United States District Court for the
District of Massachusetts

K.O. and E.O., Jr., by and through their parents and next friends, E.O. and L.J.; and C.J., by and through his father and next friend F.C.; each individually and on behalf of all others similarly situated, *Plaintiffs*, v. JEFFERSON BEAUREGARD SESSIONS III, Attorney General of the United States; KIRSTJEN NIELSEN, Secretary of the United States Department of Homeland Security; JOHN F. KELLY, White House Chief of Staff; STEPHEN MILLER, Senior Advisor to the President; GENE HAMILTON, Counselor to the Attorney General Sessions; THOMAS HOMAN, former Director of United States Immigration and Customs Enforcement (ICE); RONALD D. VITIELLO, Acting Director of ICE; L. FRANCIS CISSNA, Director of United States Citizenship and Immigration Services; KEVIN K. MCALEENAN, Commissioner of United States Customs and Border Protection (CBP); ALEX AZAR, Secretary of the United States Department of Health and Human Services; SCOTT LLOYD, Director of the United States Office of Refugee Resettlement (ORR); JOHN DOE ICE AGENTS; JOHN DOE CBP AGENTS; and JOHN DOE ORR PERSONNEL, *Defendants*.	CIVIL ACTION NO.: 4:18-CV-40149-TSH

Amicus Curiae Brief of the Immigration Reform Law Institute
in Support of Defendants and Dismissal

INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, and also organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010). Because of IRLI's expertise in immigration law, the Board of Immigration Appeals has solicited briefs, drafted by IRLI staff, from IRLI's affiliate, the Federation for American Immigration Reform, for over twenty years.

STATEMENT OF FACTS

Plaintiffs K.O. and E.O. Jr. crossed the United States-Mexican border on foot on May 19, 2018, with their mother, L.J. First Amended Complaint ("Compl.") at ¶ 138. After crossing the border, Plaintiffs walked along the Rio Grande River, hoping that a U.S. Customs and Border Patrol Agent would find them. *Id.* at ¶ 140. After about five hours, such an agent apprehended them. *Id.* at ¶ 141.

While in custody, L.J. was indicted and charged with the criminal offense of illegal entry. *Id.* at ¶ 155. The first amended complaint does not indicate the time interval between L.J.'s apprehension and charging. L.J.'s transfer into criminal custody entailed her separation from her

children (K.O. and E.O. Jr). *Id.* K.O. and E.O. Jr. were taken to a different detention facility by bus and were placed in facing cells. *Id.* at ¶ 157. They stayed at this facility for two days. *Id.* at ¶ 160. Then they were flown to Michigan and placed with caretakers. *Id.* at ¶ 168. K.O. was placed in a foster home. *Id.* E.O. Jr. was placed in a facility with about 18 other boys. *Id.* at ¶ 170. Both K.O. and E.O. Jr. attended school, and were able to see each other there. *Id.* at ¶ 170.

L.J pleaded guilty to the charges against her and was sentenced to time served. *Id.* at ¶ 155. K.O. and E.O. Jr. were released to their father (E.O. Sr.) on June 19, 2018, four weeks after being apprehended at the border. *Id.* at ¶ 174. L.R. was released on June 26, 2018, five weeks after being apprehended at the border. *Id.* at ¶ 177. Thus, the children were separated from their parents for less than a month, according to Plaintiffs' allegations.

Plaintiff C.J. crossed the United States-Mexico border with his father, F.C., at El Paso, Texas, on June 17, 2018. *Id.* at ¶ 181. When they crossed the border, C.J. and F.C. saw a U.S. Customs and Border Patrol vehicle and approached it. *Id.* at ¶ 182. They were then taken into custody. *Id.* On June 20, 2018, F.C. was charged with illegal entry into the United States and separated from C.J. *Id.* at ¶¶ 186, 191. While his father was incarcerated for criminal charges, C.J. was detained separately with other children. *Id.* at ¶ 196. Though the complaint does not state the outcome of the criminal proceedings, C.J. and F.C. were reunited on July 25, 2018 (36 days later). *Id.* at ¶¶ 187, 199.

ARGUMENT

In this *Bivens* action, the minor plaintiffs claim that the circumstances of their detention, including their separation from their parents, caused a deprivation of their constitutional rights. Plaintiffs are mistaken. It is a basic principle of immigration law that aliens who have not effected "entry" into the United States have not acquired rights under our Constitution. The minor plaintiffs in this case, when separated from their criminally-charged parents for roughly

one month shortly after crossing the border illegally, had not effected entry into the United States. They thus had not acquired any constitutional rights of which they could be deprived.

A. Plaintiffs had not effected entry into the United States when their alleged injuries occurred.

"The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

> Any discussion of [Plaintiffs'] rights in the immigration context must also start with the fundamental difference in the legal status of (1) unadmitted aliens and (2) resident aliens who have effected "entry" into the United States, whether illegally or legally. This critical difference not only was recognized in *Zadvydas*, but has been a hallmark of immigration law for more than a hundred years.

Benitez v. Wallis, 337 F.3d 1289, 1296 (11th Cir. 2003).

"Entry" is a term of art that requires "physical presence in the United States" and "freedom from official restraint." *United States v. Argueta-Rosales*, 819 F.3d 1149, 1158 (9th Cir. 2016); *accord United States v. Kavazanjian*, 623 F.2d 730, 736 (1st Cir. 1980). It is longstanding principle that an alien detained at the border and held in custody has not effected an entry. *Nishimura Ekiu v. United States*, 142 U.S. 651, 661 (1892); *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958) ("[T]he detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States."). A women detained at Ellis Island for a year and then released to live with her father "was to be regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared," even though she had been in the United State for a decade. *Kaplan v. Tod*, 267 U.S. 228, 230 (1925). "She was still in theory of law at the boundary line and had gained no foothold in the United States." *Id.*; *accord Wong Sang v. United States*, 144 F. 968, 970 (1st Cir. 1906) (citing *United States v. Ju Toy*, 198 U.S. 253, 263 (1905)). *See Dimova v.*

Holder, 783 F.3d 30, 38-40 (1st Cir. 2015) (deferring to the Board of Immigration Appeals's definition of "entry" for purposes of the alien smuggling statute as requiring "'(1) a crossing into the territorial limits of the United States, i.e., physical presence; (2)(a) an inspection and admission by an immigration officer, or (b) an actual and intentional evasion of inspection at the nearest inspection point; and (3) freedom from official restraint,'" and finding that this definition "is logical and makes eminent good sense") (quoting *Matter of Martinez-Serrano*, 25 I. & N. Dec. 151, 153 (B.I.A. 2009)); *id.* at 39-40 (holding that, whatever the correct definition of "entry" was, it was not met where aliens had crossed the border and waited in the woods overnight to be picked up by a smuggler); *Albathani v. INS*, 318 F.3d 365, 375 (1st Cir. 2003) (holding that an asylum claimant permitted to be in the United States pending his asylum hearing had not effected entry).

Here, neither set of Plaintiffs made any attempt to evade border patrol; instead, both family units sought out their apprehension, which occurred soon after their crossing. In C.J.'s and F.C.'s case, their voluntary apprehension immediately followed their crossing. Compl. at ¶ 182. In L.J.'s, K.O.'s, and E.O. Jr.'s case, they had to walk for five hours before finding a border agent to apprehend them. *Id.* at ¶¶ 140, 141. After being apprehended, all Plaintiffs were detained during all of the time in which their alleged constitutional deprivations occurred. C.J. and F.C. were not free of official restraint at any time between their crossing and their reunification. L.J., K.O., and E.O. Jr., though the apprehension they sought did not occur for five hours after their crossing, never actually or intentionally evaded inspection, but instead welcomed it. In *Dimova*, *supra*, the First Circuit held that aliens who had hidden in the woods overnight waiting for a smuggler had not effected entry; so much the less would they have effected entry if, like L.J., K.O., and E.O. Jr., they had walked for five hours in search of a

border patrol agent. Under the clear precedent of both the Supreme Court and this circuit, Plaintiffs had not effected entry.

B. Because Plaintiffs had not effected entry, their constitutional rights were limited to those afforded by Congress.

Aliens who have effected entry into the United States enjoy "additional rights and privileges not extended to those . . . who are merely 'on the threshold of initial entry.'" *Length v. Barber*, 357 U.S. 185, 187 (1958) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)). Accordingly, "[t]he Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores." *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring), *quoted with approval in Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953).

As the First Circuit has held, even the procedural due process rights of aliens who have not effected entry are limited. *Albathani v. INS*, 318 F.3d 365, 375 (1st Cir. 2003) (holding that an alien's due process challenge to his asylum proceeding failed because he had not effected entry). Indeed, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

> It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.

Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892).

Here, Plaintiffs allege a plethora of constitutional violations, specifically, violations of their Fourth Amendment rights against unreasonable seizures, and – as protected in the Due

Process Clause of the Fifth Amendment – their rights to procedural due process, substantive due process (including the right to family integrity), and equal protection. But in their procedural due process claim, they never allege that they were deprived of procedural protections afforded by Congress, Compl. at ¶¶ 235-43, and they have no further, constitutional procedural due process rights. Much less do Plaintiffs have the slew of substantive due process rights they assert under the Fifth Amendment. *See, a fortiori, Flores v. Meese*, 934 F.2d 991, 1004 (9th Cir. 1990) ("The plenary power of Congress and the narrowness of judicial review in the immigration context is reflected in the Supreme Court's teaching that any substantive due process rights aliens might have are extremely limited."), *and cases cited therein.*

The Fourth Amendment's protection of the right of "the people" against unreasonable seizures almost certainly does not apply to aliens, such as Plaintiffs, who had not effected entry and who had not developed substantial connections to this country at the time of the violation alleged. *See United States v. Verdugo-Urquidez,* 494 U.S. 259, 265 (1990) ("'[T]he people' protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."); *id.* at 271 (holding that defendant's presence in a jail in California while a search of his property took place in Mexico did not make the Fourth Amendment applicable to him; "this sort of presence – lawful but involuntary – is not of the sort to indicate any substantial connection with our country.").

In short, because Plaintiffs had not even entered the country, all of their constitutional claims must fail.

C. Even if Plaintiffs had effected entry, the family unification rights they assert would not be cognizable.

Even if Plaintiffs had effected entry to the United States, their central claims would face

an additional insurmountable hurdle. These claims are derived from their assertion that separating them from their parents was a violation of due process. Compl. ¶¶ 224, 230-31, 239-40, 249-51, 259, 270, 280, 283, 290. Yet the First Circuit has explicitly rejected the proposition that there is such a due process right to family integrity. *Aguilar v. United States Immigration & Customs Enf't Div. of the Dep't of Homeland Sec.*, 510 F.3d 1, 24 (1st Cir. 2007).

> [E]very [] detention of a parent, like every lawful arrest of a parent, runs the risk of interfering in some way with the parent's ability to care for his or her children. That a detention has an impact on the cohesiveness of a family unit is an inevitable concomitant of the deprivation of liberty inherent in the detention itself. So long as the detention is lawful, that so-called deprivation of the right to family integrity does not violate the Constitution. . . . To rule otherwise would risk turning every lawful detention or arrest of a parent into a substantive due process claim.

Id. at 22; *cf. Reno v. Flores*, 507 U.S. 292 (1993) (holding that an unaccompanied illegal alien minor does not have a due process right to be released to an adult).

CONCLUSION

For the foregoing reasons, Plaintiffs' claims should be dismissed.

Respectfully submitted,

s/Christopher J. Hajec
Christopher J. Hajec
John M. Miano
Immigration Reform Law Institute
25 Massachusetts Avenue NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590
Fax: (202) 464-3590
Email: chajec@irli.org
miano@colosseumbuilders.com

s/Brad P. Bennion
MA Bar No. 661222
Local Counsel
Brad P. Bennion
P.O. Box 890118
East Weymouth, MA 02189
Telephone: (617) 943-6164
Email: bradpbennion@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on April 2, 2019.

s/Brad P. Bennion
MA Bar No. 661222
Local Counsel
Brad P. Bennion
P.O. Box 890118
East Weymouth, MA 02189
Telephone: (617) 943-6164
Email: bradpbennion@gmail.com