

A Constitutional Right to Appointed Counsel for the Children of America’s Refugee Crisis

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Despite their remarkable courage, children fleeing persecution to America’s southern border are among the most vulnerable individuals in our society. Seeking compassion and fairness in the midst of a refugee crisis, these children instead meet a system that is all-too callous and unbending. C.J. was no different. Facing death threats from a gang at home in Honduras, C.J. and his mother Maria travelled 3,000 treacherous miles to America. Maria did her best to speak on behalf of her son in immigration court—despite limited English proficiency, no legal background, and no assistance—but the immigration judge rejected C.J.’s pleas for relief. In early 2018, the Ninth Circuit ruled against C.J. as well, holding that immigrant children facing deportation do not have a right to appointed counsel; in doing so, it became the first court to state that it is constitutionally permissible for children to be forced to represent themselves in removal proceedings. However, opening a window of hope for children asylum-seekers, the Ninth Circuit recently took the significant step of withdrawing the initial panel’s decision and electing to rehear C.J.’s case en banc.

The initial panel was incorrect; the Fifth Amendment, when carefully considered in light of today’s realities, compels a right to appointed counsel for immigrant children facing the prospect of deportation. The “fundamental fairness” principle and human dignity value underlying Fifth Amendment procedural due process point to a need for children to be represented by attorneys in order to have meaningful voices. And a thorough analysis under the Supreme Court’s procedural due process test demonstrates that the only way to ensure children with legitimate claims are not turned away in significant numbers is to provide a right to appointed counsel. Yet, because this right has not been recognized, tens of thousands of children today are deprived of the fair hearings to which they are constitutionally entitled.

The Ninth Circuit now has a historic opportunity to right this wrong. When it reconsiders C.J.’s case in the near future, it should reject the initial panel’s reasoning and instead chart a path that respects the due process rights of those who most need the protection of a fair justice system. And in the midst of unprecedented executive action curtailing the rights of asylum-seekers and utter legislative inaction in response, now is a pivotal time for our courts to recognize this right to appointed counsel. Ultimately, the lives of children like C.J.—and truly the heart and grace of the American justice system—depend on it.

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INTRODUCTION

Alone, vulnerable, and praying for a modicum of compassion in the United States, thousands of immigrant children flee danger at home and cross the southern border each year.¹ Most are courageously escaping gang-related violence and death threats in Central America; some leave after watching their loved ones killed in front of them.² The number of children journeying across the border, whether alone as unaccompanied minors or

¹ See, e.g., Tim Henderson, *After Post-Trump Decline, More Central American Children Arriving at U.S. Border*, THE PEW CHARITABLE TRUSTS (Jan. 30, 2018), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/30/after-posttrump-decline-more-central-american-children-arriving-at-us-border>, archived at <https://perma.cc/V9B7-45JZ>.

² See *id.* Most come from Honduras, El Salvador, and Guatemala, three Central American countries with high and rapidly increasing murder and crime rates. *Id.* “Children and young men are often threatened or pressured to join the gangs, while young women often experience sexual assault or abuse at the hands of gang members, forcing many to drop out of school or relocate.” Adriana Beltrán, *Children and Families Fleeing Violence in Central America*,

along with family members, has increased significantly in recent years.³ Unaccompanied children and children with family members who pass another obstacle, the “credible fear” interview, face removal proceedings that determine whether they can stay in the United States under one of several forms of relief, most commonly asylum.⁴ But instead of fair hearings, these children face almost impossible odds in attaining refuge in America. Their primary obstacle: they have no right to appointed counsel.⁵ Only a minority of immigrants facing deportation are able to find legal representation for the hearings that determine whether they will be deported. Nearly two-thirds (63%) of these individuals, including children as young as three years old,⁶ are forced to face off alone against government attorneys⁷ in one of the most complex areas of law,⁸ in a language they often cannot speak or understand. The statistics bear out the obvious: unrepresented individuals are almost five times more likely to be deported than those fortunate enough to have an attorney.⁹

When properly considered in light of these realities, the Fifth Amendment¹⁰ compels a right to court-appointed counsel for immigrant children

WOLA (Feb. 21, 2017), <https://www.wola.org/analysis/people-leaving-central-americas-north-ern-triangle/>, archived at <https://perma.cc/D5CG-3GWU>.

³ Henderson, *supra* note 1; David Nakamura, *Number of Women, Children from Central America Illegally Crossing into U.S. Climbs in 2016*, WASH. POST, Oct. 17, 2016, https://www.washingtonpost.com/news/post-politics/wp/2016/10/17/number-of-women-children-from-central-america-illegally-crossing-into-u-s-climbs-in-2016/?utm_term=.16142e093857, archived at <https://perma.cc/AY6Z-A6Y2>. While some children cross the border with a family member, unaccompanied children reach the U.S. border completely alone.

⁴ See Elizabeth Glazer, *The Right to Appointed Counsel in Asylum Proceedings*, 85 COLUM. L. REV. 1157, 1157 (1985). The other two forms of relief are withholding of removal and protection under the Convention Against Torture (CAT).

⁵ See, e.g., Kate M. Manuel, *Aliens' Right to Counsel in Removal Proceedings: In Brief*, CONG. RESEARCH SERV. 9 (2016) (“To date, there does not appear to be any published decision in which a court has found that the Due Process Clause requires the appointment of counsel for an individual alien.”); Note, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544, 1549 (2007).

⁶ Christina Jewett & Shefali Luthra, *Immigrant Toddlers Ordered to Appear in Court Alone*, USA TODAY (July 2, 2018), <https://www.usatoday.com/story/news/nation/2018/06/27/immigrant-children-deportation-court/739205002/>, archived at <https://perma.cc/H4ZR-TXUU>.

⁷ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7 (2015) (“By looking at individual removal cases decided on the merits, we find that only 37% of immigrants had counsel during our study period.”).

⁸ See, e.g., *Castro-O’Ryan v. U.S. Dep’t. of Immigration and Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (“With only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth.”) (quoting E. HULL, WITHOUT JUSTICE FOR ALL 107 (1985) (internal quotations and citations omitted)); *infra* text accompanying notes 232–235.

⁹ See *Transactional Records Access Clearinghouse, Asylum Denial Rate Reaches All Time Low: FY 2010 Results, a Twenty-Five Year Perspective*, SYRACUSE UNIV. TRAC IMMIGRATION (Sept. 2, 2010), <http://trac.syr.edu/immigration/reports/240/> [hereinafter “*Syracuse University Data Study – Asylum Denial Rates*”] (“During FY 2010, for example, only 11 percent of those without legal representation were granted asylum; with legal representation the odds rose to 54 percent.”).

¹⁰ U.S. CONST. amend. V. (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

facing removal proceedings. Yet in a long-awaited¹¹ decision in early 2018, *C.J.L.G. v. Sessions*,¹² the Ninth Circuit directly rejected this argument as made on behalf of C.J., a child who came to America with his mother Maria after fleeing death threats in Honduras.¹³ The opinion was the first to state that children are not deprived of constitutional rights when they are forced to represent themselves in removal proceedings.¹⁴ But before arriving at this grave conclusion, the court should have more carefully considered the principles and values underlying procedural due process and the Supreme Court's procedural due process test. Had it done so, it would have recognized that the "fundamental fairness" principle and the dignity value, which form the basis of procedural due process, demand legal representation for these uniquely helpless children. And it would have acknowledged that the existing protections for children are woefully insufficient to ensure that valid claims of relief are not mistakenly rejected.

Now, a broader group of Ninth Circuit judges have the opportunity to right this wrong. A ray of hope for the rights of children asylum-seekers emerged eight months after the initial panel's decision was published, as the Ninth Circuit elected to withdraw the decision and rehear C.J.'s case en banc.¹⁵ And it picked a historically consequential time to do so: the need for federal courts to recognize the right to appointed counsel for immigrant children facing deportation may never be greater than it is today. Congress has stood silently while the Trump Administration has infringed on the rights of asylum-seekers, so courts offer the only visible hope of providing children a layer of protection.

The Note will proceed in three parts. Part I will provide an overview of the refugee crisis on the southern U.S. border and the legal landscape of the removal proceedings that individuals crossing the border must face. Part II will discuss the case of *C.J.L.G.*, tracing C.J. and Maria's journey through their maze of immigration proceedings. Part III will then delineate the argument that there is a constitutional right to appointed counsel for C.J. and other immigrant children facing the prospect of deportation and why now is the time for courts, starting with the Ninth Circuit, to protect that right.

¹¹ The Ninth Circuit came close to deciding the matter in the class action case of *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016), but the case was dismissed on jurisdictional grounds. *Id.* at 1038–39.

¹² 880 F.3d 1122 (9th Cir. 2018), *reh'g en banc granted*, 904 F.3d 642 (9th Cir. 2018).

¹³ *Id.* at 1129.

¹⁴ See Ahilan Arulanantham, *Immigrant Children Do Not Have the Right to an Attorney Unless They Can Pay, Rules Appeals Court*, ACLU (Feb. 6, 2018), <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/immigrant-children-do-not-have-right-attorney>, archived at <https://perma.cc/Q9CZ-CDFM>.

¹⁵ *C.J.L.G. v. Sessions*, 904 F.3d 642 (9th Cir. 2018) (mem.).

I. AMERICA'S REFUGEE CRISIS & THE LAW OF REMOVAL PROCEEDINGS

“[The gang] wanted [my nephew] to join them and said if he did not, that meant he was a member of the other gang, their rival. He refused to join. They increased their threats. After a year . . . they killed him. We reported the murder to the police, but they never do anything. . . . We knew the gang realized we’d made the report, so we decided to go, because we knew we’d be next.”

—NELLY, ASYLUM-SEEKER FROM HONDURAS¹⁶

To frame C.J.’s case and the argument that courts should recognize the constitutional right to appointed counsel for immigrant children facing deportation, this Part will introduce the nature of the crisis on the border and its legal backdrop. It will provide a brief overview of the refugee crisis that has developed as individuals, often women and children, flee from unprecedented levels of violence in Central America to the southern border of the United States. It will then discuss the removal proceedings these individuals encounter and the protections afforded at those proceedings.

A. *America’s Refugee Crisis*

The United States is facing a refugee crisis on its southern border. Tens of thousands of women and children fleeing extraordinary levels of violence in Central America have crossed the border in recent years.¹⁷ From 2012 to 2015 alone, there was a fivefold increase in asylum-seekers—or foreign nationals¹⁸ in the United States seeking to be designated “refugees” and thus afforded the right to stay in the United States—arriving from El Salvador,

¹⁶ UNHCR, WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO 21 (2015), <http://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html>, archived at <https://perma.cc/35UK-864U>.

¹⁷ See *Statement by Secretary Johnson on Southwest Border Security, U.S. Customs and Border Protection, U.S. Department of Homeland Security, United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS AND BORDER PROTECTION, U.S. DEPARTMENT OF HOMELAND SECURITY (Oct. 18, 2016), <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>, archived at <https://perma.cc/Y3TN-QBHK> (noting that 46,893 unaccompanied children and 70,407 family units from El Salvador, Guatemala, and Honduras were apprehended at the border in fiscal year 2016, and sharing statistics since fiscal year 2009).

¹⁸ The Immigration and Nationality Act (INA) refers to foreign nationals as “aliens,” defined as a person in the United States “who is not a citizen or national of the United States.” Ruth Ellen Wasem, *Asylum and “Credible Fear” Issues in U.S. Immigration Policy*, CONG. RESEARCH SERV. 1 n.1 (2011) (citing 8 U.S.C. §101(a)(3)).

Guatemala, and Honduras.¹⁹ And the number has increased significantly since then.²⁰

The rising level of violent crime in these three nations, collectively known as the Northern Triangle of Central America (NTCA), has led to a significant movement of vulnerable individuals fleeing to the United States.²¹ Most of the individuals crossing the southern border over the last few years have come from the NTCA.²² El Salvador, Guatemala, and Honduras all faced civil wars in the 1980s; since then, gangs have grown rapidly as “a large pool of demobilized and unemployed men with easy access to weapons morphed into organized criminal groups.”²³ Ongoing battles between gangs and security forces have caused these nations to be consistently ranked among the most violent countries in the world.²⁴ According to the World Bank, the NTCA has some of the world’s highest homicide rates, approaching 100 homicides per 100,000 people in certain regions.²⁵ As the U.S. Court of Appeals for the Fourth Circuit aptly summarized it, “The rapid growth of violent gangs . . . has proved nothing short of a tragedy for those living in Central America. [Gangs] oppress[] the daily lives of innumerable people through intimidation, harassment, and staggering acts of violence.”²⁶

And the governments, particularly at local levels, “too often lack the resources, ability, or resolve to combat [gangs] effectively, still less to protect citizens and their families.”²⁷ In the United Nations High Commissioner for Refugees’ (UNHCR’s) summary of interviews with women fleeing from the NTCA and parts of Mexico, the women “consistently stated that police and other state law enforcement authorities were not able to provide sufficient protection from the violence.”²⁸ Crimes go unpunished at rates as high as 95% in some areas of these countries, and corruption erodes citizens’ trust in those who are meant to protect them.²⁹ Ultimately, “for too many, the

¹⁹ Rocio Cara Labrador & Danielle Renwick, *Central America’s Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (June 26, 2018), <https://www.cfr.org/background/cen-tral-americas-violent-northern-triangle>, archived at <https://perma.cc/XLK5-LBR5>.

²⁰ *Immigration Court Backlog Jumps While Case Processing Slows*, SYRACUSE UNIV. TRAC IMMIGRATION (June 8, 2018), <http://trac.syr.edu/immigration/reports/516/>, archived at <https://perma.cc/QED3-HHCN> [hereinafter “*Syracuse University Data Study – Immigration Court Backlog*”].

²¹ See Labrador & Renwick, *supra* note 19.

²² *Id.*

²³ *Id.*

²⁴ See WORLD BANK, CRIME AND VIOLENCE IN CENTRAL AMERICA: A DEVELOPMENT CHALLENGE 3 (2011), https://siteresources.worldbank.org/INTLAC/Resources/FINAL_VOL_UME_I_ENGLISH_CrimeAndViolence.pdf, archived at <https://perma.cc/F7V7-SGD8>.

²⁵ See *id.*

²⁶ *Solomon-Membreno v. Holder*, 578 F. App’x. 300, 301 (4th Cir. 2014).

²⁷ *Id.* at 302.

²⁸ UNHCR, *supra* note 16, at 4.

²⁹ Labrador & Renwick, *supra* note 19.

only way to escape the gang[s] is to flee home altogether.”³⁰ In 2016 alone, 338,000 people fled from the NTCA.³¹

Women and children in particular are victimized by this crisis. They face overwhelming rates of gang-related homicide, sexual assault, and extortion, as well as domestic violence, that the governments of the three nations are largely unable, unwilling, or both unable and unwilling to control.³² The aforementioned UNHCR interviews paint a heartbreaking picture:

The more than 160 women interviewed for this report talked about being raped, assaulted, extorted, and threatened by members of heavily-armed, transnational criminal groups. They spoke about their families having to contend with gunfights, disappearances, and death threats. They described seeing family members murdered or abducted and watching their children being forcibly recruited by those groups. With authorities often unable to curb the violence and provide redress, many vulnerable women are left with no choice but to run for their lives.³³

Meanwhile, children are often targeted for recruitment by gangs, who use violence, intimidation, and death threats to pressure them to join their ranks.³⁴ Contrary to the narrative that individuals crossing the border are trying to “game the system,” the reality is that for most, especially these women and children, the trip to America is “a flight from life-endangering violence.”³⁵

Once an asylum-seeker arrives in the United States, the road to her day in court is long and uncertain. Foreign nationals who are apprehended by the Department of Homeland Security (DHS) and indicate a fear of persecution are interviewed by asylum officers to determine whether they have a “credible fear” of such persecution.³⁶ If the fear is found to be credible, they are

³⁰ Solomon-Membreno, 578 F. App’x. at 302.

³¹ *Central America Refugee Crisis*, USA FOR UNHCR, THE UN REFUGEE AGENCY, <https://www.unrefugees.org/emergencies/central-america/> (last visited Sept. 30, 2018), archived at <https://perma.cc/3ZWU-8PAZ>.

³² See Maureen Meyer & Elyssa Pachico, *Fact Sheet: U.S. Immigration and Central American Asylum Seekers*, WOLA (Feb. 1, 2018), <https://www.wola.org/analysis/fact-sheet-united-states-immigration-central-american-asylum-seekers/>, archived at <https://perma.cc/E4A Y-8SYF>.

³³ UNCHR, *supra* note 16, at Foreword.

³⁴ *Id.*

³⁵ INT’L CRISIS GRP., UNDOCUMENTED MIGRATION FROM THE NORTHERN TRIANGLE OF CENTRAL AMERICA (2017), <https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/undocumented-migration-northern-triangle-central-america>, archived at <https://perma.cc/59UF-SF5N>.

³⁶ Wasem, *supra* note 18, at 1. According to the INA, “the term credible fear of persecution means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum” 8 U.S.C. § 1225 (internal quotation marks omitted). In the past, about 80% of asylum-seekers have been found to have a credible fear of persecution. Dara Lind, “*Catch and Release*,” *Explained: The Heart of Trump’s New Border Agenda*, Vox (Apr. 9, 2018), <https://www.vox.com/2018/4/9/>

referred to immigration courts operated by the Department of Justice (DOJ), specifically the DOJ's Executive Office for Immigration Review (EOIR).³⁷ Here, they must wait in a backlogged system for their days in court.³⁸ At the end of May 2018, Syracuse University's Transactional Records Access Clearinghouse (TRAC) Immigration Project reported that over 700,000 immigration cases were awaiting a decision, an "all-time high."³⁹ The recent increases appear to be driven by "the lengthening time it now takes to schedule hearings and complete proceedings in the face of the court's overcrowded dockets."⁴⁰ Decisions regarding requests for relief, including asylum, on average take about 1,000 days, or almost three years.⁴¹

And these individuals who wait with uncertainty until their cases are adjudicated are increasingly doing so in detention centers. Such centers have raised significant concerns in recent years. A 2015 report by the U.S. Commission on Civil Rights found "frequent claims of sexual abuse upon detainees in [DHS] custody, coercive staff threats of physical harm, and separation of children from mothers who reported the dismal facility conditions, which included spoiled food, undrinkable water, and inadequate access to medical care."⁴² Individuals should only be placed in detention when DHS deems them flight risks or dangers to the community.⁴³ However, in a recent lawsuit against the Trump Administration's immigration detention policies, asylum-seekers noted that the Administration has all but eliminated the possibility for parole for asylum-seekers held in several cities.⁴⁴ According to the lawsuit, 92% of asylum-seekers held in detention in Detroit, El Paso, Los Angeles, Newark, and Philadelphia were granted parole from

17190090/catch-release-loopholes-border-immigrants-trump, archived at <https://perma.cc/ZV4K-795F>. This number has dropped to 75% under the current Administration, *id.*, and observers believe the policies stemming from *Matter of A-B* will result in a bigger drop. See *infra* text accompanying notes 58–59.

³⁷ Wasem, *supra* note 18, at 1.

³⁸ See *Syracuse University Data Study – Immigration Court Backlog*, *supra* note 20.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting Franco-Gonzalez*, 90 ST. JOHN'S L. REV. 915, 956 (2016) (citing U.S. COMM'N ON CIVIL RIGHTS, WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS AT U.S. IMMIGRATION DETENTION FACILITIES 124–25 (2015)).

⁴³ This was the policy created by the 2009 "Parole Directive," which established the procedures that should be used to determine on an individual basis whether each asylum-seeker is eligible for parole. U.S. Immigration and Customs Enf't, Directive No. 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (2010), https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf, archived at <https://perma.cc/XTF8-ESU8>.

⁴⁴ See Class Complaint for Injunctive and Declaratory Relief at 14, *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018) (No. 1:18-cv-00578); Alan Gomez, *Asylum Seekers Sue Trump Administration Over Prolonged Detention*, USA TODAY (Mar. 15, 2018), <https://www.usatoday.com/story/news/nation/2018/03/15/asylum-seekers-sue-trump-administration-over-prolonged-detention/425572002/>, archived at <https://perma.cc/H3ZB-JETR>.

2010 to 2013, compared to 4% in 2018.⁴⁵ This new approach to parole and the Trump Administration's 2018 policy of separating families at the border⁴⁶ are but two examples of the attempts to deter asylum-seekers from coming to America through wide-reaching, harsh detention policies.

B. *The Law of Removal Proceedings*

Eventually, asylum-seekers who were deemed at the border to have a credible fear of persecution get their day in court through "removal proceedings," which determine whether they can legally stay in the United States or must be deported.⁴⁷ These individuals seek asylum "defensively" before an immigration judge under the DOJ.⁴⁸ Those who are not apprehended may apply for asylum "affirmatively" with the United States Citizenship and Immigration Services (USCIS) office of DHS; these claims, too, often reach removal proceedings in front of an immigration judge, as the DHS commonly refers uncertain cases.⁴⁹

Asylum-seekers must demonstrate to immigration judges, or DHS officers in the first instance in the case of affirmative asylum cases, that they meet the increasingly complex definition of a refugee. Under the Refugee Act of 1980, which codified the 1967 United Nations (UN) Protocol Relating to the Status of Refugees, an asylum-seeker must demonstrate that: (1) she is a foreign national; (2) she has a well-founded fear of persecution, by demonstrating previous persecution and/or the likelihood of future persecution; (3) this persecution is "on account of race, religion, nationality, membership in a particular social group, or political opinion;" (4) her home country's government sponsored the persecution or, if the persecutor is a private actor or group, the government is unable or unwilling to protect the individual from such persecution; and (5) in-country relocation is not reasonable.⁵⁰ Decisions of immigration judges can be appealed to the Board of Immigration Appeals (BIA) under EOIR, and finally to the U.S. Court of Appeals in the relevant jurisdiction.⁵¹

Children and adults alike fleeing Central America face an uphill battle in court, with or without representation, due to both a lack of clarity in the law and stringent legal standards for their particular cases. Because children arriving from Central America often state claims based on gang-related or domestic violence, they must argue that their claims meet the "particular

⁴⁵ Class Complaint for Injunctive and Declaratory Relief at 14, *Damus*, 313 F. Supp. 3d at 317.

⁴⁶ Tal Kopan, *DHS: 2,000 Children Separated from Parents at Border*, CNN (June 16, 2018), <https://www.cnn.com/2018/06/15/politics/dhs-family-separation-numbers/index.html>, archived at <https://perma.cc/HS3V-P7BV>.

⁴⁷ See 8 U.S.C. § 1158.

⁴⁸ See Wasem, *supra* note 18, at 1.

⁴⁹ *Id.*

⁵⁰ See 8 U.S.C. § 1158(a)(2)(A).

⁵¹ See 8 U.S.C. § 1105(a)(7).

social group” standard.⁵² However, the law regarding this standard is increasingly opaque, as it requires that the group meet the notoriously difficult-to-understand elements of “particularity” and “social visibility.”⁵³ Additionally, because the children’s claims often center on violence by private actors or groups, they must demonstrate that their governments are “unable or unwilling” to protect them.⁵⁴ But there is a considerable lack of consistency across Courts of Appeal regarding the evidence needed for asylum-seekers to demonstrate this element.⁵⁵ The result is that many asylum-seekers from Central America are turned away: individuals from El Salvador, Honduras, and Guatemala are granted asylum only 21, 22, and 25% of the time, respectively.⁵⁶ These are three of the five worst likelihoods of asylum by nationality, with the highest rates circling around 80%.⁵⁷ And the Attorney General’s 2018 decision in *Matter of A-B*,⁵⁸ if it stands after a likely review by the circuit courts, may signal an even tougher road. The decision and subsequent policies, which seek to overturn years of precedent granting victims of private violence asylum in certain cases, attempt to cast doubt on whether domestic or gang-related violence can be considered grounds for asylum.⁵⁹

In the face of these steep odds, complicated legal concepts, and conflicting precedents, Congress has provided individuals facing removal proceedings a statutory right to counsel at their own expense, but not to *government-appointed* counsel. The statutory right provides that individuals facing removal proceedings must be permitted to retain counsel at their own

⁵² See Meyer & Pachico, *supra* note 32.

⁵³ See generally Jillian Blake, Essay, *Getting to Group Under U.S. Asylum Law*, 90 NOTRE DAME L. REV. ONLINE 167 (2015) (“Of the five grounds for asylum established in the 1951 Refugee Convention, none is more heavily scrutinized than that of ‘particular social group.’”); Kristin A. Bresnahan, Note, *The Board of Immigration Appeals’s New “Social Visibility” Test for Determining “Membership of a Particular Social Group” in Asylum Claims and its Legal and Policy Implications*, 29 UC BERKELEY J. INT’L L. 649 (2011); see also *id.* at 650 (“As a result of the BIA’s sudden and unexplained application of a dispositive social visibility test, the confusion surrounding the meaning of membership of a particular social group is now more acute than ever.”).

⁵⁴ See 8 U.S.C. § 1101(a)(42); Joseph Hassell, *Persecutor or Common Criminal? Assessing a Government’s Inability or Unwillingness to Control Private Persecution*, 8 DOJ EOIR IMMIGRATION LAW ADVISOR 1, 3 (2014) (“[A]ll of the circuit courts have adopted and continue to employ the same [‘unwilling or unable’] standard, although their applications and interpretations of this standard are less than uniform.”) (citing a recent case in each circuit referring to the standard).

⁵⁵ See *infra* text accompanying notes 237–38.

⁵⁶ Holly Yan, *Which Nationalities Get Rejected the Most for US Asylum?*, CNN (May 3, 2018), <https://edition.cnn.com/2018/05/03/world/us-asylum-denial-rates-by-nationality/index.html>, archived at <https://perma.cc/WP8P-9XG5>.

⁵⁷ *Id.*

⁵⁸ 27 I&N Dec. 316 (A.G. 2018).

⁵⁹ *Id.* At the time of this writing, immigrants’ rights advocates are challenging the legality of the decision and the subsequently implemented expedited removal policies stemming from it. See Complaint for Declaratory and Injunctive Relief, *Grace v. Sessions* (D.D.C. Aug. 9, 2018) (No. 1:18-cv-01853).

private expense or by locating pro bono services.⁶⁰ No statutory provision, however, has been interpreted to mean that individuals facing deportation have a right to “appointed counsel,” or counsel appointed at the government’s expense.⁶¹

Further, courts have held that there is no *constitutional* right to appointed counsel, either under the Sixth or Fifth Amendment. The Supreme Court has famously held that the Sixth Amendment compels the right to appointed counsel for indigent criminal defendants,⁶² including in non-felony cases.⁶³ However, the right was extended only to proceedings that may lead to incarceration.⁶⁴ It was not extended to removal proceedings, since these are civil actions and the adverse result is not considered to be “punishment.”⁶⁵

Courts have also never held there is a right to appointed counsel under the Fifth Amendment, although they have arguably laid the groundwork for recognition of such a right. As a preliminary matter, the Supreme Court has long held that immigrants without legal status retain the Fifth Amendment right to due process.⁶⁶ In the 1903 case *Yamataya v. Fisher*,⁶⁷ the Court stated for the first time that the government cannot “disregard the fundamental principles that inhere in ‘due process of law’” in removal proceedings.⁶⁸ Although courts have not held that these due process protections include a right to appointed counsel in these proceedings, some promising language points in this direction. As Professor Johan Fatemi notes, at least four circuits employ an approach⁶⁹ that considers whether, “in a given case, the assistance of

⁶⁰ See 8 U.S.C. § 1362 (“In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.”). This section’s “title, legislative history, and regulations make clear that the INA in fact establishes a right.” Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 124 (2008).

⁶¹ See, e.g., Fatemi, *supra* note 42, at 919 (“This statutory right is clearly limited by the parenthetical language ‘(at no expense to the Government)’ . This limitation has been interpreted to mean that the government is not required to pay for legal representation in removal proceedings.”).

⁶² See *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

⁶³ See *Argersinger v. Hamlin*, 407 U.S. 25, 28 (1972).

⁶⁴ See, e.g., *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (extending the right only to cases that might lead to incarceration); see also Fatemi, *supra* note 42, at 922 (“[I]n *Scott*, the Court identified the outer limit of the Sixth Amendment right to counsel by holding that the appointment of counsel was only required in cases that could result in actual incarceration.”).

⁶⁵ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (calling a removal proceeding “a purely civil action”); *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (“It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment.”).

⁶⁶ See, e.g., Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD LAW J. 51, 56 n. 71 (2011) (citing cases); see also Fatemi, *supra* note 42, at 923 (“[I]t has been settled that noncitizens have due process protections under the Fifth Amendment.”).

⁶⁷ 189 U.S. 86 (1903).

⁶⁸ *Id.* at 100.

⁶⁹ Fatemi, *supra* note 42, at 925.

counsel would be necessary to provide ‘fundamental fairness, the touchstone of due process.’”⁷⁰ As Professor Fatemi has aptly summarized, however, “regardless of which individuated due process test is used, there has not been a single instance where under the prevailing case-by-case approach a constitutional right to appointed counsel has been found for noncitizens facing removal.”⁷¹

What makes the topic of this Note a compelling opportunity to establish a class-wide right to appointed counsel, however, is that it focuses on children, a class of individuals that courts repeatedly state need to be treated differently from adults under the Constitution. As the Supreme Court noted in 2011, “[o]ur history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults.”⁷² Outside the context of deportation, courts have recognized a right to appointed counsel for children in certain non-criminal proceedings, specifically juvenile delinquency hearings. In the 1967 case *In re Gault*,⁷³ the Supreme Court held that children in proceedings to determine juvenile delinquency have a right to appointed counsel.⁷⁴ The Court pushed against the concept that punishment is required to trigger the right to appointed counsel under the Fifth Amendment, noting the decisive significance of the loss of physical liberty at stake in children’s proceedings even though juvenile detention is, strictly speaking, not considered punishment.⁷⁵ Put simply by the Sixth Circuit, *In re Gault* helped to “undermine[] the position that counsel must be provided to indigents only in criminal proceedings.”⁷⁶

Finally, in the specific context of children in deportation proceedings, the Ninth Circuit has acknowledged that courts must provide additional safeguards to ensure children’s Fifth Amendment rights are protected. The Ninth Circuit recognized in *Jie Lin v. Ashcroft*,⁷⁷ for example, that in some cases an immigration judge should take a more proactive role in helping a child find representation.⁷⁸ In *Jie Lin*, a child in a deportation hearing retained counsel so ineffective that the representation “flirted with denial of counsel altogether.”⁷⁹ As such, the Ninth Circuit held that continuing to allow the repre-

⁷⁰ *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

⁷¹ Fatemi, *supra* note 42, at 925.

⁷² *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982) (internal quotations omitted)); *see also Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (recognizing that “[c]hildren have a very special place in life which law should reflect” (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring))).

⁷³ 387 U.S. 1 (1967).

⁷⁴ *Id.* at 36–37.

⁷⁵ *See id.* at 27; *see also* Elizabeth M. Frankel, *Detention and Deportation with Inadequate Due Process: The Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigrant Youth*, 3 DUKE F. L. & SOC. CHANGE 63, 98 (2011).

⁷⁶ *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 n.3 (6th Cir. 1975).

⁷⁷ 377 F.3d 1014 (9th Cir. 2004).

⁷⁸ *Id.* at 1034.

⁷⁹ *Id.* at 1033.

sentation amounted to a denial of the child’s right to privately retained counsel.⁸⁰ Summarizing its position, the panel stated that “[a]bsent a minor’s knowing, intelligent, and voluntary waiver of the right to counsel, the [immigration judge] may have to take an affirmative role in securing representation by competent counsel.”⁸¹ Unambiguously accepting the principle that children in removal proceedings need added procedural safeguards, the *C.J.L.G.* panel stated that “*Jie Lin* stands for the unremarkable proposition that minors are entitled to heightened protections in removal proceedings.”⁸²

II. THE NINTH CIRCUIT’S RULING AGAINST A CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL

I—I’m very afraid to go back.

I don’t—I’m afraid that something will happen to my child.

—MARIA, C.J.’S MOTHER⁸³

A careful due process analysis is aided by an intimate understanding of the challenges litigants face and the procedure afforded to them. In order to set the stage for the forthcoming constitutional evaluation, this Part traces the story of C.J. and his mother Maria—from their journey to the United States to their five immigration court hearings to the Ninth Circuit’s initial opinion and subsequent decision to grant a rehearing en banc.

A. *Death Threats and the Journey to America*

Before coming to the United States, C.J. lived with Maria in their home country of Honduras until he was 13.⁸⁴ The mother-son pair, who lived on their own after C.J.’s father abandoned the family,⁸⁵ shouldered far beyond their fair share of burdens in life. A gang pressured C.J. on three occasions to join its ranks;⁸⁶ he boldly refused each time, even when his life was threatened.⁸⁷ During the third confrontation, however, a gang member placed a gun to C.J.’s head and told him that he had one day to decide whether to

⁸⁰ *Id.*

⁸¹ *Id.* at 1034.

⁸² *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1134 (9th Cir. 2018), *reh’g en banc granted*, 904 F.3d 642 (9th Cir. 2018).

⁸³ *Id.* at 1131.

⁸⁴ *Id.* at 1129.

⁸⁵ *Id.* at 1130.

⁸⁶ *Id.* at 1129. The gang itself was not specified, but it was described as a “Mara gang.” *Id.* MS-13, or Mara Salvatrucha, is the most well-known “Mara gang.” It includes at least 60,000 members in Central American countries and commonly recruits low-income youth. *MS-13 Gang: The Story Behind One of the World’s Most Brutal Street Gangs*, BBC NEWS (Apr. 19, 2017), <http://www.bbc.com/news/world-us-canada-39645640>, archived at <https://perma.cc/4H9U-N4SS>.

⁸⁷ *C.J.L.G.*, 880 F.3d at 1129.

join the gang. If C.J. did not join, the gang member assured him, his mother, aunt, and uncles would be murdered.⁸⁸

Terrified, the mother-son pair fled the country. They bravely travelled about 3,000 treacherous miles to the United States' southern border, and finally entered the U.S., without being inspected, in June of 2014.⁸⁹ Four days later, Maria and C.J. were apprehended by DHS and ordered to appear for removal proceedings in Los Angeles.⁹⁰ They had severely limited English abilities and minimal financial resources; DHS provided Maria with a list of pro bono organizations that could provide free representation during the proceedings.⁹¹

B. Five Immigration Court Hearings and an Appeal

C.J.'s first hearing was in November of 2014.⁹² When the assigned immigration judge informed Maria that she had the right to an attorney at private expense, Maria responded that she did not have the money required.⁹³ After a continuance to give Maria time to secure counsel and a second hearing in January of 2015, Maria told the judge, "[I] looked for an attorney and they are charging me \$6,500 for each one, so I could not afford that amount."⁹⁴ Maria presumably could not acquire pro bono representation, either.

At the third hearing in April, after another continuance to provide time to retain counsel, Maria had no choice but to attempt to represent her son on her own.⁹⁵ She was told that she could present evidence, review and object to the government's evidence, call her own witnesses, and question the government's witnesses.⁹⁶ She stated that she feared returning C.J. to Honduras "because of the gangs," and the immigration judge asked her to complete an asylum application.⁹⁷ The judge again reiterated that Maria could find an attorney and continued the case for a fourth hearing in June.⁹⁸

At that hearing, the judge recognized that much of C.J.'s "threadbare" asylum application was "borderline inscrutable and non-responsive."⁹⁹ In explaining the contents of the application, the Ninth Circuit noted an example of the types of responses provided: "[I]n response to the question whether C.J. has ever caused harm or suffering to another based on a pro-

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 1130.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

tected ground, the application states: ‘THE GAN’S TOLD ME I HAVE TO KILL A PEOPLE TO BE AND THE GAN’S.’”¹⁰⁰ Nevertheless, the immigration judge moved the case forward for what would be its final hearing in February of 2016, more than a year and a half after the mother-son pair arrived in the United States.¹⁰¹

At this pivotal winter hearing, Maria again attempted to represent C.J. herself, having been unable to secure representation for her son.¹⁰² Her final words to the court were sobering: “I—I’m very afraid to go back. I don’t—I’m afraid that something will happen to my child.”¹⁰³ The judge rejected C.J.’s claim for asylum, as well as his related claims for withholding of removal and relief under the Convention Against Torture (CAT).¹⁰⁴ Regarding the primary claim of asylum, she stated that C.J. “lacked an objectively reasonable basis” for asylum relief, having failed to sufficiently address each of three required elements of asylum in his case: (1) showing either that he had suffered past persecution or that he had an objectively reasonable fear of future persecution based on the harm awaiting him in Honduras; (2) establishing membership in a protected group; and (3) showing that the Honduran government is unable to control the gang.¹⁰⁵ After the hearing, C.J. was able to retain representation by non-profit advocacy groups and filed an appeal with the BIA.¹⁰⁶ He argued that the judge had improperly denied his claims for relief and violated his due process rights by refusing to appoint counsel on his behalf.¹⁰⁷

The BIA affirmed.¹⁰⁸ It agreed with the decision of C.J.’s particular case on the merits, and it held that there is no constitutional right to appointed counsel for children facing removal—only a statutory right to privately retained counsel.¹⁰⁹ C.J. filed a petition for review with the Ninth Circuit Court of Appeals.¹¹⁰

¹⁰⁰ *Id.* at 1130 n.5.

¹⁰¹ *Id.* at 1130.

¹⁰² *See id.* at 1130.

¹⁰³ *Id.* at 1131.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* C.J. also argued that his process violated his due process rights, because the judge failed to adequately develop the record and because she did not advise him of his potential eligibility for Special Immigrant Juvenile (SIJ) status, another form of relief from deportation. *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1131–32.

¹¹⁰ *Id.* at 1132.

C. *The Ninth Circuit's Denial of Review and Decision to Rehear the Case En Banc*

The initial Ninth Circuit panel denied C.J.'s petition for review.¹¹¹ Writing for the court, Judge Callahan¹¹² agreed with the BIA's conclusion that C.J.'s constitutional due process rights were not violated.¹¹³ The panel concluded that no case law, from the Supreme Court or the Ninth Circuit, suggested that "alien minors are categorically entitled to court-appointed counsel at government expense."¹¹⁴ It distinguished *Jie Lin v. Ashcroft*, which required an immigration judge to suspend a child's removal hearing if private counsel was deemed inadequate.¹¹⁵ The Ninth Circuit held that while the *Jie Lin* court determined that minors have "heightened protections in removal proceedings,"¹¹⁶ it did not suggest such protections extend to the provision of court-appointed counsel.¹¹⁷ The panel also distinguished *In re Gault*, which held that minors facing juvenile delinquency charges are entitled to court-appointed counsel,¹¹⁸ by noting that its holding applies only in contexts in which a child could be deprived of liberty by means of incarceration, rather than deportation.¹¹⁹

Having concluded that the relevant case law was unresponsive to C.J.'s claim, the Ninth Circuit proceeded to conduct a fresh constitutional analysis. It employed the *Mathews v. Eldridge*¹²⁰ three-part procedural due process balancing test,¹²¹ which considers (1) "the private interest at stake;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional safeguards;" and (3) "the government's interest, including the burdens of any additional process."¹²² It

¹¹¹ *Id.* at 1129.

¹¹² Judge Callahan was joined by Judge Owens and Judge Faber, a United States District Judge for the Southern District of West Virginia who was sitting by designation.

¹¹³ *Id.* at 1129.

¹¹⁴ *Id.* at 1135–36.

¹¹⁵ *Id.* at 1033. ("C.J.'s reliance on *Jie Lin* is misplaced. Far from deciding that alien minors are categorically entitled to court-appointed counsel, *Jie Lin* held only that an IJ should assist minors in retaining the private counsel to which they are statutorily entitled.").

¹¹⁶ *Id.* at 1134.

¹¹⁷ *Id.* at 1133–35.

¹¹⁸ *In re Gault*, 387 U.S. 1, 41 (1967) ("We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.").

¹¹⁹ *C.J.L.G.*, 880 F.3d at 1135–36.

¹²⁰ 424 U.S. 319 (1976).

¹²¹ *C.J.L.G.*, 880 F.3d at 1136–46. The Supreme Court has characterized the *Mathews* test as "a general approach for testing challenged state procedures under a due process claim," *Parham v. J.R.*, 442 U.S. 584, 599 (1979), and has consistently "applied it in a variety of contexts," *Medina v. California*, 505 U.S. 437, 444–45 (1992), including asylum law.

¹²² *Id.* at 1136 (citing *Oshidi v. Holder*, 729 F.3d 883, 894 (2013) and quoting *Mathews*, 424 U.S. at 335).

noted that if C.J. were able to satisfy this test, he would potentially need to defeat the “rebuttable presumption” against mandating court-appointed counsel¹²³ set out in *Lassiter v. Department of Social Services*.¹²⁴

The panel determined that C.J.’s claim failed the *Mathews* test.¹²⁵ To start, it decided that the first factor leaned in C.J.’s direction because, if deported, “he [would] be returned to a country where his liberty—indeed, he alleges his very life—may be at risk.”¹²⁶

But the panel decided that the second and third *Mathews* factors weighed in favor of the government.¹²⁷ Relying primarily on the second factor,¹²⁸ the court found that C.J. “fail[ed] to show that the additional process he seeks—government-funded, court-appointed counsel—is necessary, either in his case or for alien minors as a class.”¹²⁹ It reasoned that the additional protection of appointed counsel is unnecessary because there are already procedural protections in place for immigrant children—most notably, that immigration judges are responsible for investigating and developing the applicants’ claims.¹³⁰

The panel found that the third *Mathews* factor—the government’s interest—also weighed in the government’s favor, because “[r]equiring government-funded counsel would significantly increase the funds expended on immigration matters.”¹³¹ But it noted that it would have decided the third factor differently had the second factor favored C.J., because of the government’s critical interest in “fair and just administration of our Nation’s immigration laws.”¹³² Considering the *Mathews* factors collectively, then, the Ninth Circuit found that C.J. and similarly situated immigrant children do not possess a constitutional right to court-appointed counsel.¹³³ It did not consider whether C.J. was unduly prejudiced because he lacked counsel.¹³⁴

¹²³ *C.J.L.G.*, 880 F.3d at 1136. The court noted that this was a “close[] question,” but declined to answer it because it concluded that C.J.’s claim did not satisfy the *Mathews* test. *Id.* ¹²⁴ 452 U.S. 18 (1981).

¹²⁵ *Id.*

¹²⁶ *Id.* at 1137.

¹²⁷ *Id.* at 1144–45.

¹²⁸ *Id.* at 1145 (“We hasten to note that our conclusion relies on the second and not the third *Mathews* factor.”).

¹²⁹ *Id.* at 1143.

¹³⁰ *Id.* (“Indeed, the fact that Congress vested IJs with the responsibility of investigating and developing an applicant’s claims tilts the equities in favor of the government on the second *Mathews* factor.”).

¹³¹ *Id.* at 1145.

¹³² *Id.* (“[H]ad the second *Mathews* factor favored C.J., then the third would likely do so, as well.”).

¹³³ *Id.* at 1145–46. As for the two other constitutional due process claims, the court held that any errors regarding the immigration judge’s development of the record were not prejudicial and that the immigration judge was not required to inform C.J. of his ability to apply for Special Immigrant Juvenile Status. *Id.* at 1122. The court also held that the Immigration and Nationality Act (INA) does not provide a statutory right to appointed counsel, *id.* at 1147, and that C.J.’s claim for relief under the Convention Against Torture was lacking, *id.* at 1150.

¹³⁴ The court noted that if it recognized the right to appointed counsel, it would then need to consider the issue of prejudice, as the “[v]iolation of an alien minor’s due process rights

Judge Owens concurred.¹³⁵ His four-sentence opinion described the panel's holding as possessing a "narrow scope."¹³⁶ Specifically, he pointed out that the opinion did not "hold, or even discuss," the question of whether *unaccompanied* children have a right to court-appointed counsel.¹³⁷ To him, that was "a different question that could lead to a different answer."¹³⁸

In response, C.J. petitioned for a rehearing or a rehearing en banc.¹³⁹ In September of 2018, the Ninth Circuit officially withdrew its decision and elected to take the major step of rehearing the case en banc.¹⁴⁰

III. THE ARGUMENT FOR A CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.

—UNITED STATES SUPREME COURT, *MATHEWS V. ELDRIDGE*¹⁴¹

A consideration of the principles and values underlying the procedural due process right and a careful, step-by-step due process analysis both lead to the conclusion that C.J. was correct: immigrant children facing deportation have a constitutional right to court-appointed counsel.

First, the initial Ninth Circuit panel failed to accord proper weight to the first principles of procedural due process. To protect the foundational due process principle of "fundamental fairness,"¹⁴² courts are charged with ensuring that immigrant children have a "meaningful" opportunity to be heard in their removal hearings. But C.J.'s case is indicative of the courts' repeated failure to honor that obligation, because these children, with their particular vulnerabilities as a class, are simply incapable of being meaningfully heard within one of the most complex areas of American law. Meanwhile, considerations of human dignity, a core value underlying the right to procedural due process, further point to the existence of a constitutional right to appointed counsel.

Second, the Ninth Circuit's due process analysis, specifically its evaluation of the second *Mathews* prong on which it "relie[d],"¹⁴³ gave too much

does not automatically require reversal. In most cases, the petitioner must also show prejudice." *Id.* at 1133. This Note will focus on C.J.'s claim for a constitutional right to appointed counsel, without extending its scope to the issue of whether prejudice should be required or whether there was prejudice in C.J.'s case.

¹³⁵ *Id.* at 1151.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See Petition for Panel Rehearing and Petition for Rehearing En Banc, *C.J.L.G.*, 880 F.3d 1122 (9th Cir. 2018) (No. 16-73801).

¹⁴⁰ *C.J.L.G. v. Sessions*, 904 F.3d 642 (9th Cir. 2018) (mem.).

¹⁴¹ 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (internal quotations omitted)).

¹⁴² See *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

¹⁴³ *C.J.L.G.*, 880 F.3d at 1145.

credit to alternative procedural safeguards for immigrant children facing deportation. Evidence suggests that these safeguards are insufficient to prevent a high risk of erroneous deprivation. And each element of this due process analysis is only further strengthened in the context of those children who arrive in America completely alone, rather than with family members.

Finally, the time for courts to recognize the right to appointed counsel for children facing removal proceedings is now. Judicial protection is needed more than ever to offer a due process safeguard in the face of the Trump administration's sharp curtailment of asylum-seekers' rights.

This Part will provide the constitutional arguments supporting the recognition of a right to appointed counsel for immigrant children, with specific reference to the Ninth Circuit's reasoning in C.J.'s case. It aims to offer a roadmap for the Ninth Circuit, in its upcoming rehearing en banc, to challenge the initial panel's reasoning and ultimately its conclusion, and for sister courts to do the same as they face this due process issue in the future.

A. *Procedural Due Process Principles and Values*

The step-by-step due process analysis prescribed by the Supreme Court in *Mathews* is inherently inexact and flexible, so an understanding of the underlying principles and values should help guide an evaluation under that test. Accordingly, this section discusses the "fundamental fairness" principle and the human dignity value underlying the concept of procedural due process. Ultimately, while these two considerations alone might be insufficient to compel recognition of a right, given courts' entrenched reliance on the *Mathews* test, they serve as important background factors that should weigh on a court's analysis.

1. *The Due Process Principle of "Fundamental Fairness"*

The Supreme Court has established that the core principle of due process is "fundamental fairness," and it has developed its articulation of this principle over time. It first noted in *Gagnon v. Scarpelli*¹⁴⁴ that fundamental fairness is "the touchstone of due process."¹⁴⁵ In laying out its three-part procedural due process test in *Mathews v. Eldridge*, the Court further explained the central principle of due process: "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."¹⁴⁶ It noted also the importance of context. Due process, "unlike some legal rules, is not a technical conception with a fixed content

¹⁴⁴ 411 U.S. 778 (1973).

¹⁴⁵ *Id.* at 790.

¹⁴⁶ *Mathews*, 424 U.S. at 333 (quoting *Armstrong*, 380 U.S. at 552 (internal quotations omitted)).

unrelated to time, place and circumstances.”¹⁴⁷ Rather, it is “flexible and calls for such procedural protections as the *particular situation* demands.”¹⁴⁸ Bringing these cases together provides helpful guidance in considering whether a particular practice honors due process principles: “fundamental fairness” exists when, given an analysis of the specific context of the proceeding, an individual is provided a timely opportunity to present her case in a “meaningful manner.”¹⁴⁹

An honest consideration of the context surrounding children in removal hearings today leads to the conclusion that they cannot have a “meaningful” opportunity to be heard—they cannot be offered “fundamental fairness”—without counsel. First, the complexity of removal proceedings raises the bar for the competency required to ensure adequate due process protections. Immigration law is widely considered to be among the most confusing fields of law, navigable only by specialized lawyers.¹⁵⁰ And asylum law is among the most complex areas within immigration law, as an asylum-seeker must demonstrate that “she meets a definition with at least five sub-parts, prove that she is not subject to various additional legal bars, and corroborate her entire claim with both subjective and objective evidence.”¹⁵¹ To the extent that complexity of proceedings adds an obstacle to a person having a meaningful voice without counsel, immigrants facing removal, as a general matter, have an especially difficult path.

Second, while any non-lawyer would struggle to navigate removal proceedings, children are a class uniquely unable to do so. In the context of criminal law, the Supreme Court has held that “refusal to appoint counsel is

¹⁴⁷ *Id.* at 334 (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)) (internal quotations omitted).

¹⁴⁸ *Id.* (emphasis added) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); see also *Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18, 24–25 (1981) (“Applying the Due Process Clause is therefore an uncertain enterprise which must discover what ‘fundamental fairness’ consists of in a particular situation[.]”); Hill, *supra* note 66, at 56 (“*Lassiter* . . . warns that the due process mandate of ‘fundamental fairness’ requires evaluating each ‘particular situation.’”).

¹⁴⁹ As the Sixth Circuit stated in referring to the “fundamental fairness” principle in *Gagnon*, “where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government’s expense.” *Aguilera-Enriquez v. INS*, 516 F.2d 565, 569 (6th Cir. 1975).

¹⁵⁰ See, e.g., *Castro-O’Ryan v. U.S. Dep’t. of Immigration and Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (“With only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth.”) (quoting E. HULL, WITHOUT JUSTICE FOR ALL 107 (1985) (internal quotations and citations omitted)); *infra* text accompanying notes 232–35.

¹⁵¹ Keren Zwick, *Rethink Immigration: Right to a Lawyer? The Fiction of Legal Counsel in Immigration Proceedings*, NAT’L IMMIGRANT JUST. CENT. (Mar. 22, 2013), <https://www.immigrantjustice.org/staff/blog/rethink-immigration-right-lawyer-fiction-legal-counsel-immigration-proceedings>, archived at <https://perma.cc/GF3L-XPKN>; see also 8 U.S.C. § 1101(a)(42)(A); Rachel Roubein, *Here’s How Hard It Is for Unaccompanied Minors to Get Asylum*, THE ATLANTIC (July 15, 2014), <https://www.theatlantic.com/politics/archive/2014/07/heres-how-hard-it-is-for-unaccompanied-minors-to-get-asylum/456267/>, archived at <https://perma.cc/F74M-HHPH>.

a denial of due process” where “individuals who, by reason of age, ignorance, or mental capacity, are incapable of representing themselves.”¹⁵² And when it comes to children as a class, the Court has emphasized that the same analysis of constitutional rights employed in relation to adults will not do. “[T]he constitutional rights of children cannot be equated with those of adults” because of “the peculiar vulnerability of children” and “their inability to make critical decisions in an informed, mature manner.”¹⁵³ In the context of juvenile proceedings, as C.J.’s attorneys pointed out, the Court stated that a child “requires the guiding hand of counsel at every step in the proceedings against him.”¹⁵⁴ And the Ninth Circuit has already acknowledged the inability of children to represent themselves in this exact context, concluding that “heightened protections in removal proceedings” are required for children.¹⁵⁵ In *In re Gault*, the Court emphasized the complexities of juvenile delinquency proceedings, noting that children need counsel to “cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of proceedings, and to ascertain whether [they have] a defense and to prepare and submit it.”¹⁵⁶ These same skill-sets are required in removal proceedings.

Third, the particular subset of children here possesses additional characteristics that prevent them from being heard in a meaningful manner. Having recently fled another country, whether alone or accompanied by family, they are particularly vulnerable to not having the facts of their cases and their basic arguments heard due to language barriers and the stresses of recent and potentially ongoing traumas. C.J.’s inability to fill out a comprehensible asylum application, even with Maria’s help, is an example of the language barrier in action. Meanwhile, the traumas borne of being expelled from their homes, of the difficult journey to America, of time spent in detention, and of the looming prospect of deportation are additional obstacles causing immigrant children in removal proceedings to be particularly unable to stand for themselves in court.¹⁵⁷ Recognizing these obstacles, one district court required the government to ensure children receive advice of some sort before

¹⁵² *Wade v. Mayo*, 334 U.S. 672, 684 (1984).

¹⁵³ *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

¹⁵⁴ *In re Gault*, 387 U.S. 1, 36 (1967) (citing *Powell v. Alabama*, 287 U.S. 45, 69 (1932)); see also *Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012) (noting children’s “lack of maturity” and “underdeveloped sense of responsibility,” and the fact that “they are more vulnerable . . . to . . . outside pressures,” have “limited control over their own environment,” and “lack the ability to extricate themselves from horrific, crime-producing settings”) (quoting *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005)).

¹⁵⁵ *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1134 (9th Cir. 2018), *reh’g en banc granted*, 904 F.3d 642 (9th Cir. 2018).

¹⁵⁶ *Gault*, 387 U.S. at 36.

¹⁵⁷ See Rachel Aviv, *The Trauma of Facing Deportation*, *NEW YORKER*, Apr. 3, 2017, <https://www.newyorker.com/magazine/2017/04/03/the-trauma-of-facing-deportation>, archived at <https://perma.cc/5V6W-MN8H>; see also Robert Lovato, *Central American Deportees Fear Yet More Trauma and Violence Back Home*, *THE GUARDIAN* (Jan. 6, 2016), <https://www.theguardian.com/commentisfree/2016/jan/06/central-american-deportees-fear-trauma-violence-back-home>, archived at <https://perma.cc/A4NA-7LFY>.

agreeing to voluntary departures; this court acknowledged that, as Elizabeth Frankel puts it, “minors cannot make knowing and voluntary decisions under stressful conditions, and that many of the children come from cultures where it is natural to ‘defer to the authority before them.’”¹⁵⁸

Finally, as will be discussed in the upcoming analysis of the second *Mathews* factor, evidence suggests that the majority of children in detention have claims that *could* be successful—but their claims rarely succeed without an attorney. This only further confirms what the previous three points demonstrate: legal representation is a prerequisite for meaningful presentation of an immigrant child’s claims in removal hearings.

2. *The Due Process Value of Human Dignity*

Though human dignity has not been elevated to a constitutionally protected right in the United States as it has in other nations,¹⁵⁹ its fundamental importance has been repeatedly and increasingly recognized by the Supreme Court in making crucial decisions about a range of constitutional rights.¹⁶⁰ In the First Amendment context, the Court has noted that a system of free expression is the only one that “would comport with the premise of individual dignity and choice upon which our political system rests.”¹⁶¹ When it comes to the Fifth Amendment, the Court has stated that the “constitutional foundation underlying” the right against self-incrimination is “the respect a government—state or federal—must accord to the dignity and integrity of its citizens.”¹⁶² The Court has established that the determination of whether a practice constitutes cruel and unusual punishment begins with a recognition that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”¹⁶³ It has ruled against practices that it has determined to be “antithetical to human dignity.”¹⁶⁴ And in the arena of Fourteenth Amendment substantive due process, the Court has emphasized that human dignity is central to individual liberty interests.¹⁶⁵ Put simply by Professor Maxine Goodman, “the Court has repeatedly treated human dignity as a value underlying, or giving meaning to, existing constitutional rights and guarantees.”¹⁶⁶

¹⁵⁸ Frankel, *supra* note 75, at 104 (quoting *Perez-Funez v. INS*, 619 F. Supp. 656, 661 (C.D. Cal. 1985)).

¹⁵⁹ See, e.g., Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 202–03 (2008).

¹⁶⁰ See, e.g., Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 793 (2006) (discussing the reliance on dignity in constitutional decisions and noting that the Supreme Court is “moving in th[e] direction of treating human dignity as a value having invariant strength in its decision-making,” *id.*).

¹⁶¹ *Cohen v. California*, 403 U.S. 15, 24 (1971).

¹⁶² *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

¹⁶³ *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

¹⁶⁴ *Hope v. Pelzer*, 536 U.S. 730, 745 (2002).

¹⁶⁵ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

¹⁶⁶ Goodman, *supra* note 160, at 743.

In keeping with this emphasis on dignity in relation to constitutional rights, the concept of human dignity should also inform considerations of procedural due process. The procedural due process principle of fundamental fairness is inextricably tied to dignity. As Professor Richard Saphire notes, several of the moral philosophers whose thinking became building blocks of the Constitution emphasized that the government's pursuit of fairness—indeed the government itself—exists to ensure that human beings' basic needs for dignity and autonomy are met.¹⁶⁷ As Professor Saphire explains, this involves both “substantive dignity”—ensuring that the outcomes of government action protect against severe deprivation and are such that the “facts upon which the action is based [are] determined by accurate and reliable means” —and “inherent dignity”—ensuring that the government treats individuals with respect during the decision-making process itself.¹⁶⁸ Given this connection between fairness and human dignity, overlaying considerations of dignity onto the *Mathews* step-by-step procedural due process analysis, as Professor Jerry Mashaw puts it, “reconcile[s] procedural due process analysis with the spirit of the Constitution.”¹⁶⁹

Turning to the present case, then, values considerations of both substantive and inherent dignity point toward a right to appointed counsel for children in removal proceedings. With respect to substantive dignity, the results of removal cases in which immigrants do not have representation should raise grave concerns. Nearly 90% of individuals who face removal proceedings without representation are deported (compared to 46% of those with representation);¹⁷⁰ the government is regularly taking from children access to life-sustaining resources by sending them back to areas where they often face near-certain harm or death. And these decisions are frequently made based on the shakiest and least reliable information—statements articulated by a child or her parent with significant language deficiencies, without legal training, and often with trauma as an impediment. In *C.J.L.G.*, the immigration judge's reliance on a largely illegible asylum application is a vivid example of a substantive dignity violation: the judge made a decision that will likely lead to absolute deprivation based on shockingly limited, suspect information.

Inherent dignity, too, is violated by forcing children to stand in immigration court, with practically no support, to argue on behalf of their own liberty. It is not only ineffective procedure, but it also fails to treat these children in a manner that adequately recognizes their humanity. Consider the glaring absence of inherent dignity in these descriptions of two children before immigration judges in Texas and Arizona, respectively:

¹⁶⁷ See Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 117–19 (1978).

¹⁶⁸ *Id.* at 119–21.

¹⁶⁹ Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 898 (1981).

¹⁷⁰ See *Syracuse University Data Study – Asylum Denial Rates*, *supra* note 9, at 1.

A young girl sits in the front row of the public seating area in Courtroom No. 4. She might be on a class trip. Her hair is neatly drawn back in two pigtails tied with purple bows that perfectly match her purple shirt. Her feet only reach three-quarters of the way to the floor. She swings her legs as the judge calls out a series of case numbers. Suddenly, the girl is standing. Apparently she is not on a class trip. She tells the judge her name: Alejandra. . . . Although she was led into the courtroom with nine other juveniles, she is effectively standing before the judge alone—without the benefit of a lawyer, a parent, or even a friend. Alejandra is seven years old.¹⁷¹

After a long, scary trek through three countries to escape the gang violence in El Salvador, a 15-year-old boy found himself scared again a few months back, this time in a federal immigration court here. There was an immigration judge in front of him and a federal prosecutor to his right. But there was no one helping him understand the charges against him. “I was afraid I was going to make a mistake,” the boy said in Spanish from his uncle’s living room, in a modest cinder-block house on the south side of this city. “When the judge asked me questions, I just shook my head yes and no. I didn’t want to say the wrong thing.”¹⁷²

This type of process puts a child, whom the Supreme Court says should assuredly not be treated “simply as [a] miniature adult[],”¹⁷³ in the most vulnerable of positions. She must stand up for her own life in an intimidating courtroom, against a government attorney, and without any real understanding of the process—of what she needs to say to succeed, or even, due to language and cognitive barriers, what is going on at all.

Justice Frankfurter once wrote that procedural rules “generate[e] the feeling, so important to a popular government, that justice has been done,”¹⁷⁴ and Justice Stevens once wrote that inmates retain “at the very minimum the right to be treated with dignity—which the Constitution may never ignore.”¹⁷⁵ In the case of children facing deportation, the image of seven-year-

¹⁷¹ Warren Richey, *Alejandra, Age 7, is Facing a Judge Alone. Is That Due Process?*, CHRISTIAN SCIENCE MONITOR, Nov. 1, 2016, <https://www.csmonitor.com/USA/Politics/2016/1101/Alejandra-age-7-is-facing-a-judge-alone.-Is-that-due-process>, archived at <https://perma.cc/NGS9-4DCS>.

¹⁷² Fernando Santos, *It’s Children Against Federal Lawyers in Immigration Court*, N.Y. TIMES, Aug. 20, 2016, <https://www.nytimes.com/2016/08/21/us/in-immigration-court-children-must-serve-as-their-own-lawyers.html>, archived at <https://perma.cc/39J5-VH3V>.

¹⁷³ J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011) (“[O]ur history is replete with laws and judicial recognition’ that children cannot be viewed simply as miniature adults.”) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982)).

¹⁷⁴ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

¹⁷⁵ *Meachum v. Fano*, 427 U.S. 215, 233 (1976) (Stevens, J., dissenting).

olds standing alone in immigration court surely does not evoke the sense that “justice has been done,” and we cannot afford to allow the Constitution to ignore the need for dignity in these children’s lives.

B. *The Constitutional Test for Procedural Due Process*

The test to determine whether a procedure is deficient under the Fifth Amendment, set out by the Supreme Court in *Mathews v. Eldridge*, also points to a right to appointed counsel. The *Mathews* test is composed of three parts: “(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 probable value, if any, of additional procedural safeguards; and (3) the Government’s interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.”¹⁷⁶ If the *Mathews* analysis leans toward the claim for a constitutional right to appointed counsel for immigrant children facing deportation, then there is functionally an additional fourth step: determining whether the analysis overcomes the presumption, established in *Lassiter Department of Social Services* and recently clarified in *Turner v. Rodgers*,¹⁷⁷ against a right to appointed counsel in civil proceedings.

This Note’s *Mathews* analysis aims to draw on previous literature conducting the analysis in relation to the right to appointed counsel in removal proceedings, some of which incorporate the principles of the relatively recent *Turner* decision.¹⁷⁸ It will specifically focus on rebutting the arguments put forth by the Ninth Circuit in *C.J.L.G.* In doing so, it will use C.J.’s story as an instructive example and engage the often-ignored voices of immigration judges.

1. *Part One: The Private Interest at Stake*

Regarding the first factor of the three-part *Mathews* test—“the private interest at stake”¹⁷⁹—the Ninth Circuit was correct: it favors court-appointed

¹⁷⁶ 424 U.S. 319, 335 (1976).

¹⁷⁷ 564 U.S. 431 (2011).

¹⁷⁸ See, e.g., Fatemi, *supra* note 42, at 926–38 (applying the *Turner* factors to individuals facing removal generally), 938–52 (applying the *Mathews* test and *Turner* factors to mentally incompetent individuals facing removal), 957–63 (applying the *Turner* factors to detained women and children); Frankel, *supra* note 75, at 103–05 (describing the *Perez-Funez* court’s application of the *Mathews* analysis to children facing removal); Benjamin Good, *A Child’s Right to Counsel in Removal Proceedings*, 10 STAN. J. C.R. & C.L. 109, 128–47 (2014) (applying the *Mathews* test and *Turner* factors to children facing removal); Hill, *supra* note 66, at 56–69 (applying the *Turner* factors to unaccompanied children facing removal); Soulmaz Taghavi, *Montes-Lopez v. Holder: Applying Eldridge to Ensure a Per Se Right to Counsel for Indigent Immigrants in Removal Proceedings*, 39 THURGOOD MARSHALL L. REV. 245, 260–68 (2014) (applying the *Mathews* test to indigent individuals facing removal).

¹⁷⁹ *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1136 (9th Cir. 2018), *reh’g en banc granted*, 904 F.3d 642 (citing *Oshodi v. Holder*, 729 F.3d 883, 894 (2013) and quoting *Mathews*, 424 U.S. at 335).

counsel for immigrant children in removal proceedings. Apart from the interest in freedom from incarceration, it is difficult to conceive of a private interest more substantial than a child's hope of staying in America as a safe haven from the threat of persecution back at home. The panel in *C.J.L.G.* acknowledged this, appropriately recognizing that its decision could be, as it is for so many asylum-seekers, a matter of life or death: "[I]n the case of an asylum and withholding of removal applicant, the private interest could hardly be greater. If the court errs, the consequences for the applicant could be severe persecution, torture, or even death."¹⁸⁰ The panel correctly noted that the Supreme Court, in the context of the *Mathews* test, has recognized the seriousness of the interest at stake in removal proceedings, having found it a "weighty"¹⁸¹ one because an individual "stands to lose the right to stay and live and work in this land of freedom."¹⁸²

But this factor favors C.J. and other similarly situated children even more than the court acknowledged. The panel should have rejected outright the government's argument that C.J.'s liberty interest was limited because he had been in the country only four days before being apprehended. The time of actual removal—from C.J.'s crossing to his case's disposition—would have been nearly a year and a half after arrival. If longer stays do correlate with greater liberty interests, then, C.J.'s interest was wrongly evaluated. And more fundamentally, the logic of the government's argument is unsound. Giving more deference to longer time periods from arrival to apprehension suggests that a liberty interest grows with every day of being in America unlawfully. It rewards the evasion of immigration authorities, and it punishes those who submit themselves to authorities to begin the asylum process or who are apprehended earlier.

2. *Part Two: The Risk of Erroneous Deprivation and Probable Value of Safeguards*

The Ninth Circuit's pivotal oversight came in its failure to consider the realities of today's immigration law when analyzing the second *Mathews* factor. The factor—"the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional safeguards"—is naturally divisible into two components: first, "the risk of an erroneous deprivation" and, second, the "probable value, if any, of additional safeguards."¹⁸³

¹⁸⁰ *Id.* at 1137 (quoting *Oshodi*, 729 F.3d at 894).

¹⁸¹ *Landon v. Plascencia*, 459 U.S. 21, 34 (1982).

¹⁸² *C.J.L.G.*, 880 F.3d at 1136 (citing *Landon*, 459 U.S. at 34); *see also* Good, *supra* note 178, at 133–35 (noting that the government also has an interest in "family integrity," which points to providing appointed counsel).

¹⁸³ *C.J.L.G.*, 880 F.3d at 1136 (citing *Oshodi*, 729 F.3d at 894 and quoting *Mathews*, 424 U.S. at 335).

a. *Risk of Erroneous Deprivation*

Is there a significant risk of “erroneous deprivation”? The statistics strongly suggest there is. They point to the conclusion that thousands of children in detention today, who might receive relief if their cases were fully presented, will instead be deported solely because they cannot afford legal representation. Consider the thorough study of immigration cases from 2005 to 2014 accepted by the court in *C.J.L.G.*¹⁸⁴ It shows that nearly half—48%—of unaccompanied children appearing in removal proceedings do not have an attorney.¹⁸⁵ This means that, as is argued in this subsection, if there is an unacceptably high risk of erroneous deprivation when a child proceeds without representation, that harm has affected the lives of tens of thousands of children in the last few years alone.¹⁸⁶

Determining the magnitude of the risk of erroneous deprivation in *C.J.*’s case requires a consideration of the frequency of wrongful deportations, or deportations despite valid claims for relief, that occur due to a lack of representation. A recent study of unaccompanied children in immigration custody found that 63% have claims that are likely to meet the bar for relief;¹⁸⁷ yet, according to the aforementioned study cited by the court,¹⁸⁸ only 10% of unaccompanied children without representation are granted relief, compared to 47% of unaccompanied children with representation.¹⁸⁹ Even assuming

¹⁸⁴ *Id.* at 1138. This study conducted a case-by-case analysis of immigration court records related to unaccompanied children facing removal orders from 2005 to 2014. *New Data on Unaccompanied Children in Immigration Court*, SYRACUSE UNIV. TRAC IMMIGRATION (July 15, 2014), <http://trac.syr.edu/immigration/reports/359/>, archived at <https://perma.cc/6ZFR-LP75> [hereinafter “*Syracuse University Data Study – Unaccompanied Children*”].

¹⁸⁵ *Syracuse University Data Study – Unaccompanied Children*, *supra* note 184; see also *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1041 (9th Cir. 2016) (McKeown, J., specially concurring) (“Yet these programs [initiated to increase representation of immigrant children], while laudable, are a drop in the bucket in relation to the magnitude of the problem—tens of thousands of children will remain unrepresented.”).

¹⁸⁶ *Syracuse University Data Study – Unaccompanied Children*, *supra* note 184. Good cites two other studies that tell the same story: “A 2011 study of adjudication in New York immigration courts showed that success rates for non-detained respondents in removal proceedings increase from 13% to 74% when respondents are represented by counsel. For detained respondents, success rates increase from 3% to 18%. Another study investigating outcomes in asylum cases found the asylum grant rate to be roughly three times higher for asylum seekers with legal counsel.” Good, *supra* note 178, at 147.

¹⁸⁷ Letter from Jonathan D. Ryan, Exec. Dir., Refugee Immigrant Ctr. for Educ. & Legal Servs., to President Barack Obama (July 18, 2014), <http://immigrationimpact.com/wp-content/uploads/2014/07/Letter-to-President-Obama-from-RAICES.pdf>, archived at <https://perma.cc/4HXZ-GXQY>. The organization conducting this study, the Refugee and Immigrant Center for Education and Legal Services (RAICES), arrived at this percentage by peer-reviewing intakes of 925 unaccompanied children in immigration custody in San Antonio. *Id.* Importantly, it notes that its evaluations are likely to be accurate given that, in its twenty years of experience, “the cases that [RAICES]’ staff screens and determines to be eligible for relief ultimately have a success rate of 98 percent in proceedings before immigration judges. Thus RAICES’ preliminary legal determinations are supported by hundreds of favorable adjudications” *Id.*

¹⁸⁸ *C.J.L.G.*, 880 F.3d at 1138.

¹⁸⁹ *Id.*

some error or some difference in proportion of valid claims between unaccompanied children and children who arrive with family (though there is no information to indicate this), two comparisons using this data suggest that immigration courts are rejecting a significant number of valid claims because of a lack of representation. The first comparison below shows that erroneous deprivation is very frequent, and the second indicates, albeit without the requisite data analysis to isolate the variable, that the major cause of this deprivation is a lack of counsel.

First, the difference between the percentage of valid claims and the percentage of unrepresented unaccompanied children ultimately succeeding (63% to 10%) demonstrates that there is significant erroneous deprivation among unrepresented children in the immigration court system. This comparison suggests that over half of unrepresented unaccompanied children have claims that would be successful if they were sufficiently developed, but that only one in ten receives the benefit of sufficient development; in a group of ten unrepresented unaccompanied children, six deserve relief, but only one gets it. This means about half of unrepresented unaccompanied children are erroneously deprived of the relief they deserve—a far-from-acceptable error rate, particularly given the grave consequences of deportation.

The second comparison—the fact that 47% of represented unaccompanied children are granted relief compared to 10% of unrepresented unaccompanied children—helps to isolate the legal representation variable: the presence of a lawyer is the difference-maker. This stark difference in success rates (47% to 10%) suggests that legal representation adds significant value in articulating legal claims and has a major impact on the ultimate result of removal proceedings. Even assuming that immigration attorneys on the margins select cases with a higher likelihood of success, the conclusion appears inescapable, given the size of this disparity, that the decisive factor in a significant portion of cases is the presence or absence of legal representation. The two statistical comparisons together, then, indicate that any given unrepresented immigrant child with valid claims is likely to face erroneous deprivation of liberty, and that this deprivation will likely be in large part due to her lack of representation. As Syracuse's TRAC Immigration analysis concludes, "the single most important factor in determining outcomes is whether or not these individuals are represented in their court proceedings."¹⁹⁰

Moreover, this data about the high likelihood of erroneous deprivation due to a lack of counsel confirms what is known anecdotally, including from immigration judges, about the obstacles children like C.J. face in presenting their cases. A group of eleven former immigration judges, with nearly 200

¹⁹⁰ *Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court "Women with Children" Cases*, SYRACUSE UNIV. TRAC IMMIGRATION (July 15, 2015), <http://trac.syr.edu/immigration/reports/396/>, archived at <https://perma.cc/96WT-6XZR> [hereinafter "*Syracuse University Data Study – Women with Children Cases*"].

years of collective experience presiding over immigration cases, authored an amicus brief in support of C.J.'s petition for a rehearing or rehearing en banc.¹⁹¹ In it, they note their view that "only counsel can provide the time, commitment, and expertise to develop a child's case such that a full and fair hearing consistently takes place."¹⁹² Having heard removal cases "every day from the bench," they contend that, "all else being equal, professional representation is the single largest factor in whether a minor successfully navigates the immigration court process."¹⁹³

The panel in *C.J.L.G.* seemed willing to accept that the presence of an attorney offers a greater likelihood of success, but still held that "alien minors can be afforded a full and fair hearing absent court-appointed counsel," and that C.J. was afforded such a hearing in his case.¹⁹⁴ Its analysis ignored the high frequency of erroneous deprivation—as the first comparison shows—and the fact that this deprivation is caused in significant part by a lack of representation—as the second comparison shows. As the next subsection illustrates, this sizeable erroneous deprivation due to lack of counsel is not difficult to understand; it is borne from predictable shortfalls at each step of the existing process, in which immigration judges cannot be expected to perform the basic functions of legal counsel—functions necessary for success in all but exceptional cases.

b. Probable Value of Safeguards

The question posed by the second *Mathews* factor is: how much value would additional safeguards provide? The panel held that the statutory duty of the immigration judge to investigate and develop C.J.'s claims was a sufficient safeguard to ensure a fair hearing,¹⁹⁵ without considering the immense added value provided by dedicated counsel. "[T]he onus was almost entirely on the [immigration judge] to develop the record" because Maria "was ill-equipped to understand the proceedings or to comprehend C.J.'s burden in establishing eligibility for relief, and the government asked no

¹⁹¹ See Brief for Former Federal Immigration Judges as Amici Curiae Supporting Petitioners, *C.J.L.G. v. Sessions*, 880 F.3d 1122 (9th Cir. 2018) (No. 16-73801).

¹⁹² *Id.* at 12.

¹⁹³ *Id.*

¹⁹⁴ *C.J.L.G.*, 880 F.3d at 1138.

¹⁹⁵ See note 130 and accompanying text; see also *C.J.L.G.*, 880 F.3d at 1143 n.12. Hill discusses other special accommodations provided by "congressional acts, EOIR standards, and DHS regulations." Hill, *supra* note 66, at 63–65. She notes that EOIR guidelines involving unaccompanied children are intended to "foster a child-friendly environment" and that regulations "encourage immigration judges to employ 'child sensitive procedures' in order to take account of factors like a child's 'age, development, experience and self-determination.' Judges are instructed on developing practical skills, such as how to form simple, active voice questions; evaluate a child's credibility; develop the necessary rapport between the child and courtroom personnel; and otherwise accommodate a child's physical and mental capacities." *Id.* at 63. She also recognized that "[i]n numerous jurisdictions, special dockets have been created to segregate detained and non-detained juvenile cases from those of adults." *Id.* at 64.

questions.”¹⁹⁶ While the court admitted that C.J.’s proceedings were not a “paragon of procedural decorum,”¹⁹⁷ it concluded that the judge had adequately fulfilled her duty.

The court’s *Mathews* analysis and rejection of the constitutional right to appointed counsel hinges significantly on this point,¹⁹⁸ but previous literature on the subject has rarely considered the enhanced roles of immigration judges in juvenile proceedings and whether they actually fill the procedural due process gaps left by the lack of attorneys.¹⁹⁹ Certainly the judge’s slightly increased responsibility in inquiring about and developing children’s cases is better than no support for children whatsoever; however, these resource-constrained judges still spend minimal time on each case. As Judge McKeown of the Ninth Circuit has recognized, “Immigration judges are constrained by extremely limited time and resources. Indeed, those judges may sometimes hear as many as 50 to 70 petitions in a three-to-four hour period, leaving scant time to delve deeply into the particular circumstances of a child’s case.”²⁰⁰

There is perhaps no better source to turn to in determining whether immigration judges’ enhanced roles in proceedings involving children are, in practice, providing children with a “meaningful” voice than immigration judges themselves. However, the literature on this subject has largely excluded their perspectives. The aforementioned former immigration judges who authored the amicus brief noted that a judge’s slightly more involved role stands in stark contrast to the robust support a legal advocate provides. They point out that, due to resource constraints as well as ethical guidelines and DOJ policy, the immigration judge does not “replicat[e] even a fraction of counsel’s efforts”²⁰¹; for instance, the judge does not meet with the child outside of court and is not required to investigate all forms of relief.²⁰²

One-on-one conversations with some of these immigration judges tell the same story—the boosted role of judges when children are facing removal is not enough to give the child a “meaningful” opportunity to be heard. One former immigration judge, who presided over his immigration court’s “juvenile docket,” discussed the procedural protections in an interview with the author, before dismissing them as sorely insufficient.²⁰³ The judge explained that “getting kids who are traumatized and threatened to tell their stories is a difficult process . . . and they definitely can’t do it themselves; they need

¹⁹⁶ *C.J.L.G.*, 880 F.3d at 1139.

¹⁹⁷ *Id.* at 1143.

¹⁹⁸ See text accompanying note 130.

¹⁹⁹ See Hill, *supra* note 66, at 63–65 (discussing several “special accommodations” afforded to children, but without noting the enhanced role of judges or its efficacy).

²⁰⁰ *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1041 (9th Cir. 2016) (McKeown, J., specially concurring) (internal quotations and citations omitted).

²⁰¹ Brief for Former Federal Immigration Judges as Amici Curiae Supporting Petitioners, *C.J.L.G.*, 880 F.3d 1122 (No. 16-73801), at 16.

²⁰² *Id.* at 13–17.

²⁰³ Interview with John F. Gossart, Jr., Former U.S. Immigration Judge (June 21, 2018).

representation.”²⁰⁴ He concluded that immigration judges “can be helpful, but we’re not the advocate.”²⁰⁵ Both he and another interviewed former immigration judge unequivocally condemned²⁰⁶ the now-infamous statement made in a deposition by former immigration judge Jack Weil, who stated that he has “taught immigration law literally to 3-year-olds and 4-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.”²⁰⁷

C.J.’s case illustrates at least three fundamental ways the immigration judge falls short of the basic role of counsel: failing to fully understand the child’s story, failing to identify all possible legal claims, and failing to develop the legal basis for those claims. While the panel lauds the fact that the immigration judge “asked C.J. questions to determine potential avenues for relief” and “gave Maria an opportunity to give a narrative statement in support of C.J.,” these procedural “safeguards” did not even approach the basic contributions of legal counsel. As such, C.J.’s case shows just how inadequate the primary protection against erroneous deprivation—the immigration judge’s heightened role in children’s cases—turns out to be in reality, and just how much value appointed counsel would add.

First, in C.J.’s proceedings, one crucial procedural shortfall occurred when the immigration judge evaluated the asylum claim based on his “threadbare,” largely illegible application.²⁰⁸ Given the judge’s acceptance of and reliance on the application, even C.J.’s *basic story* was not relayed to the court. Second, without clarity regarding the facts themselves, the immigration judge did not inform C.J. of all of the potential avenues to relief available to him; as the panel acknowledged, the judge could not reasonably be relied on to inform C.J. that he might be eligible for Special Immigrant Juvenile (SIJ) status.²⁰⁹ Both presenting a client’s basic story and knowing the available forms of relief—basic elements essential to success in a defense against deportation—were missing in this case and would have been provided by even minimally competent legal representation.

Next, without a solid factual understanding of the case and with a heavy docket bearing down on her, the immigration judge did not appear to even attempt to sufficiently flesh out the legal elements required for asylum relief. Ultimately, C.J.’s claim failed because he did not adequately address four factors required for asylum relief. Given Maria’s and C.J.’s limited English proficiency, the immigration judge was the only one capable of developing these elements. But, given the resource constraints noted above, the judge

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*; Interview with Jeffrey S. Chase, Former U.S. Immigration Judge (June 4, 2018).

²⁰⁷ Deposition of Honorable Jack H. Weil, *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016) (No. 2:14-cv-01026-TSZ), at 69–70.

²⁰⁸ *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1134 (9th Cir. 2018), *reh’g en banc granted*, 904 F.3d 642 (9th Cir. 2018).

²⁰⁹ *Id.* at 1150.

did not, and could not realistically be expected to, spend the time required to develop them at even a superficial level—to inquire into the harm C.J. suffered in order to make a case for it meeting the bar for “persecution”; to search for the “credible, direct and specific evidence” needed to show a reasonable fear of persecution upon return; to explore whether C.J. met the standard for any protected class; or to research whether the government in Honduras could control the gang in C.J.’s home region. As a result, a facially valid asylum claim was never developed in C.J.’s case, virtually ensuring his failure. These functions are required to state a legal claim for asylum, they are functions central to the role of counsel, and they are functions that, as C.J.’s case illustrates, immigration judges cannot be expected to, and do not, regularly perform.

Finally, it is worth noting that the support for ruling in C.J.’s favor on each of the two subparts of *Mathews* factor two—the high risk of erroneous deprivation and significant value added by counsel—reinforce one another. The shortfalls of the immigration judge in understanding and developing children’s cases explain why the statistics show a severely disproportionate likelihood of failure for unrepresented children. At each step, from understanding the child’s story, to identifying the possibly applicable legal claims, to developing the legal case for those claims, there is a high likelihood that an immigration judge will do far less than what is required for the claims to be successful. And the same data that demonstrates the unacceptably high risk of erroneous deprivation—the comparisons of the percentage of valid claims to successful claims, and the percentage of successful claims with counsel compared to those without—is evidence of the added value of counsel. It shows that, in the context of children facing removal, counsel is very frequently the difference-maker ensuring that immigrant children who qualify for relief are granted that relief rather than wrongly deported to danger.

3. *Part Three: The Government Interest*

With respect to the third factor—the “government interest”²¹⁰—the Ninth Circuit again oversimplified its analysis. The panel rightfully tethered this factor to the second one, thereby highlighting the government’s crucial interest in “fair and just administration of our Nation’s immigration laws.”²¹¹ Because of this interest, it noted that, “had the second *Mathews* factor favored C.J., then the third would likely do so, as well.”²¹² The panel quoted the Court in recognizing that, no matter the cost, “there will remain certain cases in which fundamental fairness—the touchstone of due process—will require” a right to appointed counsel.²¹³ Ultimately, then, the above analysis

²¹⁰ *Id.* at 1136 (citing *Oshidi v. Holder*, 729 F.3d 883, 894 (2013) and quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

²¹¹ *Id.* at 1145.

²¹² *Id.*

²¹³ *Id.* (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973))

of *Mathews* factor two, as well as the prior considerations of fundamental due process principles, should have compelled the court to rule in favor of C.J. here as well.

Even if it were evaluating the third factor separately from the second, the court's analysis insufficiently analyzed costs to the government. It emphasized, with concern, the extra financial burden appointed lawyers would place on "an already overextended" immigration system.²¹⁴ But the court ignored the fact that there is a backlog of cases partly because immigration judges are the ones investigating, developing cases, and explaining proceedings to clients—all lawyer-specific tasks that judges do not have the time or resources to do.²¹⁵ If C.J. had been represented, for example, it is unlikely that there would have been three hearings over the course of more than a year before the substance of the case was addressed. So, even considering costs in isolation, it is quite plausible that the immigration system would work more efficiently and at lower cost with consistent representation. And, as pointed out by Professor Fatemi, "children who are represented have a much higher appearance rate in immigration court, 92.5%, versus 27.5% for unrepresented children."²¹⁶ This means appointed counsel might lead to quicker decisions, less burdened dockets, and less time housing immigrants in detention, which costs American taxpayers about \$2 billion every year.²¹⁷ Last but not least, Benjamin Good also appropriately notes that the government has an interest not only in justice being achieved, but also specifically in "the welfare of the child."²¹⁸

²¹⁴ *Id.* at 1144. The financial cost may not be as high as one might imagine. In contextualizing what this hypothetical decision's impact for all individuals (not just children) would look like compared to *Gideon*, Good notes: "providing counsel for all respondents who currently proceed pro se in immigration court would create a case load of about 3.1% of *Gideon*'s yearly burden on state public defender offices." Good, *supra* note 178, at 140.

²¹⁵ See, e.g., *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1041 (9th Cir. 2016) (McKeown, J., specially concurring) ("[T]here is only so much even the most dedicated and judicious immigration judges (and, on appeal, members of the Board of Immigration Appeals) can do. Immigration judges are constrained by extremely limited time and resources.") (internal citations and quotations omitted).

²¹⁶ Fatemi, *supra* note 42, at 949 (quoting AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION, A HUMANITARIAN CALL TO ACTION: UNACCOMPANIED CHILDREN IN REMOVAL PROCEEDINGS CONTINUE TO PRESENT A CRITICAL NEED FOR LEGAL REPRESENTATION 1 (2016), <https://www.americanbar.org/content/dam/aba/administrative/immigration/uacstatement.auth.checkdam.pdf>, archived at <https://perma.cc/G5CH-XV7N>).

²¹⁷ *Immigration Detention: How Can the Government Cut Costs?*, HUMAN RIGHTS FIRST (2013), <https://www.humanrightsfirst.org/uploads/pdfs/immigration-detention-fact-sheet-jan-2013.pdf>, archived at <https://perma.cc/C5M3-9D39>; see also Fatemi, *supra* note 42, at 947 ("The most significant fiscal savings that would accrue under a regime of appointed counsel result from the reduction in detention costs."); Hill, *supra* note 66, at 67 ("[T]he assistance of counsel will create more orderly hearings, thereby enhancing courtroom efficiency. As Justice Blackmun argued in his *Lassiter* dissent, counsel will reduce the 'difficulty and exasperation' evident . . . where litigants appear pro se.") (citing *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 56 (1981) (Blackmun, J., dissenting)).

²¹⁸ Good, *supra* note 178, at 141.

4. *The “Lassiter Presumption” Against a Right to Appointed Counsel and the Turner Factors*

Had the court deemed that the *Mathews* test weighed in favor of C.J., the next step would have been to determine whether to apply the *Lassiter* presumption against a right-to-appointed-counsel determination in civil cases. Under *Lassiter*, civil litigants not facing the possibility of a loss of physical liberty as a result of the proceedings “are presumed *not* to require appointed counsel.”²¹⁹ The court should have found that the *Lassiter* presumption did not apply given the liberty interests at stake for children facing removal. And even if it decided that the presumption did apply, it should have determined the *Mathews* factors, in combination with the *Turner* factors recently established by the Supreme Court, rebutted the presumption.

The physical liberty of immigrant children is at risk in removal proceedings, so the *Lassiter* presumption should not apply. Former Attorney General Eric Holder argued that immigrant children in removal proceedings are not at risk of losing physical liberty because “the purpose of a deportation proceeding is not to determine whether a child should be incarcerated but to decide where the child is *entitled to live freely*.”²²⁰ Nonetheless, the Ninth Circuit in *C.J.L.G.* noted that this is a “close[] question,” and that “[a]rguably, sending C.J. back to a hostile environment where he has faced death threats in the past implicates his freedom.”²²¹ The court’s instinct was correct. A long history of Supreme Court jurisprudence points away from the Attorney General’s overly formalist construction and emphasizes that deportation is a deprivation of liberty comparable to, if not more severe than, incarceration. As the Court itself recently recognized, “Our law has enmeshed criminal convictions and the penalty for deportation for nearly a century.”²²² As far back as 1922, the Court stressed that deportation may deprive one “of both property and life, or of all that makes life worth living.”²²³ In 1945, it again acknowledged the “technical[]” distinction between removal proceedings and criminal proceedings, but noted the liberty interest was a grave one:

Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted.

²¹⁹ Lewis Tandy, Note, *Reevaluating the Path to a Constitutional Right to Appointed Counsel for Unaccompanied Alien Children*, 96 TEX. L. REV. 653, 653 (2018); *Lassiter*, 452 U.S. at 25–27.

²²⁰ *In re Compean*, 24 I. & N. Dec. 710, 718 n.3 (Att’y Gen. 2009), *vacated on other grounds*, 25 I. & N. Dec. 1 (Att’y Gen. 2009) (emphasis added).

²²¹ *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1136 (9th Cir. 2018), *reh’g en banc granted*, 904 F.3d 642 (9th Cir. 2018).

²²² *Padilla v. Kentucky*, 559 U.S. 356, 365–66 (2010).

²²³ *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.²²⁴

Meanwhile, the Court in *Wong Yang Sung v. McGrath*²²⁵ noted that “[a] deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself.”²²⁶ And the Court in 2001 stated that “[p]reserving the client’s right to remain in the United States may be more important . . . than any potential jail sentence.”²²⁷

Moreover, commentators have contended creatively and forcefully that the presumption should not apply because of the similarities between immigrant detention and incarceration. Specifically, some immigrants do face prolonged detention if they lose in their proceedings, some immigrants in detention may be wrongfully deprived of release, and the conditions of immigrant detention are “virtually identical” to incarceration.²²⁸ Additionally, as Linda Kelly Hill notes, even immigrants under final orders of removal “who cannot be physically removed or safely released in the United States may be subjected to prolonged detention.”²²⁹

Still, even assuming that the presumption does apply, the Supreme Court’s analysis in *Turner v. Rogers*²³⁰ emphasizes that this negative presumption is by no means determinative. Rather, it must be considered in light of both the three *Mathews* factors, which themselves can rebut the *Lassiter* presumption, and other surrounding factors—all of which favor immigrant children’s right to court-appointed counsel. Specifically, in asking whether the presumption is overcome, the Court considered three “*Turner* factors”: “(1) the complexity of the contested issue; (2) whether the opposing party is the government; and (3) the availability of substitute procedural safeguards.”²³¹

²²⁴ *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

²²⁵ 339 U.S. 33 (1950).

²²⁶ *Id.* at 50.

²²⁷ *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (internal citation omitted); see also *Jordan v. De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) (stating that removal proceedings “practically . . . are [criminal] for they extend the criminal process of sentencing to include on the same convictions an additional punishment”); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (“[D]eportation is a drastic measure and at times the equivalent of banishment or exile.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) (“Every one [sic] knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that oftentimes most severe and cruel.”).

²²⁸ Good, *supra* note 178, at 129–32; see also Beth J. Werlin, *Renewing the Call: Immigrants’ Right to Appointed Counsel in Deportation Hearings*, 20 B.C. THIRD WORLD L.J. 393, 405 (2000) (“Some immigrants find that deportation is not only analogous to criminal punishment, but that in fact, it will result in physical harm to them.”).

²²⁹ Hill, *supra* note 66, at 57.

²³⁰ 564 U.S. 431 (2011).

²³¹ Tandy, *supra* note 219, at 663–64 (citing *Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18, 31 (1981)).

Each of the *Turner* factors indicate that appointed counsel for children facing removal proceedings should defeat the *Lassiter* presumption. First, the complexity of the proceedings children like C.J. face is just about second to none. As Professor Fatemi notes, this is the result of the “piecemeal manner in which the INA has been amended,” including three significant revisions in the decade between 1986 and 1996, resulting in “the gradual accumulation of increasing layers of complexity.”²³² The Second Circuit has called the INA “a baffling skein of provisions,”²³³ the Ninth Circuit has noted that “plain words do not always mean what they say,”²³⁴ and the Fifth Circuit has stated that “morsels of comprehension must be pried from molusks of jargon.”²³⁵ As one example beyond the notoriously complicated “particular social group” standard,²³⁶ the asylum requirement that victims of private persecution show that the government is “unable or unwilling” to protect the asylum-seeker is anything but clear. Different circuits have created different tests for the requirement, almost none of which are laid out plainly. While some circuits have a strong, generally applicable negative presumption when an individual does not ask for help from the government, others simply state that the individual must show that asking would have been futile and offer several avenues to demonstrate futility.²³⁷ And while some circuits state that the asylum-seeker must show that her home government acts with “complete helplessness” in responding to the type of persecution, others are far more flexible.²³⁸

Second, the opposing party is indeed the government. “The government is always represented in immigration proceedings,”²³⁹ in these cases by DHS attorneys acting as prosecutors.²⁴⁰ As Hill describes it, “the atmosphere in an immigrant court remains adversarial and formal. . . . The immigration judge appears in a black robe and is seated behind a large, elevated dais. The DHS trial attorney prosecuting the removal is seated before the immigration judge

²³² Fatemi, *supra* note 42, at 935.

²³³ *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977).

²³⁴ *Yuen Sang Low v. Att’y Gen. of U.S.*, 479 F.2d 820, 821 (9th Cir. 1973).

²³⁵ *Dong Sik Kwon v. INS*, 646 F.2d 909, 919 (5th Cir. 1981) (three quotes aggregated in Fatemi, *supra* note 42, at 935).

²³⁶ See *supra* text accompanying note 53.

²³⁷ Compare *Lleshanaku v. Ashcroft*, 100 F. App’x. 546, 549 (7th Cir. 2004) (stating that there is a “disinclination” to grant asylum based on private persecution “where the applicant did not even attempt to seek police protection”) with *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1066 (citations omitted) (9th Cir. 2017) (noting five avenues for establishing that a request for help would have been futile).

²³⁸ Compare *Guillen-Hernandez v. Holder*, 592 F.3d 883, 886–87 (8th Cir. 2010) (stating that a government must show “complete helplessness” to protect victims for it to be deemed “unable” to protect) with *Fiadjoe v. Att’y Gen. of U.S.*, 411 F.3d 135, 161 (3d Cir. 2005) (overturning BIA decision regarding unable or unwilling standard in part because “the record is replete with evidence that the police would have done nothing even if they had been informed of that aspect of the abuse”).

²³⁹ Fatemi, *supra* note 42, at 951.

²⁴⁰ See Ashley Ham Pong, *Humanitarian Protections and the Need for Appointed Counsel for Unaccompanied Immigrant Children Facing Deportation*, 21 WASH. & LEE J. C.R. & SOC. JUST. 68, 75 (2014).

at one table, and the unrepresented child is seated alone at another.”²⁴¹ This asymmetry in representation is glaring: DHS attorneys, trained not only in the law generally but also in this complicated field specifically, appear against individuals who have no legal training, no understanding of immigration law, perhaps no English fluency, and who have not even matured into adults.

Third, as discussed in detail in the analysis of the core *Mathews* test, the substitute procedural safeguards, specifically the heightened role of immigration judges, are minimal and have proven insufficient in practice.²⁴² Ultimately, then, the three *Turner* factors, in addition to the weight of the three *Mathews* factors in favor of children like C.J., are sufficient to overcome the *Lassiter* presumption, if it is deemed to apply here.

5. *Applying This Due Process Analysis to Unaccompanied Children*

Notably, this initial Ninth Circuit decision, by way of a narrow holding and the concurrence’s direct language, left open the door to a constitutional right to counsel for *unaccompanied* minors. So, even if the upcoming rehearing en banc yields the same conclusion as the initial panel, the arguments made in this Note should lead the Ninth Circuit, and other courts, to hold that unaccompanied children have a constitutional right to appointed counsel.

Unaccompanied children are worse off than children with family members when it comes to the first two factors of the *Mathews* test and, by extension, the third (given that the governmental interest in “fair and just administration” of immigration laws²⁴³ relies on the second factor²⁴⁴). Regarding the first *Mathews* factor, unaccompanied children have an arguably greater private liberty interest at stake because they are more likely to be harmed if they are deported alone. As to the second factor, the risk of erroneous deprivation and the added value of legal counsel are greater because unaccompanied children may have no one to support them during removal proceedings.²⁴⁵ Finally, the three *Turner* factors contribute additional support to overcome the *Lassiter* presumption for unaccompanied children in the same way that they do for accompanied children. Hill and others have articulated the arguments for a right to appointed counsel specifically for unac-

²⁴¹ Hill, *supra* note 66, at 64.

²⁴² See *supra* text accompanying notes 199–209.

²⁴³ C.J.L.G. v. Sessions, 880 F.3d 1122, 1145 (9th Cir. 2018), *reh’g en banc granted*, 904 F.3d 642 (9th Cir. 2018).

²⁴⁴ See *supra* text accompanying note 133.

²⁴⁵ One study estimates that 65% of unaccompanied children are released to “sponsors” who are meant to appear with the children at hearings. BENJAMIN J. ROTH & BREANNE L. GRACE, S.C. C. OF SOC. WORK, POST-RELEASE: LINKING UNACCOMPANIED IMMIGRANT CHILDREN TO FAMILY AND COMMUNITY, 3, 7 (2015).

companied children, discussing in greater detail the particular vulnerability of children without any adult accompanying them.²⁴⁶

Judge Owens' concurrence in *C.J.L.G.*—written with the express purpose of noting that the issue of unaccompanied minors “is a different question that could lead to a different answer”²⁴⁷—suggests that the right to appointed counsel for unaccompanied children could be the first right of this sort to be recognized in the Ninth Circuit, in the event that the rehearing en banc does not result in the recognition of the right for all children. In addition, the greater attention paid to unaccompanied minors and the stronger notion of vulnerability when considering a child who often has no adult in her life could make this class a more likely starting point. The American Bar Association (ABA), as one example, recently called the lack of counsel for unaccompanied minors “a nationwide due process crisis in our country’s immigration court system.”²⁴⁸ Should a court hold that unaccompanied minors have a right to appointed counsel, the reality that accompanied minors like C.J. are in effect just as incapable of meaningfully stating their claims will likely lead to the extension of that holding. As the former immigration judges note in their amicus brief, “the presence of a parent without qualified counsel does not necessarily enhance, and can significantly diminish, the fairness of a hearing.”²⁴⁹ As they point out, the testimony of a well-meaning parent, as in C.J.’s case, can cause immigration judges to “effectively end[] the critical inquiry” into an element of asylum, even though the parent is just as unaware of the required elements of asylum as the child is.²⁵⁰ This is in addition to potential conflicts of interest regarding parents’ own immigration cases,²⁵¹ cases of abusive parents, and other situations that could obscure or manipulate the child’s voice.

C. *Now is the Time to Act*

1. *The Need*

Today, the need to recognize a right to appointed counsel in removal proceedings for immigrant children, or immigrants more generally, has never been greater. The Trump Administration has significantly narrowed and hardened asylum law, causing concern among observers across the polit-

²⁴⁶ See generally Hill, *supra* note 66.

²⁴⁷ *C.J.L.G.*, 880 F.3d at 1151.

²⁴⁸ AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION, A HUMANITARIAN CALL TO ACTION: UNACCOMPANIED CHILDREN IN REMOVAL PROCEEDINGS CONTINUE TO PRESENT A CRITICAL NEED FOR LEGAL REPRESENTATION 1 (2016), <https://www.americanbar.org/content/dam/aba/administrative/immigration/uacstatement.authcheckdam.pdf>, archived at <https://perma.cc/3WVG-5KJU>.

²⁴⁹ Brief for Former Federal Immigration Judges as Amici Curiae Supporting Petitioners at 17, *C.J.L.G.*, 880 F.3d 1122 (No. 16-73801).

²⁵⁰ *Id.* at 18.

²⁵¹ See *id.*

ical spectrum. The Administration's policy of separating children from parents in detention²⁵² and the Attorney General's attempt to overturn protections for victims of domestic and gang-related violence are just two examples.²⁵³ And specifically related to counsel for those facing removal proceedings, the Administration has elected not to renew key funding for a primary source of legal representation for immigrant children.²⁵⁴ Meanwhile, Congress, as of the time of this writing, has continued to fail to protect the rights of asylum-seekers and to more generally improve the immigration system that controls their fate.²⁵⁵

In the face of existing and proposed policies that make seeking asylum through fair processes and procedures more difficult, the most fundamental protection that a court can provide is a right to appointed counsel. Only the guarantee of a lawyer can ensure a layer of protection between a child and the hurricane of changes surrounding her under the present Administration. Only an attorney can navigate the shifting legal standards and processes on behalf of the child, ensure she is provided a "meaningful" opportunity to be heard, and offer a legitimate chance for her claim to be evaluated fairly. As the Supreme Court has put it, "the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of [a] person in his dealings with the police and the courts."²⁵⁶

2. *The Opportunity*

In addition to the need, the opportunity to act may also be at its height today. Federal courts have increasingly stood up to protect vulnerable immigrants against harsh policies under the Trump Administration.²⁵⁷ However,

²⁵² Kopan, *supra* note 46.

²⁵³ *In re A-B*, 27 I&N Dec. 316 (Att'y. Gen. 2018).

²⁵⁴ See Nicole Einbinder, *How the Trump Administration is Rewriting the Rules for Unaccompanied Minors*, PBS (Feb. 13, 2018), <https://www.pbs.org/wgbh/frontline/article/how-the-trump-administration-is-rewriting-the-rules-for-unaccompanied-minors/>, archived at <https://perma.cc/S9WE-5E5X> ("[T]he Department of Justice decided not to renew approximately \$4.5 million in funding for Justice AmeriCorps, a program created three years ago that helped provide legal services to nearly 7,000 unaccompanied minors."); see also *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1041 (9th Cir. 2016) (McKeown, J., specially concurring) (recognizing that, though insufficient, funding the Justice AmeriCorps program was a step in the right direction "to address the difficulties confronting unaccompanied and unrepresented minors").

²⁵⁵ See Paul Kane, *'Get So Close—and Nothing Happens': Congress's Record on Immigration is Repeated Failures*, WASH. POST (June 23, 2018), https://www.washingtonpost.com/powerpost/get-so-close—and-nothing-happens-congress-record-on-immigration-is-repeated-failures/2018/06/23/702660c0-7624-11e8-b4b7-308400242c2e_story.html?utm_term=.38bcd1b0ddc, archived at <https://perma.cc/B4GV-N2TB>.

²⁵⁶ *Fare v. Michael C.*, 442 U.S. 707, 719 (1979).

²⁵⁷ For example, in the face of the several iterations of the travel ban, federal courts have issued and upheld nationwide injunctions to protect immigrants. See, e.g., *Washington v. Trump*, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017); *Hawaii v. Trump*, 245 F.Supp.3d 1227 (D. Haw. 2017), *aff'd in part, vacated in part, remanded by* 859 F.3d 741 (9th Cir. 2017); *International Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017), *aff'd in part, vacated in part by* 857 F.3d 554 (4th Cir. 2017). In Massachusetts and Michigan, district courts have issued nationwide injunctions to protect Indonesian Christians and Iraqis, respec-

their actions have largely been reactive; the courts now have an opportunity to proactively protect the rights of immigrants. The affirmative recognition of a right to appointed counsel would create a more permanent, systematic safeguard against administrative overreach that could help ensure not only individualized justice for each child, but also additional watchful eyes on the actions of the Administration.

The primary counterargument, and perhaps the most significant hesitation for courts, is a reasonable one: given the immediate cost requirements, as well as the political nature of immigration law, might recognizing such a right exceed the proper role of the courts? The Ninth Circuit has already expressed this concern. In *J.E.F.M. v. Lynch*,²⁵⁸ a case that dismissed on jurisdictional grounds a claim similar to C.J.'s, two Ninth Circuit judges authored a "special concurrence" to lament the lack of representation for immigrant children, but concluded: "What is missing here? Money and resolve—political solutions that fall outside the purview of the courts."²⁵⁹ The third judge, in his own "special concurrence," wrote that "because the solution to the representation problem is a highly controversial political matter, I think our own advocacy of some particular reform measure is unnecessary and the matter is better left to the political process."²⁶⁰

While legitimate in theory, however, this counterargument fails to recognize not only the utter inaction of Congress on immigration issues, but also the essential role of the courts in protecting the rights of the most vulnerable and upholding the Constitution. The court has "no duty more important than that of enforcing constitutional rights, no matter how unpopular the cause or powerless the plaintiff."²⁶¹ Courts have in the past stood for the rights of those who cannot adequately make their voice heard in court, despite the financial implications—by determining a right to appointed counsel for indigent defendants facing the prospect of prison,²⁶² as well as children facing the prospect of juvenile delinquency.²⁶³ And while there are costs, it is worth remembering the Supreme Court's words: "the cost of protecting a constitutional right cannot justify its total denial."²⁶⁴ If a diligent due process analysis indicates that the constitutionally endowed rights of immigrant children are being violated, as this Note argues, the courts should rise to their most fundamental calling and protect those rights once again.

tively, from deportation. See *Devitri v. Cronen*, 289 F. Supp. 3d 287 (D. Mass. 2018); *Hamama v. Adduci*, 261 F. Supp. 3d 820, 839 (E.D. Mich. 2017). And the federal district court in Washington D.C. preliminarily enjoined a DHS policy of detaining asylum-seeking families that was designed to "send[] a message of deterrence to other Central American individuals who may be considering immigration." *R.I.L.-R. v. Johnson*, 80 F. Supp. 3d 164, 188–89 (D.D.C. 2015).

²⁵⁸ 837 F.3d 1026 (9th Cir. 2016).

²⁵⁹ *Id.* at 1039 (McKeown, J., specially concurring).

²⁶⁰ *Id.* at 1040 (Kleinfeld, J., specially concurring).

²⁶¹ *Madrid v. Gomez*, 889 F. Supp. 1146, 1265–66 (N.D. Cal. 1995).

²⁶² See *Gideon v. Wainwright*, 372 U.S. 335, 338 (1963).

²⁶³ See *In re Gault*, 387 U.S. 1, 87 (1967).

²⁶⁴ *Bounds v. Smith*, 430 U.S. 817, 825 (1977).

CONCLUSION

C.J.'s case occurs in a broader context in which immigrant children in removal proceedings are becoming increasingly disconnected from fundamental principles of justice. With growing numbers of women and children arriving from Central America, the United States is facing a major crisis on the border—and courts must decide how to treat some of the most vulnerable children in the world. The initial Ninth Circuit panel expressed compassion for C.J., but still decided against a right to appointed counsel: “We sympathize with his personal plight, as C.J. appears to have displayed courage in the face of serious adversity. But while our hearts are with [C.J.], the law does not support his requested relief.”²⁶⁵

Rather than denying C.J. and Maria's call for help, the panel should have recognized that its hearts were headed in a direction that also reflected a more thorough analysis of the law. It should have more carefully considered the core due process principle of fundamental fairness. It should have more thoughtfully accounted for the violations of children's dignity that occur when they face removal proceedings without attorneys. And it should have more carefully analyzed the procedural due process framework with a realistic sense of the obstacles preventing children from having a meaningful voice in those proceedings. Ultimately, it should have ensured fair hearings for children like C.J. Instead, its holding, if it were not withdrawn, would have permitted countless children with legitimate claims for relief to be sent back to chaos, violence, and likely persecution.

Now, the Ninth Circuit has an opportunity to pave the path toward an entirely different, more humane future for U.S. asylum law. As the court prepares to reconsider C.J.'s case, it should remember that equal justice for children like C.J. hangs in the balance—and perhaps so too does the heart and grace of the American justice system.

²⁶⁵ C.J.L.G. v. Sessions, 880 F.3d 1122, 1145 (9th Cir. 2018) (quoting Dugard v. United States, 835 F.3d 915, 917 (9th Cir. 2016) (internal quotation marks omitted)), *reh'g en banc granted*, 904 F.3d 642 (9th Cir. 2018).

