Docket No. 16-73801, Agency No. A206-838-888

In the

United States Court of Appeals

For the

Ninth Circuit

C.J.L.G., A JUVENILE MALE,

Petitioner,

v.

JEFFERSON BEAUREGARD SESSIONS III, Attorney General,

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals

BRIEF OF FORMER FEDERAL IMMIGRATION JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING AND REHEARING EN BANC

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are former Immigration Judges (IJs) who collectively have over 175 years' experience adjudicating immigration cases, including thousands of cases involving children. A complete list of *amici* is as follows:

Sarah M. Burr served as an IJ in New York from 1994 to 2012 and as Assistant Chief Immigration Judge for New York from 2006 to 2011. She currently serves on the board of Immigrant Justice Corps.

Jeffrey S. Chase served as an IJ in New York from 1995 to 2007 and as an advisor at the Board of Immigration Appeals (BIA) from 2007 to 2017. Previously, he chaired the Asylum Reform Task Force of the American Immigration Lawyers Association (AILA) and received AILA's pro bono award.

George T. Chew served as an IJ in New York from 1995 to 2017. Previously, he served as a trial attorney at the INS.

Cecelia M. Espenoza served as a member of the BIA from 2000 to 2003 and as Senior Associate General Counsel at the Executive Office for Immigration Review (EOIR) from 2003 to 2017.

Noel Ferris served as an IJ in New York from 1994 to 2013 and as an advisor at the BIA from 2013 to 2016. Previously, she led the Immigration Unit of the U.S. Attorney's Office for the Southern District of New York.

John F. Gossart, Jr. served as an IJ from 1982 to 2013. Previously, he served in various positions at the INS. Judge Gossart served as president of the National Association of Immigration Judges, co-authored the National Immigration Court Practice Manual, and received the Attorney General Medal.

Eliza Klein served as an IJ in Miami, Boston, and Chicago from 1994 to 2015.

Lory D. Rosenberg served as a member of the BIA from 1995 to 2002. Previously, she served on the board of AILA and received multiple AILA awards. Judge Rosenberg co-authored the treatise Immigration Law and Crimes.

Susan G. Roy served as an IJ in Newark. Previously, she served as a Staff Attorney at the BIA and in various positions at the INS and its successor Immigration and Customs Enforcement.

Paul W. Schmidt served as chair of the BIA from 1995 to 2001, as a member of the BIA from 2001 to 2003, and as an IJ in Arlington from 2003 to 2016. Previously, he served as acting General Counsel and Deputy General Counsel at the INS.

Polly A. Webber served as an IJ in San Francisco from 1995 to 2016, with details in Tacoma, Port Isabel, Boise, Houston, Atlanta, Philadelphia, and Orlando. Previously, she served a term as National President of AILA.

Amici have dedicated their careers to improving the fairness of the immigration system, particularly in the administration of justice to children. In *amici*'s personal judicial experience, children are incapable of meaningfully representing themselves in this nation's labyrinthine immigration system. Absent legal representation, IJs cannot independently develop a child's case to permit the fair adjudication that due process requires. Accordingly, *amici* have a profound interest in the resolution of this case.[1]

SUMMARY OF ARGUMENT

Respectfully, the Panel erred in determining that IJs can and will ensure the due process rights of pro se children without the aid of counsel. This error is painfully clear from the vantage point of IJs, who face overburdened and ever-growing dockets, the complexity of immigration law, and, as Department of Justice (DOJ) employees, the constraints of administrative policy. As such, and as demonstrated by the impact of counsel on a child's likelihood of success in immigration court, IJs lack the necessary time, resources, and power to ensure that unrepresented minors receive meaningful adjudication of their eligibility to remain in this country.

[1] No party's counsel authored this brief in whole or in part; no party, party's counsel, nor anyone other than *amici* or their counsel contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

The Panel further erred in vastly overstating the value to pro se children of certain extant procedural safeguards. While the Panel correctly identifies an IJ's duty to develop the record, it fails to understand the practical and procedural limits of this duty in the context of an adversarial proceeding, and wrongly transforms it into a cure-all for the otherwise overwhelming lack of due process an unrepresented minor would receive. The Panel similarly holds up the hypothetical availability of pro bono counsel as a potential due process panacea, and Judge Owens's concurrence suggests the same of the presence of a parent. But these factors also fall far short of remedying the basic unfairness of forcing children to represent themselves in immigration court.

If the Panel's decision is not revisited, thousands of minors will be forced to navigate the complex immigration system without representation. In many instances, these children will be returned to life-threatening circumstances despite their eligibility to legally remain in this country. It is hard to imagine a question of more exceptional importance.

ARGUMENT

I. Immigration Judges Cannot Independently Develop a Child's Case to Permit the Fair Adjudication that Due Process Requires

IJs strive to provide fair removal proceedings based on a complete record. But they cannot be charged with the responsibility that the Panel has devolved on them to independently develop a minor's case to the point that due

process requires. Several factors create a chasm between the Panel's ambitious directive and the reality of immigration proceedings. First, overloaded dockets overwhelm IJs and severely limit their capacity to engage in independent fact finding. Second, DOJ policies further preclude anything more than cursory factual inquiries, even in cases involving unrepresented children. Third, the complexity of immigration law ensures that such cursory inquiries will fail to identify valid bases for relief for pro se minors. Moreover, the dramatic statistical impact of counsel demonstrates that the width of this chasm cannot possibly comport with a child's due process right to a full and fair hearing.

A. Immigration Judges Are Overwhelmed

The Immigration Courts are inundated with cases. As of December 2017, there were 667,839 currently pending cases in the 58 immigration courts across the country. TRAC Immigration, *Immigration Court Backlog Tool*, http://trac.syr.edu/phptools/immigration/court_backlog (last visited Mar. 14, 2018). Further, the average case had been pending for 708 days. *Id.* For an individual IJ, this translates to thousands of cases at a time, and sometimes over a hundred matters in a single day. Even for complex asylum hearings, one day will often involve several such hearings. Unsurprisingly, IJs report that they are too busy to conduct basic case-related legal research or remain up to date on changes in immigration law. U.S. Gov't Accountability Office, GAO-17-438, *Immigration*

Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges 31 (June 2017), https://www.gao.gov/assets/690/685022.pdf.[2]

Cases involving unrepresented minors comprise a significant percentage of these overcrowded dockets. Accordingly, IJs cannot spend extra time on such matters without further contributing to substantial delays in resolving the remainder of their caseload. Even with a drop-off in new cases involving unaccompanied children in 2017, the backlog of such matters still reached an all-time high of 88,069. TRAC Immigration, *Children: Amid a Growing Court Backlog Many Still Unrepresented* (Sept. 28, 2017), http://trac.syr.edu/immigration/reports/482/. And despite extensive efforts to provide pro bono counsel for these children, many continue to go unrepresented—29% whose cases began in 2015, 40% in 2016 cases, and 76% in 2017 cases. *Id.* Nor is this crisis ending. From October 2017 to February 2018, 17,575 new unaccompanied children were apprehended at the southwest border. U.S. Customs and Border Prot., *U.S. Border Patrol Southwest Border Apprehensions by Sector FY2018*, https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions (last visited Mar. 14, 2018). Though staggering, such figures do not account for many

[2] Nor can law clerks meaningfully fill this gap, as several IJs typically share a single clerk. *See also id.* at 27 (noting "lack of . . . legal clerks" and "[in]sufficient funding to appropriately staff the immigration courts").

more cases involving children, like C.J., who are unrepresented but not classified as unaccompanied. These unrelenting demands dramatically curtail an IJ's capacity to engage in independent fact finding for pro se children.

B. DOJ Policy Mandates Efficiency and Skepticism

Far from encouraging IJs to ignore competing demands and spend as much time as necessary to independently develop each child's eligibility for relief, recent DOJ policy has instead expressly prioritized efficiency and skepticism as to the availability of relief. In a speech to EOIR personnel last fall, Respondent protested the "case law that has expanded the concept of asylum," complained that "vague, insubstantial, and subjective [asylum] claims have swamped our system," suggested there should be "cost or risk for those who make a baseless asylum claim," and suggested there should not be "a court hearing on every asylum application." U.S. Dep't of Justice, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review* (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.

Subsequently, Respondent issued a memorandum ordering IJs to adhere to the principles that "timely and efficient conclusion of cases serves the national interest," "efficient and timely completion of cases and motions before EOIR is aided by the use of performance measures," and "any and all suspected

instances of fraud should be promptly documented and reported." Att'y Gen., *Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest* 2 (Dec. 5, 2017), https://www.justice.gov/opa/press-release/file/1015996/download.

Just last week, Respondent personally vacated a four-year-old BIA precedent decision holding that immigrants applying for asylum or withholding of removal are entitled to a full hearing. *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018).

Lest any IJ mistakenly believe that these priorities do not apply to children, EOIR's Chief Immigration Judge also released a memorandum specifically addressing minors. Echoing Respondent's preoccupation with efficiency, she instructs IJs to familiarize children with the courtroom, but only "[t]o the extent that resources and time permit," and "to resolve issues of removability and relief without undue delay." Chief Immigration Judge, OPPM 17-03, *Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children* 4, 6 (Dec. 20, 2017), https://www.justice.gov/eoir/file/oppm17-03/download. Reiterating the mandate for skepticism, the short memo twice reminds IJs of the "adversarial" nature of immigration court and twice invokes the importance of ensuring due process ***for***

the government. *Id*. at 4, 6-7.[3] The memo also advises "that legal requirements, including credibility standards and burdens of proof, are not relaxed or obviated for juvenile respondents." *Id*. at 7. As for cases involving an Unaccompanied Alien Child (UAC), the memo notes "an incentive to misrepresent accompaniment status or age in order to attempt to qualify for the benefits associated with UAC status," and that IJs "should be vigilant in adjudicating cases of a purported UAC." *Id*. at 7-8.

Thus, even where an IJ has the inclination to ignore her bulging docket and take the time to establish a rapport with an unrepresented child that will actually allow her to more thoroughly investigate the child's claim, Respondent has forbidden it.

C. Immigration Law Is Exceedingly Complex

Notwithstanding this staggering caseload, subjection to "performance measures," and requisite vigilance for fraud, IJs are tasked with obtaining answers to complex questions of mixed law and fact that pro se children do not meaningfully understand and thus cannot effectively help answer. As this Court

[3] The memo does not mention a child's due process rights, but suggests "limiting the amount of time the child is on the stand without compromising due process for the opposing party," *id*. at 6, and cautions that "[d]ue process and fundamental fairness require that testimony by a juvenile . . . be subject to cross-examination, particularly if the testimony is speculative, vague, or contains indicia of inappropriate coaching," *id*. at 7.

recognizes: "[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).

To begin with, an IJ must determine citizenship, an inquiry into not just place of birth but also a child's parents and grandparents. 8 U.S.C. § 1401. Where alienage is established, the IJ must also determine how, when, and why the child arrived in the U.S. *Id.* § 1361. In addition, the IJ must ascertain what experiences the child encountered prior to and since arriving in the U.S. All this information affects not only whether the government has stated a valid charge of removability, but also eligibility for particular forms of relief that an unrepresented child may not know exist, let alone understand how to pursue.

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. *Id.* § 1101(a)(27)(J); 8 C.F.R. § 204.11. The Court need not look beyond the instant matter to understand that potential eligibility for SIJS relief will frequently be missed absent counsel. Similarly, where a child was a victim of a crime in the U.S., she may be eligible for a U visa, also a path to lawful permanent residency. 8 U.S.C. § 1101(a)(15)(U). But again, an IJ charged with closing cases on a bloated docket may easily miss facts that

would support such relief, and even a thoughtful background inquiry will often fail to elicit critical information from a pro se child.

A child may also be eligible for asylum based on prior persecution. *Id.* § 1101(a)(42). While an IJ is unlikely to miss asylum eligibility altogether, she may well fail to identify facts essential to a successful asylum claim, such as membership in a relevant social group or the government's acquiescence to persecution. Nor can an unrepresented child be expected to appreciate that his life must be in danger ***for the right reason*** to establish eligibility for asylum.

Here, C.J. and his mother showed no understanding of why a gang-related threat alone would not warrant asylum, but the IJ's cursory inquiry effectively ended without seeking the motivation for that threat. This record is not dispositive of C.J.'s asylum claim (and related Convention Against Torture claim), which could still rise or fall based on unanswered questions about why the gang targeted him and his family and whether the government was complicit. *See, e.g.*, *Flores-Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (evidence gang targeted family supports social group claim); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1091-92 (9th Cir. 2013) (en banc) ("people who testify against gang members" can be a particular social group).

In short, combined with resource constraints and DOJ policy, the complexity of immigration law guarantees that an IJ will frequently miss valid bases for relief when adjudicating the removal of a pro se minor.

D. Counsel Dramatically Improve Outcomes

While these structural factors demonstrate that IJs cannot independently connect minors with due process as the Panel envisions, they also make clear that only counsel can bridge the gap. In *amici*'s experience, 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. And as *amici* observed every day from the bench, all else being equal, professional representation is the single largest factor in whether a minor successfully navigates the immigration court process.

Statistical research resoundingly confirms *amici*'s conclusions. Indeed, the Panel accepts the government data showing that from 2005 to 2014, "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." Slip. Op. at 25-26. The same research shows a widening gap from 2012 to 2014, when just 15% of unrepresented children were allowed to remain in the U.S., compared to 73% of represented children. TRAC Immigration, *Representation for Unaccompanied Children in Immigration Court*

(Nov. 25, 2014), http://trac.syr.edu/immigration/reports/371/. Where representation is so often outcome-determinative, common sense dictates that, categorically, unrepresented children do not receive a full and fair hearing.

II. The Panel Vastly Overstates the Value of Existing Procedures for Unrepresented Minors

While the Panel recognizes that "C.J.'s removal proceeding was not a paragon of procedural decorum," it concludes that the "IJ did, however, provide most of the procedural safeguards necessary to ensure a full and fair hearing." Slip Op. at 37 & n.12. Chief among these supposed safeguards are that the IJ "asked C.J. questions to determine potential avenues for relief," "gave [his mother] Maria an opportunity to give a narrative statement in support of C.J.," and "granted four continuances spanning nearly a year and a half, which afforded Maria multiple opportunities to secure counsel." *Id*. at 37 n.12. Yet none of these steps actually ensured a full and fair hearing for C.J., nor would they for other unrepresented minors like him.

A. The Duty to Develop the Record Does Not Obviate the Need for Counsel

The Panel insists that "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" as to whether it has afforded a child with a full and fair immigration hearing absent counsel. Slip Op. at 38. In *amici*'s

experience, children in removal proceedings are frequently traumatized, unable to understand English, and incapable of comprehending legal terminology or evidentiary standards. 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. As discussed in Part I.C *supra*, 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.

Promisingly, the Panel recognizes that "the onus was almost entirely on the IJ to develop the record" because "C.J.'s mother was ill-equipped to understand the proceedings or to comprehend C.J.'s burden in establishing eligibility for relief, and the government asked no questions." *Id*. at 27-28. But the Panel fails to take the next logical step and recognize that, in such circumstances, the IJ could no more realistically live up to her responsibility without a lawyer for C.J. than she could without a translator for him. Counsel is the only hope that children like C.J. have to meaningfully communicate with the court, and a full and fair hearing would have been far more likely had the government allocated the single lawyer present to him rather than DHS.

Puzzlingly, the Panel also opines that where an IJ fails to provide a full and fair hearing, an "effective process already exists to safeguard the rights of minors in formal removal proceedings: remand to an IJ to correct any

deficiencies." *Id.* at 37-38. But this of course assumes that the likely still unrepresented minor will know that she did not receive due process and be able to articulate why on appeal in a coherent and procedurally proper manner. This theoretical possibility does nothing to make remand a meaningful safeguard in practice.

Unlike an IJ or BIA member, competent immigration counsel can and must first establish a relationship with a child and thoroughly explore all possibilities for relief, and only then ascertain and furnish relevant factual information to support appropriate legal arguments. Applicable ABA rules instruct an attorney to "meet with the Child as soon as possible" and "maintain frequent contact with him." ABA Comm. on Immigration, *Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States* § V.C.1 (Aug. 2004), https://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf. Related commentary stresses "maintaining a trusting relationship," that counsel should have "a full understanding of the Child's background . . . such that the Attorney can present a full picture of the Child's circumstances to the court," and that "representation is not permitted" when—like an IJ—counsel has "not even met with [the Child] prior to . . . court." *Id.* The rules also command counsel to "investigate all forms of

relief available to the Child." *Id.* § V.A.1.i. Here, for instance, counsel would have thoroughly explored the possibility of SIJS. In contrast, even the Panel does not believe we can rely on an IJ "to inform C.J. that he might be eligible." Slip Op. at 50.

Ethical guidelines and DOJ policy also preclude IJs from replicating even a fraction of counsel's efforts. The Panel asserts that the duty to develop the record "distinguishes immigration proceedings from other adversarial forums where judges act only as neutral arbiters." Slip Op. at 26. In fact, experienced government attorneys are charged with opposing relief in immigration court and frequently object to insist upon impartiality when IJs attempt to elicit information supporting children's claims. *See* Exec. Office for Immigration Review & Nat'l Ass'n of Immigration Judges, *Ethics and Professionalism Guide for Immigration Judges* 2 (Jan. 26, 2011), https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf ("immigration judge shall act impartially and shall not give preferential treatment to any organization or individual") (citing 5 C.F.R. § 2635.101(b)(8)). Further, recent DOJ policy instructs IJs not only to refrain from advocating for, but also to be ***actively suspicious*** of, the minors before them. *See* Chief Immigration Judge, OPPM 17-03 at 3 ("Although juvenile cases may present sympathetic allegations, Immigration Judges must be mindful that they are unbiased arbitrators of the law and not

advocates for either party in the cases they hear."); *supra* Part I.B (immigration court is "adversarial" and standards are "not relaxed or obviated for juvenile[s]," who have "incentive to misrepresent accompaniment status or age"). Reviewing these policies alongside the Panel's decision, one could be excused for failing to understand that they purport to describe the same adjudication process.

B. A Parent Does Not Obviate the Need for Counsel

The Panel identifies Maria as a "devoted mother," Slip Op. at 50, and takes clear procedural comfort that she was present to "speak on behalf of C.J.," *id.* at 37. Judge Owens goes further and strongly suggests that her presence may have sufficed to ensure due process notwithstanding the absence of counsel. *Id.* at 53 (Owens, J., concurring) ("[W]hether the Due Process Clause mandates counsel for unaccompanied minors . . . is a different question that could lead to a different answer."). While a parent's devotion is no doubt a considerable asset to a child in many contexts, it cannot meaningfully replace a lawyer in adversarial removal proceedings.

In *amici*'s experience, the presence of a parent without qualified counsel does not necessarily enhance, and can significantly diminish, the fairness of a hearing. For instance, a child may be unwilling to share certain information in front of a parent. Here, had C.J. been targeted due to a religious affiliation or sexual orientation that ran counter to Maria's beliefs, or been the victim of abuse at

Maria's hands, it is hard to imagine such information coming out without an attorney's involvement. Similarly, an unrepresented child may not correct harmful misinformation provided by her parent for fear she would cause anger or even jeopardize her parent's immigration status.

Moreover, due to the complex and often counterintuitive nature of immigration law, *see supra* Part I.C, a well-meaning parent can often do a significant disservice to her child's case. Here, that danger was far more than hypothetical—Maria confirmed that she and C.J. fled "because [C.J.] was being threatened by the gangs," and that there was nothing else to tell the IJ other than that they were "very afraid to go back." Slip Op. at 11. While Maria understandably chose to emphasize the danger she and C.J. faced, her testimony effectively ended the critical inquiry into why C.J. was targeted and whether the government was complicit in the gang violence that they both feared. Competent counsel would have explored those issues further.

C. A Pro Bono List Does Not Obviate the Need for Counsel

The Panel concludes that the IJ took "an affirmative role in securing representation by competent counsel for C.J.," because "DHS provided C.J.'s mother with a list of *pro bono* attorneys, and the IJ granted several continuances—over the course of nearly a year and a half—to allow C.J.'s mother to secure legal counsel." Slip Op. at 19 (internal quotations omitted). While no doubt meaningful

where pro bono counsel is actually secured, the Court need not look past this matter to see how hollow these safeguards are when no pro bono counsel is available. Moreover, in *amici*'s experience, C.J.'s inability to secure representation was far from anomalous. In fact, because C.J. was not detained and had a devoted parent, his chances were better than many. The volume of cases involving indigent immigrants has long left pro bono legal service providers woefully overstretched, as clearly demonstrated by the fact that 40% of unaccompanied minors whose cases began two years ago never secured counsel. *See supra* Part I.A. Handing a child a lottery ticket for pro bono counsel is not due process.

CONCLUSION

For all the foregoing reasons, *amici* respectfully request that this Court grant C.J.'s petition.

Dated: March 15, 2018

Respectfully submitted,

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The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/ Harrison "Buzz" Frahn

Date: Mar 15, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 15, 2018.

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.

/s/ Harrison "Buzz" Frahn
Harrison "Buzz" Frahn