No. 16-73801

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.J.L.G., A 206-838-888
(Non-Detained)
Petitioner,

v.

JEFFERSON B. SESSIONS III, Attorney General,
Respondent.

PETITION FOR REHEARING AND REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

C.J. is a child who was ordered removed without legal representation. He asserts he was denied a fair hearing when the Immigration Judge ("IJ") moved forward against him without ensuring he had an attorney. The Panel rejected that claim and affirmed the removal order. In so doing, it issued the first federal circuit court opinion to hold that children can represent themselves in adversarial proceedings where significant legal rights are at stake. As a result, thousands of children, including those fleeing horrific violence in Central America, will never have a meaningful opportunity to present their defenses to removal.

C.J. requests rehearing en banc because the Panel's decision involves a matter of exceptional importance, conflicts with this Court's cases, and misapplies Supreme Court precedent.

I. This Case Involves a Question of Exceptional Importance

This case involves a question of exceptional importance because the lives of thousands of children depend on its outcome. Most children currently in removal proceedings come from El Salvador, Guatemala, or Honduras, three of the most violent countries on Earth. *See* ECF 41-2 at 3-4 ("shockingly high rates of violence against children" in those countries). Nonetheless, the children's asylum claims are complex. Much of the violence they face arises from non-state actors like gangs or the children's own family members. Persecution by non-state actors can be

grounds for asylum, but only where the applicant establishes certain factual predicates. *See Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1062 (9th Cir. 2017) (en banc) (explaining standards for whether government is "unable or unwilling to control" non-state actors). Moreover, whether or not the persecution is "on account of a protected ground" turns on evolving caselaw defining a "particular social group." *See, e.g.*, *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087-92 (9th Cir. 2013) (en banc) (describing complex legal requirements and concluding that witnesses who testify against gangs could constitute particular social group). This intricate legal doctrine is far beyond a child's understanding.

Many of these children are also eligible for Special Immigrant Juvenile status ("SIJS"). Yet pursuing SIJS involves a complex, multi-phase process that requires litigation in state court, proceedings before U.S. Citizenship and Immigration Services ("USCIS"), and litigation in immigration court. *See* ECF 29 at 46-47; *see generally* ECF 40. Children cannot obtain such relief without counsel.

Therefore, to have fair hearings children need attorneys to investigate and articulate these and other complex defenses. Data confirms this fact. Represented children win far more often than unrepresented children. Slip Op. at 25 ("[O]nly 10% of unrepresented children were permitted to remain in the United States,

whereas 47% of represented children were awarded relief in their immigration proceedings.").[1] Thus, the lives of C.J. and numerous others are at stake.

II. The Panel's Decision Conflicts with Governing Precedent

A. The Panel's Decision Conflicts with This Court's Law Governing Children in Removal Proceedings

The Court should rehear this case because the decision conflicts with *Jie Lin*, which held that "minors are entitled to trained legal assistance" when significant rights are at stake. *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1033 (9th Cir. 2004) (quoting *Johns v. County of San Diego*, 114 F.3d 874, 876-66 (9th Cir. 1997)); *see also Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1160 (9th Cir. 2004) (holding minors cannot accept service because, *inter alia*, "minors generally cannot appreciate or navigate the rules of or rights surrounding final proceedings that significantly impact their liberty interests").[2]

[1] This figure may underestimate the success rates of represented children. Updated statistics concerning cases pending or completed in this circuit since July 2014 reveal that only about *five percent* of represented children were ordered removed. *See* Plaintiffs-Appellees' Second Request for Judicial Notice, Ex. 11, ¶¶ 17-19, *J.E.F.M. v. Lynch*, 15-35738, 15-35739 (9th Cir. Aug. 11, 2016), ECF 63-1. Either set of statistics confirms that thousands of children will be deported to danger if the Panel's decision stands.

[2] *Flores-Chavez* found serious constitutional problems with a scheme that permitted children to accept service of the charging documents on their own. 362 F.3d at 1161. Although *Flores-Chavez* is not about counsel, it is inconceivable that children can be competent to represent themselves in immigration court if they are not competent to accept service in immigration cases.

The Panel's decision distorts *Jie Lin*'s holding. It asserts "*Jie Lin* held only that an IJ should assist minors in retaining the private counsel to which they are statutorily entitled," Slip Op. at 16; that "*Jie Lin* stands for the unremarkable proposition that minors are entitled to heightened protections in removal proceedings," *id.* at 18; and "all that *Jie Lin* requires" is that IJs provide a pro bono referral list and grant some continuances for unrepresented children, *id.* at 19.

But if "all that *Jie Lin* requires" is what the IJ did here, then it established no special rules for children at all. IJs must provide pro bono referral lists and additional time to seek counsel to *adults* as well as children. *See, e.g.*, 8 C.F.R. 1240.10(a)(1)-(2) (requiring notice of right to counsel and pro bono list); *Biwot v. Gonzales*, 403 F.3d 1094, 1099 (9th Cir. 2005) (finding denial of right to counsel where IJ proceeded without waiver from adult).

Rather, *Jie Lin* found reversible error because the IJ did not do precisely what C.J. sought: postpone the hearing until an attorney could be located—whether through the IJ's efforts or those of others. *Jie Lin* held that "the IJ could not let Lin's hearing proceed without counsel" because "*of the added protections he is due as a minor*." 377 F.3d at 1033 (emphasis added); *see also id*. at 1032 ("Under certain circumstances, a petitioner may be forced to proceed without counsel. This might be warranted *if the petitioner were not a minor* and had explicitly waived his right to counsel.") (emphasis added). *Jie Lin* explained that where a *child* lacks

competent representation, the IJ must "suspend the hearing and give [the child] a new opportunity to retain competent counsel or *sua sponte* take steps to procure competent counsel." *Id*. at 1033.

Contrary to the Panel's suggestion, Slip Op. at 18-19, C.J. sought the same relief that *Jie Lin* required. C.J. argued that the government could not proceed against him without counsel, which is precisely what *Jie Lin* held as to that child. *See* ECF 60 at 1 ("C.J.L.G. was denied a fair hearing because he did not have counsel. He asks only that this Court vacate his removal order on that basis."). While C.J. framed the request as for appointed counsel, IJs would obviously retain authority to *either* provide counsel *or* refuse to proceed under the rule sought here.

Nor can *Jie Lin* be distinguished as "rooted firmly in the statutory right to privately-retained counsel." Slip Op at 18. *Jie Lin* applied the Fifth Amendment. *See* 377 F.3d at 1033 ("The record offers no evidence for a finding that Lin knowingly and intelligently waived his *Fifth Amendment* right to counsel.") (emphasis added); *id*. at 1032 ("the IJ shares with counsel responsibility for the denial of Lin's *due process right*") (emphasis added).

For similar reasons, Judge Owens's suggestion that the Panel's ruling could be limited to cases involving accompanied children, Slip Op. at 53-54 (Owens, J., concurring), cannot be reconciled with this Court's cases. *Jie Lin* held that "minors are entitled to trained *legal* assistance" when their rights are being adjudicated. *Jie*

Lin, 377 F.3d at 1034 (quoting *Johns*, 114 F.3d at 877) (emphasis added). *Johns* held that parents cannot *represent* their children in federal court, as has every other circuit to consider the question. *See Johns*, 114 F.3d at 877; *see also, e.g.*, *Osei-Afriyie v. Medical College of Pennsylvania*, 937 F.2d 876, 882-83 (3d Cir. 1991); *Cheung v. Youth Orchestra Foundation of Buffalo, Inc.*, 906 F.2d 59, 61-62 (2d Cir. 1990). Thus, C.J.'s hearing cannot have been constitutional simply because C.J.'s mother was present, particularly given that she submitted a facially deficient asylum application, asked him no questions on the record, and failed to pursue other available relief for him. *See* Slip Op. at 9-11, 28-29, 37 & n.12 (discussing Maria's unsuccessful attempts to "represent" C.J.); ECF 60 at 7 (arguing that IJ further violated C.J.'s due process rights by permitting his mother to waive his right to counsel and act as his attorney).

Regardless, in all likelihood no pro se unaccompanied child will ever file a petition for review to test Judge Owens's suggested distinction. *See* Plaintiffs-Appellees' Petition for Rehearing, *J.E.F.M. v. Lynch*, 15-35738, 15-35739 (9th Cir. Dec. 5, 2016), ECF 106-1. In the past three years alone, thousands of such children have been ordered removed, yet none has raised a counsel claim on appeal.

B. The Panel's Decision Conflicts with This Court's Law Governing Removal Proceedings

The Panel's decision also conflicts with this Court's law governing removal proceedings in two other respects.

First, the decision dramatically alters existing law governing the IJ's duty to advise immigrants of apparent eligibility for relief. This duty, grounded in 8 C.F.R. 1240.11(a)(2) and the Due Process Clause, "obviously is meant to prompt the IJ to help an alien explore legal avenues of relief that might not be apparent to him or his attorney." *Moran-Enriquez v. INS*, 884 F.2d 420, 422-23 (9th Cir. 1989). This Court's prior law established that an immigrant need not show *actual* eligibility for relief to trigger the IJ's duty, only "a reasonable possibility that the petitioner may be eligible for relief." *Id.*; *see also United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000) (duty arises when record "contains an inference" of relief eligibility); *Bui v. INS*, 76 F.3d 268, 271 (9th Cir. 1996) (immigrant need not have "certainly qualif[ied] for relief" to trigger duty).

However, the Panel held an unrepresented child must show the IJ that he already satisfies *every element* of SIJS relief before the IJ has any obligation to advise of apparent eligibility. *See* Slip Op. at 48 ("Had C.J. secured the requisite state court determinations and revealed that development in the immigration proceeding, then the IJ would have been obligated to inform him of his 'apparent eligibility' to seek SIJ status."). But the petitioners in *Moran-Enriquez* and *Bui* had not shown they could satisfy every element of the relief they sought. *See Moran-Enriquez*, 884 F.2d at 422 (record implied that petitioner could meet one "threshold requirement," but contained no evidence on others); *Bui*, 76 F.3d at 269,

271 (reversing even though record lacked evidence that visa requirement would have been met). The Panel's rule effectively eliminates the IJ's duty to identify apparent eligibility for SIJS; only children who already know about it could possibly meet all eligibility requirements.

The Panel's holding has implications far beyond SIJS. For example, its holding eliminates the IJ's duty to alert the spouse of a U.S. citizen that she may be eligible to seek lawful permanent resident status, except in cases where the U.S. citizen spouse has already filed a visa petition with a separate agency (USCIS). Similarly, the holding eliminates an IJ's duty to inform the victim of a violent assault that she may qualify for a U visa unless she already has signed the requisite certification form, even though no pro se litigant would know about that form unless informed by the IJ. Yet "[b]y definition," the duty to advise "involve[s] situations where the alien does not have the wherewithal to make a complete showing of eligibility." *Moran-Enriquez*, 884 F.2d at 423.

Second, the Panel contradicted this Court's precedent by "deny[ing] a petition for review on a ground that the BIA itself did not base its decision." *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1110 (9th Cir. 2011). The BIA did *not* find that the record failed to trigger the IJ's duty. Instead, it wrongly concluded that to prevail C.J. must "establish[] on appeal that he is eligible for other forms of relief" by submitting an SIJS application or other evidence. AR5. The Panel

improperly "accept[ed] appellate counsel's post hoc rationalizations," thereby contradicting controlling precedent. *Id.* at 1109.

C. The Panel's Decision Conflicts with Governing Supreme Court and Ninth Circuit Procedural Due Process Doctrine

1. The Panel Demands Prejudice Where None Is Required

The Panel's decision conflicts with *Montes-Lopez v. Holder*, 694 F.3d 1085, 1092 (9th Cir. 2012), which held that petitioners do not have to show prejudice from *denial* of counsel claims (as opposed to ineffective assistance claims) "for *two* reasons." (emphasis added). While the first reason was that the counsel claim in that case was statutory, the second was that "denial of counsel more fundamentally affects the whole of a proceeding than ineffective assistance." *Id*. In support, the Court cited Sixth Amendment caselaw holding that prejudice is conclusively presumed where counsel was denied because "the absence of counsel can . . . prevent [the noncitizen] from making potentially-meritorious legal arguments, and limit the evidence the [noncitizen] is able to include in the record." *Id.*; *see also id*. (rationale derives from "principles of administrative *and constitutional* law") (emphasis added); *id*. at 1092-93 ("The Sixth Amendment does not apply in the immigration context, but we see no reason why the logic that has guided our interpretation of the Sixth Amendment should not also guide our decision here."). *Montes-Lopez*'s second rationale plainly applies here, yet the Panel disregarded it.

The Panel's decision to ignore half of *Montes-Lopez*'s rationale also creates tension with *Gomez-Velasco v. Sessions*, 879 F.3d 989, 993 (9th Cir. 2018), which relied on that aspect of *Montes-Lopez* in distinguishing it. As *Gomez-Velasco* explained,

> [t]he rule we adopted in *Montes–Lopez* is based in part on the practical difficulties one would face in trying to prove that the outcome of the merits hearing would have been different had counsel been able to assist. . . . The same practical difficulties explain why, in the Sixth Amendment context, a showing of prejudice is not required when the defendant is denied counsel.

Id. (internal citation omitted).

The Panel's treatment of the evidence concerning the motive for the gang's persecution of C.J.—a critical issue for his asylum claim—confirms its error. The Panel assumes that the IJ adduced all available evidence, Slip Op. 34-35, but ignores that no one has investigated *why* C.J.'s uncle and other family were targeted. A lawyer would have investigated that question (by contacting C.J.'s family) to determine whether the gang had a separate motive to target his uncle, e.g., if he were a police officer. Then, a lawyer would have asked "*why* did the gangs target you" and "*why* did the gangs target your uncle," neither of which the IJ asked. Such exploration could have revealed an independent basis for establishing persecution on account of a protected ground. *See Flores-Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) ("[T]he family remains the quintessential particular social group."); *Hernandez-Ortiz v. Gonzales*, 496 F.3d

1042, 1046 (9th Cir. 2007) ("[I]njuries to a family must be considered in an asylum case where the events that form the basis of the past persecution claim were perceived when the petitioner was a child.").

The Panel also ignores that no one ever asked C.J. why *he opposed the gang*, and whether he ever articulated those reasons to the gang or anyone else in his community. Such facts could also have established asylum eligibility. *See Matter of N-C-M-*, 25 I&N Dec. 535, at 2 n.1 (BIA 2011) (noting that targeting due to "express or implied antigang political opinion" could establish asylum claim); *Henriquez-Rivas*, 707 F.3d at 1083 (recognizing that "witnesses who testify against gang members" may constitute particular social group).

Of course, whether or not such exploration would actually bear fruit requires speculation, as there is nothing in the record suggesting what counsel might have learned about this or the other asylum elements. That is precisely why this Court has conclusively presumed prejudice in cases involving denials of counsel.

2. The Panel Decision Conflicts with Governing Procedural Due Process Doctrine

The Panel's opinion also creates conflict with governing Due Process doctrine. Under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), a court analyzes the probable value of the requested safeguard—here, counsel for children in removal proceedings—*as a general matter* in any given context. In contrast, the Panel resolves the due process question solely by reference to the particular facts

of C.J.'s case and its view of whether he suffered prejudice. The Panel's opinion contains no analysis of the risk of erroneous deprivation for unrepresented children in removal proceedings *generally*. *See* Slip Op. at 41 n.15 ("Because we conclude that C.J. is not entitled to court-appointed counsel in his own proceeding, his claim that alien minors enjoy a categorical right to court-appointed counsel necessarily fails.").

The Panel's failure to consider the probable value, *in general*, of counsel for children's cases contravenes governing precedents. The Supreme Court's most recent civil counsel decision, *Turner v. Rogers*, 564 U.S. 431 (2011), considered whether due process "require[s] counsel in every proceeding *of the present kind*" by assessing whether, *inter alia*, the "available set of 'substitute procedural safeguards,' if employed together, can significantly reduce the risk of an erroneous deprivation" in civil contempt proceedings generally. *Id.* at 445-46 (quoting *Mathews*) (emphasis added). The Panel entirely ignored this question. The Panel also ignored the other general factors on which *Turner* focused when assessing the probable value of counsel: the complexity of the proceedings generally, and whether the other side generally has counsel.

This Court's immigration due process cases have also analyzed the risk of erroneous deprivation by focusing on the proceeding generally, rather than the particular individual involved. *See, e.g.*, *Oshodi v. Holder*, 729 F.3d 883, 894-97

(9th Cir. 2013) (en banc) (finding that "second *Mathews* factor weighs in favor of requiring oral testimony *in asylum cases*, which often turn solely on credibility determinations" without reference to particular asylum case at issue) (emphasis added); *V. Singh v. Holder*, 638 F.3d 1196, 1208-09 (9th Cir. 2011) (holding that due process requires contemporaneous recording of prolonged detention bond hearings based on general analysis, but finding no prejudice).

Because of this error, the Panel also mistakenly conflated its due process and prejudice inquiries. Slip Op. at 29 ("We incorporate this inquiry into the *Mathews* analysis because it is critical to determining whether C.J. was prejudiced by any procedural deficiencies."). In contrast, *Oshodi*, *V. Singh*, and other cases treat the question of what due process requires as distinct from whether there was prejudice; the former requires only that the Court assess, in general, the probable value of the additional safeguard. *See, e.g.*, *Oshodi*, 729 F.3d at 895-97; *V. Singh*, 638 F.3d at 1204-05. But here the Panel concluded that C.J. had to establish "a virtual certainty," Slip Op. at 41, that *he himself* could not obtain a fair hearing without counsel in order to establish a right to appointed counsel for children generally.

The Panel's failure to consider children's cases in general led to several other errors. First, it caused the Panel to ignore the Supreme Court's extensive jurisprudence on the unique vulnerabilities of children. *See, e.g.*, *Montgomery v. Louisiana*, 136 S. Ct. 718, 726 (2016) (different sentencing rules because of

children's "underdeveloped sense of responsibility," and vulnerability to pressure) (citing, *Roper v. Simmons,* 543 U.S. 551 (2005); *Graham v. Florida,* 560 U.S. 48 (2010); and *Miller v. Alabama*, 576 U.S. 460 (2012)). *See also J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2397 (2011) (different interrogation rules because "[t]he law has historically reflected the [] assumption that children . . . possess only an incomplete ability to understand the world around them"); ECF 29-1 at 23-25. The Panel says nothing about this substantial body of Supreme Court law.

Second, it caused the Panel to disregard the overwhelming statistical and other evidence that legal representation dramatically improves the quality of immigration court decision-making. *See supra* Part I (children far more likely to prevail with attorney). The Panel noted the existence of that evidence, but never mentioned it in its due process analysis. Slip Op. at 25.

Third, it led the Panel to erroneously assess the alternative safeguards it considered. The Panel held that "the appropriate remedy" for any due process violation in this case would have been "remand with instructions to the IJ to adequately develop the record," rather than counsel. Slip Op. at 41. But the question under *Mathews* must be whether appeals and petitions for review are available as error correction mechanisms *in the generality* of cases, such that they render counsel of little additional value. Had the Panel analyzed that question, it

would have asked whether *most* unrepresented children can file appeals and petitions for review—which, of course, they cannot.

Finally, because the Panel examined only C.J.'s individual case when assessing his counsel claim, it focused on whether the IJ fulfilled her duties to develop the record, without inquiring as to whether a lawyer would have asked more or different questions, or investigated further, in a way that could have decreased the risk of error. *Compare* Slip Op. at 35 *with supra* Part II.C.1.

D. Rehearing Is Needed to Address Other Errors

Finally, this Court should grant rehearing to correct several additional errors that create conflict or confusion in governing immigration doctrine.

First, the Panel accords "an exceedingly high level of deference" to Congress because this case involves "immigration policy." Slip Op. at 6. But the cases it cites address challenges to statutory schemes governing *admission*. *See id.*; Slip Op. at 23. When this Court has addressed challenges to *procedures* governing *removal hearings* it has accorded no heightened deference. *See, e.g.*, *Oshodi*, 729 F.3d at 889 ("[W]e review de novo due process claims in removal proceedings"); *V. Singh*, 638 F.3d at 1202-03 (addressing due process claims arising from detention incident to removal without according deference).[3]

[3] Relatedly, the Panel's assertion that "none of [C.J.'s] cited authorities," Slip Op. at 20-21, establish a right to government-funded appointed counsel ignores *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG-DTBx, 2013 WL 3674492

Second, the Panel's statement that noncitizens who have "not effected entry into the United States . . . lack[] constitutional rights," Slip Op. at 14 n.6, conflicts with this Court's prior cases, which hold that such persons retain rights in certain contexts. *See Papa v. United States*, 281 F.3d 1004, 1010 (9th Cir. 2002) (excludable noncitizens have Due Process rights against deliberate indifference toward their safety) (citing *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987) (excludables have rights against "gross physical abuse")); *Kwai Fun Wong v. United States*, 373 F.3d 952, 974 (9th Cir. 2004) (same for equal protection); *cf. Jennings v. Rodriguez*, __ U.S. __, 2018 WL 1054878, *29 (Feb. 27, 2018) (Breyer, J., dissenting) ("No one can claim, nor since the time of slavery has anyone to my knowledge successfully claimed, that persons held within the United States are totally without constitutional protection.").

Third, the Panel's assertion that IJs can act as more than neutral arbiters where needed to ensure fair hearings, Slip Op. at 26-28, 36-38, defies agency caselaw and practice. *See In re J-F-F-*, 23 I&N Dec. 912, 922 (A.G. 2006) (IJ should not become "advocate" for either party). It also is contrary to the Panel's

(C.D. Cal. Apr. 23, 2013), which did precisely that for certain individuals in removal proceedings with serious mental disabilities. The federal government has subsequently implemented that holding throughout the country, undermining the Panel's assertion that the immigration statute forecloses appointed counsel.

own rejection of C.J.'s SIJS claim on the ground that the "IJ is not required to parse the record for evidence of a petitioner's potential eligibility." Slip Op. at 49.

Fourth, the Panel mischaracterizes SIJS. It states that children "may apply for SIJ status with the IJ;" that the IJ must make the requisite findings of abuse, neglect, or abandonment; that a child must be found a "dependent upon a juvenile court" to qualify; and that children living with one parent may not be eligible for it. Slip Op. at 47, 53-57. Each of these statements is wrong. *See* ECF 40-2 at 14-15 (children apply for SIJS with USCIS, not IJ); *id*. at 11-12 (state court, not IJ, makes findings on abuse, abandonment, and neglect); *id.* at 9 (*either* children must be found dependent on juvenile court, *or* juvenile court must place child under custody of appointed entity or individual); *In re Israel O.*, 233 Cal. App. 4th 279, 290 (2015) (child living with one parent can be eligible for SIJS).

Finally, the Panel's analysis of C.J.'s asylum claim fails to apply this Court's standard for determining whether authorities are "unable or unwilling" to protect an applicant. *See Bringas-Rodriguez*, 850 F.3d at 1063, 1067, 1072 (holding that court must examine "all relevant evidence," should not emphasize "laws as opposed to practices," and may find inability to control persecution "in the applicant's home city or area . . . sufficient"). The Panel resolves the issue solely by reference to the State Department report's assertion that Honduran "security forces severely punish gang members." Slip Op. at 36. That finding

cannot suffice under *Bringas*, particularly where that same report emphasizes that gangs continued to commit "violent crimes and . . . acts of murder." AR120. In C.J.'s home town they killed nine children in less than one month. AR143.

CONCLUSION

For all of these reasons, this Court should grant rehearing en banc.

Dated: March 5, 2018

ACLU OF SOUTHERN CALIFORNIA

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Circuit Rule 40-1(a). This brief contains 4,199 words as counted by the word-processing system used to prepare the brief.

Dated: March 5, 2018

ACLU OF SOUTHERN CALIFORNIA

s/ Ahilan T. Arulanantham
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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2018, I caused to be electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate 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: March 5, 2018

ACLU OF SOUTHERN CALIFORNIA

s/ Ahilan T. Arulanantham
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C.J.L.G., a juvenile male, Petitioner,

v.

JEFFERSON B. SESSIONS III, Attorney General,

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ON PETITION FOR REVIEW OF A FINAL ORDER OF THE BOARD OF IMMIGRATION APPEALS
Agency No. A206-838-888

RESPONDENT'S OPPOSITION TO PETITIONER'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Immigration and Nationality Act of 1952, as amended:

RULES

OTHER AUTHORITIES

INTRODUCTION

Responding to the order of March 6, 2018, the Attorney General opposes panel rehearing and rehearing *en banc*. The Court correctly concluded that Petitioner, as a 15-year-old in removal proceedings accompanied by his mother, has no categorical right to counsel at taxpayer expense, and properly rejected other challenges to his removal order. The decision is consistent with Supreme Court and circuit precedent, and otherwise raises no issue of exceptional importance. The absence of an exceptionally important question is clear from the limited number of cases that could raise a viable claim to taxpayer-funded counsel, dispelling Petitioner's assertion that the "lives of thousands of children" are at stake. In addition, even if an issue of exceptional importance might be raised in an appropriate case, the present matter would be a poor vehicle for *en banc* consideration because of the vastly over-broad group (consisting of *all* indigent minors in removal proceedings) on which Petitioner based his categorical claim. The Court should deny rehearing in all respects.

BACKGROUND

Petitioner C.J.L.G. and his mother were apprehended within four days after they illegally entered the United States. *See CJLG v. Sessions*, 880 F.3d 1122, 1129 (9th Cir. 2018). The government served Petitioner's mother with a Notice to Appear charging C.J.L.G. with removability, and reinstated a prior removal order

against the mother. *See id.* at 1129 & n.4; Admin. Record ("AR") 54, 71. On his behalf, C.J.L.G.'s mother accepted service of process and a list of *pro bono* legal services, and she attended all of his removal hearings after the Immigration Judge requested at the outset that she do so. *See CJLG*, 880 F.3d at 1129; AR 71, 181. Unable to afford attorneys that she contacted over nearly a year-and-a-half of continuances, the mother spoke on behalf of C.J.L.G. during his removal hearings; he testified as well. *See CJLG*, 880 F.3d at 1129-31. During the proceedings, the mother heard the Immigration Judge's description of C.J.L.G.'s rights, AR 86, 101; submitted a change of address form, AR 176; obtained a Honduran birth certificate for her son, AR 157; had it translated, AR 156; found someone possibly claiming to be a lawyer to fill out an asylum application for C.J.L.G., AR 158-67; and likely assisted her son in appealing to the Board of Immigration Appeals ("Board"), AR 45.

Although the panel noted that C.J.L.G.'s mother was ill-equipped to understand proceedings, *see* 880 F.3d at 1139, the same is true for many adult aliens, who have no right to taxpayer-funded counsel in removal proceedings, *cf. JEFM v. Lynch*, 837 F.3d 1026, 1041 (9th Cir. 2016) (Kleinfled, J., specially concurring), *petition for reh'g pending*. There has otherwise never been any doubt about the mother's competence as an adult and parent. C.J.L.G.'s circumstances before the Immigration Court were thus largely the same as those of children

whose parents are also charged with removability in the same proceedings and who, like their children, have a right to retain counsel but not to counsel appointed at taxpayer expense.

Following the Immigration Judge's finding of removability and denial of relief and protection, C.J.L.G. sought review and then retained counsel before the Board, which dismissed the appeal. *See CJLG*, 880 F.3d at 1131. A panel of this Court, in a thorough opinion by Judge Callahan, denied the alien's counseled petition for review, properly rejecting his categorical claim of a right to taxpayer-funded counsel as well as challenges to the merits of the removal order. *See id.* at 1128-29, 1132-51. Concurring in the panel's opinion, Judge Owens noted that the decision did not specifically discuss "counsel for unaccompanied minors," which presented "a different question that could lead to a different answer." *Id.* at 1151.

ARGUMENT

Under Fed. R. App. P. 35(a), "en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Panel rehearing may be appropriate where the Court has "overlooked or misapprehended" a material point of law or fact. *See* Fed. R. App. P. 40(a)(2). Petitioner fails to establish that rehearing is necessary under any of these criteria.

A. Petitioner's Categorical Claim to Appointed Counsel is Not Exceptionally Important Given the Limited Number of Actual Claims and the Ability to Assess Due Process Rights in Individual Cases.

Petitioner contends that a question of exceptional importance is presented in this case "because the lives of thousands of children depend on its outcome." Pet. for Reh'g at 1; *see also id.* at 6. The argument fails for two reasons. First, it is not apparent that Petitioner's categorical claim of a right to taxpayer-funded counsel would, if accepted, affect the outcome of a significant number of cases. Second, the ability to assess individual claims seeking appointed counsel remains unaffected by the panel's decision.

The number of minors charged by themselves and ordered removed without counsel is far more limited than the rehearing petition acknowledges. During a six-month period in which the government provided Petitioner's attorneys "with notice of any minor without counsel [it] is aware of ordered removed by an immigration judge following a merits hearing" within the boundaries of the Ninth Circuit, *JEFM*, 837 F.3d at 1037 n.10, the government believes that only two individuals met these criteria, *see* Br. of Resp. at 47 n.6, and Petitioner's counsel was able to contact exactly one such individual – the Petitioner here, *see* Pet.'s Opening Br. at 17. Petitioner disputed these figures mainly by claiming that 684 minors had been ordered removed *in absentia* during a 20-month period, *see* Pet.'s Reply Br. at 11, but these numbers are irrelevant to the issue of appointing

taxpayer-funded lawyers to litigate the merits of immigration proceedings (rather than just assuring attendance at hearings). In any event, the record does not support the claim that thousands of lives depend on the outcome of this case, and instead suggests the effectiveness of the many safeguards that already exist for minors in removal proceedings, *see JEFM*, 837 F.3d at 1036-37; *id. at* 1040-41 (McKeown, J., specially concurring); *CJLG*, 880 F.3d at 1143 n.12.

In addition, while the panel's decision rejected both a categorical claim to appointed counsel as well as an individualized claim by C.J.L.G., *see* 880 F.3d at 1129, 1145 n.15, the decision does not foreclose future individual claims by others seeking the appointment of taxpayer-funded counsel in their specific cases. *Cf. Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) ("the requirements of due process are flexible and cal[l] for such procedural protections as the particular situation demands") (internal marks and citation omitted); *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.") (internal marks and citation omitted). Especially given the limited number of minors likely to raise viable claims for taxpayer-funded counsel, it would be an inefficient use of the Court's resources to undertake *en banc* consideration of this case. At bottom, Petitioner fails to demonstrate an issue of exceptional importance.

B. This Case, as it has been Litigated and in the Posture Now Presented, is Not a Suitable Vehicle for *En Banc* Consideration.

To the extent that a claimed categorical right to appointed counsel nevertheless might present an exceptionally important issue in an appropriate case, this petition is not a suitable vehicle for *en banc* review. Partly because Petitioner was accompanied by a parent, he proposed a group of minors in support of his categorical claim that is dramatically over-broad.

The asserted right to taxpayer-funded counsel rejected by the panel and which Petitioner now defends is based on a theory that the right exists for all members of a given category. *See CJLG*, 880 F.3d at 1129, 1133-47. Petitioner based his claim on a far-reaching group of individuals that he defined simply as "unrepresented children in removal proceedings." Pet.'s Opening Br. at 1; *see also id.* at 17-18, 21-22, 25-26; Pet.'s Reply Br. at 4-5. Indeed, Petitioner's claim may not even be bounded by removal proceedings, as Petitioner's counsel also sought the appointment of counsel for certain related state court and administrative proceedings. *See* Pet.'s Opening Br. at 45-47; *CJLG*, 880 F.3d at 1129, 1148. Respondent has previously emphasized the extraordinary breadth of the category that Petitioner proposes. *See* Br. for Resp. at 1 ("every minor in removal proceedings, regardless of their circumstances"); *see also id.* at 29, 31, 37-39, 54. In particular, Respondent observed that the category appeared to include "every alien under the age of 18, regardless of whether they are indigent, or accompanied

by a parent, or even in proceedings with their family." *Id.* at 38. Petitioner replied only by excluding minors who could afford counsel and those in expedited removal proceedings. *See* Pet.'s Reply Br. at 3 n.2 & 9; *see also* Oral Arg. Video (posted on Court's website), at 10:06 to 11:12, 15:47 to 16:08, 36:12 to :52, 44:43 to 45:00.

Petitioner made clear that the right he asserts would accrue to himself, of course, notwithstanding his mother's presence throughout his removal proceedings. *See* Pet. Opening Br. at 19 ("the child must *also* have an attorney to satisfy due process"); *accord* Pet.'s Reply Br. at 16. This aspect of Petitioner's claim underlies Judge Owens's observation that the panel's decision did not discuss unaccompanied alien minors specifically. *See CJLG*, 880 F.3d at 1151. But as is apparent from the foregoing, Petitioner's asserted right to appointed counsel sweeps far beyond unaccompanied minors.

Petitioner's over-broad proposed group frustrates an optimal assessment of the three factors of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), relevant to identifying the specific dictates of due process. As the panel recognized, the degree of procedural protection afforded aliens varies with their connection to this country. *See CJLG*, 880 F.3d at 1132 n.6. Similarly, aliens from first-world countries, for example, who are unlikely to have asylum-type claims will not have the potential for harm as a basis for claiming a greater right to procedural

protections. *Cf. id.* at 1137. Furthermore, "the risk of erroneous deprivation," *Mathews*, 424 U.S. at 335, in removal proceedings may also vary significantly depending not only on the maturity of the alien but also on the degree of assistance available from a parent (or other adult) who may either be in proceedings with the minor or may otherwise be attending the proceedings (as in the present case). It will also vary depending on other circumstances of the minor's case, including the complexity of issues presented and the specific safeguards utilized by the Immigration Judge.

Petitioner's expansive claim that he is entitled as a matter of due process to appointed counsel simply because he is an indigent minor in removal proceedings makes the *Mathews* analysis unwieldy and susceptible to distorting effects. *Cf. Daskalea v. Washington Humane Soc'y*, 275 F.R.D. 346, 359-63 (D.D.C. 2011) (breadth of proposed class precluded proper *Mathews* analysis). Petitioner nevertheless attempted to justify the broad alleged right on which he relied by claiming that children in general still represent a sub-set of all persons subject to removal proceedings. *See* Pet.'s Opening Br. at 26; *see also* Oral Arg. Video at 10:36 to 11:07; 44:43 to 45:10. By attempting some differentiation, this argument only highlights the problem posed by diverse categories of individuals, while ultimately failing to address the broad array of differences remaining in Petitioner's proposed sub-set. The claim here to counsel at taxpayer expense thus

fails to present an exceptionally important question appropriate for *en banc* review because it is based on an undifferentiated group with widely varying backgrounds and interests.[1]

C. The Panel's Decision Does Not Conflict with Governing Precedent.

Petitioner suggests four main points on which the panel's decision conflicts with Supreme Court or circuit precedent. None have merit.

1. There is No Conflict with the *Jie Lin* Decision, as that Case Did Not Concern a Right to Taxpayer-Funded Counsel.

Petitioner argues at length that the panel's decision conflicts with *Jie Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004). *See* Pet. for Reh'g at 3-6. It does not. The panel correctly distinguished the precedent on the basis that it concerns the right to *retain* counsel, not a right to counsel at taxpayer expense. *See CJLG*, 880 F.3d at 1133-35. In this respect, it is noteworthy that Petitioner has never contended that his right to retain counsel was violated.[2] Given that the right to retain counsel was observed, the holding of *Jie Lin* has no application here.

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[1] The panel also observed that, even assuming Petitioner prevailed under *Mathews*, he would still have to overcome a presumption against appointing counsel at taxpayer expense. *See* 880 F.3d at 1136. Petitioner's rehearing petition makes no showing that he would be able to do so.

[2] Petitioner received four continuances over nearly a year-and-a-half, *see CJLG*, 880 F.3d at 1135, 1143 n.12, sufficient to honor the right to retain counsel. *See Perez v. INS*, 116 F.3d 405, 409 (9th Cir. 1997); *Vides-Vides v. INS*, 783 F.2d 1463, 1470 (9th Cir. 1986); *see also Montes-Lopez v. Holder*, 694 F.3d 1085, 1094 (9th Cir. 2012).

Contrary contentions in the rehearing petition are undermined by this exchange at oral argument:

> Court: Do you concede we would be the first to boldly go there?
>
> Petitioner's Counsel: How bold it is is, I guess, for you to decide, Your Honor, but yes, there is not a court which has found that there is an appointed counsel right for children. *Jie Lin* comes awfully close.

Oral Arg. Video at 11:40-55 (emphasis added). Regarding statements in *Jie Lin* that might have supported Petitioner's claim, counsel also remarked that "Your Honor can give them whatever force you believe, you believe they're warranted." *Id.* at 13:21-26. Petitioner should not now be heard to claim a conflict with *Jie Lin*. In any event, the panel's decision correctly explains why there is none.

In connection with his argument regarding *Jie Lin*, Petitioner challenges the panel's decision and Judge Owens's concurrence specifically with regard to accompanied minors, contending that "C.J.'s hearing cannot have been constitutional simply because C.J.'s mother was present." Pet. for Reh'g at 5-6. Petitioner relies on *Johns v. County of San Diego*, 114 F.3d 874 (9th Cir. 1997), for the proposition that "parents cannot *represent* their children in federal court," Pet. for Reh'g at 6.

Petitioner misconstrues *Johns* (and related out-of-circuit decisions) because it holds only that "a parent or guardian cannot *bring an action* on behalf of a minor child without retaining a lawyer." 114 F.3d at 877 (emphasis added). *Johns* is

silent regarding a parent being able to speak for a child when the government has lawfully brought proceedings *against* the child. Moreover, the two interests with which *Johns* was concerned – first, protecting the minor's claims when the child cannot competently choose to act as a *pro se* plaintiff and, second, excluding non-licensed persons from appearing as attorneys on behalf of others, *see* 114 F.3d at 876 – are not at stake in government-initiated removal proceedings when a parent speaks for a child. The child is not advancing any claim as a plaintiff that otherwise could be postponed until the child reaches adulthood, and a parent speaking for her child *in response* to the government does not thereby become an unlicensed attorney (even if the parent might informally be said to "represent" the child when exercising parental rights in the proceedings). *Cf. CJLG*, 880 F.3d at 1143 (noting parent's rights both to retain counsel and to speak for child); Br. for Resp. at 50-51. A parent's presence in removal proceedings against the child thus legitimately distinguishes such cases from those where a child truly appears alone. When Judge Owens's concurrence concluded that accompanied minors, in particular, are not entitled to taxpayer-funded counsel, his express view did not conflict with *Johns*, nor does any aspect of the majority decision implicitly conflict with *Johns*.

2. There is No Conflict Regarding a Need to Provide SIJ Advice.

Petitioner challenges the panel's decision that there was not sufficient reason in the record to require the Immigration Judge to advise Petitioner of Special Immigrant Juvenile ("SIJ") classification. *See* Pet. for Reh'g at 6-8. But Petitioner fails to cite circuit precedent requiring advice about SIJ classification under circumstances analogous to those here. Meanwhile, the panel cited the same standard for requiring advice as Petitioner cites in his rehearing petition. *Compare id.* at 7 ("a reasonable possibility that the petitioner may be eligible for relief") (internal marks and citation omitted) *with CJLG*, 880 F.3d at 1148 (quoting same language). Petitioner complains only about the application of the standard in the particular context here, and fails to identify a direct conflict with circuit precedent.

In addition, a further conflict-free reason supports the panel's decision regarding the absence of a duty for the Immigration Judge to provide Petitioner with SIJ advice. The "consent" of U.S. Citizenship and Immigration Services ("USCIS") is necessary before it can confer SIJ classification. *See* Br. of ILRC as Amicus Supporting Rehearing at 4-5; *see also* 8 U.S.C. § 1101(a)(27)(J)(iii); Br. of Resp. at 16-17. The consent requirement ensures that "the juvenile court order was sought to obtain relief from abuse, neglect, abandonment, or a similar basis under state law, *and not primarily or solely to obtain an immigration benefit*." USCIS Policy Manual, vol. 6, pt. J, ch. 2.D.5 (emphasis added); *accord* H.R. Rep.

No. 105-405, at 130 (1997) (Conf. Rep.), *as reprinted in* 1997 U.S.C.C.A.N. 2941, 2981.

In the present case, there has never been any suggestion of a *need* (apart from relief from removal) for some form of state court proceeding that would provide protection from abuse, neglect, or abandonment and in which SIJ determinations could be requested. *Cf.* AR 90, 107 (abandonment by father occurred long ago). Under the circumstances, if Petitioner and his mother were to file an action in state court to seek SIJ determinations, the case would be (on the present record) analogous to one where the California Court of Appeal doubted the litigants' bona fides because it appeared that they only sought an immigration benefit. *Cf. Bianka M. v. Superior Ct.*, 199 Cal. Rptr. 3d 849, 859, 863-64 (Cal. Ct. App.), *petition for review granted*, 202 Cal. Rptr. 3d 495 (Cal. 2016). Absent an apparent need for state proceedings *apart from obtaining an immigration benefit*, there is no sound reason consistent with the purposes of SIJ classification to require an Immigration Judge to advise an alien of the benefit.[3]

[3] Petitioner contends that the Board did not rule on the basis that the Immigration Judge need not have provided SIJ advice. *See* Pet. for Reh'g at 8-9. Remanding on this issue, however, would be an "idle and useless formality." *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969).

3. There is No Conflict Regarding a Need to Show Prejudice from a Violation of an Assumed Due Process Right to Appointed Counsel.

Petitioner advances another alleged conflict between the panel's decision and *Montes-Lopez v. Holder*, 694 F.3d 1085 (9th Cir. 2012). *See* Pet. for Reh'g at 9-11. Again, the argument fails. As the panel correctly observed, *see CJLG*, 880 F.3d at 1133, the conclusion in *Montes-Lopez* that prejudice need not be shown from the denial of the right to retain counsel was derived in part from the statutory and regulatory bases for that right. *See Montes-Lopez*, 694 F.3d at 1092; *see also id.* at 1093-94 (holding that prejudice need not be shown pertains to "the statutory right" to counsel).

By contrast, Petitioner relies directly on the Fifth Amendment for his claimed right to appointed counsel. *See* Pet.'s Opening Br. at 20-39. The panel correctly observed that such claims normally require a showing of prejudice, *see id.* at 1133, and Petitioner fails to cite any case conflicting with this point. Indeed, as *Montes-Lopez* itself acknowledges: "If the alien cannot show prejudice, then his or her right to a full and fair hearing has not been violated." 694 F.3d at 1092. Petitioner's references to issues that allegedly reflect the difficulty of establishing prejudice, *see* Pet. for Reh'g at 10-11, also fail to show any conflict between the

Court's precedents and the panel's unsurprising decision to require prejudice in support of a due process claim.[4]

4. There is No Conflict Regarding the Manner in Which the *Mathews* Balancing Test Was Applied.

Petitioner further challenges the manner in which the panel applied the three-factor test for assessing the procedural requirements of due process set out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Petitioner contends that the panel erred by focusing on the specifics of the present case rather than applying the *Mathews* test more generally. *See* Pet. for Reh'g at 11-15. Importantly, Petitioner fails to cite a case requiring the generalized approach he advocates while proscribing the specific approach he condemns; there is, thus, no conflict on this point meriting *en banc* proceedings.

While Petitioner cites to cases taking a generalized approach, *see id.* at 12-13, the panel cited Ninth Circuit precedent focusing on the details presented there as it applied *Mathews*. *See CJLG*, 880 F.3d at 1139, 1143 (citing *Buckingham v. Sec'y of the U.S. Dep't of Agric.*, 603 F.3d 1073, 1082 (9th Cir. 2010)). In the end, the approaches are not likely to be very different, provided that the specific case is representative of the general type of case raising the claimed due process violation.

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[4] Petitioner asserts that the panel's decision "creates tension with *Gomez-Vela[z]co v. Sessions*, 879 F.3d 989, 993 (9th Cir. 2018)." Pet. for Reh'g at 10. The point lacks merit because the right to counsel considered in *Gomez-Velazco* was based in part on a statute, 8 U.S.C. § 1228(b)(4)(B). *See* 879 F.3d at 993.

As recounted above, the category here is challenged in that regard, but Petitioner nevertheless believed that his case was representative of the group on which he based his due process claim. *See* Pet.'s Opening Br. at 27 ("C.J.L.G.'s experiences illustrate all these harms."); *see also id.* at 28, 30-31 (to same effect). It therefore was not unreasonable or contrary to precedent for the panel to focus on the details of Petitioner's case when conducting its *Mathews* analysis to decide his categorical claim.

Petitioner further asserts that the focus on his particular case led to omissions in the panel's analysis. *See* Pet. for Reh'g at 12-15. This is incorrect. For example, the panel noted Petitioner's contention that "asylum law is 'extremely complex.'" *CJLG*, 880 F.3d at 1137-38. The panel remarked on the presence of government counsel during removal proceedings. *See id.* at 1131, 1139. The panel accounted for the vulnerabilities of children. *See CJLG*, 880 F.3d at 1134, 1138, 1141, 1143 & n.13. Furthermore, the panel "assume[d] the accuracy of [Petitioner's statistical] figures," *id.* at 1138, despite Respondent's challenge to them, *see* Br. for Resp. at 45 & nn.4-5. Finally, consideration of questions that might have been asked by counsel would have been implicit in assessing whether the Immigration Judge adequately developed the record. *See CJLG*, 880 F.3d at 1142-43; *see also id.* at 1138 (assuming that "an attorney

provides a [higher] level of advocacy" than others). In sum, the panel's focus on Petitioner's case in conducting the *Mathews* analysis was not erroneous.

D. Petitioner's Remaining Points Fail to Show Any Need for Rehearing.

Finally, Petitioner claims several other errors allegedly "creat[ing] conflict or confusion in governing immigration doctrine." Pet. for Reh'g at 15. No rehearing is necessary on these points either, particularly as no specific conflict with precedent is shown. Furthermore, regarding the level of deference afforded the government's immigration procedures, *see id.*, Petitioner does not dispute that the government's interests are an important consideration under *Mathews*, as the panel appropriately recognized. *See CJLG*, 880 F.3d at 1144-45. The panel's acknowledgement of the deference owed executive and legislative judgments in the immigration context was a proper aspect of this analysis.

In addition, when Petitioner questions "the Panel's assertion that IJs can act as more than neutral arbiters," Pet. for Reh'g at 16, he is really questioning the Court's long-held requirement that Immigration Judges appropriately develop the record. *See CJLG*, 880 F.3d at 1138-39, 1143. The panel's decision correctly abided by that requirement, and Petitioner undoubtedly does not mean to challenge it. Relatedly, while two amici briefs have raised questions about Immigration Judges' workload, *see generally* Br. of Former Federal IJs as Amici Supporting Rehearing; *see also* Br. of Ctr. For Gender & Refugee Studies Supporting

Rehearing at 4-6, administrative constraints on Immigration Judges would not justify a failure to develop the record as required and therefore are not a factor in assessing whether due process mandates taxpayer-funded counsel.

Finally, regarding the panel's assessment of the "unable or unwilling" component to Petitioner's asylum claim, Petitioner does not dispute that his counsel waived this claim before the Board and thus failed to exhaust it. *See CJLG*, 880 F.3d at 1142-43; *see also id.* at 1146 n.16. The panel's discussion of the claim was certainly sufficient in light of the waiver and lack of exhaustion.

CONCLUSION

The petition for panel rehearing and rehearing *en banc* should be denied.

Respectfully submitted,

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April 17, 2018

CERTIFICATE OF COMPLIANCE

I certify that pursuant to 9th Cir. R. 40-1(a), the attached Respondent's Opposition to Petitioner's Petition for Rehearing and Rehearing *En Banc* complies with Fed. R. App. P. 32(c)(2) and:

(1) is proportionally spaced using Times New Roman type;

(2) has a typeface of 14 points or more; and,

(3) consists of 4,174 words, and therefore does not exceed 4,200 words.

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2018, I filed the foregoing response with the U.S. Court of Appeals for the Ninth Circuit via the appellate CM/ECF system. Counsel for the petitioner is a registered CM/ECF user and will be served via the appellate CM/ECF system.

/s/ *W. Manning Evans*
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