Nos. 15-35738, 15-35739

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J.E.F.M. *et al.*,
Plaintiffs-Appellees,

v.

LORETTA LYNCH, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:14-cv-1026 (Hon. Thomas S. Zilly)

BRIEF OF FORMER FEDERAL IMMIGRATION JUDGES AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR REHEARING AND REHEARING *EN BANC*

R. Reeves Anderson
Holly E. Sterrett
Paul W. Rodney
Adrienne Boyd
ARNOLD & PORTER LLP
370 Seventeenth Street
Suite 4400
Denver, CO 80202
(303) 863-1000
(303) 832-0428 (fax)
Reeves.Anderson@aporter.com

Attorneys for Amici Curiae

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Identity and Interest of *Amici Curiae*[1]

Bruce J. Einhorn is a retired U.S. Immigration Judge. He was appointed by U.S. Attorney General Richard L. Thornburgh in 1990 and served until 2007 on the Los Angeles Immigration Court, which manages the busiest immigration docket in the United States. Judge Einhorn adjudicated tens of thousands of deportation and removal cases and relief applications. Judge Einhorn currently serves as Executive Director and CEO of The Asylum Project.

Eliza Klein is a retired U.S. Immigration Judge, having presided over immigration cases in Miami, Boston, and Chicago from 1994 to 2015. During her tenure, Judge Klein adjudicated well over 20,000 cases, issuing decisions on removal, asylum applications, and related matters. Judge Klein currently practices immigration law at the Gil Law Group in Aurora, Illinois.

Lory D. Rosenberg served as a member of the Board of Immigration Appeals (BIA) from September 1995 to October 2002 by appointment of U.S. Attorney General Janet Reno. During her tenure, Judge Rosenberg adjudicated tens of thousands of appeals from removal and asylum decisions of U.S. Immigration

[1] No party's counsel authored this brief in whole or in part. No party or a party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici curiae* or their counsel made such a monetary contribution. All parties have consented to the filing of this brief pursuant to Circuit Rule 29-2(a).

Judges, as well as visa and waiver decisions of district directors of the Immigration and Naturalization Service.

Bruce E. Solow is a retired U.S. Immigration Judge. He was appointed by U.S. Attorney General Edwin Meese III in 1985 and served until the end of 2011, principally in the Miami Immigration Court, one of the busiest in the United States. Judge Solow adjudicated thousands of removal cases and relief applications and served as President of the National Association of Immigration Judges for six years. He currently is in private practice in Miami.

As former immigration judges and as practicing immigration attorneys, who collectively have over 75 years' experience adjudicating tens of thousands of immigration cases (including thousands of cases involving children), *amici* have a profound interest in the resolution of this case. They have dedicated their careers to improving the fairness and efficiency of the U.S. immigration system, particularly in the administration of justice to children.

This appeal concerns the threshold jurisdictional question whether the minor plaintiffs may present their appointed-counsel claims before the district court in this case, or whether they must instead raise those claims in individual appeals from final orders of removal. As the panel recognized, the resolution of that jurisdictional question turns, in part, on whether children in removal proceedings have a meaningful opportunity to present an appointed-counsel claim at the

conclusion of administrative proceedings. In answering that factual question with a resounding "no," *amici* draw on their personal judicial experience to explain the practical impediments that prevent unrepresented children from successfully pursuing their claims through this nation's labyrinthine immigration system.

In *amici*'s experience, children are incapable of representing themselves effectively in immigration proceedings. Absent effective representation, it is impossible for anyone in an immigration court—including the Immigration Judge—to investigate and develop the child's case to a degree that would permit the fair adjudication that due process requires. In *amici*'s view, the lack of appointed counsel impedes the pursuit of justice and burdens the operation of the immigration system as a whole. Given *amici*'s familiarity with the procedures of immigration appeals, *amici* respectfully submit that their views will assist the Court in assessing the importance of the underlying issue and in determining whether to grant plaintiffs' petition for rehearing and rehearing en banc.

ARGUMENT

Each year, thousands of unrepresented minors face deportation from the United States. The merits question in this case is whether those children are entitled to court-appointed counsel—by statute or by constitutional right—during their immigration proceedings. That question, and this Court's jurisdiction to

consider it in a meaningful way, are indisputably important and warrant further consideration by the panel or the entire Court sitting en banc.

Respectfully, the panel erred when it determined that the district court lacks jurisdiction over plaintiffs' claims, because requiring unrepresented minors to exhaust and preserve their constitutional appointed-counsel claims through one of this country's most procedurally complex administrative processes does not allow for meaningful judicial review of those claims. Rather, it is the experience of *amici curiae* that no child reasonably can be expected to successfully navigate removal proceedings and the immigration appeals process *pro se* while preserving an appointed-counsel claim. The fact that the panel identified one counterexample (from 2004) only proves *amici*'s warning. Meaningful review should not be a one-in-a-million happenstance.

The panel further erred by positing that procedural mechanisms, including oversight by Immigration Judges, will ensure the due process rights of these children. Faced with overburdened and ever-growing dockets, Immigration Judges have long lacked the necessary power, time, and resources to ensure that unrepresented minors receive meaningful judicial review of their claims. In an attempt to alleviate this problem, minor plaintiffs seek appointed counsel at government expense. It is not realistic to demand that Immigration Judges also play the indispensable role of counsel for the litigants that come before them.

If the panel's decision is not revisited, thousands of unrepresented minors will be forced to navigate—almost assuredly unsuccessfully—the complex immigration system alone. The panel's decision raises a question of exceptional importance that warrants rehearing by this Court.

I. The exceptional importance of ensuring meaningful judicial review to minors' claim for appointed counsel in removal proceedings warrants rehearing.

"[T]he 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." *Baltazar-Alcazar v. I.N.S.*, 386 F.3d 940, 948 (9th Cir. 2004). Nevertheless, the panel opinion concludes that a child facing deportation can assert an appointed-counsel claim in federal court *only* upon successfully navigating that labyrinth *without* the assistance of an attorney, while defending against the government's effort to remove her from this country. Respectfully, the panel opinion denies meaningful judicial review of these plaintiffs' appointed-counsel claim, because the path from Immigration Court to the BIA and then to the U.S. Court of Appeals is littered with obstacles at every turn.

The critical importance of the issue at stake in this case was not lost on the panel. In a rare special concurrence, Judges McKeown and Smith addressed the magnitude of the problem:

> The border crisis created what has been called a "perfect storm" in immigration courts, as children wend their way

> from border crossings to immigration proceedings. The storm has battered immigration "courtrooms crowded with young defendants but lacking lawyers and judges to handle the sheer volume of cases."
>
> The net result is that thousands of children are left to thread their way alone through the labyrinthine maze of immigration laws . . . . This reality prompted the Chief Immigration Judge to acknowledge that "[t]he demands placed on the [immigration] courts are increasing due to the unprecedented numbers of unaccompanied minors being placed in immigration proceedings . . . ."
>
> Given the onslaught of cases involving unaccompanied minors, there is only so much even the most dedicated and judicious immigration judges (and, on appeal, members of the Board of Immigration Appeals) can do.

J.E.F.M. v. Lynch, 837 F.3d 1026, 1039-40 (9th Cir. 2016) (internal citations omitted).

Despite recognizing this "extremely difficult situation," *id*. at 1036, the panel posits an unrealistic scenario in which Immigration Judges can adequately safeguard the rights of each of the thousands of unrepresented minors appearing before them, resulting in a record sufficient to provide meaningful review. As explained below, this outcome ignores the reality faced by unrepresented minors and presents a matter of exceptional importance that warrants rehearing.

A. Immigration Judges cannot meaningfully safeguard the interests of unrepresented minors.

The Immigration Courts are inundated with cases; 525,000 cases are currently pending in the 58 immigration courts across the country. *Backlog of*

Pending Cases in Immigration Courts as of November 2016, Transactional Records Access Clearinghouse (TRAC) Immigration, http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (last accessed Dec. 13, 2016). The Immigration Courts received 284,667 new cases in 2015 alone. Exec. Office for Immigration Review, *FY 2015 Statistics Yearbook* A2 (Apr. 2016). Cases involving unrepresented minor children comprise an increasing percentage of the docket in the Immigration Courts. In fiscal years 2014 and 2015, over 108,500 unaccompanied children were apprehended at the nation's southwest border, and over 30,900 were apprehended in the first six months of 2016. U.S. Customs and Border Enforcement, *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016* (Oct. 18, 2016), https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016. As a result, Immigration Judges must sometimes address 50 to 70 cases on a three- to four-hour timeframe, and some must manage dockets that can exceed 160 cases per day.

It is in the context of this overloaded system that a child must try to vindicate her right to counsel. At the outset, the child must appear *pro se* before the Immigration Judge and assert a right to appointed legal representation. The Immigration Judge likely will inform the child that the judge lacks authority to appoint counsel for children. In a particularly compelling case, an Immigration

Judge might contact a pro bono legal service provider. But those overburdened organizations cannot provide representation to every child in need of assistance. And with thousands of cases on the docket, Immigration Judges tasked with finding pro bono legal representation for every minor would have no time to carry out their judicial functions. Most unrepresented children, therefore, are left to their own devices in a system that lacks sufficient safeguards for their welfare.

Despite extremely limited time and resources, Immigration Judges must obtain answers to critical questions that bear on the *pro se* child's case and possible eligibility for relief. For example, the Immigration Judge must determine whether the child is a citizen of the United States. Place of birth alone is not necessarily sufficient; the Immigration Judge may also need to consider other information about the child's parents and grandparents. Immigration and Nationality Act (INA) §§ 301(c)–(h), 8 U.S.C. §§ 1401(c)–(h). If alienage is established, the Immigration Judge must also determine how, when, and why the child arrived in the United States. A child in deportation proceedings bears the burden of proof to establish the time, place, and manner of entry. INA § 291, 8 U.S.C. § 1361. The answers to these questions can affect not only whether the government has stated a valid charge of removability, but also whether the child is eligible for particular forms of relief that the unrepresented child may not even know to request.

In addition, the Immigration Judge must ascertain what experiences the child encountered prior to and since arriving in the United States. Again, the answer to these questions may determine eligibility for relief. For instance, abandonment, neglect, or abuse by a parent may allow the child access to Special Immigrant Juvenile Status (SIJS), a type of relief that may afford lawful permanent residence through state court proceedings. *See* INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11. If the child was a victim of a crime in the United States, she may be eligible for a U visa, which is also a path to lawful permanent residency. *See* INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U). Or a child may be eligible for asylum based on a form of prior persecution, such as his parents' political or religious affiliation, prior participation in hostilities during periods of civil strife, or ownership of property or possession of knowledge that has become useful to a hostile group. *See* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). In such cases, children are the target of harm yet have no idea why.

Immigration Judges rely heavily on counsel to furnish relevant factual information and to raise appropriate legal arguments. In *amici*'s experience, even a child capable of articulating basic facts cannot advocate effectively for herself, because she cannot be expected to know which facts are relevant to her claims. Moreover, there is no reason why a child would know about her eligibility for

SIJS, a U visa, or asylum, let alone have the legal knowledge or tools to pursue those forms of relief. Indeed, experienced attorneys are often reluctant to take on SIJS cases because of the complexity of the proceedings.

There is little doubt that the appointment of counsel dramatically affects whether a minor is able to successfully navigate the system. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 57 (2015) ("At every stage in immigration court proceedings, representation [i]s associated with dramatically more successful case outcomes for immigrant respondents."). From fiscal year 2012 to 2014, children represented by counsel were allowed to remain in the United States in 73% of removal proceedings as compared to 15% of children who appeared without representation. *Representation for Unaccompanied Children in Immigration Court*, TRAC Immigration (Nov. 25, 2014), http://trac.syr.edu/immigration/reports/371 (last accessed Dec. 8, 2016).

Overall, legal representation correlated with up to a 43% increase in success rate for all respondents (adults and children) before the Immigration Court. Eagly & Shafer, *supra*, at 49, 50. Before the BIA, the statistics are even starker, with only 9.5% of unrepresented respondents achieving a favorable result. Exec. Office for Immigration Review, *A Ten-Year Review of the BIA Pro Bono Project (2002–2011)* (Feb. 27, 2014), at 12. The success rate jumped to 31% in cases where BIA

Pro Bono Project volunteers provided representation. *Id.*[2] These statistics confirm what *amici* observed every day from the bench: that professional representation, particularly for unrepresented minors, may be the single largest factor in determining whether a person successfully navigates the administrative process.

Immigration Judges, by and large, desperately strive to reach a just outcome in every case based on a complete and accurate record of facts. But there are limits to what Immigration Judges can accomplish in this regard. Immigration Judges may ask questions of the child and any witnesses for the purpose of eliciting relevant information that the child has not provided, INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1), but children in removal proceedings are frequently traumatized, unable to understand English, and incapable of comprehending legal terminology or evidentiary standards. The amount of time that Immigration Judges would need to expend to develop the facts precludes anything more than cursory inquiries. Even then, the extra time required to elicit basic information has the collateral effect of slowing an already overloaded docket; spending more time with children

[2] *See also* Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 Harv. J. on Legis. 331, 338–39 (2013) (finding that, in 2010, immigration judges granted 54% of applications for asylum seekers represented by counsel compared to 20% for those unrepresented).

further contributes to substantial delays in resolving other cases before the immigration courts.[3]

Apart from resource constraints, Immigration Judges who provide coaching to a child in order to elicit information that would show eligibility for relief tread perilously close to the bounds of their proper role as an impartial adjudicator. *See* Exec. Office for Immigration Review & Nat'l Ass'n of Immigration Judges, *Ethics & Professionalism Guide for Immigration Judges* 2 ("An immigration judge shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.") (citing 5 C.F.R. § 2635.101(b)(8)).

If left to stand, the panel's decision will prevent any court from considering the underlying question whether these minor plaintiffs are entitled to court-appointed counsel, the practical effect of which is to leave "thousands of children . . . to thread their way alone through the labyrinthine maze of immigration laws." *J.E.F.M.*, 837 F.3d at 1040. The vast majority of these children will never receive representation and will likely lose the most important legal battle of their lives.

[3] As of November 2016, the average case has been pending for 678 days. *See Immigration Court Backlog Tool*, TRAC Immigration, http://trac.syr.edu/phptools/immigration/court_backlog (last accessed Dec. 13, 2016).

B. The panel's decision did not address the impediments to preserving and developing a sufficient record in removal proceedings to resolve an appointed-counsel claim on appeal.

The panel also overlooked the fact that *pro se* minors in removal proceedings are unlikely to preserve an appointed-counsel claim throughout the administrative process and develop a sufficient record for appellate review. Those complications further minimize the possibility of meaningful judicial review in the context of removal proceedings. As explained below, obstacles abound at every turn.

After the Immigration Judge invariably has denied the request for appointed counsel, the child must file a *pro se* notice of appeal (Form EOIR-26) with the BIA. 8 C.F.R. §§ 1240.15, 1240.53(a), 1003.3; *see* Exec. Office for Immigration Review, Form EOIR-26, *Notice of Appeal from a Decision of an Immigration Judge* (Form EOIR-26). The child must fill out the form in English. And the child must ensure that the notice of appeal preserves her claim for appointed counsel.

Form EOIR-26 requires the child to identify the nature of the appeal and describe "in detail" the reasons for the appeal. The form and the BIA Practice Manual admonish the child to "clearly explain the specific facts and law on which you base your appeal of the Immigration Judge's decision." Form EOIR-26. The BIA may "summarily dismiss [the child's] appeal if it cannot tell from this Notice of Appeal, or any statements attached to this Notice of Appeal, why [the child is]

appealing." *Id.* "[V]ague generalities, generic recitations of the law, and general assertions of Immigration Judge error are unlikely to apprise the Board of the reasons for appeal." BIA Practice Manual § 4.4(b)(iv)(D).

The BIA strongly encourages applicants to file a brief in their appeal. BIA Practice Manual § 4.6(b) ("A well-written brief is in any party's best interest and is therefore of great importance to the Board."). Yet, the BIA Practice Manual clearly contemplates that an attorney well-versed in immigration law—not a minor child with perhaps a poor grasp of the English language—will be drafting the brief. *See, e.g.*, *id.* § 4.6(b) (advising that "[b]riefs should always recite those facts which are appropriate and germane to the adjudication of the appeal, and should cite proper legal authority, where such authority is available").

After the BIA rejects the appointed-counsel request—because the Board, too, lacks any statutory or regulatory power to grant the requested relief—the child must file a petition for review with the applicable federal court of appeals. The child must then brief the case, again presenting all relevant claims that have been administratively exhausted and preserved.

At the end of this journey, the biggest impediment to review is preservation of the claim to legal representation. Failure to exhaust administrative remedies is a bar to judicial review in the court of appeals. *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004). While a *pro se* petitioner need not use precise legal

terminology in order to raise and preserve a claim, this Court—even construing a *pro se* petitioner's claims liberally—must dismiss claims that the petitioner failed to exhaust before the agency. *See Alvarado v. Holder*, 759 F.3d 1121, 1128 (9th Cir. 2014).

This appellate process assumes a level of practical capabilities, legal sophistication, and foresight that no child realistically possesses.[4] The procedure requires, for example, the ability to read, write, and comprehend the English language, access to and proficiency with the U.S. banking system and an understanding of U.S. currency, and familiarity with the U.S. mail. And these basic skills do not even include the faculties a child would need to understand and defend herself on the substantive merits or to prepare the numerous legal documents required to present her case. It should come as no surprise then that "[t]he law has historically reflected the . . . assumption that children characteristically lack the capacity to exercise mature judgment and possess only

[4] The United States' Assistant Chief Immigration Judge, whom the government proffered as a witness in this case, testified in his deposition that children as young as three years old have the capacity to provide competent legal representation to themselves in deportation proceedings in U.S. immigration courts. *See* Pls.'-Appellees'/Cross-Appellants' Req. Judicial Notice, ECF No. 28, at 3–4 (citing *J.E.F.M. v. Lynch*, No. 2:14-cv-01026 (W.D. Wash.), ECF No. 202-1, Ex. F). That position has been justly ridiculed as preposterous. *See, e.g.*, Jerry Markon, *Can a 3-year old represent herself in immigration court? This judge thinks so.*, Wash. Post, March 5, 2016.

an incomplete ability to understand the world around them." *J.D.B. v. North Carolina*, 564 U.S. 261, 273 (2011).

Even if a child were somehow able to avoid all the procedural pitfalls of the immigration process described above and find herself in a federal court of appeals with a preserved claim, she might still be denied an opportunity for meaningful judicial review if she did not create an adequate administrative record for this Court's review of the appointed-counsel claim.

The panel opinion fails to appreciate how difficult it is for children to create an adequate record. The panel concludes that meaningful judicial review is available, in part, because Immigration Judges are trained and required to elicit information that bears on a child's eligibility for relief. But the panel ignored the limits to what Immigration Judges or BIA members can accomplish in this regard. Children in removal proceedings are frequently traumatized, unable to understand English, and incapable of comprehending legal terminology or evidentiary standards. The amount of time that Immigration Judges would need to expend to develop the facts precludes anything more than cursory inquiries. To be sure, if the Supreme Court has recognized that "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law" and "requires the guiding hand of counsel at every step in the proceedings against him," surely there is no question

that a child needs such a guiding hand. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (internal citations omitted).

Yet, the panel's decision will require the child to navigate this procedural minefield alone. A child who has retained counsel cannot raise a claim for appointed counsel. Therein lies the rub. Immigration laws are so complex and their procedures so unforgiving that it is virtually impossible for a child to raise and preserve a claim for appointed counsel without a lawyer's assistance. Indeed, the panel can point to only *one* case where a minor preserved his appointed-counsel claim. *See J.E.F.M.*, 837 F.3d at 1037. Notably, the claim was clearly articulated to this Court *only* after the child obtained pro bono counsel to represent him in his Petition for Review. *Id*. *Amici* adjudicated tens of thousands of removal proceedings and appeals, including a countless number of cases involving minors. Despite that volume of cases, *amici* never saw an unrepresented child raise and preserve a claim for appointed counsel.

The panel opinion leaves unrepresented minors in a classic Catch-22: in order for a child to bring and preserve a claim for appointed counsel, a child must have a lawyer to navigate the appellate process; but if a child has a lawyer, she cannot bring a claim for appointed counsel. Consigning children to the administrative process is tantamount to a complete denial of judicial review of the

appointed-counsel claims asserted here. *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 496–97 (1991).

CONCLUSION

Given the stakes of this matter, the Court should grant plaintiffs-appellees' petition for rehearing and rehearing *en banc*.

Dated: December 15, 2016

Respectfully submitted,

/s/ *R. Reeves Anderson*

ROBERT REEVES ANDERSON
HOLLY E. STERRETT
PAUL W. RODNEY
ADRIENNE BOYD
ARNOLD & PORTER LLP
370 Seventeenth Street, Suite 4400
Denver, CO 80202
Reeves.Anderson@aporter.com
(303) 863-1000
(303) 832-0428 (fax)

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a) and Ninth Circuit Local Rule 29-2(c)(2) because this brief contains 3,939 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman typeface.

Dated: December 15, 2016

Respectfully submitted,

/s/ *R. Reeves Anderson*

Robert Reeves Anderson
ARNOLD & PORTER LLP
370 Seventeenth Street, Suite 4400
Denver, CO 80202
(303) 863-1000
(303) 832-0428 (fax)
Reeves.Anderson@aporter.com

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that, on December 15, 2016, I electronically filed the foregoing brief with the Clerk of the Court by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 15, 2016

Respectfully submitted,

/s/ *Paul W. Rodney*

Paul W. Rodney
ARNOLD & PORTER LLP
370 Seventeenth Street, Suite 4400
Denver, CO 80202
(303) 863-1000
(303) 832-0428 (fax)
Reeves.Anderson@aporter.com

Counsel for Amici Curiae