

1
2
3
4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 F.L.B., et al.,

7 Plaintiffs,

8 v.

9 LORETTA E. LYNCH, et al.,

10 Defendants.

C14-1026 TSZ

ORDER

11 THIS MATTER comes before the Court on a partial motion to dismiss, docket
12 no. 229, pursuant to Federal Rules of Civil Procedure 12(b)(3) and 12(b)(6), brought by
13 defendants Loretta E. Lynch, Attorney General of the United States; Juan P. Osuna,
14 Director of the Executive Office for Immigration Review; Jeh C. Johnson, Secretary of
15 Homeland Security; Sarah R. Saldaña, Director of U.S. Immigration and Customs
16 Enforcement (“ICE”); León Rodríguez, Director of U.S. Citizenship and Immigration
17 Services (“USCIS”); Lisa McDaniel, Field Office Director for ICE’s Office of
18 Enforcement and Removal Operations (“ERO”) in Seattle; Bryan Wilcox, Assistant Field
19 Office Director for ICE’s ERO in Seattle; Sylvia M. Burwell, Secretary of Health and
20 Human Services; and Robert Carey, Director of the Office of Refugee Resettlement.
21 Having reviewed all papers filed in support of, and in opposition to the motion, including
22 the supplemental briefs filed at the Court’s request, see Minute Order (docket no. 256),
23

1 and having considered the oral arguments of counsel, the Court enters the following
2 order.

3 **Background**

4 This action, seeking classwide declaratory and individual injunctive relief on the
5 ground that juveniles in removal proceedings have a constitutional right to counsel at
6 government expense, began with eight (8) named plaintiffs. See Compl. (docket no. 1);
7 Am. Compl. (docket no. 73). Three (3) plaintiffs were added when the Second Amended
8 Complaint, docket no. 95, was filed. In responding to these pleadings, the then-named
9 defendants did not challenge venue. See Defs.' Mot. (docket no. 80); Defs.' Supp. Brief
10 (docket no. 97); Defs.' Supp. Reply (docket no. 104). Of the eleven (11) plaintiffs
11 identified in the Second Amended Complaint, two (2) were voluntarily dismissed, see
12 Notice (docket no. 107), and the claims of another three (3) were dismissed without
13 prejudice on defendants' motion, see Order at 7-8, 11 & 38 (docket no. 114). The claims
14 of three (3) other plaintiffs, who had been granted asylum status, were later dismissed as
15 moot. See Order at 7-8 (docket no. 174).

16 To the three (3) remaining plaintiffs, the Third Amended Complaint, docket
17 no. 207, joined seven (7) more, one of whom (A.E.G.E.) had previously been dismissed
18 without prejudice. See also Minute Order (docket no. 224) (dismissing certain claims
19 that were improperly re-alleged in the Third Amended Complaint). The Third Amended
20 Complaint also joined a new defendant -- León Rodríguez, the Director of USCIS -- who
21 seeks to be dismissed because plaintiffs do not allege any actionable misconduct by
22 USCIS. As to nine (9) of the ten (10) plaintiffs left in the action (i.e., everyone other than
23

1 F.L.B.), defendants collectively assert various grounds for dismissal, including mootness,
2 improper venue, and lack of a cognizable claim to procedural due process and/or counsel
3 at government expense. The Court agrees that Director Rodríguez is not an appropriate
4 defendant, that the right-to-counsel claim of one plaintiff (J.E.V.G.) is moot, and that the
5 right-to-counsel claim of another plaintiff (M.A.M.) might soon be moot. Defendants’
6 motion is therefore GRANTED in part, with regard to Director Rodríguez and J.E.V.G.,
7 and DEFERRED in part as to M.A.M., but it is DENIED in all other respects for the
8 reasons stated in this order.

9 **Discussion**

10 **A. Claims Against León Rodríguez**

11 Plaintiffs essentially concede that they have no cognizable claim against USCIS
12 Director León Rodríguez. Plaintiffs indicate that their “primary interest in adding
13 USCIS” was to obtain discovery from the agency. *See* Resp. at 24 (docket no. 239).
14 They state that, if the Court makes clear USCIS must respond to discovery in this case,
15 they “would not oppose” dismissing their claims against Director Rodríguez. *Id.* Joining
16 a party to a lawsuit for the sole purpose of conducting discovery is improper. To the
17 extent the other parties to this litigation have refused to produce materials from USCIS
18 files, plaintiffs have remedies other than joining the USCIS Director as a defendant, for
19 example, serving a subpoena under Rule 45, filing a motion to compel under Rule 37, or
20 requesting documents under the Freedom of Information Act. Plaintiffs have made no
21 allegations that USCIS plays a role in removal proceedings or has taken any action
22 adverse to a named plaintiff. To the contrary, USCIS granted asylum status to former
23

1 plaintiffs J.E.F.M., J.F.M., and D.G.F.M., see 3d Am. Compl. at ¶¶ 75, 77, & 79 (docket
2 no. 207), and granted special immigrant juvenile status to plaintiff M.A.M., see id. at
3 ¶ 90. Plaintiffs' claims against Director Rodríguez are DISMISSED.

4 **B. Mootness**

5 Defendants contend that J.E.V.G.'s and M.A.M.'s right-to-counsel claims are now
6 moot and should be dismissed.¹ Both J.E.V.G. and M.A.M. have turned 18, and are no
7 longer within the class of aliens plaintiffs seek to represent. J.E.V.G. has retained an
8 attorney, and his attorney has successfully moved for the dismissal of his removal
9 proceedings so that he may seek special immigrant juvenile ("SIJ") status from USCIS.
10 See Ex. B to Mot. (docket no. 229-2).² Because no removal proceedings are now pending
11 against J.E.V.G., forming yet another basis for his exclusion from the class proposed by
12 plaintiffs, and because J.E.V.G. cannot be said to have been prejudiced, while still a
13 juvenile, by the lack of counsel at government expense, his right-to-counsel claim is
14 DISMISSED as moot.

15 M.A.M. has already received SIJ status. According to defendants' counsel,
16 M.A.M.'s removal proceedings have been continued to April 28, 2016, and he is awaiting
17

18 ¹ Plaintiffs accuse defendants of repeating an argument the Court previously rejected. The Court,
19 however, denied defendants' previous motion without prejudice, see Order at 6 (docket no. 174), thereby
20 acknowledging that circumstances might change during the course of this litigation, in which event,
21 defendants could again move for dismissal on the basis of mootness.

22 ² With regard to J.E.V.G., because the Court has considered matters outside the pleadings, defendants'
23 Rule 12(b)(6) motion must be treated as one for summary judgment. See Fed. R. Civ. P. 12(d). The
Court concludes that no genuine dispute of material fact exists as to the status of J.E.V.G.'s removal
proceedings and that defendants are entitled to judgment as a matter of law concerning the mootness of
J.E.V.G.'s right-to-counsel claim. See Fed. R. Civ. P. 56(a).

1 approval of his adjustment to permanent resident status. See Tr. (Mar. 24, 2016) at 9:2,
2 14-18 (docket no. 261). Because M.A.M.’s removal proceedings remain pending, but are
3 likely to be dismissed in the near future, defendants’ motion to dismiss M.A.M.’s right-
4 to-counsel claim is DEFERRED, and the parties are DIRECTED to file a Joint Status
5 Report by May 6, 2016, concerning the status of M.A.M.’s removal proceedings.

6 **C. Venue**

7 If an officer or employee of the United States is a defendant in a civil case, venue
8 is proper “in any judicial district in which . . . the plaintiff resides if no real property is
9 involved in the action.” 28 U.S.C. § 1391(e)(1)(C) (emphasis added). In the context of
10 actions involving multiple plaintiffs, the Third and Sixth Circuits have defined the phrase
11 “the plaintiff” to mean “any plaintiff” rather than “all plaintiffs,” and thus, venue lies in a
12 judicial district in which at least one plaintiff resides. Exxon Corp. v. Fed. Trade
13 Comm’n, 588 F.2d 895 (3d Cir. 1978), implicitly overruled on other grounds by Wilton v.
14 Seven Falls Co., 515 U.S. 277 (1995); see Sidney Coal Co. v. Soc. Sec. Admin., 427 F.3d
15 336 (6th Cir. 2005).³

16 The Ninth Circuit has not fully analyzed this issue, but it has cited Exxon with
17 approval, summarizing Exxon as holding that, “in order to avoid a multiplicity of similar
18 suits in different courts, venue need be proper for only one plaintiff under 28 U.S.C.

20 ³ Defendants incorrectly suggest that the Seventh Circuit has held to the contrary. See Reply at 11
21 (docket no. 240) (citing Reuben H. Donnelley Corp. (“Donnelley”) v. Fed. Trade Comm’n, 580 F.2d 264
22 (7th Cir. 1978)). In Donnelley, the Seventh Circuit addressed only how residency is determined for
23 federal agencies and corporate entities and where the cause of action at issue arose; the Seventh Circuit
was not faced with litigation involving more than one plaintiff. See 580 F.2d at 266-70.

1 § 1391(e).” *Ry. Labor Execs.’ Ass’n v. Interstate Commerce Comm’n*, 958 F.2d 252, 256
2 (9th Cir. 1991); see also *Matsuo v. United States*, 416 F. Supp. 2d 982, 997 (D. Haw.
3 2006). Under the Third and Sixth Circuits’ interpretation of § 1391(e)(1)(C), with which
4 the Ninth Circuit does not appear to disagree, when plaintiffs initiated this action against
5 then Attorney General Eric H. Holder, Secretaries Johnson and Burwell, Director Osuna,
6 and the predecessors of Directors Saldaña, Carey, McDaniel, and Wilcox, all of whom
7 were, at the time, officers or employees of the United States, the Western District of
8 Washington was an appropriate venue because at least one of the original plaintiffs
9 resided in the district.

10 Defendants’ suggestion that the Court should depart from the Third and Sixth
11 Circuits’ guidance is unsupported by any authority. Moreover, defendants’ current venue
12 challenge is barred because it was waived when it was not raised in their previous motion
13 to dismiss. See Fed. R. Civ. P. 12(g)(2) & 12(h)(1).⁴ The Second Amended Complaint,
14 which was the operative pleading at the time defendants’ earlier motion to dismiss was
15

16 ⁴ Defendants argue that plaintiffs’ filing of the Third Amended Complaint provides them a “do over.”
17 See Defs.’ Mot. at 6-7 (docket no. 229) (citing *Harris v. Sec’y, U.S. Dep’t of Veterans Affairs*, 126 F.3d
18 339 (D.C. Cir. 1997), and *In re WellPoint, Inc. Out-of-Network “UCR” Rates Litig.*, 903 F. Supp. 2d 880
19 (C.D. Cal. 2012)). Neither of the cases cited by defendants stands for such proposition. *Harris* merely
20 described the distinction between “forfeiture” and “waiver” of a defense, and indicated that forfeiture by
21 failing to plead may be cured via amendment pursuant to Rule 15, whereas relief is not available under
22 Rule 15 for the type of intentional relinquishment that constitutes waiver. 126 F.3d at 343 n.2.
23 *In re WellPoint* simply concluded, in response to the plaintiffs’ argument that the points made in the
defendants’ Rule 12(b)(6) motions were or could have been raised in earlier motions to dismiss, that the
defendants would not be held to the high standards applicable to motions for reconsideration.
903 F. Supp. 2d at 893-94. Moreover, *In re WellPoint* is not relevant to the question before the Court
because Rule 12(b)(6) motions are not subject to the waiver provisions of Rules 12(g)(2) and 12(h)(1).
See Fed. R. Civ. P. 12(h)(2) (“Failure to state a claim upon which relief can be granted . . . may be raised:
(A) in any pleading allowed or ordered under Rule 7(a); (B) by motion under Rule 12(c); or (C) at trial.”).

1 considered by the Court, identified plaintiffs who reside in California and Texas, as well
2 as plaintiffs who live in Washington. The Third Amended Complaint's joinder⁵ of other
3 plaintiffs who reside outside Washington does not, in any significant way, alter the scope
4 of the case, and it does not resurrect defendants' ability to contest venue. See Johnson v.
5 Bryson, 851 F. Supp. 2d 688, 704-05 (S.D.N.Y. 2012) (ruling that "[t]he filing of an
6 amended complaint will not revive the right to present by motion defenses that were
7 available but were not asserted in timely fashion prior to the amendment of the pleading"
8 and rejecting the defendant's improper venue defense because *inter alia* "all three of the
9 New Plaintiffs reside in close geographic proximity to one or more of the Original
10 Plaintiffs"); Lanehart v. Devine, 102 F.R.D. 592, 595 (D. Md. 1984) (holding that the
11 defense of improper venue was waived by the failure to include it in the answer, even as
12 to plaintiffs who were later joined); cf. DBSI Signature Place, LLC v. BL Greensboro,
13 L.P., 2006 WL 1275394 at *5 (D. Idaho May 9, 2006) (observing that, when an amended
14

15 ⁵ Defendants argue in their motion (and in a supplemental brief filed at the Court's request) that J.R.A.P.,
16 who was added as a plaintiff when the Third Amended Complaint was filed, and who is the only plaintiff
17 residing in Florida, could not be joined pursuant to Rule 20, and that the Court therefore lacks venue as to
18 J.R.A.P.'s right-to-counsel claim, citing the last sentence of § 1391(e)(1), which provides: "Additional
19 persons may be joined as parties . . . in accordance with the Federal Rules of Civil Procedure and with
20 such other venue requirements as would be applicable if the United States or one of its officers . . . were
21 not a party." 28 U.S.C. § 1391(e)(1). The Court disagrees. Rule 20 permits the joinder in one action of
22 plaintiffs who "assert any right to relief jointly, severally, or in the alternative with respect to or arising
23 out of the same . . . series of transactions or occurrences" if "any question of law or fact common to all
plaintiffs will arise in the action." Fed. R. Civ. P. 20(a)(1). All plaintiffs in this litigation seek identical
relief with respect to their removal proceedings, which constitute the requisite "series of transactions or
occurrences," and their assertion that they are constitutionally entitled to counsel at government expense
in such proceedings will involve one or more common questions of law or fact. Defendants' argument
that resources and methods for conducting removal proceedings vary among immigration courts and from
state to state does not itself defeat joinder, but rather raises issues the Court may address in crafting any
relief, in certifying any class, and/or by severing matters for trial. See Fed. R. Civ. P. 20(a)(3), 20(b), 21,
& 23.

1 complaint “changes the theory or scope of the case, the defendant is allowed to plead
2 anew as though it were the original complaint” (emphasis added) (quoting Brown v. E.F.
3 Hutton & Co., 610 F. Supp. 76, 78 (S.D. Fla. 1985))). The Court is satisfied that venue is
4 proper because at least one plaintiff resides in Washington, that the joinder of additional
5 plaintiffs who live outside Washington does not fundamentally change the nature of this
6 litigation, and that, by not earlier challenging venue, defendants waived any argument to
7 the contrary. Defendants’ Rule 12(b)(3) motion is DENIED.

8 **D. Failure to State a Claim**

9 **1. Standard**

10 Although a complaint challenged by a Rule 12(b)(6) motion to dismiss need not
11 provide detailed factual allegations, it must offer “more than labels and conclusions” and
12 contain more than a “formulaic recitation of the elements of a cause of action.” Bell Atl.
13 Corp. v. Twombly, 550 U.S. 544, 555 (2007). The complaint must indicate more than
14 mere speculation of a right to relief. Id. In ruling on a motion to dismiss, the Court must
15 assume the truth of a plaintiff’s factual allegations and draw all reasonable inferences in
16 the plaintiff’s favor. Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987).
17 The question for the Court is whether the facts in the operative pleading sufficiently state
18 a “plausible” ground for relief. Twombly, 550 U.S. at 570.

19 **2. Rights of “Non-Admitted” Aliens**

20 Defendants contend that, as “arriving” or “non-admitted” aliens, A.E.G.E., E.G.C.,
21 A.F.M.J., L.J.M., M.R.J., and K.N.S.M. have no procedural due process rights under the
22
23

1 Fifth Amendment. Defendants’ argument is not supported by the authorities they cite.⁶
2 Under the Immigration and Nationality Act (“INA”), as amended by the Illegal
3 Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), an alien is
4 “removable” if (i) he or she was not admitted to the United States and is “inadmissible”
5 under 8 U.S.C. § 1182, or (ii) he or she was admitted to the United States and is
6 “deportable” under 8 U.S.C. § 1227. See 8 U.S.C. § 1229a(e)(2). Before the enactment
7 of IIRIRA, a distinction had been drawn between “exclusion” and “deportation” of
8 individuals. See Dormescar v. U.S. Att’y Gen., 690 F.3d 1258, 1260 (11th Cir. 2012);
9 see also United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950).
10 “Excludable” aliens, meaning those who sought but had not yet achieved admission, were
11 treated as though they were detained at the border, even if they were physically present
12 within the United States, Dormescar, 690 F.3d at 1260, and “excludable” aliens were
13 entitled to fewer procedural protections than “deportable” aliens, Mariscal-Sandoval v.
14 Ashcroft, 370 F.3d 851, 854 (9th Cir. 2004). When IIRIRA became effective on

16 ⁶ Defendants’ reliance on both Alvarez-Garcia v. Ashcroft, 378 F.3d 1094 (9th Cir. 2004), and Wong v.
17 United States, 373 F.3d 952 (9th Cir. 2004), is misplaced. Alvarez-Garcia does not support defendants’
18 assertion that excludable aliens have no procedural due process rights, but rather stands for the
19 proposition that Congress may treat excludable and deportable aliens differently without running afoul of
20 the equal protection prong of the substantive due process doctrines developed under the Fifth
21 Amendment. 378 F.3d at 1097-99; see also Mathews v. Diaz, 426 U.S. 67 (1976) (indicating that
22 Congress may distinguish between classes of aliens, *i.e.*, those who are permanent residents and
continuously present in the United States for five years versus those who are not, in determining who is
eligible for Medicare benefits). In Wong, the Ninth Circuit concluded that the plaintiff, as a “non-
admitted” alien, had substantive due process rights under the Fifth Amendment, but held that the
individual officers involved in the “purely invidious discrimination” at issue were entitled to qualified
immunity because the law was not clearly established at the time they engaged in the constitutional
violations. 373 F.3d at 970-77. The case, however, remained pending against the United States, and the
parties are now engaged in settlement discussions. Wong does not involve procedural due process rights
or even removal proceedings, and it offers no guidance concerning the issues now before the Court.

1 April 1, 1997, see Pub. L. No. 104-208, Div. C, § 309(a), 110 Stat. 3009 (1996),
2 exclusion and deportation proceedings were merged into the broader category of
3 “removal” proceedings.⁷ Mariscal-Sandoval, 370 F.3d at 854 n.6.

4 In support of their position, defendants rely on both pre-IIRIRA⁸ and post-IIRIRA
5 cases. None of these decisions, however, stand for the proposition that aliens who have
6 not been “admitted” into the United States are not entitled to any of the protections
7 afforded by the Due Process Clause of the Fifth Amendment. Indeed, most of the cases
8 cited by defendants say quite the opposite. For example, in the oldest case cited by
9 defendants, the Supreme Court interjected certain due process rights into an act of
10 Congress that concerned excludable aliens. See Yamataya v. Fisher, 189 U.S. 86 (1903).
11 In Yamataya, approximately four days after arriving in the United States, the appellant
12 was deemed a pauper and a person likely to become a public charge, and a warrant was
13 issued directing that she be taken into custody and returned to Japan. Id. at 87. The
14 warrant was issued pursuant to a statute authorizing the Secretary of the Treasury to

16 ⁷ Removal proceedings are conducted before an immigration judge, and such proceedings are “the sole
17 and exclusive” means for determining whether an alien may be admitted to or removed from the United
18 States. 8 U.S.C. §§ 1229a(a)(1) & (3). Pursuant to INA § 240(b), an alien in a removal proceeding may
19 offer evidence on his or her own behalf and may review the evidence and cross-examine the witnesses
presented by the Government, subject to certain national security limitations. 8 U.S.C. § 1229a(b)(4)(B).
An alien also has the statutory “privilege of being represented, at no expense to the Government, by
counsel of the alien’s choosing” in both “removal proceedings before an immigration judge” and “appeal
proceedings before the Attorney General.” 8 U.S.C. §§ 1229a(b)(4)(A) & 1362.

20 ⁸ Two of the pre-IIRIRA cases cited by defendants are so far afield from the issue before the Court that
21 they do not bear any further discussion. See United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)
(holding that the warrant requirements of the Fourth Amendment did not apply to a search by American
22 authorities of the Mexican residence of a Mexican citizen who was apprehended in Mexico); Johnson v.
Eisentrager, 339 U.S. 763 (1950) (holding that an enemy alien who was captured, tried, convicted of war
23 crimes, and imprisoned outside the United States was not entitled to apply for a writ of habeas corpus).

1 apprehend any alien of such excluded class, within one year after he or she entered the
2 United States, and return him or her to the country of origin. *Id.* at 99. The Supreme
3 Court rejected the argument that the statute permitted the Secretary of the Treasury or any
4 executive officer to take such actions without providing notice and “all opportunity to be
5 heard upon the questions involving [the alien’s] right to be and remain in the United
6 States.” *Id.* at 99-101; *id.* at 101 (“No such arbitrary power can exist where the principles
7 involved in due process of law are recognized.”). The Supreme Court observed that the
8 “reasonable construction” it had given to the act of Congress at issue brought the statute
9 “into harmony with the Constitution,” but the appellant was denied habeas corpus relief
10 because she had, in fact, received the requisite notice and opportunity to be heard. *Id.* at
11 101-02.

12 The Supreme Court reiterated the rule of *Yamataya* in deciding *Shaughnessy v.*
13 *United States ex rel. Mezei*, 345 U.S. 206 (1953), a case on which defendants heavily
14 rely. In *Mezei*, the Supreme Court summarized *Yamataya* as teaching that “aliens who
15 have once passed through our gates, *even illegally*, may be expelled only after
16 proceedings conforming to traditional standards of fairness encompassed in due process
17 of law.” *Id.* at 212 (emphasis added). In *Mezei*, however, unlike in *Yamataya*, the habeas
18 corpus petitioner never gained entry into the United States; he was stranded on Ellis
19 Island after being excluded upon arrival in New York on national security grounds and
20 after being refused entry by all other countries to which he had applied. *Id.* at 208-09.
21 With respect to the habeas corpus petitioner in *Mezei*, the Supreme Court observed that
22 “an alien on the threshold of initial entry stands on a different footing: ‘Whatever the
23

1 procedure authorized by Congress is, it is due process as far as an alien denied entry is
2 concerned.’” *Id.* at 212.

3 Defendants point to this last passage in *Mezei* as support for the contention that
4 aliens who have not been “admitted” into, but are physically present in, the United States
5 are not entitled to the procedural due process guaranteed by the Fifth Amendment. Their
6 argument, however, ignores *Mezei*’s and *Yamataya*’s clear statement to the contrary, and
7 blurs the distinction between entry and admission.⁹ Entry, meaning physically crossing
8 the border in the United States, can occur both legally and illegally. Admission, within
9 the meaning of the INA as amended by IIRIRA, however, requires the sovereign to grant
10 permission to enter. *Mezei* and *Yamataya* teach that an alien who has entered the United
11 States, by being admitted or without having obtained such permission, has at least the
12 procedural due process rights to notice and an opportunity to be heard, which are the
13 constitutional minimum. *See United States v. Raya-Vaca*, 771 F.3d 1195, 1204 (9th Cir.
14 2014) (“Due process always requires, at a minimum, notice and an opportunity to

15 ⁹ A post-IIRIRA case cited by defendants further confuses matters. *See Angov v. Lynch*, 788 F.3d 893
16 (9th Cir. 2013) (amended June 8, 2015). In *Angov*, the question presented was summarized as follows:
17 “Does an immigration judge err by relying on a State Department investigation of an asylum petitioner’s
18 claim?” *Id.* at 896. The petitioner argued that the immigration judge’s reliance on a letter summarizing
19 the results of an investigation conducted by the United States consulate in Sofia, Bulgaria (the “Bunton
20 letter”) violated his procedural due process rights. *Id.* at 896-98. The majority declared that the petitioner
21 “has no such right,” but then cited *Mezei* for the proposition that “[a]liens ‘who have once passed through
22 our gates, even illegally,’ are afforded the full panoply of procedural due process protections.” *Id.* at 898
23 (quoting *Mezei*, 345 U.S. at 212). The dissent in *Angov* observed that five other circuits have held that
“the government may not deny asylum solely on the basis of conclusory letters prepared for litigation in
reliance on multiple layers of unauthenticated hearsay, without affording the petitioner some right of
confronting the charges.” *Id.* at 911 (Thomas, C.J., dissenting). Given the dissent’s observation that the
majority’s holding in *Angov* is at odds with the decisions of five other circuits, and the fact that *Angov*
concerns asylum rather than removal proceedings, the Court declines defendants’ invitation to rely on
Angov for the proposition that a “non-admitted” alien in removal proceedings has no procedural due
process rights.

1 respond.” (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985)); see
2 also Abdulai v. Ashcroft, 239 F.3d 542, 549 (3d Cir. 2001) (“[D]ue process requires three
3 things,” namely (i) “factfinding based on a record produced before the decisionmaker and
4 disclosed to” the alien, (ii) an opportunity for the alien “to make arguments on his or her
5 own behalf,” and (iii) “an individualized determination” of the alien’s interests);
6 Marincas v. Lewis, 92 F.3d 195, 203 (3d Cir. 1996) (defining as “two of the most basic of
7 due process protections” the right to “a neutral judge and a complete record of the
8 proceeding”). No named plaintiff in this action is in a situation analogous to that of the
9 habeas corpus petitioner in Mezei, and Mezei provides no basis for dismissing plaintiffs’
10 right-to-counsel claim for lack of cognizability.¹⁰

11 The distinction that defendants draw between “non-admitted” and “deportable”
12 aliens might, however, still play a role in this litigation. The question the Court faces in
13 this case is not whether plaintiffs have procedural due process rights. Clearly they do.
14

15 ¹⁰ Defendants cite several cases involving “expedited removal” proceedings. See Pena v. Lynch, 815 F.3d
16 452 (9th Cir. 2015) (amended Feb. 18, 2016) (superseding 804 F.3d 1258 (9th Cir. 2015)); United States
17 v. Barajas-Alvarado, 655 F.3d 1077 (9th Cir. 2011); Garcia de Rincon v. Dep’t of Homeland Sec., 539
18 F.3d 1133 (9th Cir. 2008); M.S.P.C. v. U.S. Customs & Border Prot., 60 F. Supp. 3d 1156 (D.N.M. 2014),
19 vacated as moot, 2015 WL 7454248 (D.N.M. Sep. 23, 2015). Except for M.S.P.C., which has been
20 vacated and is of no precedential value, these authorities delineate the limits of a court’s jurisdiction to
21 review “expedited removal” proceedings. See generally Raya-Vaca, 771 F.3d at 1199 (explaining that
22 two classes of aliens are subject to “expedited removal” proceedings: (i) aliens “arriving” in the United
23 States; and (ii) aliens who have entered the United States, are physically present without having been
admitted or paroled, are discovered within 100 “air miles” of the border, and cannot establish that they
have been physically present in the United States for at least 14 days (citing Designating Aliens for
Expedited Removal, 69 Fed. Reg. 48877-01, 48880 (Aug. 11, 2004))). In this action, plaintiffs are not
pursuing a right-to-counsel claim on behalf of juvenile aliens in “expedited removal” proceedings, and
thus, the cases recognizing legislative restrictions on judicial involvement regarding such proceedings are
not relevant. Moreover, defendants’ contention that aliens in “expedited removal” proceedings are
afforded no procedural rights other than what Congress has provided runs contrary to the Ninth Circuit’s
holding in Raya-Vaca that such proceedings must conform “to the dictates of due process.” Id. at 1203.

1 The question is what procedural rights are due to plaintiffs. The answer to this question
2 might be different for “non-admitted” aliens than it is for “deportable” aliens. See
3 Zadvydas v. Davis, 533 U.S. 678, 682 (2001) (observing that “[w]e deal here with aliens
4 who were admitted to the United States [and] subsequently ordered removed,” whereas
5 “[a]liens who have not yet gained initial admission to this country would present a very
6 different question”).

7 In Landon v. Plasencia, 459 U.S. 21 (1982), the Supreme Court recognized this
8 dichotomy. In Plasencia, a pre-IIRIRA case, Maria Antoineta Plasencia, a permanent
9 resident of the United States, was denied admission when she attempted to return to the
10 country after a brief visit to Mexico; at the time, she and her husband were accompanied
11 by six aliens trying to illegally cross the border. Id. at 22-23. The issue in Plasencia was
12 whether the Immigration and Nationalization Service (“INS”) was required to proceed
13 against Plasencia in exclusion proceedings or in deportation proceedings; Plasencia
14 asserted that she was entitled to a deportation hearing at which she would receive more
15 procedural and substantive protections than in an exclusion proceeding. Id. at 22, 27.
16 The Supreme Court concluded that Plasencia was not entitled to a deportation proceeding
17 because the applicable statute indicated that admissibility of an alien was to be
18 determined solely in an exclusion hearing. Id. at 27-32.

19 With respect to any such exclusion proceeding, the United States conceded that
20 Plasencia was entitled to due process. Id. at 34. This concession (which is contrary to
21 defendants’ position in this case) did not, however, resolve the matter. As the Supreme
22 Court observed in Plasencia, the “constitutional sufficiency of procedures provided in
23

any situation, of course, varies with the circumstances.” *Id.* The existing safeguards and any additional proposed procedures must be evaluated using the three-part balancing test first articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976).¹¹ *See* 459 U.S. at 34. In *Plasencia*, the Supreme Court declined to perform the *Mathews* analysis because the parties had “devoted their attention to the entitlement to a deportation hearing rather than to the sufficiency of the procedures in the exclusion hearing.” *Id.* at 36-37. The question of whether *Plasencia* had been “accorded due process under all of the circumstances” was remanded to the Ninth Circuit, *id.* at 37, which remanded to the district court, *Plasencia v. Dist. Dir., Immigration & Naturalization Serv.*, 719 F.2d 1425 (9th Cir. 1983).

In the end, defendants’ argument about the difference between “non-admitted” and “deportable” aliens merely highlights for the Court that the *Mathews* factors might lead to a variety of results depending on each plaintiff’s circumstances, but such possibility does not establish that plaintiffs have failed to state a plausible claim for relief within the meaning of Rule 12(b)(6) and *Twombly*. If, as defendants seem to suggest, the potential for losing on the merits was the measure of whether a claim was adequately pleaded, then

¹¹ Under *Mathews*, in evaluating whether due process has been satisfied, the following factors must be weighed: (i) the nature of the private interest affected by the government action; (ii) the risk of erroneous deprivation of such interest through the procedures used, as well as the probable value of additional or substitute safeguards; and (iii) the interest of the government, including the fiscal or administrative burdens that additional or different procedural requirements would entail. 424 U.S. at 335. In *Turner v. Rogers*, 564 U.S. 431 (2011), the Supreme Court indicated that the *Mathews* factors are “useful” in determining whether due process requires the appointment of counsel in a civil proceeding. *Id.* at ---, 131 S. Ct. at 2517; *see also Oshodi v. Holder*, 729 F.3d 883 (9th Cir. 2013) (applying the *Mathews* standard in concluding that an asylum petitioner who entered the United States without inspection was denied due process in his removal proceedings when the immigration judge directed him to limit his testimony to events that were not discussed in his asylum application).

1 no claim would ever survive a Rule 12(b)(6) motion. To the extent defendants’
2 Rule 12(b)(6) motion is premised on the theory that “non-admitted” aliens have no due
3 process rights beyond what Congress has provided, their motion is without merit.
4 Whether the scope of such aliens’ procedural rights under the Fifth Amendment includes
5 the right to counsel at government expense is a question more appropriately reserved for
6 dispositive motion practice or trial.

7 **3. Consolidated Removal Proceedings**

8 Defendants assert that A.F.M.J., L.J.M., and M.R.J. have not pleaded a claim for
9 relief because they cannot seek counsel at government expense when their mother is also
10 in removal proceedings and presumably represents their interests. Although the result of
11 the mother’s removal proceedings will affect her children, presumably because she and
12 her two daughters and son will not wish to be separated, defendants’ contention that the
13 mother is a proper “representative” for her children in their removal proceedings is not
14 supported by the cases they cite. None of the four cases upon which defendants rely
15 stand for the proposition that a parent may or must represent his or her child in removal
16 proceedings. In two of the cases, the minor aliens filed asylum applications that ran
17 contrary to their parents’ wishes. Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985);¹²

18
19 ¹² In Polovchak, citizens of the former Union of Soviet Socialist Republics (“U.S.S.R.”), who had settled
20 in Chicago, decided to return to their native country. 774 F.2d at 732. Their two eldest children, Nataly
21 and Walter, ages 17 and 12, wanted to remain in the United States, and Walter eventually filed an
22 application for asylum, which was granted without notice to his parents. Id. at 732-33. The Seventh
23 Circuit held that, although the parents were not parties to the asylum proceedings, they were entitled to
notice and an opportunity to be heard before asylum was granted to their son. Id. at 735-36. The Seventh
Circuit reasoned that the parents’ interest was “one of the strongest our society knows” and the proposed
pre-deprivation procedures “would burden the government only slightly.” Id.

1 see *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000).¹³ Although the Seventh and
2 Eleventh Circuits held in those cases that the parents' views should ordinarily trump
3 those of young children, both matters involved asylum applications, not removal
4 proceedings, and in neither situation was a parent serving or seeking to serve as a
5 "representative" for a child in removal proceedings.

6 The third case cited by defendants, involving an adult alien asserting a derivative
7 asylum claim, is even less favorable to their position. *See Oforji v. Ashcroft*, 354 F.3d
8 609 (7th Cir. 2003). In *Oforji*, the asylum petitioner, who was a Nigerian citizen, claimed
9 that removal would potentially cause her two daughters, who were United States citizens
10 but who would presumably return with her to Nigeria if she was removed, to be subjected
11 to female genital mutilation. *Id.* at 612. The derivative asylum claim was rejected
12 because the daughters were United States citizens and had a legal right to remain in the
13 country, which could be accommodated through placement with their father, if he could
14 be found, or an appointed guardian. *Id.* at 616. The Seventh Circuit saw this result as a
15 disincentive to excludable or deportable aliens to bear children whose rights, as American
16

17 ¹³ In *Gonzalez*, the plaintiff, Elian Gonzalez, arrived in the United States at the age of six, having endured
18 a boat ride from Cuba during which his mother died. 212 F.3d at 1344. He was paroled into the United
19 States and released to the custody of his great-uncle, who filed an application for asylum on his behalf.
20 *Id.* Elian subsequently filed his own asylum application. *Id.* His father, who remained in Cuba, indicated
21 a desire for Elian's return. *Id.* at 1345. The INS concluded that Elian's asylum applications were legally
22 void. *Id.* at 1345-46. The INS reasoned that a six-year-old child lacks the capacity to sign an application
23 for asylum, but must instead be represented by an adult in immigration matters, and absent "special
circumstances," the only proper adult to represent a child is a parent, even when the parent is not within
the United States. *Id.* at 1349-50. The INS further found that a parent's residence in a communist,
totalitarian state like Cuba did not constitute "special circumstances." *Id.* The Eleventh Circuit held that
the INS's policy was facially reasonable and had not been applied arbitrarily, capriciously, or in a manner
constituting an abuse of discretion. *Id.* at 1350-56.

1 citizens, to stay in the United States are separate from the parents' obligations to depart.
2 Id. at 618.

3 In Oforji, the asylum petitioner was not "representing" her daughters in removal
4 proceedings, but rather using their interests in not returning to Nigeria as a basis for her
5 to remain in the United States. Thus, Oforji does not support defendants' contention that
6 "a parent or other guardian necessarily speaks for a child too young to articulate his or
7 her own claim." Mot. at 19-20 (docket no. 229) (citing the concurrence in Oforji, as
8 opposed to the majority opinion). Rather, Oforji illustrates the type of problem faced by
9 plaintiffs A.F.M.J. and L.J.M., whose biological father was a United States citizen; their
10 rights to remain in the United States are different from their mother's, but she might be
11 unwilling to assert their rights for fear of being separated from them if she cannot also
12 stay in the United States.

13 The fourth case on which defendants rely, Johns v. Dep't of Justice, 624 F.2d 522
14 (5th Cir. 1980), actually runs contrary to their position. In Johns, a husband and wife
15 brought an infant girl from Mexico into the United States without a visa or other proper
16 documentation. Id. at 523. Approximately five years later, the girl's biological mother
17 sought her return to Mexico, claiming that the child had been kidnapped. Id. The couple
18 contended that the biological mother had willingly given up the child and that they had
19 taken the girl with the biological mother's consent. Id. The Fifth Circuit concluded that,
20 in connection with deportation proceedings, neither the spouses nor the biological mother
21 could represent the young girl's interests, and it remanded with instructions to appoint a
22 guardian ad litem for the child and to direct the INS to conduct all further proceedings
23

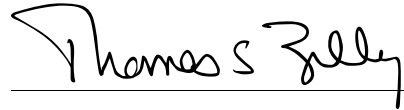
1 with the guardian ad litem serving as the child's representative. *Id.* at 523-24. The
2 holding of *Johns* does not support defendants' argument that A.F.M.J., L.J.M., and
3 M.R.J. have failed to state a claim for counsel at government expense because their
4 mother is in removal proceedings with them. To the extent their mother's interests are
5 not aligned with their interests, which is conceivable given that two of them might have a
6 claim to United States citizenship, *Johns* indicates that someone other than the mother
7 should be appointed to represent the children. Defendants' assertion that, simply because
8 A.F.M.J., L.J.M., and M.R.J. are in removal proceedings with their mother, their right-to-
9 counsel claims are not cognizable lacks merit.

10 **Conclusion**

11 For the foregoing reasons, defendants' partial motion to dismiss, docket no. 229, is
12 GRANTED in part, DEFERRED in part, and DENIED in part. Plaintiffs' claims against
13 USCIS Director León Rodríguez are DISMISSED. Plaintiff J.E.V.G.'s right-to-counsel
14 claim is DISMISSED as moot. Defendants' motion is DEFERRED with respect to
15 plaintiff M.A.M.'s right-to-counsel claim, and the parties are DIRECTED to file, by
16 May 6, 2016, a Joint Status Report concerning the status of M.A.M.'s removal
17 proceedings. Defendants' partial motion to dismiss is otherwise DENIED. Defendants
18 shall file their answer to the Third Amended Complaint by May 16, 2016. *See* Fed. R.
19 Civ. P. 12(a)(4) (upon the denial of a Rule 12 motion, the Court may set a time for a
20 responsive pleading to be filed).

1 IT IS SO ORDERED.

2 Dated this 15th day of April, 2016.

3
4 

5 Thomas S. Zilly
6 United States District Judge
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23