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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 F.L.B., et al.,

8 Plaintiffs,

9 v.

10 LORETTA E. LYNCH, et al.,

11 Defendants.

C14-1026 TSZ

ORDER

12 THIS MATTER comes before the Court on plaintiffs' fourth motion to certify
13 class, docket no. 230. Having reviewed all papers filed in support of and in opposition to
14 plaintiffs' motion, including the supplemental briefs filed in response to the Minute
15 Orders entered March 10, 2016, docket no. 248, and April 18, 2016, docket no. 266, and
16 having considered the oral arguments of counsel, see Transcript (Mar. 24, 2016) (docket
17 no. 261), the Court hereby CERTIFIES the following Class and Subclass pursuant to
18 Federal Rule of Civil Procedure 23(b)(2):

19 **Class:** All individuals under the age of eighteen (18) who:

20 (1) are in removal proceedings, as defined in 8 U.S.C. § 1229a, within
21 the boundaries of the Ninth Judicial Circuit, on or after the date of entry of
this Order;

22 (2) were not admitted to the United States and are alleged, in such
23 removal proceedings, to be "inadmissible" under 8 U.S.C. § 1182;

1 (3) are without legal representation, meaning (a) an attorney, (b) a law
2 student or law graduate directly supervised by an attorney or an accredited
3 representative, or (c) an accredited representative, all as defined in 8 C.F.R.
4 § 1292.1;

5 (4) are financially unable to obtain such legal representation; and

6 (5) are potentially eligible for asylum under 8 U.S.C. § 1158,
7 withholding of removal under 8 U.S.C. § 1231(b)(3), or protection under
8 the Convention Against Torture, or are potentially able to make a colorable
9 claim of United States citizenship.

10 **Subclass**: All individuals in the Class who are under the age of fourteen
11 (14).

12 Specifically excluded from the Class and Subclass are juveniles who (i) qualify as an
13 “applicant for admission” as defined in 8 U.S.C. § 1225(a)(1), (ii) have not been paroled
14 into the United States pursuant to 8 U.S.C. § 1182(d)(5), and (iii) satisfy the other criteria
15 for “expedited removal,” *e.g.*, were encountered by an immigration official within 100 air
16 miles of the border and were unable to establish continuous physical presence in the
17 United States during the fourteen-day period prior to such encounter. *See Designating*
18 *Aliens for Expedited Removal*, 69 Fed. Reg. 48877-01, 48880 (Aug. 11, 2004).

19 **Discussion**

20 In a prior motion for class certification, plaintiffs proposed to certify a class of
21 “[a]ll individuals under the age of eighteen (18) who are in immigration proceedings on
22 or after July 9, 2014, without legal representation in their immigration proceedings and
23 who are financially unable to obtain such representation.” Plas.’ 3d Mot. at 2 (docket
no. 191). Plaintiffs’ earlier motion was denied without prejudice because the proposed
class was too expansive to meet the commonality and typicality requirements of Federal
Rule of Civil Procedure 23(a). *See* Order (docket no. 225) (setting forth the applicable

1 standards for certifying a Rule 23(b)(2) class). In their current motion, plaintiffs again
2 ask to certify the same overbroad class. Their renewed request lacks merit for the reasons
3 previously articulated by the Court, but the Court concludes that a more narrow class is
4 appropriate.

5 Plaintiffs also seek to certify two pairs of subclasses; each pair of subclasses
6 comprises the entire class. *See* Plas.’ 4th Mot. at 1-2 (docket no. 230) (suggesting
7 “entering” and “arriving” subclasses, as well as “accompanied” and “unaccompanied”
8 subclasses). The Court requested additional briefing along similar lines, describing
9 potential subclasses of allegedly “inadmissible” and “deportable” juveniles, as well as a
10 subclass of minors in removal proceedings consolidated with those of a parent or legal
11 guardian and a subclass of unaccompanied alien children. *See* Minute Order (docket
12 no. 266). Having reviewed the supplemental briefs, the Court is persuaded that such
13 subclasses are unnecessary.

14 **A. “Inadmissible” Versus “Deportable”**

15 For purposes of determining what procedural rights are due to minor aliens under
16 the Fifth Amendment, the Court has acknowledged that a distinction might need to draw
17 between “non-admitted” and “deportable” individuals. Order at 13-14 (docket no. 264).
18 Plaintiffs, however, concede that no named plaintiff has been admitted to the United
19 States and is alleged, in removal proceedings, to be “deportable” under 8 U.S.C. § 1227.
20 Thus, the named plaintiffs’ claims are not typical of the right-to-counsel claims that
21 might be asserted by juvenile aliens who are alleged, in removal proceedings, to be
22 “deportable.” The Court therefore declines to certify a subclass of allegedly “deportable”
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1 minors, and instead incorporates as part of the class definition that each member must not
2 have been admitted to the United States and must be alleged, in removal proceedings, to
3 be “inadmissible” under 8 U.S.C. § 1182.

4 **B. Unaccompanied Minors**

5 Defendants contend that the designation of a juvenile as an “unaccompanied alien
6 child” is made at the time he or she is placed into federal custody, *see* 6 U.S.C. § 279, and
7 it has no relevance to the question of whether, in later removal proceedings, such minor
8 might reside with, be accompanied by, and/or have the assistance of a parent or guardian.

9 Defendants have also represented to the Court that resources have been allocated to
10 provide counsel for certain groups of unaccompanied minors. *See* Order at 35 n.28
11 (docket no. 114). How the availability of attorneys for some, but apparently not all,
12 unaccompanied juvenile aliens might affect the balancing required under *Mathews v.*
13 *Eldridge*, 424 U.S. 319 (1976),¹ is unclear. On one hand, it might evidence a consensus
14 or acknowledgement that, even if other aliens can navigate the immigration labyrinth
15 without a lawyer, unaccompanied minors need legal representation. On the other hand, it
16 might demonstrate that existing procedures are sufficient to address or perhaps negate the
17 risk of erroneous deprivation. Regardless, the Court is persuaded that subclasses need
18 not be certified to deal with the possible differences between unaccompanied minors,

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20 ¹ Under *Mathews*, in evaluating whether due process has been satisfied, the following factors must be
21 weighed: (i) the nature of the private interest affected by the government action; (ii) the risk of erroneous
22 deprivation of such interest through the procedures used, as well as the probable value of additional or
23 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; *see Turner v.*
Rogers, 564 U.S. 431, 444-45 (2011); *see also Oshodi v. Holder*, 729 F.3d 883, 894 (9th Cir. 2013).

1 children in removal proceedings consolidated with those of a parent or guardian, and
2 other juvenile aliens, and that relief, if any, can be crafted in a manner taking into account
3 such circumstances, if appropriate.

4 **C. Eligibility for Relief**

5 Plaintiffs must demonstrate, as a prerequisite to any *Mathews* analysis and their
6 assertion of due process rights, the likely adverse consequences associated with removal.
7 *See* Order at 5 (docket no. 225); Order at 31-32 (docket no. 114). Nevertheless, in all
8 four of their motions for class certification, plaintiffs failed to frame a class of juveniles
9 who might face potential harm if removed to their country of origin. To address this
10 deficiency, the Court suggested that the class definition refer to eligibility for asylum or
11 similar relief. *See* Minute Orders (docket nos. 248 & 266). In response to the Court's
12 proposal, plaintiffs assert that class members should include, not only minor aliens
13 potentially eligible for asylum, withholding of removal, or protection under the
14 Convention Against Torture, but also those "potentially eligible for other remedies under
15 the Immigration and Nationality Act." Plas.' Supp. Br. at 9 (docket no. 271). Plaintiffs,
16 however, offer no example of relief other than asylum, withholding of removal, or
17 protection under the Convention Against Torture that would be based on the risk of harm
18 possibly arising from removal. Plaintiffs' proposed catch-all phrase does not eliminate
19 from the class the teenagers or exchange students hypothesized by defendants, who are
20 from relatively stable nations, *see* Order at 5 (docket no. 225), and the Court therefore
21 declines plaintiffs' request to incorporate such residual clause.

1 **D. Class Period**

2 In proposing a class of juveniles who “are in immigration proceedings on or after
3 July 9, 2014,” plaintiffs attempt to include within the class any minor aliens as to whom
4 an order of removal was issued on or after July 9, 2014, and before the date of this Order.
5 The Court, however, lacks jurisdiction over the claims of such individuals. *See* Order at
6 10-11 (docket no. 114); *see also* 8 U.S.C. § 1252(g). Thus, the Court adopts defendants’
7 suggestion that the class period run forward from the date of class certification, *i.e.*, from
8 the date of this Order. *See* Defs.’ 2d Supp. Br. at 11 n.4 (docket no. 275).

9 **E. Commonality and Typicality**

10 In opposing class certification, defendants have not disputed either numerosity or
11 the ability of the class representatives to fairly and adequately protect the interests of the
12 class. *See* Fed. R. Civ. P. 23(a). Defendants have instead focused on the requirements of
13 commonality and typicality, asserting that the *Mathews* test cannot be applied on a class-
14 wide basis because of variations in age, abilities, and circumstances among the putative
15 class members. Defendants’ arguments ignore the ways in which the competency and
16 capacity of juveniles are categorically based on age. *See* Minute Order at ¶ 1 (docket
17 no. 248) (citing various state statutes). Among adolescents, intellect and maturity levels
18 vary significantly, but the age at which they may drive, marry, seek emancipation (and
19 thereby sue, be sued, enter into contracts, and consent to health care), or be prosecuted as
20 adults is generally uniform within each state. Similarly, some young children are savvier
21 than others, but the law presumes all of them below a certain age incapable of committing
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1 crime. Age is a type of litmus test from which conclusions are frequently drawn about
2 what can and what cannot be expected of a minor.

3 Defendants do not appear to dispute that children below a certain age (perhaps
4 those who cannot yet speak, read, or write) are incapable of appearing pro se in removal
5 proceedings. Such children are also presumably unable, from a financial standpoint, to
6 house, feed, and clothe themselves, and thus, in most cases, they will be residing with a
7 parent or guardian. With respect to such youngsters, defendants' position in this matter
8 seems to involve, rather than the minors' individual skills, the role that a parent or
9 guardian can or must play in removal proceedings, which is a legal question susceptible
10 to a common answer. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir.
11 2011) (“[I]t is insufficient to merely allege any common question Instead, [a
12 plaintiff] must pose a question that ‘will produce a common answer to the crucial
13 question’” (citations omitted)). Thus, the Court is satisfied that some maximum age
14 exists as to which class certification is appropriate.

15 As reflected in the Order entered January 21, 2016, docket no. 225, the Court has
16 struggled with the question of whether a *Mathews* balancing can be conducted across the
17 ranges of age, education, intelligence, language facility, and experience reflected among
18 juvenile aliens. For purposes of moving this litigation forward, the Court will use the
19 ages of eighteen (18) and fourteen (14) because they are thresholds identified by the
20 states in the Ninth Circuit in which one or more plaintiffs reside, namely Washington and
21 California. *See* Minute Order at ¶ 1 (docket no. 248); *see also Roper v. Simmons*, 543
22 U.S. 551, 574 (2005) (“Drawing the line at 18 years of age is subject, of course, to the
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1 objections always raised against categorical rules. . . . For the reasons we have discussed,
2 however, a line must be drawn. . . . The age of 18 is the point where society draws the
3 line for many purposes between childhood and adulthood.”); *Thompson v. Oklahoma*,
4 487 U.S. 815, 824-25 (1988) (“The line between childhood and adulthood is drawn in
5 different ways by various States. . . . All of this legislation is consistent with the
6 experience of mankind, as well as the long history of our law, that the normal 15-year-old
7 is not prepared to assume the full responsibilities of an adult.”). If, at a later stage in this
8 action, the Court is persuaded that individual questions predominate over common ones
9 with regard to certain age groups, the Court can adjust the definition of the Class and/or
10 Subclass accordingly.

11 **F. Notice**

12 Unlike with respect to a Rule 23(b)(3) class, notice to members of a Rule 23(b)(2)
13 class is not mandated. Fed. R. Civ. P. 23(c)(2)(A). Contrary to plaintiffs’ suggestion,
14 notice to every class member in this matter is neither necessary nor practicable.² Because
15 the Court lacks jurisdiction to grant classwide injunctive relief, *see* Order at 36-38
16 (docket no. 114), and because class members cannot opt out of this litigation, *see* Fed. R.
17 Civ. P. 23(c)(2) advisory committee’s note to 2003 amendment, certification does not, at

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19 ² Plaintiffs request that immigration judges and agency personnel be required to explain this litigation to
20 every class member with whom they come into contact, that defendants transmit information to plaintiffs’
21 counsel every time a removal order is issued with regard to a class member, and that defendants maintain
22 and/or distribute the address of a website through which plaintiffs’ counsel can provide materials to class
23 members. Because class members must be indigent and potentially eligible for asylum, withholding of
removal, or protection under the Convention Against Torture or able to make a colorable claim of United
States citizenship, and because removal orders can be issued in absentia, assessing whether a particular
juvenile alien is a potential class member and whether plaintiffs’ counsel must be advised about such
minor might not even be possible, let alone an efficient expenditure of limited resources.

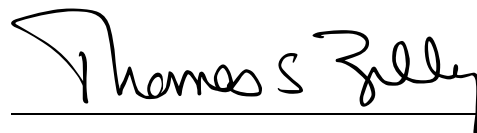
1 this time, directly affect class members. They will have no active role to play unless the
2 Court grants favorable declaratory relief. See Order at 38 (docket no. 114) (indicating
3 that any classwide declaratory judgment would have to be enforced on a case-by-case
4 basis). The Court therefore agrees with defendants that the issue of what notice, if any,
5 must be provided to class members should be deferred until the merits of plaintiffs'
6 constitutional right-to-counsel claims are resolved.

7 **Conclusion**

8 For the foregoing reasons, plaintiffs' fourth motion to certify class, docket no. 230,
9 is GRANTED in part and DENIED in part.

10 IT IS SO ORDERED.

11 Dated this 24th day of June, 2016.

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14 Thomas S. Zilly
15 United States District Judge
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