No. 16-73801

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.J.L.G.,

Petitioner,

v.

JEFFERSON B. SESSIONS III, Attorney General,

Respondent.

AMICI CURIAE BRIEF OF CONSTITUTIONAL LAW AND PROCEDURE SCHOLARS JUDITH RESNIK AND BRIAN SOUCEK IN SUPPORT OF PETITIONER

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STATEMENT OF AMICI CURIAE

Amici Curiae are scholars of constitutional law and procedure who write and teach about the Due Process Clause.[1] Judith Resnik is the Arthur Liman Professor of Law at Yale Law School; Brian Soucek is Professor of Law and Martin Luther King Jr Hall Research Scholar at the University of California, Davis School of Law.[2] Professor Resnik and Professor Soucek offer this brief to provide an overview of decades of Supreme Court case law on how to assess the adequacy of process guaranteed under the Fifth and Fourteenth Amendment of the U.S. Constitution.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation and submission of this brief, and no person other than *amici* or their counsel made such a contribution. All parties consented to the filing of this brief.

[2] *Amici*'s institutional affiliations are provided for identification purposes only.

INTRODUCTION

A central question raised in this case is whether the Due Process Clause requires the government to provide counsel for children in removal hearings. The answer resides in decades of Supreme Court jurisprudence addressing "how much process is due" when life, liberty, or property is at stake. During the past forty years, in areas of law ranging from welfare and disability benefits to prison assignments and the admission of immigrants, the Supreme Court has developed, refined, and applied a balancing test to determine whether the Fifth or Fourteenth Amendments require additional procedure in a specific context.

That test, first given its contemporary form in *Mathews v. Eldridge*, 424 U.S. 319 (1976), instructs courts to weigh three factors: the private interests at stake, the governmental concerns that are implicated, and the value to be added by the additional process sought. When, as here, counsel is the additional element of procedure being requested, the Supreme Court has added a further step. In *Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. 18, 25 (1981), the Court held that in the civil context, where a person's physical liberty is not at risk, the result of the *Mathews* balancing test has to be weighed against a presumption that counsel is not generally required. To overcome that presumption, *Lassiter* looked at whether the private interests at stake and the risk of error from proceeding without counsel were uniformly high in the category of cases under

consideration—there, parental termination hearings. Thirty years later, in *Turner v. Rogers*, the Court assessed whether fundamental fairness required counsel for parents facing civil contempt for failure to pay child support. 564 U.S. 431 (2011).

In *Lassiter*, the Court held that the due process required counsel in a subset of cases, when the risk of error was high or the abilities of the adult parent especially limited. In *Turner*, the Court concluded that, given the straightforward judicial inquiry in contempt proceedings, substitute procedures could accord fundamental fairness when the other side was unrepresented by counsel. In both decisions, as in all the other due process cases, the Court reasoned from the set of legal problems and people affected (rather than an individual instance) and then applied its governing rule to the case at hand.

The test established in *Mathews* and used in *Lassiter* and in *Turner*—and dozens of other cases—requires that courts look not to any particular litigant or case but to structural considerations about the type of proceeding, the process provided, and the additional process sought by a category of claimants. In the forty years of case law since *Mathews*, the Supreme Court has always applied the *Mathews* test categorically, analyzing the interests at stake for the general class (whether they be welfare recipients or indicted bank officials, owners of towed cars or enemy combatants), and analyzing the costs and the benefits of the additional procedure across the general category of proceedings. In *Mathews v. Eldridge*, like

the cases decided in its wake, the Court asked not whether the additional process sought (in that case, an evidentiary hearing) would have changed the result for the specific litigant, George Eldridge, but whether and to what extent the Constitution required pre-termination hearings for all of those at risk of losing their disability benefits.

As scholars of due process, we, along with many others, have thought and written about the development of this line of cases.[3] Some of the academic literature on *Mathews* is critical—raising concerns that the *Mathews* analysis fails to capture the breadth of commitments embodied in the Due Process Clause. Yet the idea that unites scholars in this field is that the Constitution protects us all from arbitrary treatment; to fulfill this obligation, it requires courts to determine "what process is due" across groups and categories of claims, not based on the isolated facts of an individual case.

Applying the Supreme Court's method in this case requires categorical analysis of the private interests at stake, the government interest in accurate, fair, and efficient decision-making, and the value of counsel. Here, that evaluation

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[3] *See, e.g.*, Owen M. Fiss & Judith Resnik, *The Values of Procedure*, *in* ADJUDICATION AND ITS ALTERNATIVES 54 (2003); Judith Resnik, *The Story of Goldberg: Why This Case Is Our Shorthand*, *in* CIVIL PROCEDURE STORIES 473, 499 (2d ed. 2008); Jerry Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976-1977); E. Thomas Sullivan & Toni M. Massaro, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW 120 (2013).

entails acknowledgement of the dramatic consequences of removal hearings, the limited capacities of children (which the law has repeatedly recognized), the role that lawyers for the government play in these proceedings, and the complexity of our immigration laws. The Due Process Clause does not countenance that children operating in a strange, legally-complex environment, often in a different language should lack counsel when facing deportation.

ARGUMENT

I. THE SUPREME COURT REQUIRES CATEGORICAL ANAYSES TO DETERMINE WHETHER THE PROVISION OF COUNSEL FOR CHILDREN IN REMOVAL HEARINGS IS MANDATED BY THE DUE PROCESS CLAUSE.

In 1976, the Supreme Court was asked in *Mathews v. Eldridge* whether the Due Process Clause requires an evidentiary hearing before Social Security disability payments are terminated. Drawing from its groundbreaking decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970), where the Court had tailored an evidentiary hearing suitable for the "capacities and circumstances of those who are to be heard" (there, welfare recipients as a general class), *id.* at 269, the *Mathews* Court developed a three-part balancing test for procedural due process claims. In *Mathews*' now-familiar words:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural

> safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

As *Mathews* makes clear, this test looks to the types of disputes and disputants typical in any given category of cases: "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." 424 U.S. at 344. Thus, in applying its factors, the *Mathews* Court assessed characteristics typical of those receiving disability payments, and characteristics typical of termination disputes, to decide what forms of process were "due."

The Court, for example, discussed "the typically modest resources of the family unit of the physically disabled worker," the "little possibility that the terminated recipient will be able to find even temporary employment," and "the torpidity of … administrative review" as factors indicating that the hardship imposed on erroneously terminated recipients "may be significant." *Id.* at 341-42. The Court then compared those challenges to that of individuals entitled under *Goldberg* to an in-person hearing and decided that disability recipients' needs were "likely to be less than that of a welfare recipient," and that the "potential deprivation here is generally likely to be less than in *Goldberg*, although the degree of difference can be overstated." *Id*.

Turning to what it called "the nature of the relevant inquiry" in the type of proceeding at issue, *id.* at 343, the Court found that disability terminations "will turn, in most cases, upon . . . medical reports by physician specialists"—unlike welfare termination hearings, where "issues of witness credibility and veracity often are critical to the decisionmaking process." *Id.* at 343-44. Disability proceedings make "a more sharply focused and easily documented decision than the typical determination of welfare entitlement." *Id*. at 343. Finally, after discussing the "ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants," the Court concluded that in the context of disability insurance, the procedures already in place were "tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard.'" *Id.* at 348, 349 (quoting *Goldberg*, 397 U.S. at 268-69).

Notable throughout this discussion is the lack of focus on facts specific to George Eldridge or the particular proceedings in his case. Instead, the balancing in *Mathews* looked to what is "typically" or "generally" true of the "category of claimants" whose rights are at stake, and to what additional procedure "often" or "in most cases" would lead to greater accuracy. *Id* at 341-44, 348. Mention of Eldridge's individual circumstances—the foreclosure of his home and repossession of his furniture—appeared in the dissent. *See id.* at 350 (Brennan, J., dissenting). But even there, Justice Brennan used the problems of Mr. Eldridge not to focus on

the particulars but to illustrate that disability recipients generally were a needy group of people. *See id.*

Since *Mathews* was decided in 1976, the Supreme Court has relied on its balancing test in 36 cases.[4] The variety of contexts in which the test has been

[4] *See Nelson v. Colorado*, __ U.S. __, 137 S. Ct. 1249 (2017); *Kaley v. United States*, 571 U.S. 320 (2014); *Turner v. Rogers*, 564 U.S. 431 (2011); *Wilkinson v. Austin*, 545 U.S. 209 (2005); *City of Los Angeles v. David*, 538 U.S. 715 (2003); *Gilbert v. Homar*, 520 U.S. 924 (1997); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993); *Heller v. Doe by Doe*, 509 U.S. 312 (1993); *Connecticut v. Doehr*, 501 U.S. 1 (1991); *Zinermon v. Burch*, 494 U.S. 113 (1990); *Washington v. Harper*, 494 U.S. 210 (1990); *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230 (1988); *United States v. Salerno*, 481 U.S. 739 (1987); *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Illinois v. Batchelder*, 463 U.S. 1112 (1983); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Landon v. Plasencia*, 459 U.S. 21 (1982); *Schweiker v. McClure*, 456 U.S. 188 (1982); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981); *Little v. Streater*, 452 U.S. 1 (1981); *United States v. Raddatz*, 447 U.S. 667 (1980); *Mackey v. Montrym*, 443 U.S. 1 (1979); *Parham v. J. R.*, 442 U.S. 584 (1979); *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1 (1979); *Addington v. Texas*, 441 U.S. 418 (1979); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978); *Smith v. Org. of Foster Families For Equal. & Reform*, 431 U.S. 816 (1977); *Dixon v. Love*, 431 U.S. 105 (1977); *Ingraham v. Wright*, 430 U.S. 651 (1977); *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482 (1976). It has also been applied in nine plurality, concurring, or dissenting opinions. *See Kerry v. Din*, __ U.S. __, 135 S. Ct. 2128, 2144 (2015) (Breyer, J., dissenting); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality); *Burns v. United States*, 501 U.S. 129, 147 (1991) (Souter, J., dissenting); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 53 (1991) (O'Connor, J., dissenting); *Atkins v. Parker*, 472 U.S. 115, 150 (1985) (Brennan, J., dissenting); *Ponte v. Real*, 471 U.S. 491, 512 (1985) (Marshall, J., dissenting); *Black v. Romano*, 471 U.S. 606, 618 (1985) (Marshall, J., concurring); *Block v. Rutherford*, 468 U.S. 576, 605 (1984) (Marshall, J., dissenting); *Schall v. Martin*, 467 U.S. 253, 304 (1984) (Marshall, J., dissenting); *Jones v. United States*, 463

invoked is striking and includes determinations of what due process requires in the contexts of immigration[5] and the obligation to provide counsel.[6]

As scholars who have studied and taught the *Mathews* test and its many applications, we can report that the Supreme Court has never proceeded by starting with the particular and moving to the general. Not once has the Court begun by asking whether a certain person would have gotten a different outcome from a certain procedure, or whether an individual litigant was prejudiced by its absence.

Instead, in dozens of cases over four decades, the Court has considered the needs typically shared by an entire category of people, whether welfare recipients or university police officers, owners of towed cars or citizen-detainees. And in all of these cases, the *Mathews* balancing test has weighed the value of a given procedure generically, as it would *likely* affect the *typical* welfare termination proceeding or employment suspension, payment-recovery hearing or enemy combatant classification. Indeed, the Court has repeatedly made express that "a process must be judged by the generality of cases to which it applies," *Walters*, 473 U.S. at 330, and thus, "[t]he specific dictates of due process must be shaped by 'the risk of error inherent in the truthfinding process as applied to the generality of

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U.S. 354, 371 (1983) (Brennan, J., dissenting); *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 99 (1978) (Marshall, J., concurring in part and dissenting in part).

[5] *See Kerry*, 135 S. Ct. 2128; *Landon*, 459 U.S. 21.

[6] *See Turner*, 564 U.S. 431; *Walters*, 473 U.S. 305; *Lassiter*, 452 U.S. 18.

cases' rather than the 'rare exceptions.'" *Mackey*, 443 U.S. at 14 (quoting *Mathews*).[7]

This test of how much process is "due" was applied in the civil right-to-counsel context in *Lassiter v. Department of Social Services*. This 1981 decision addressed whether the Constitution requires the government to provide counsel to parents in parental termination hearings. *Lassiter* directed lower courts, when deciding this category of claims, to take an additional step after analyzing the three factors in the *Mathews* test. After balancing "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions," *Lassiter* instructed courts to "set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." 452 U.S. at 27.

Lassiter is thus another illustration of the categorical balancing common to the *Mathews* line. Through its categorical analysis, the Court determined that parental termination cases have significant and systematic variations. The Court concluded that in many instances, the core issue of the nature of the parent's relationship with her or his child was not "abstruse, technical, or unfamiliar," but rather a subject "as to which the parent must be uniquely well informed." *Id.* at 29.

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[7] *See also, e.g.*, *Walters*, 473 U.S. at 330 (criticizing lower court analysis for failing to "suggest how the availability of these services would reduce the likelihood of error in the run-of-the-mill case").

Moreover, "sometimes" the government itself was represented by social workers instead of lawyers. *Id*.

On the other hand, the Court also observed that, at times, complex medical and other expert testimony could be involved and some unrepresented parents were "likely to be people with little education, who have had uncommon difficulty in dealing with life." *Id.* at 29-30. As the Court noted, in "some" cases, these factors could "combine to overwhelm an uncounseled parent." *Id*. Given significant variability in the capabilities of parents and the nature of parental termination hearings, the Court concluded that "the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high." *Id.* at 31. Asked whether due process requires appointed counsel in parental termination hearings, the *Lassiter* Court answered that in some subset of cases, counsel was obligatory.

As a consequence of its answer, the Court imposed a new obligation on lower tribunals in all future termination proceedings by leaving "the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review." *Id.* at 32. *Lassiter* required appellate review because the right to counsel in child termination was obligatory when the

balance required it. But "because child-custody litigation must be concluded as rapidly as is consistent with fairness," and because the protracted history of that case was harming the child, the Court undertook to decide that question itself for the particular litigant before it. *Id.* at 32 & n.7. Only having first answered the categorical question addressed by the *Mathews* test, and then finding that special circumstances required immediate resolution of an issue that would normally be left to the trial court, did the Court go on to consider the individual circumstances of the party to determine if those circumstances fell within the subset requiring counsel.

The Court returned to the provision of counsel outside the criminal context in 2011 in *Turner*. The civil contempt proceeding at issue there involved a father, Michael Turner, who failed to comply with a court order to provide child support and received twelve months of detention. 564 U.S. at 436-37. Neither Turner nor the child's mother, the other party to the proceeding, was represented by counsel. *Id.*

Once again, the Court applied the *Mathews* factors categorically to the class of cases (civil contemnors in child support proceedings), and only after fashioning the rule of law, applied it to Turner's particular case. The Court concluded that fundamental fairness did not always require counsel. First, the issues were generally simple, albeit not invariably so. A statistical review showed that a

defendant's ability to pay "may arise fairly often" and was "the critical question likely at issue," which "in many—but not all—cases is sufficiently straightforward." *Id*. at 445-46. Moreover, under fifty different state law regimes, "sometimes" the opposing side was an unrepresented parent rather than the government represented by counsel. *Id.* at 446, 447-48.

As a consequence, due process would not require appointed counsel when (1) the opposing party was unrepresented and (2) the state provides substitute procedural safeguards adequate to provide "fundamental fairness" for the straightforward claims at issue. *Id.* at 448. These safeguards had to include adequate notice that ability to pay is a critical issue, a fair opportunity to provide and dispute information on that issue, and an express finding by the court. *Id.* at 447-48. The Court explicitly declined to extend that holding to cases in which the opposing party was the government or represented by counsel, or to "unusually complex" cases, and indicated that due process might require counsel in those circumstances. *Id.* at 448-49. Because South Carolina had provided neither counsel nor the alternative safeguards, the Court held in *Turner* that the state had violated the Due Process Clause. *Id.* at 449.

In sum, the test established in *Mathews*, augmented in *Lassiter*, and invoked in *Turner*, continues to provide the governing principles in procedural due process cases such as this. The Supreme Court applied the *Mathews* balancing test as

recently as 2017, *see Nelson*, 137 S. Ct. at 1255, and the Ninth Circuit has repeatedly done so as well. *See, e.g.*, *Oshodi v. Holder*, 729 F.3d 883, 894-96 (9th Cir. 2013) (en banc) (applying *Mathews* balancing in the context of removal hearings); *Hernandez v. Whiting*, 881 F.2d 768, 771 n.3 (9th Cir. 1989) (noting that, under *Lassiter*, the presumption against appointed counsel can be overcome if *Mathews* balancing "suggests that fundamental fairness may not be served in the absence of appointed counsel").

These dozens of decisions embody the Supreme Court's unwavering commitment to the approach it first set out in *Mathews*: When a litigant claims that the Due Process Clause requires the appointment of counsel in a given class of cases—as here, in removal hearings involving children—the judicial task is to apply a categorical balancing test coupled with the *Lassiter*/*Turner* considerations. Both the private and the governmental interests at stake have to be considered categorically, and the risk of error (here, the risk of error if children are forced to navigate removal proceedings without counsel) must be considered in "the generality of cases." *Mathews*, 424 U.S. at 344.

Evaluating procedural needs on the categorical level, rather than case-by-case, reflects and promotes values underlying the Due Process Clause—non-arbitrary decisionmaking, fairness, equal treatment, and a "preference for prospective versus post-hoc regulations." E. Thomas Sullivan & Toni M. Massaro,

THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW 120 (2013). As the Supreme Court has emphasized: "[T]he very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case." *Walters*, 473 U.S. at 321.

II. THE SUPREME COURT'S DUE PROCESS JURISPRUDENCE DEMONSTRATES THAT COUNSEL IS OBLIGATORY FOR CHILDREN IN REMOVAL PROCEEDINGS.

The Supreme Court's forty years of case law applying the test established in *Mathews* and its progeny provides several guideposts for understanding what procedural protections the Constitution requires in the context of removal hearings for children.

First, the private interest of children such as C.J.—the first factor to be considered under *Mathews*—is as high as that in any of the Supreme Court cases catalogued above. Given the violence and disorder around the world, removal can put an individual at risk of death; at a minimum, removal is a transformative dislocation. For children, it can entail the rupture of family ties and the loss of caregivers. As this Court has recognized, "the private liberty interests involved in deportation proceedings are indisputably substantial." *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1160 (9th Cir. 2004). Indeed, "[i]n the case of an asylum and withholding of removal applicant, the private interest could hardly be greater." *Oshodi*, 729 F.3d at 894.

Second, *Mathews* requires analysis of the governmental interests at stake. In this as in other due process cases, the public and private interests overlap, for the government also has an interest in "the fair and just administration of our Nation's immigration laws," as the panel opinion in this case correctly noted. *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1145 (9th Cir. 2018). That bedrock commitment of the U.S. government can—and must in some arenas—outweigh the government's interest in reducing its financial and administrative burdens. *See, e.g.*, *Goldberg*, 397 U.S. at 264-66 (noting that "important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing," offsetting "countervailing governmental interests in conserving fiscal and administrative resources"); *Lassiter*, 452 U.S. at 27-28 (remarking that the State "shares the parent's interest in an accurate and just decision" and thus "may share the indigent parent's interest in the availability of appointed counsel"); *see also* Charles A. Koch Jr., *A Community of Interest in the Due Process Calculus*, 37 HOUSTON L. REV. 635 (2000). Moreover, as the panel also correctly observed, the court's "paramount responsibility" to ensure adequate process necessarily means that this "factor must take a back seat to the second." *C.J.L.G.*, 880 F.3d at 1145. Thus, the rule to be applied in this case—as in many due process decisions—turns on the *Mathews* factor that asks about the risk of error with and without counsel.

Third, to analyze the risk of error prong, important distinctions between this case, on the one hand, and *Lassiter* and *Turner*, on the other, explain why counsel must categorically be provided to children in deportation proceedings. As detailed below, the available data about the effect of counsel, the fact that children have limited capabilities, and the complex nature of the legal claims in these cases make the risk of error too great when counsel are absent.

1. The empirical evidence that counsel reduces error in child deportations is robust.

The Supreme Court has made clear that statistical or other empirical evidence of the risk of error is "relevant." *See Mathews*, 424 U.S. at 346-47; *see also Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 n.21 (1978) (citing lower court finding that procedure resulted in adjustments to outcome in 16% of cases as evidence that risk of erroneous deprivation was not insubstantial). But in some cases, the risk of error is difficult to assess given the lack of reliable data on whether a particular procedural element will have a marked effect on proceedings. Indeed, scholars have long criticized the *Mathews* test for this very reason: as one of us has written, "its veneer of scientific constraints on judicial judgment can serve to mask [a] lack of genuine empiricism."[8]

[8] Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 Harv. L. Rev. 78, 158 (2011) (noting that, generally, "[n]either judges nor litigants can identify with any rigor . . . the impact in terms of false positives and negatives produced by the same, more, or

Here, by contrast, robust empirical evidence is available. The presence of counsel has been documented to significantly reduce erroneous deportations for children.[9] As the panel discussed, government data shows that over the course of a decade "only 10% of unrepresented children were permitted to remain in the United States, whereas 47% of represented children were awarded relief in their immigration proceedings." *C.J.L.G.*, 880 F.3d at 1138.[10]

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different processes"); *see also* Martin H. Redish and Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 473 (1986); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 39 (1976) (faulting the Court's "subjective and impressionistic" approach in *Mathews*).

[9] *See, e.g.*, Steering Committee of the New York Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel Removal Proceedings* (New York Immigrant Representation Study Report: Part 1), 33 CARDOZO L. REV. 357 (2011); Lindsay Nash, *Accessing Justice: A Model for Providing Representation to Noncitizens in Deportation Proceedings* (New York Immigrant Representation Study Report: Part 2) (2012); Robert A. Katzmann, *When Legal Representation is Deficient: The Challenge of Immigration Cases for the Courts*, 143 DAEDALUS 37 (2014).

[10] *See also* TRAC, *New Data on Unaccompanied Children in Immigration Court*, available at http://trac.syr.edu/immigration/reports/359/; Expert Report of Prof. Susan B. Long, Ex. KK to 8th Decl. of Stephen Kang, *J.E.F.M. v. Lynch*, No. 14-cv-01026-TSZ (W.D. Wash. Aug. 11, 2016), ECF 343-7. More recent data for this circuit is even starker, indicating that unaccompanied children in cases closed in this circuit between July 2014 and March 31, 2016 were almost 16 times more likely to be ordered removed when they were unrepresented—with 5% of represented children ordered removed and 78% of unrepresented children ordered removed—and almost eight times more likely to be ordered removed even when excluding in absentia removal orders. *See* Decl. of Dr. Susan B. Long, Ex. 11 to Pls.' 2d RJN, ¶¶ 17-19, *J.E.F.M. v. Lynch*, 15-35738, 15-35739 (9th Cir. May 23, 2016), ECF 63-2.

In *Lassiter*, the majority and dissent disagreed on the significance of evidence that parents charged with neglect in one New York court had somewhat lower rates of neglect adjudications when represented by counsel (62.5% when represented versus 79.5% when unrepresented). 452 U.S. at 29 n.5 (majority) & 46 n.15 (dissent).[11] In contrast, the available evidence here shows that, for the over 60,000 juvenile cases closed nationally between 2004 and 2014 where the government sought removal, the 52% of children represented by counsel were almost five times more likely to be allowed to remain in the United States than the 48% of children without representation. TRAC, *New Data on Unaccompanied Children in Immigration Court*. The disparity is even starker for more recent cases in the Ninth Circuit. *See supra* note 10.

While the Court has cautioned that "bare statistics" will not always "provide a satisfactory measure" when other conflating factors "diminish[]" their explanatory power, *Mathews*, 424 U.S. at 346-47,[12] the statistics concerning child deportation outcomes fit with other evidence showing that the impact of lawyers

[11] A similar dispute over the effectiveness of counsel complicated the application of the *Mathews* test in *Turner*. *See* Resnik, *Fairness in Numbers*, 125 HARV. L. REV. at 158 & n.475 ("[I]n *Turner*, the disputants debated whether lawyers slowed or facilitated decisionmaking and whether adding lawyers would enhance accuracy or produce more misguided results.").

[12] For example, the Court in *Mathews* found statistics on the reversal rate for disability terminations unsatisfactory as a measure of error in the original decision because, in light of the rules providing for an open record, appellate reversals could have been based on the presentation of new evidence. 424 U.S. at 346 & n.29.

on child deportation proceedings is often outcome-determinative. *See* Expert Report of Prof. Susan B. Long, Ex. KK to Eighth Declaration of Stephen Kang, *J.E.F.M. v. Lynch*, No. 14-cv-01026-TSZ (W.D. Wash. Aug. 11, 2016), ECF 343-7; *see also supra* note 9. And these statistics are hardly surprising. As explained below, the dramatic effect of counsel in deportation proceedings involving children reflects the complexity of these proceedings and the limited capacity of the children trying to navigate them.

2. The law recognizes that children need special protection.

This case, unlike *Lassiter* and *Turner*, involves children. Children are uniquely vulnerable and ill-equipped to handle complex law and formal proceedings. *Cf. J.D.B. v. North Carolina*, 564 U.S. 261, 272-73 (2011); *In re Gault*, 387 U.S. 1, 40 (1967);. Indeed, the Supreme Court has often recognized that children are categorically different than adults in the way our Constitution protects them, not least because of their limited capacity.[13] And the Supreme Court's due process case law has repeatedly required heightened procedural protections for proceedings involving the rights of children and family relationships. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (in a case involving parental status, indigent parents entitled to waiver of fees for appellate record to allow appellate review);

[13] *See, e.g.*, *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596, 599 (1948).

Santosky v. Kramer, 455 U.S. 745 (1982) (the Due Process Clause requires that a state present clear and convincing evidence before a child can be deemed permanently neglected and put up for adoption). In *Lassiter* itself, the Court noted that North Carolina law required that *children* be provided a lawyer to represent their interests in cases where a parent filed a written answer to a termination petition, even while it did not always require provision of counsel to the adult parent. 452 U.S. at 28. Provision of lawyers for children is common across the country.[14]

In the context of removal hearings, the challenges that children face in navigating the law are acute. Children in these proceedings typically struggle with language barriers, and many have suffered recent trauma—whether from violence in their home countries, trauma suffered during travel, or the trauma of living in an unfamiliar country.

3. Removal proceedings entail complex factual records and legal issues.

The Supreme Court in *Lassiter* and *Turner* concluded that the issues involved in parental termination proceedings and child support civil contempt proceedings varied, but in many the issues were not complex. *See Lassiter*, 452 U.S. at 29 (finding that the main subject of hearings—the nature of a parent's relationship with his or her child—was not "abstruse, technical, or unfamiliar" but

[14] *See, e.g.*, Elizabeth G. Thornburg, *The Story of Lassiter: The Importance of Counsel in an Adversary System*, in CIVIL PROCEDURE STORIES 509 (2d ed. 2008).

something with which parents were familiar); *Turner*, 564 U.S. at 446 ("critical" issue of defendant's ability to pay "sufficiently straightforward" in many cases).

This context is far different. "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." *Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (internal citation omitted). That is especially true in asylum claims, where often the central issue is properly defining the "particular social group," an inquiry that has confused even courts. *See, e.g.*, *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087-91 (9th Cir. 2013) (en banc); *see also Matter of A-B-*, 27 I&N Dec. 316, 344 (A.G. 2018) (requiring that "an applicant seeking asylum or withholding of removal based on membership in a particular social group must clearly indicate, on the record and before the immigration judge, the exact delineation of any proposed particular social group").

4. No substitutes for lawyer can adequately provide fundamental fairness in removal hearings for children.

The Supreme Court in *Turner* held that, given the generally straightforward nature of the issues in civil contempt proceedings for nonpayment of child support, certain alternative procedural safeguards sufficed to reduce the risk of error such that counsel was not required—as long as those substitute safeguards were

deployed and the opposing party was also unrepresented. 564 U.S. at 447-48. No such alternative procedures exist or could suffice here.

In contrast to *Turner*, the issues in removal hearings are complex and the opposing party—the government—is always represented by counsel. Immigration judges cannot substitute for lawyers. *But see C.J.L.G.*, 880 F.3d at 1138-39 (suggesting immigration judges' heightened duty to engage in fact-finding for *pro se* children would be an adequate substitute). Immigration judges cannot do independent fact investigation, meet ex parte with the child in a comfortable setting, or otherwise play the role of counsel. Moreover, immigration judges now have enormous dockets, and the Department of Justice has recently required that decisions be made within increasingly short time limits.[15] Most importantly, the statistics cited above show that, without a lawyer, children are handed dramatically different outcomes in removal cases, even though immigration judges are present in all cases.

Further, these proceedings are always adversarial in nature. In both *Lassiter* and *Turner*, the Court noted that the opposing party is sometimes represented by counsel and sometimes not, such that providing counsel in some cases could make the proceedings *less* fair. *See Turner*, 564 U.S. at 446-47; *Lassiter*, 452 U.S. at 29.

[15] *See, e.g.*, *Matter of L-A-B-R*, 27 I &N Dec. 405 (A.G. 2018); EOIR Performance Metrics for Immigration Judges, *available at* https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics; TRAC, *Immigration Court Backlog Tool*, available at http://trac.syr.edu/phptools/immigration/court_backlog/.

Similarly, the Court in *Lassiter* observed that the government "in some but not all cases" has an "interest in informal procedures," *Lassiter*, 452 U.S. at 31. *See also Walters*, 473 U.S. at 333-34 (explaining that such informal procedures are "not designed to operate adversarially"). The deportation proceedings at issue here are always formal and adversarial, pitting a child against the government represented by counsel. Here, "the complexity of the proceeding and the incapacity of the uncounseled" child (*see Lassiter*, 452 U.S. at 31) does not vary substantially from case to case. Rather, the risk of erroneous deportation without lawyers becomes insupportably high in light of the nearly five-fold increase in deportations for unrepresented children.

* * *

The Supreme Court's framework in *Turner* and *Lassiter* makes plain that for some types of proceedings—those in which the needs of the litigants and the complexity of the proceedings are uniformly high—the Due Process Clause will categorically require the appointment of counsel. Our study of the nearly half century of relevant precedent demonstrates that child deportation hearings belong among those types of proceedings. Given the record of the impact made by lawyers for children, the balancing approach of *Mathews*, *Lassiter*, and *Turner* require the government to provide lawyers to indigent children facing removal from the United States.

III. PROCEDURAL DUE PROCESS CASES DO NOT ASK, EX ANTE, ABOUT PREJUDICE IN INDIVIDUAL CASES.

The *Mathews* line of cases asks whether, in some particular context, the procedural protections offered are adequate, or whether some *additional* element of procedure is constitutionally required. When deciding that a particular facet of procedure has to be included, a court's analysis under *Mathews* does not ask about the prejudice the individual experienced from not having received that procedure. By contrast, the panel in this case put the burden on C.J. to show "*both* that his constitutional rights were violated for lack of court-appointed counsel *and* that this prejudiced the outcome of his removal proceeding." *C.J.L.G.*, 880 F.3d at 1133.

The idea of prejudice is not wholly foreign to due process law. Rather, in a line of due process cases assessing whether existing procedures were adequately implemented, courts often have inquired about prejudice. Unlike *Mathews* and its progeny, these "full-and-fair process" cases generally, though not always, require a showing that the individual case would have turned out differently. Thus, for example, in *Jacinto v. INS*, 208 F.3d 725 (9th Cir. 2000), the petitioner claimed she had not gotten a full and fair hearing because the Immigration Judge had refused to allow her to testify in narrative form. Previous decisions had established the constitutional right to a full and fair hearing in deportation proceedings. *See, e.g.*, *Campos-Sanchez v. INS*, 164 F. 3d 448, 450 (9th Cir. 1999). This Court required Jacinto to show that her case might have turned out differently if she had been

given the full and fair hearing to which she was constitutionally entitled. A showing of prejudice was required because in full-and-fair hearing cases, the alleged procedural inadequacy is case-specific. So too, then, is the availability of a remedy.

Claims that some additional procedure is constitutionally required in some category of cases raise questions distinct from claims that established procedure was not adequately provided in any given case. Here, the issue is whether lawyers are required for children facing deportation. So, here, the question of prejudice is not an element of the analysis. To repeat the Supreme Court's admonition: "the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case." *Walters*, 473 U.S. at 321.

CONCLUSION

Decades of case law makes clear how the *Mathews* balancing test should be used to analyze procedural due process claims, including those raising the right to counsel in civil contexts. Using the Supreme Court's test and considering the information in the record about the needs of children, the factual density of immigration claims, and the complexity of the legal questions involved, the conclusion which emerges is that the Constitution requires the appointment of counsel for indigent children in deportation proceedings.

Date: November 2, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. The foregoing brief complies with the type-volume limitation of Circuit Rule 29-2(c)(3). The Brief is printed in proportionally spaced 14-point type, and there are 6,583 words in the brief according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and with the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman.

November 2, 2018 By: */s/ Jonathan Meltzer*

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2018, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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