each child involved in the class may not have had exactly the same experiences, all the Children shared three fundamental characteristics: (1) the Government initiated immigration proceedings against them; (2) they were forced to appear unrepresented in complex court proceedings; and (3) they were all children under the age of 18, and therefore presumably lacked the intellectual and emotional capacity of adults.[42] The Children alleged violations of the INA and violations of the Due Process Clause of the Fifth Amendment.[43]

Over the next year, the Children's counsel[44] worked diligently to certify the class.[45] Initially, the plaintiffs asserted the class should consist of: "[a]ll individuals under the age of eighteen (18) who are or will be in immigration proceedings on or after July 9, 2014, without legal representation in their immigration proceedings.[46] However, the Government challenged the certification of the class claiming factual and legal differences amongst the plaintiffs but failed to specify these differences.[47] Ultimately, the court denied this proposed class without prejudice due to the class being "too expansive to meet the commonality and typicality requirements."[48] After the Children's fourth motion, the court found that the Children satisfied the class certification requirements.[49]

---

[39] *Id.*

[40] *Id.*

[41] Complaint at 2.

[42] Complaint at 8.

[43] Complaint at 25. The Fifth Amendment does provide protection for noncitizens. See *infra* note 125.

[44] The counsel referred to here represents the children for their right to counsel claim, not for their individual removal proceedings.

[45] There are four prerequisites a class must satisfy in order to maintain a class action: (1) Numerosity, (2) Commonality, (3) Typicality, and (4) Adequacy. *Class Action*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[46] Complaint at 23.

[47] Reply in Support of Plaintiffs' Motion for Class Certification at 2 of Document 65, J.E.F.M. v. Holder, F. Supp. 3d 1119 (W.D. Wash. 2014).

[48] Order at 3. Commonality means that members of the class share at least one issue of law or fact whose resolution will affect all or a significant number of class members. *Commonality*, BLACK'S LAW DICTIONARY (11th ed. 2019). Typicality means the claims of defenses of the representative parties are typical of the claims or defense of the whole class. Fed. R. Civ. P. 23(a)(3).

[49] *See Supra* note 29.

On April 13, 2015, district court Judge Zilly held that §§ 1252(a)(5) and (b)(9) did not bar the Children's due process claim under the Fifth Amendment but the district court did lack jurisdiction to hear the Children's statutory claim.[50] The Attorney General filed an interlocutory appeal[51] to the Ninth Circuit on the grounds that the district court erred in finding it had jurisdiction over the Children's due process claim.[52] In September 2016, the Ninth Circuit affirmed the district court's holding regarding the children's statutory claim because "the [constitutional] balancing standard does not apply and . . . concerns about the adequacy of administrative record are not warranted."[53] However, the Ninth Circuit reversed the district court's finding as to the Children's due process claim.[54]

The court, through statutory interpretation of sections 1252(a)(5) ("Petition for Review Provision") and (b)(9) found there was not proper subject matter jurisdiction.[55] The court stated, "Congress has clearly provided that all claims—whether statutory or constitutional—that 'aris[e] from' immigration removal proceedings can only be brought through the petition for review [("PFR")] process in the federal court of appeals."[56] While the court recognized the gravity of the Children's claims, it nonetheless held the statutes did not allow the Children to bypass the immigration courts by proceeding directly to a district court.[57] Further, the court held that there was no violation of due process.[58]

A. THE NINTH CIRCUIT'S REASONING

The Ninth Circuit's analysis began with an introduction to § 1252(a)(5) and § 1252(b)(9), which dictate when and how one may challenge an order of removal.[59] According to the Ninth Circuit, these

---

[50] Holder, 107 F. Supp. 3d at 1144.

[51] An interlocutory appeal is an appeal that occurs before the trial court's final ruling on the entire case. Some interlocutory appeals involve legal points necessary to the determination of the case. *Appeal*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[52] Lynch, 837 F.3d at 1029-30.

[53] Lynch, 837 F.3d at 1030.

[54] *Id.* at 1029. After extensive internal debate, the legal team chose not to seek certiorari and therefore the case was then dismissed by the district court. E-mail from Ahilan Arulanantham, Senior Counsel, ACLU Immigrant's Rights Project, to author (March 10, 2021, 9:51am) (on file with author).

[55] Lynch, 837 F.3d at 1029.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 1031.

provisions "d[o] not foreclose *all* judicial review of agency actions," but merely channel the judicial review of final orders.[60]

Next, the Ninth Circuit explained that § 1252(b)(9), the channeling provision, contains "built-in limitations".[61] While the channeling provision requires that, "[j]udicial review of all questions of law and fact . . . *arising from* any action taken or proceeding brought to remove an alien . . . shall be available only in judicial review of a final order [of removal]" the court noted that "arising from" limits the application of the provision in some situations.[62] This limitation, the court concluded, excluded any claim that did not yet "arise from" the removal proceedings from the PFR process. Despite this finding, which may have led to a favorable decision for the Children, the Ninth Circuit concluded that the Children's right to counsel claim *did* arise from their removal proceedings,[63] thus the channeling provision applied and the Children's claim had to be based on a final order.[64] The Court reasoned that since the Children's "claims [were] bound up in and an inextricable part of the administrative process," they arose from the removal process.[65] To reach this conclusion, the Ninth Circuit relied on the First Circuit case of *Aguilar v. United States Immigration & Customs Enforcement.*[66]

In *Aguilar* the First Circuit held that § 1252(b)(9) did bar subject matter jurisdiction over the petitioners' right to counsel claims.[67] The court found that the petitioners failed to show they would be irreparably harmed due to no meaningful judicial review if required to exhaust their claims.[68] Similar to the Ninth Circuit, the court in *Aguilar*, did not read the phrase "arising from" found in § 1252(b)(9) to apply to all removal claims.[69] The First Circuit also recognized that most courts are willing to classify claims as collateral when "requiring exhaustion would foreclose all meaningful judicial review."[70] However, the Ninth Circuit focused on the First Circuit's statement that "right to counsel possesses a direct link to, and is inextricably intertwined with, the administrative process" to reach its conclusion that the Children's right to counsel claim must be

---

[60] *Id.*

[61] *Id.* at 1032.

[62] § 1252(b)(9).

[63] *Id.* at 1032-33.

[64] *Id.* at 1033.

[65] *Id.* at 1033.

[66] In *Aguilar*, the petitioners alleged that ICE inhibited their exercise of the right to counsel due to ICE officers turning away lawyers who attempted to speak with petitioners at the detention center. Aguilar v. ICE, 510 F.3d 1, 6 (1st Cir. 2007)

[67] *Id.* at 14.

[68] *Id.* at 14.

[69] *Id.* at 10.

[70] *Id.* at 12 (citing Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212–13 (1994)).

exhausted, rather than considering the lack of meaningful juridical review for the Children.[71]

In addition, the Ninth Circuit turned to the legislative history of the INA and its amendments.[72] Here, the court found that the history and amendments of the INA confirmed that:

> Congress intended to channel all claims arising from removal proceedings to the federal courts of appeals and bypass the district courts.[73] [The Ninth Circuit stated that], [c]onsolidation of the review process for immigration orders of removal began in 1961, when Congress amended the INA to channel immigrants' challenges to their removal proceedings to the courts of appeals via the PFR.[74]

In 1996 Congress appealed the 1961 statute and enacted the channeling provision.[75] The Ninth Circuit stated that the enactment of the channeling provision in 1996 was a response to the Supreme Court ruling in *McNary v. Haitian Refugee Center*.[76] In *McNary*, the Supreme Court laid out the "blueprint" for what would ultimately be codified as § 1252(b)(9).[77] Because of the Supreme Court's holding, the Ninth Circuit here presumed that Congress drafted the channeling provision with its eye on that precedent and therefore neatly tracked the policy and practice of the jurisdiction-channeling language found in *McNary* with the newly amended provision of § 1252(b)(9).[78] Two of the guiding principles developed from the *McNary* holding were as follows: (1) the court must consider whether the claim is challenging a procedure or policy collateral to the removal proceeding and (2) whether the plaintiff's claim is ripe.[79]

In sum, the Ninth Circuit reasoned that the legislative history and chronology of the amendments to the channeling provision eliminated

---

[71] Lynch, 837 F.3d at 1033 (quoting Aguilar, 510 F.3d at 13).

[72] Lynch, 837 F.3d at 1033.

[73] *Id.* at 1033.

[74] *Id.*

[75] *Id.* at 1033 n5.

[76] Id at 1033. In *McNary*, a group of immigrants applied for amnesty under the special agricultural workers (SAW) program and filed an action in district court alleging injuries caused by "unlawful practices and policies" adopted by the INS. The Court held that the district court did have jurisdiction to hear the challenge because the controlling statute only channeled individual claims and not wider policy claims through the PFR process. McNary v. Haitian Refugee Center, 498 U.S 479, 483, 487 (1991).

[77] Lynch, 837 F.3d at 1034 (citing McNary 498 U.S at 487.

[78] Lynch, 837 F.3d at 1035.

[79] Proyecto San Pablo v. INS, 189 F.3d 1130, 1136 (9th Cir. 1999) (citing Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 (1993)) (determining ripeness by whether the plaintiffs have taken the affirmative steps they could take before INS blocked their path.).

any concern or confusion regarding the plain meaning of the statute.[80] Further, it reasoned that §§ 1252(b)(9) and 1252(a)(5) channel review of "all claims, including policies-and-practices challenges, through the PFR process whenever they 'arise from' removal proceedings."[81] Therefore, because the Ninth Circuit determined the Children's right to counsel claims "arise from" their removal proceedings, the claims must be brought through the PFR process.[82] Due to this finding, the Ninth Circuit concluded the district court did not have jurisdiction over the Children's claims.[83]

B. AFTER THE NINTH CIRCUIT'S DECISION

In 2018, the Children filed a petition for rehearing en banc in the Ninth Circuit.[84] The panel voted to deny the petition for rehearing.[85] However, Judge Marsha Berzon and four other Circuit Judges authored a dissent to the denial order.[86] Judge Berzon reasoned in her dissent that the Children were not challenging orders of removal but rather were challenging that "they have a due process and statutory right to appointed counsel in the removal proceedings they face."[87] Judge Berzon stated,

> [t]he panel did not allow the merits of [the Children's] right-to-counsel claim to be heard. Instead, it [the panel] shut the courthouse doors on them, broadly proclaiming that 8 U.S.C § 1252(b)(9) strips district courts of jurisdiction to hear "*any* issue—whether legal or factual—arising from *any* removal related activity."[88]

Judge Berzon reasoned that 8 U.S.C. § 1252(b)(9) is not applicable to this case because the statute "bars district court review of a claim only where an order of removal has been entered and an individual seeks relief from that order. . .[and] the class of children here have not reached

---

[80] Lynch, 837 F.3d at 1035.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] J.E.F.M. v. Whitaker, 908 F.3d 1157, 1157 (9th Cir. 2018). A petition for rehearing en banc is "a request that the full appellate court consider a panel decision that conflicts with a precedent of either the court itself or the highest court within the jurisdiction, with the additional requirement that the proceeding must involve one or more questions of exceptional importance. *Rehearing En Banc*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[85] Whitaker, 908 F.3d at 1157.

[86] *Id.* (Berzon, J., dissenting). Judge Berzon was confirmed to the Ninth Circuit Court of Appeals on March 9, 2000 where she still sits today. Federal Judicial Center, *Berzon, Marsha Siegel*, FJC.GOV (last visited Jan. 13, 2021), https://www.fjc.gov/history/judges/berzon-marsha-siegel.

[87] Whitaker, 908 F.3d at 1158.

[88] *Id.* (Berzon, J., dissenting).

that stage . . .," meaning that the Children are not contesting a final order removal.[89]

Additionally, Judge Berzon relied on the Supreme Court case, *Jennings v. Rodriguez*, which held that § 1252(b)(9) did not bar district court review of a challenge to immigration detention because the detention claims at issue were not "challenging any part of the [removal] process. . .."[90] Further, Judge Berzon disagreed with the panel's decision that the right to counsel claim was linked to the Children's removal proceeding.[91] Judge Berzon relied on *Martinez v. Napolitano* to determine whether a claim is "inextricably linked" to an order of removal.[92] *Martinez* clarified that "distinction between an independent claim and indirect challenge will turn on the substance of the relief that a plaintiff is seeking."[93]

Lastly, Judge Berzon acknowledged the *McNary* case—a case the Ninth Circuit did not refer to in its opinion.[94] Judge Berzon emphasized that, under *McNary*, the Children's lack of representation created a legitimate possibility that they would not be able to adequately preserve the record for appeal, which would prevent meaningful judicial review.[95] Judge Berzon acknowledged that the Children did in fact present "weighty constitutional issues" and "the law require[d] that [the panel] at least hear them out."[96]

II. THE IMMIGRATION PROCESS AND APPLICABLE LAWS

A. THE ASYLUM AND REMOVAL PROCESSES

An immigrant. or sometimes referred to as a refugee is a person who is unable or unwilling to return to their country due to fear of persecution.[97] Once a refugee enters the United States, they may seek asylum. One way an immigrant enters the asylum process is through what is called affirmative asylum, which occurs when an immigrant affirmatively applies for asylum.[98] This is generally referred to as asylum pro-

---

[89] *Id.* at 1158-59 (Berzon, J., dissenting).

[90] *Id.* at 1160 (citing Jennings v. Rodriguez, 138 S. Ct. 830, 841 (2018)).

[91] Whitaker, 908 F.3d at 1160 (Berzon, J., dissenting).

[92] *Id.* at 1162 (Berzon, J., dissenting).

[93] *Id.* (Berzon, J., dissenting) (quoting Martinez v. Napolitano, 704 F.3d 620, 622 (9th Cir. 2012)).

[94] Whitaker, 908 F.3d at 1162 (Berzon, J., dissenting).

[95] *Id.* at 1163 (Berzon, J., dissenting) (citing McNary, 498 U.S. at 483).

[96] Whitaker, 908 F.3d at 1165.

[97] 8 U.S.C. § 1101(a)(42).

[98] *Asylum in the United States*, AM. IMMIGR. COUNCIL 1, 2-3 (June 11, 2020), https://www.americanimmigrationcouncil.org/research/asylum-united-states.

ceedings. A second avenue is through defensive asylum.[99] Defensive asylum applies to immigrants already in the removal process and acts as a defense against the removal."[100] This is generally referred to as removal proceedings.[101]

The removal process involves numerous steps, many of which are the same for both adult immigrants and unaccompanied immigrant children. First, the Department of Homeland Security ("DHS") initiates the removal proceeding by serving the immigrant with a Notice to Appear ("NTA") and files the NTA with the Department of Justice's Executive Office for Immigration Review ("EOIR").[102] The NTA orders the immigrant to appear before an immigration judge and provides them with information such as the removal proceedings, any alleged violations, and any consequences that stem from a refusal to participate in the proceedings.[103]

During removal proceedings, a DHS attorney represents the Government, and the respondent (immigrant) may provide a defense or apply for protection or relief with or without an attorney or representative.[104] When the immigration court receives the NTA, it schedules an initial hearing where the judge will determine if the applicant is removable.[105] If the court finds that the person is removable, he or she may then apply for withholding of removal.[106] This request will initiate an individual merits hearing at which time the DHS attorney and the respondent can present arguments and evidence before the judge who then determines if the immigrant is eligible for withholding of removal.[107]

If the respondent does not appear for a scheduled hearing, the immigration judge will conduct an in absentia hearing, "which is a removal hearing without the respondent present."[108] During this type of hearing, the immigration judge will order the absent respondent to be removed *in absentia* if DHS can establish evidence that shows the respondent was properly notified with the pertinent details of the hearing.[109] Within

---

[99] Id.

[100] *Id.* at 2.

[101] J.*E.F.M. v. Lynch* involves removal proceedings—-i.e. "defensive asylum" I would argue however that indigent immigrant children should have the benefit of counsel in both affirmative and defensive asylum cases and the reader can assume the arguments herein apply to both.

[102] *Executive Office for Immigration Review, An Agency Guide*, U.S. DEP'T OF JUST. 1, 2 (Dec. 2017), https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

thirty days of the immigration judge's final order, either party may appeal to the Board of Immigration Appeals ("BIA") which will conduct a review of the previous order by conducting a paper or record review.[110] This means that the BIA rarely hears oral arguments when making decisions on the appeal and instead relies on what has been established in the official record from the immigration judge's hearing.[111] If the BIA affirms the immigration judge's order to remove the respondent, the respondent may then file an appeal to the appropriate federal circuit court of appeals.[112]

B. THE APPLICABLE LAWS: § 1252 AND THE REAL ID ACT OF 2005

Immigration laws are tremendously fluid and ever changing. In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") which significantly changed the previously enacted Immigration and Nationality Act.[113] Notably, through the enactment of the IIRIRA, Congress made amendments to § 1252. It is through the IIRIRA that Congress adopted the channeling provision, § 1252(b)(9).[114] Since its adoption, courts have failed to reach a consensus regarding the interpretation of the channeling provision. To provide the courts with additional clarity, Congress responded by enacting the Real ID Act of 2005[115] to confirm that the restrictions imposed by the IIRIA do, in fact repeal habeas jurisdiction and allow for the channeling of all claim that arise from a removal proceeding.[116] Together, both the IIRIRA and the Real ID Act amended the INA and created a narrow channeling mechanism, codified in both §§ 1252(a)(5) and (b)(9), which

---

[110] *Id.* at 7.

[111] *Id.* at 3.

[112] *Id.* at 7.

[113] *Major US Immigration Laws, 1790 - Present*, MIGRATION POL'Y INST., (Mar. 2013), https://www.migrationpolicy.org/sites/default/files/publications/CIR-1790Timeline.pdf.

[114] § 1252(b)(9).

[115] The Real ID Act was part of a series of statutes enacted to help in the fight against terrorism. After the World Trade Center attacks on September 11, 2001, the United States formed a "9/11 Commission" whose purpose was to reform the United States intelligence community and to implement security measures in order to prevent future terrorist attacks. *The History of Federal Requirements for State Issued Driver's Licenses and Identification Cards,* NAT'L CONF. OF STATE LEGISLATURES https://www.ncsl.org/research/transportation/history-behind-the-real-id-act.aspx (last visited Jan. 24, 2021).

[116] Jill E Family, *Stripping Judicial Review During Immigration Reform: The Certificate of Reviewability*, 9 NEV. L. J. 499, 504 (2008). Habeas jurisdiction refers to the courts ability to hear habeas corpus claims. Habeas corpus is a write employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal. *Habeas Corpus*, BLACK'S LAW DICTIONARY (11th ed. 2019).

expedites claims arising from removal proceedings to the court of appeals and bypasses the district courts.

III. THE RIGHT TO COUNSEL: WHERE IT COMES FROM AND WHOM IT PROTECTS

The Supreme Court has extended the Sixth Amendment right to counsel in certain non-criminal cases. The Supreme Court deemed the right to counsel imperative in youth law and juvenile proceedings.[117] Juvenile proceedings are considered civil in nature[118] and are treated different from adult criminal proceedings. For example, in adult criminal cases the government's position is the prosecuting attorney, whereas in juvenile cases, the government proceeds parens patrie or in a protective role,[119] not as an adversary.[120] Even though juvenile proceedings are deemed civil in nature, the Supreme Court has held that the right to counsel is a Constitutional right that transcends beyond the traditional criminal proceeding.[121] In *In re Gault*, the Court held that the personal interest in freedom—not the nature of the proceeding—triggered the right to appointed counsel.[122] Later in *Lassiter v. Dep't of Social Services*, the Court summarized its precedent to mean "that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[123]

In addition to the right to counsel under the Sixth Amendment, a right to counsel exists through the Due Process Clause ("DPC") of the Fifth Amendment.[124] The right to counsel afforded by the DPC applies to both citizens and noncitizens[125] and "establishes a right to a full and fair hearing in removal cases for noncitizens."[126] At minimum, a full and fair

---

[117] *In re* Gault, 387 U.S. 1 (1967).

[118] Kent v. United States, 383 U.S. 541, 555 (1966).

[119] *Parens Patriae*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/parens_patriae (last visited Aug. 14, 2021). ("Under parens patriae, a state or court has a paternal and protective role over its citizens or others subject to its jurisdiction.").

[120] Kent, 383 U.S. at 555 (finding that the lack of a sufficient investigation prior to a juvenile court waiver of jurisdiction was a reversible error).

[121] *In re* Gault, 387 U.S. at 41.

[122] *Id.* at 61 (Black, J., concurring).

[123] In *Lassiter,* a mother alleged a violation of her due process rights in her parental status termination proceeding for which she was not represented by an attorney. Lassiter v. Dep't. of Soc. Serv., 452 U.S. 18, 26 (1981). The court found that with regard to the "fundamental fairness" requirement of the Due Process Clause there is a presumption that an indigent litigant has a right to appointed counsel if physical liberty is at stake. *Id*.

[124] Miranda v. Arizona, 384 U.S. 436, 471 (1966).

[125] Torres v. United States Dep't of Homeland Sec., 411 F. Supp. 3d 1036, 1063 (C.D. Cal. 2019) (holding the petitioner's conditions of confinement claims are not inextricably a part of the removal process, and as such § 1252's channeling mechanism does not apply).

[126] Torres, 411 F. Supp. 3d at 1063.

hearing provides an opportunity to present and rebut evidence and to cross-examine witnesses.[127] Although the Supreme Court has yet to find a categorical right to counsel for children during their immigration proceedings, the Court has implemented the balancing test from *Mathews v. Eldridge* to analyze whether a violation of an individual's due process rights occurred.[128]

IV. THE NINTH CIRCUIT ERRED IN PART BY DISMISSING *J.E.F.M.* FOR LACK OF SUBJECT MATTER JURISDICTION

A. THE NINTH CIRCUIT INCORRECTLY INTERPRETED THE CHANNELING PROVISION

The Ninth Circuit relied on its interpretation of the channeling provision to hold that the court did not have subject matter jurisdiction to hear the Children's claims because the claims "arose from" the Children's removal proceedings.[129] The Court erred in its interpretation which unjustly impacted the lives of the Children and thousands of other unaccompanied children facing removal proceedings. Additionally, the Ninth Circuit overlooked the part of the statute that renders it only applicable to final orders of removal—"judicial review of all questions of law and fact. . . arising from any action . . . brought to remove an [immigrant] . . . under this title shall be available *only in judicial review of a final order under this section*."[130] By stating, "[the statute] mean[s] that *any* issue—whether legal or factual arising from *any* removal-related activity can be reviewed *only* through the PFR process," the Ninth Circuit wrongly interpreted § 1252(b)(9) and rendered it irreconcilable with its plain meaning.[131]

First, as Judge Berzon stated in her dissent, the channeling provision was inapplicable to the Children's claims because the Children were not appealing a final order of removal.[132] Judge Berzon pointed out that § 1252(b)(9) is a subsection and therefore a requirement under § 1252 titled, "Requirements for review of orders of removal."[133] Therefore, § 1252(b)(9) cannot apply to a claim that is made *before* an order of

[127] Grigoryan v. Barr, 959 F.3d 1233, 1240 (9th Cir. 2020) (citing Cinapian v. Holder, 567 F.3d 1067, 1073-74 (9th Cir. 2009)).

[128] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[129] Lynch, 837 F.3d at 1031.

[130] § 1252(b)(9) (emphasis added).

[131] *See* Lynch, 837 F.3d at 1031 (noting § 1252(a)(5) likewise means that any issue arising from any removal activity can only be reviewed through the PFR process).

[132] Whitaker, 908 F.3d at 1159 (Berzon, J., dissenting).

[133] § 1252.

removal has been rendered. As previously mentioned, the Children in this case were still in removal proceedings and some had not even commenced the process which means there had not been a final order of removal rendered for any of the Children in the class.[134] Simply put, the channeling mechanism of § 1252(b)(9) is inapplicable to the Children's claim because § 1252(b) as a whole applies only to review of final orders for removal. The Ninth Circuit should not have relied on an inapplicable provision as justification for holding there was no subject matter jurisdiction. Rather, the Children should have been able to address their right to counsel claim with the district court, just like any other aggrieved party.

Alternatively, even if the statute were applicable, the Children's claim did not "arise from" a final order of removal because J.E.F.M., like Mr. Rodriguez in *Jennings v. Rodriguez*, alleged a constitutional violation of due process.[135] When applying *Jennings* to J.E.F.M.'s case it becomes clear that the Ninth Circuit misinterpreted the scope and application of § 1252(b)(9). It is true that some of the Children were in the process of a removal proceeding but as the Supreme Court pointed out, it is simply too easy to assume § 1252(b)(9) swallows every collateral claim based on a causation justification such as, had the Children not been in a removal proceeding they would not be bringing this constitutional right to counsel claim. The Supreme Court, considering the Ninth Circuit's holding and interpretation of the channeling provision, pointed out that when an immigrant is in the removal process, any issue or claim that may arise during that time would be considered to "arise from" that very removal process.[136] That expansive interpretation is what the Supreme Court wanted to avoid in *Jennings*. That expansive and extreme interpretation led to staggering results. Namely, the fact that thousands of immigrant children are left to defend and represent themselves while facing a very serious consequence—removal from the United States and ultimately the deprivation of their physical liberty.[137]

---

[134] *See supra* note 30.

[135] In *Jennings*, the petitioner filed a habeas petition alleging a violation of his Fifth Amendment due process rights in a district court due to his lengthy detention. Jennings v. Rodriguez, 138 S. Ct. 830, 841 (2018). The Supreme Court held that § 1252(b)(9) did not strip it of subject matter jurisdiction because an expansive interpretation of §1252(b)(9) would be absurd. *Id*. The Court realized interpreting § 1252(b)(9) in this extreme way would make most claims brought in addition to a removal proceeding effectively unreviewable. *Id*. The Court concluded that the claim here did not arise from Mr. Rodriguez's removal proceeding but rather he was challenging the collateral issue of length of detention. *See Id*.

[136] Jennings v. Rodriguez, 138 S. Ct. 830, 841 (2018).

[137] Egkolfopoulou, Misyrlena, *The Thousands of Children Who Go to Immigration Court Alone*, (Aug. 21, 2018) https://www.theatlantic.com/politics/archive/2018/08/children-immigration-court/567490/.

Additionally, the Ninth Circuit relied on the First Circuit's case of *Aguilar* to conclude that right to counsel claims do "arise from" removal proceedings and that there was no foreclosure of meaningful judicial review for the Children.[138] While *Aguilar* is convincing, the Children's claim is distinguishable because the Children would be foreclosed meaningful judicial review. The Children cannot receive effective relief for their right to counsel claim simply by navigating the channels deliberately dredged by Congress, whereas in *Aguilar* the court found the plaintiff could receive effective relief because the adult petitioners had the ability to navigate those channels.[139]

The First Circuit found it completely practical for Mr. Aguilar to follow the INA's required procedure—immigration judge first, then BIA, then finally the court of appeals.[140] This same task would be nearly impossible to ask of immigrant children. A child is likely incapable of navigating this process by themselves and should not be expected to do so. Because of the large differences in capabilities between adults and children—differences the Supreme Court has already recognized in cases like *In re Gault* and *Lassiter*—foreclosing immigrant children from raising their right to counsel claim in a district court would foreclose them from any meaningful judicial review since there would likely be no claim to review due to the inability of the Children to establish a proper record with a lower court. The First Circuit, aware of this potential consequence, acknowledged that "certain claims, by reason of the nature of the right asserted, cannot be raised efficaciously within the administrative proceeding."[141] Here, a right to counsel claim raised by immigrant children cannot be raised efficaciously within the administrative proceeding.

Unlike the Ninth Circuit, the First Circuit utilized the three *Mathews* factors to determine if Mr. Aguilar's right to due process had been implicated.[142] The court held that due process had not been violated on the right to counsel claim because the petitioners in *Aguilar* did not satisfactorily explain how or why they would be irreparably harmed if required to exhaust their right to counsel claim.[143] However, applying those same three *Mathews* factors to the Children's claim, it is clear that the Children could not and would not receive effective relief for their alleged violations of the right to counsel, which would cause them irreparable harm.

---

[138] Aguilar, 510 F.3d at 14.
[139] Aguilar, 10 F.3d at 14.
[140] Aguilar, 510 F.3d at 14.
[141] Aguilar, 510 F.3d at 11.
[142] Aguilar, 510 F.3d at 14.
[143] Aguilar, 510 F.3d at 14.

B. THE GOVERNMENT VIOLATED THE CHILDREN'S DUE PROCESS RIGHT TO COUNSEL

The Supreme Court established a balancing test in *Mathews v. Eldridge*.[144] The three factors used for the balancing test are:

> [1] the private interest that will be affected by the official action; [2] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; [3] the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[145]

The Ninth Circuit did not address any of these factors in *J.E.F.M.* Had the court appropriately applied the Supreme Court's precedent, it may have reached a different result.

1. The Children's Private Interest to Receive a Full and Fair Hearing Was Affected

Here, the private interest at issue was the Children's ability to receive adequate representation by an attorney throughout their removal proceedings. This interest encompassed the Children's Fifth Amendment right to a full and fair hearing. The Fifth Amendment right to due process as codified in the Bill of Rights is considered a fundamental right.[146] Therefore, because the private interest in question here is a fundamental right, the importance of the interest weighs heavily in favor of the Children. The Children have an interest in a full and fair hearing to determine their eligibility for asylum. The potential consequences of not being afforded a full and fair hearing include being forced to return to violence, poverty, and oppression. The denial of a fair hearing when these important liberty interests are on the line is a denial of due process and strongly weighs in favor of the Children. For J.E.F.M., this denial of a full and fair hearing meant being sent back to El Salvador and having to face the gang members who he witnessed kill his father.

---

[144] In *Mathews,* the Court held that under the Due Process Clause of the Fifth Amendment, Mathews was not entitled to an evidentiary hearing prior to the termination of disability benefits after balancing the three factors to determine if Mathews due process had been violated. Mathews, 424 U.S. at 349.

[145] Mathews, 424 U.S. at 335.

[146] Wash. v. Glucksberg, 521 U.S. 702, 719-20 (1997); *see, e.g., Fundamental right*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A fundamental right is a right derived from natural or fundamental law.").

2. The Risk of Erroneous Deprivation Outweighs Established Safeguards

Next, there is a high risk of an erroneous deprivation of the Children's due process rights by stripping the district court of jurisdiction to hear the constitutional right to counsel claim. The result will likely be the removal of these children from the United States, which is a serious risk. While there are some special safeguards put in place specifically for unaccompanied children representing themselves, these safeguards clearly do not provide the equivalent protection provided by legal counsel. For example, one of the safeguards, implemented in 2014 by the Office of the Chief Immigration Judge, was The Friend of the Court Model for Unaccompanied Minors in Immigration Proceedings.[147] The Ninth Circuit reasoned that the addition of The Friend of the Court Model acted as an additional protection which the Children could rely on.[148] However, that is not what the program does.

The Office of the Chief of Immigration Judge sent a memo which stated, a friend of the court is defined as "a bystander whose mission is to aid the court, to act only for the personal benefit of the court."[149] In summation, the friend of the court "serves in a non-representational role, the scope of which is determined by the court in its discretion."[150] It is clear that the probative value of this safeguard is not strong. In the memo the Chief Immigration Judge sent out, he wrote in bold letters, "The Friend of the Court does not represent a respondent."[151] Further, the friend of the court is not an attorney or even a trained professional, so it falls short of the Children's needs. Therefore, this protection was not put into place to assist unaccompanied children but rather the friend of the court model assists the court and its needs.

An additional safeguard which the Ninth Circuit relied was the assumption that immigration judges always uphold their obligations to thoroughly inquire whether the child understands their right to seek out counsel and determine whether a waiver of counsel is knowing and voluntary.[152] The Ninth Circuit further stated that when an immigrant is proceeding pro se, "the judges have a duty to 'fully develop the re-

---

[147] Lynch, 837 F.3d at 1037.

[148] *Id.* at 1037.

[149] Memorandum from Brian M. O'Leary, Chief Immigr. Judge, Exec. Off. for Immigr. Rev., to all Immigr. Judges, 1 (Sept. 10, 2014) (on file with U.S. Department of Justice), *available at* https://www.justice.gov/sites/default/files/pages/attachments/2016/12/21/friendofcourtguidancememo091014.pdf.

[150] *Id.* at 2.

[151] *Id.*

[152] *See* Lynch, 837 F.3d at 1033.

cord.'"[153] The Ninth Circuit made it clear that it relied on the individual decisions of each immigration judge to fulfill his or her duties in order to safeguard unrepresented immigrant children.[154] This conflict of interest poses a significant risk. The need for effective advocacy on behalf of children should not be left to judge who is materially averse to the children. Moreover, immigration judges have large caseloads due to the backlog of cases in the immigration system.[155] The mere assumption that each judge will diligently analyze each case is not reliable enough when a child's well-being and livelihood are on the line. Therefore, the risk to due process is too high and the probative value of the safeguards put into place are too low to require the Children to proceed unrepresented and to require them to exhaust administrative remedies before addressing their constitutional claims with a district court.

3. The Government's Interest and the Fiscal Burden Do Not Outweigh the Right to Counsel Under the Due Process Clause

The third *Mathews* factor assesses the Government's interest in the alleged due process right as illustrated by the fiscal and administrative burdens.[156] Providing representation to unaccompanied immigrant children will necessarily require additional resources, time and expense. But the Government also has a substantial interest in creating a more functional and ultimately more fiscally conscious legal process for immigrants. Further, the Government has demonstrated it has the ability or at least the desire to provide legal representation for immigrant children based on the newly introduced U.S. Citizenship Act of 2021.[157] Section 292(c) of this proposed bill states in part, "the Attorney General shall appoint, at the expense of the Government, counsel to represent any noncitizen financially unable to obtain adequate representation in such proceedings . . . ."[158]

Allowing children to be removed without adequate legal representation creates a disorganized, chaotic and inefficient process because children are unable to efficiently meet deadlines, file proper paperwork or

[153] *Id.* at 1036 (quoting Agyeman v. INS, 296 F.3d 871, 877 (9th Cir. 2002)).

[154] *See* Lynch, 837 F.3d at 1036-37.

[155] According to the National Immigration Forum, as of August 7, 2018, each IJ had a backlog of over 2,000 cases. *Fact Sheet: Immigration Courts*, NAT'L IMMIGR. FORUM, (Aug. 7, 2018), https://immigrationforum.org/article/fact-sheet-immigration-courts/.

[156] Mathews, 424 U.S. at 335.

[157] *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System*.

[158] U.S. Citizenship Act of 2021, H.R. 1177, 117th Cong. § 292(c) (2021).

show up for scheduled meetings or hearings. These shortcomings, which are no fault of the children, cause further delay within an already delayed operation. The Government has an interest to ensure the immigration system is running efficiently and effectively.

For example, the Institute for Defense Analyses ("IDA") conducted a study, in which it analyzed the potential financial impact on the Government if unaccompanied immigrant children were appointed counsel. Through this study, IDA concluded that expanding representation to all unaccompanied immigrant children would increase the rate of children defeating removal by twenty-two percent and the overall number of these immigration court hearings would drop by 6.7 percent.[159] The IDA was able to conclude what the financial commitment would look like by analyzing the ten years prior. The cost for a total expansion that would have covered representation for all children over the last ten years was estimated to be around $157 million.[160] IDA then broke down the estimated cost per year based on the number of cases per year. For example, in 2016 when removal cases for unaccompanied children were at an all-time high, the estimate for that year was around $33 million, whereas the estimate for 2008, when there were far fewer cases, was only around $4 million.[161] The importance of this study shows that in comparison to other Government expenditures,[162] the ability for the Government to provide immigrant children with proper legal counsel during their immigration proceedings is absolutely possible.

Due to the legitimate Government interest here in ensuring effective and efficient representation for immigrant children, the larger short-term financial commitment should not be the obstacle that prohibits children from receiving adequate representation and in turn guaranteeing their due process right to a full and fair hearing. Because all three of the *Mathews* factors weigh in favor of the Children, the Children's right to due process was violated when they were forced to proceed in their removal hearings without representation. By stripping the jurisdiction from the district court, the Ninth Circuit deprived the Children of an avenue to challenge this lack of due process. Moreover, as Judge Zilly pointed out,

---

[159] Bryan W. Roberts et al., *A Benefit-Cost Analysis of Expanding Federally Funded Counsel Programs for Unaccompanied Immigrant Children in Removal Proceedings in the United States*, INST. FOR DEF. ANALYSES, i, iv (2019).

[160] *Id.* at 72.

[161] *Id.* at 73.

[162] To illustrate, the federal government owns over 700,000 empty buildings that cost $1.7 billion each year to maintain. Marissa Laliberte, *11 Bizarre Things the U.S. Government Actually Spent Money On*, READER'S DIGEST (Jan. 5, 2020), https://www.rd.com/list/wasteful-government-spending-examples/. Additionally, the federal government spent $2.5 million to run a thirty second ad during Super Bowl XLIX in 2015. *Id.*

"[a]ssuming a [child], acting pro se, successfully navigated the immigration labyrinth all the way to the appropriate court of appeals, he or she would arrive there without the record necessary to conduct the balancing of interests required by *Mathews*."[163] Allowing the Children to present their claims to a district court provides the Children ability to develop a proper record to be heard on appeal.

C. THE EXHAUSTION REQUIREMENT DENIES THE CHILDREN ANY MEANINGFUL JUDICIAL REVIEW

The Ninth Circuit failed to properly distinguish between a claim arising from removal proceedings, versus a claim challenging the constitutional legality of a policy, and by eliding these two distinct claims into the same type of claim, the Ninth Circuit's application of the statue was in error. As previously mentioned, the Ninth Circuit developed two guiding principles in *McNary* for determining whether there could be meaningful judicial review.[164] First, the constitutional right to counsel claim here involves a "procedure or policy" or the absence of one.[165] The Children here are claiming inadequate representation. Like the claim in *McNary*, the Children's claim is not specifically seeking review of each individual removal proceeding. Rather, the Children are alleging that the policy of not providing legal representation for unaccompanied immigrant children is unconstitutional.[166]

The consequence of children representing themselves pro se throughout their immigration proceeding is that they are unable to fully develop the administrative record. Children are largely incapable of knowing when or how to make objections on their own behalf. The Children would likely be unaware of the fact that they must raise affirmative defenses at this stage in the process or else they will be waived. This means the administrative record would be insufficient to use as a basis for a meaningful judicial review of the administrative decision. The Children could not appeal an issue that was not included in the administrative record such as an objection to being unrepresented. The jurisdiction channeling provision of § 1252(b)(9) does not preclude district court jurisdiction over an action challenging the legality of a policy without referring to or relying on an individual's claim about their removal proceeding. Thus, the Ninth Circuit's reliance on §1252(b)(9) to strip the district court of jurisdiction was an error.

---

[163] Holder, 107 F. Supp. 3d at 1125.

[164] *Id.* at 1130 (citing McNary, 498 U.S. at 498).

[165] Holder 107 F Supp. 3d at 1132.

[166] *Id.* at 1131.

Second, the constitutional right to counsel claim is ripe because a request to have counsel appointed would be futile in light of the current immigration laws and regulations. An immigrant child would have to go through his or her entire removal proceedings before raising the issue of lack of representation on appeal. According to the Ninth Circuit's decision in *J.E.F.M.,* the Children would have to wait to raise their right to counsel claim until after they were subjected to the entire removal process without any legal representation.[167] Yet by the time that occurred, the Children would likely have already failed to properly raise the objection of lack of representation and therefore it would not be included in the administrative record. As previously stated, a party cannot appeal an issue that is not included in the administrative record. The Children have presented the Ninth Circuit with a purely legal issue as to whether a violation of their constitutional right allows them to file a claim with the district court instead of wandering their way through the removal process on their own.

Additionally, the likelihood of an unpresented immigrant child having the ability to make it to the court of appeals is very low. A child first must represent himself or herself in his or her own removal hearing in front of an immigration judge. That same child must then figure out how, when, and where to appeal to the BIA and only after that may the child appeal the BIA's decision to the court of appeals. Without legal representation from the very beginning, the Children are in most cases on a direct path to deportation. In the year 2016, there was 9,896 unrepresented children who were removed from the U.S. compared to only 2,132 represented children who were removed.[168] These numbers demonstrate that an unrepresented minor in 2016 was 400 percent more likely to be removed than a represented minor.

In *J.E.F.M.,* the Ninth Circuit did not address either of the *McNary* guiding principles.[169] Instead, the Ninth Circuit declared that because *McNary* dealt with a different statute it was completely inapplicable to this case.[170] The Ninth Circuit did not acknowledge the fact that in prior cases it had, along with the Supreme Court, applied the *McNary* guiding principles to other cases that concerned interpreting statutes—statutes which, just like § 1252(b)(9)—were different from the statute at issue in

[167] Lynch, 837 F.3d at 1035.

[168] Juveniles – Immigration Court Deportation Proceedings, TRAC REP., https://trac.syr.edu/phptools/immigration/juvenile/ (in State column, select "All"; in Represented column, toggle between "Not Represented" and "Represented"; in Outcome column, select "Removal Order"; then view statistics in 2016).

[169] Lynch, 837 F.3d at 1036.

[170] *Id.*

McNary.[171] Therefore, this dismissal of *McNary* without incorporating any application of the guiding principles developed by Ninth Circuit case precedent seems like another way in which the Ninth Circuit attempted to expedite its conclusion by only relying on its erroneous interpretation of § 1252(b)(9) instead of taking into account the vulnerability and unique situation in which immigrant children find themselves in when expected to represent themselves and raise their own claims during the removal process.

CONCLUSION

Immigrant children will continue to flee to the United States with the hopes of a better and safer life. In fact, since the Biden Administration took office, the number of unaccompanied minors apprehended at the border has been on a sharp rise with 4,276 migrant children in custody as of March 2021.[172] Instead of exposing these children to the vicious cycle that is the immigration administrative law system, the government, legislators and judicial branch, should be giving these children a fighting chance by providing the bare minimum—a right to representation. Children like J.E.F.M. are not equipped to navigate their way through one of the most complex set of laws in the United States. Many of these individuals are scared children who just fled the only home they knew in order to survive.

The Ninth Circuit had the opportunity to make a lasting and impactful impression on immigration law but instead reached an erroneous jurisdictional analysis. Had the Ninth Circuit properly interpreted and applied § 1252(b)(9)—the very statute on which it purported to rely—it would have concluded that the district court had subject matter jurisdiction to hear the Children's due process right to counsel claim. Additionally, by stripping the district court of jurisdiction the Ninth Circuit prevented the Children of any meaningful judicial review. The Children were not equipped to properly bring evidence, question witnesses, and raise objections on their own in order to establish a complete administrative record. The consequence of that oversight is the Children's inability

[171] In *Proyecto San Pablo v. INS,* the Ninth Circuit held the district court had jurisdiction over a challenge to the procedures for accessing prior deportation files under 8 U.S.C. § 1255(a) after applying the McNary guiding principles. Proyecto San Pablo, 189 F.3d at 1138. In *Guerrero-Lasprilla,* the Supreme Court applied well-established *McNary* principles when asked to interpret § 1252(a) and ultimately held that, "the Provision's [§ 1252(a)] phrase "question of law" includes the application of a legal standard to undisputed or established facts [and] the Fifth Circuit erred in holding that it had no jurisdiction." Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1064-1073 (2020).

[172] Franco Ordoñez & Dana Farrington, *Young Migrants Held by Border Patrol Far Longer than Allowed, Document Shows*, NPR (March 16, 2021), https://www.npr.org/2021/03/16/977853878/young-migrants-held-by-border-patrol-far-longer-than-allowed-document-shows.

to appeal issues that did not make it onto the administrative record at no fault of their own.

The Supreme Court has interpreted Fifth Amendment protections to apply to non-citizens as well as citizens.[173] There should be no question that those protections should extend to the most vulnerable immigrant group—children. *J.E.F.M. v. Lynch* is not the final chapter in the discussion about the right to counsel for immigrant children. This need for representation is prevalent in the proposed U.S. Citizenship Act of 2021 which recognizes the vulnerabilities of immigrant children and the dire necessity to provide these children with the necessary legal protections and representation.[174] This bill proposes to reduce immigration court backlogs, expand training for immigration judges, and authorize funding for counsel for the representation children and other vulnerable individuals in order to promote the fair and efficient resolution of their claims.[175] While the need for change is immediate, there should be some optimism that the necessary change is in the near future. Until then, volunteer organizations and the public must continuously advocate for these children.

[173] *Supra* note 125.

[174] *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System*, WH.GOV (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/.

[175] *Id.*