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11
12
13 *Attorneys for Plaintiffs*

14 **UNITED STATES DISTRICT COURT**
15 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
16 **WESTERN DIVISION**

17 IMMIGRANT DEFENDERS LAW
18 CENTER;; and REFUGEE AND
19 IMMIGRANT CENTER FOR
EDUCATION AND LEGAL SERVICES,

20 Plaintiffs,

21 v.

22 U.S. DEPARTMENT OF HOMELAND
SECURITY; PETE GAYNOR, in his
23 official capacity as Acting Secretary of the
U.S. Department of Homeland Security;
24 U.S. CUSTOMS AND BORDER
PATROL; MARK A. MORGAN, in his
25 official capacity as Commissioner of the
U.S. Customs and Border Patrol; U.S.
26 IMMIGRATION AND CUSTOMS
ENFORCEMENT; TAE D. JOHNSON, in
27 his official capacity as Acting Director of
U.S. Immigration and Customs
28 Enforcement; U.S. ENFORCEMENT
AND REMOVAL OPERATIONS;

Case No. 2:21-cv-00395

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

1 HENRY LUCERO, in his official capacity
2 as Executive Associate Director of U.S.
3 Enforcement and Removal Operations;
4 U.S. CITIZENSHIP AND
5 IMMIGRATION SERVICES; KENNETH
6 (KEN) T. CUCCINELLI, in his official
7 capacity as purported Director of U.S.
8 Citizenship and Immigration Services;
9 DEPARTMENT OF HEALTH AND
10 HUMAN SERVICES; ALEX AZAR II, in
11 his official capacity as Secretary of the
12 Department of Health and Human
13 Services; U.S. OFFICE OF REFUGEE
14 RESETTLEMENT; HEIDI STIRRUP, in
15 her official capacity as Director of the
16 Office of Refugee Resettlement,

Defendants.

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INTRODUCTION

1
2 1. This lawsuit seeks to ensure that unaccompanied immigrant children
3 (“UC”)—a vulnerable population struggling to navigate the byzantine United States
4 immigration system without the help of a parent or guardian—are restored the
5 protections enshrined by the William Wilberforce Trafficking Victims Protection
6 Reauthorization Act (“TVPRA”), the Due Process Clause of the Fifth Amendment
7 to the United States Constitution, and the *Flores* Settlement Agreement.

8 2. Plaintiffs are legal services providers whose mission is to provide *pro*
9 *bono* legal services and advocacy to immigrants. They are tasked with ensuring that
10 unaccompanied children have unfettered access to their TVPRA protections.
11 Plaintiffs are two of the largest legal services providers for unaccompanied
12 immigration children in the country and provide services to children entering from
13 the Southwest border.

14 3. Defendants are agencies of the federal government and their
15 responsible officers, who over the last two years in connection with their
16 implementation of the Trump Administration’s Migrant Protection Protocols
17 (“MPP,” or the “Remain in Mexico Program”) have systematically failed in their
18 stewardship of unaccompanied immigrant children with MPP ties (“MPP-UC”).
19 Defendants’ actions and failings have frustrated Plaintiffs’ missions and led to a
20 diversion of resources that are otherwise needed to protect the interests of vulnerable
21 unaccompanied immigrant children.

22 4. Historically—and as legally mandated—Defendants provided
23 unaccompanied immigrant children with a variety of protections, triggered upon
24 designation by U.S. Customs and Border Protection (“CBP”) as an “unaccompanied
25 alien child” under the Immigration and Nationality Act (“INA”).¹ These protections
26

27
28 ¹ The INA defines UC as children under the age of eighteen with no lawful immigration status and no parent or legal guardian in the United States, or no parent

1 include, among others, the right to seek asylum through an age-appropriate and
2 trauma-sensitive, non-adversarial process under the jurisdiction of the U.S.
3 Citizenship and Immigration Services (“USCIS”); release from federal custody for
4 placement with a parent, guardian or sponsor; and access to counsel. These
5 protections have extended, by statutory command and historical practice, to all UC,
6 regardless of how they came to the United States or their prior immigration history.

7 5. Since the Trump Administration introduced MPP, however, immigrant
8 children have faced increasingly dire circumstances along the southern border.
9 Under MPP, immigrant children who initially came to the United States with a
10 parent were forced to remain in Mexico—often in squalid refugee camps lacking
11 basic necessities and facing an ever-present threat of violence. Once in MPP, they
12 must await their hearings before so-called “tent courts” hastily constructed to handle
13 MPP proceedings. Hardship, danger, and other violent and unsafe circumstances in
14 MPP have forced these children to enter the United States on their own—with the
15 gut-wrenching result that many are separated from a parent or caregiver.
16 Compounding this state-imposed crisis, Defendants thereafter have failed to
17 implement policies necessary to ensure that these UC receive—and indeed have
18 taken affirmative steps to ensure they cannot access—the protections guaranteed
19 them by law.

20 6. All unaccompanied children² who present alone at the United States
21 border are legally entitled to, and ordinarily receive, processes designed to protect

22 _____
23 or legal guardian in the United States available to provide care and physical custody.
See 6 U.S.C. § 279(g)(2).

24 ² CBP must designate as a UC any non-citizen child for whom the officer has a
25 “reasonable claim or suspicion” that the child is: (1) under eighteen years of age; (2)
26 lacks immigration status; and (3) does not have a parent or guardian available to
27 “provide care and physical custody.” U.S. Customs and Border Protection,
28 *Implementation of the William Wilberforce Trafficking Victims Protection
Reauthorization Act of 2008 (TVPRA)* (March 19, 2009),
<https://www.aila.org/infonet/cbp-issues-interim-guidance-for-processing-uac>
(redacted copy).

1 their wellbeing and safeguard their legal rights, including basic due process required
2 by the Constitution. No such certainty exists for MPP-UC. Contrary to DHS’s
3 policies excluding UC from MPP, Defendants are enforcing MPP against UC.

4 7. Without notice or explanation, Defendants have abandoned their legal
5 duties to MPP-UC by delaying their reunification with appropriate caregivers,
6 allowing MPP Courts to retain jurisdiction over UC even after they are in ORR
7 custody, and preventing UC from seeking TVPRA-asylum in the United States.
8 Defendants recognize the children are UC but have failed to adopt necessary
9 procedures to ensure that MPP-UC are able to access their rights under the TVPRA.
10 Defendants pick and choose amongst MPP-UC, fast-tracking removal of some while
11 allowing others to proceed as ordinary UC.

12 8. Defendants’ actions contravene the TVPRA, as well as their repeated
13 pronouncements such as: “[u]naccompanied alien children . . . will not be subject to
14 MPP”;³ “are not amenable to MPP”;⁴ and again, as recently as recently as December
15 7, 2020, “[UC] are not amendable to MPP.”⁵

16 9. Defendants’ have created a situation where MPP-UC—children whom
17 Congress has recognized as a “particularly vulnerable population” to whom our
18 country “owes a special obligation” to treat “humanely and fairly”—regularly
19

20 ³ U.S. Dep’t of Homeland Sec., *Migrant Protection Protocols* (Jan. 24, 2019),
21 <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> (emphasis
22 added); *see also* Memorandum from the Deputy Dir. of the U.S. Immigr. and
23 Customs Enf’t to Exec. Assoc. Directors 1 (Feb. 12, 2019),
[https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy-
Memorandum-11088-1.pdf](https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy-Memorandum-11088-1.pdf) (“DHS will not use the INA section 235(b)(2)(C)
process in the cases of unaccompanied alien children”).

24 ⁴ U.S. Customs and Border Protection, *MPP Guiding Principles* (Jan. 28, 2019),
25 [https://www.cbp.gov/sites/default/files/assets/documents/2019Jan/MPP%20Guiding
%20Principles%201-28-19.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2019Jan/MPP%20Guiding%20Principles%201-28-19.pdf).

26 ⁵ U.S. Dep’t of Homeland Sec., *Supplemental Policy Guidance for Additional*
27 *Improvement of the Migrant Protection Protocols* (Dec. 7, 2020),
28 [https://www.dhs.gov/sites/default/files/publications/supplemental_policy_guidance.
pdf](https://www.dhs.gov/sites/default/files/publications/supplemental_policy_guidance.pdf).

1 receive less process before removal than adults who reenter the United States with
2 prior removal orders.

3 10. Plaintiffs—whose practice is ordinarily limited to representing UC in
4 accessing their TVPRA benefits—must now divert their organizational resources to
5 protect MPP-UC’s TVPRA rights from evisceration.

6 11. In aggregate, Defendants’ actions have the potential to harm hundreds
7 if not more of MPP-UC nationwide. For Plaintiffs, representing even one MPP-
8 unaccompanied child means having to put on hold the needs of other children who
9 need their services. Defendants’ actions detract from Plaintiffs’ missions and force
10 Plaintiffs to deplete precious resources to advocate for unaccompanied children with
11 ties to prior MPP proceedings.

12 12. Through this action, Plaintiffs seek a judgment declaring that
13 Defendants are in violation of the Due Process Clause of the Fifth Amendment, the
14 TVPRA, the INA, the *Flores* Settlement Agreement, and the APA, and injunctive
15 relief requiring Defendants to comply with the laws and regulations cited herein and
16 stop differentiating between MPP-UC and UC generally.

17 **JURISDICTION AND VENUE**

18 13. This Court has subject matter jurisdiction under 28 U.S.C. § 1331
19 (federal question) and § 1346 (United States as defendant). Defendants have waived
20 sovereign immunity with respect to the claims alleged in this case. *See* 5 U.S.C. §
21 702. This Court has jurisdiction to enter declaratory and injunctive relief under 28
22 U.S.C. §§ 2201 and 2202, Federal Rules of Civil Procedure 57 and 65, and the
23 Court’s inherent equitable powers.

24 14. This case arises under the Fifth Amendment of the United States
25 Constitution; the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*;
26 and the TVPRA, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (codified at 8 U.S.C.
27 §§ 1158, 1232 *et seq.*).

28 15. Venue is proper under 28 U.S.C. § 1391(e)(1) because Defendants are

1 agencies or officers of the United States acting in their official capacity, and one of
2 the Plaintiff organizations has its principal residence in this district.

3 **PARTIES**

4 **A. Plaintiffs**

5 **1. Immigrant Defenders Law Center (“ImmDef”)**

6 16. Plaintiff Immigrant Defenders Law Center (“ImmDef”) is a Southern
7 California-based 501(c)(3) nonprofit organization whose mission is to achieve
8 universal representation for immigrants in removal proceedings. Founded in 2015,
9 ImmDef pursues this mission by providing *pro bono* services to and advocacy for
10 Southern California’s most marginalized immigrant and refugee communities.
11 ImmDef is a next-generation, social justice law firm that defends immigrant
12 communities against systemic injustices in the legal system. ImmDef’s services
13 include community empowerment, strategic litigation, and direct representation of
14 clients before the asylum office, immigration court, the Boards of Immigration
15 Appeals (“BIA”), and the Ninth Circuit.

16 17. With a diverse staff of over 100 employees, ImmDef has over seventy
17 full-time attorneys, law clerks, and support staff members across offices in
18 Downtown Los Angeles, Santa Ana, Riverside, and San Diego, California. In 2019,
19 ImmDef represented more than 1,200 noncitizens in their immigration removal
20 proceedings and provided education and outreach services to over 1,100
21 individuals.⁶

22 18. The Children’s Representation Project (“CRP”) is ImmDef’s largest
23 direct representation program and one of the largest programs of its kind in the
24 United States. CRP currently provides full-scale legal representation, case
25 management support, and other legal services to more than 900 UC through its staff
26 of eight directing and managing attorneys, twenty staff attorneys, and thirty-one

27 _____
28 ⁶ ImmDef has not yet compiled its 2020 client count.

1 support staff, including a six-person, non-attorney “Detained Youth Empowerment
2 Program” (“DYEP”). In response to an anticipated influx of UC and the opening of
3 new ORR-contracted shelters in our geographic service area in the coming year,
4 ImmDef has secured additional funding to hire one new managing attorney, one
5 additional DYEP coordinator, and four additional DYEP associates.

6 19. ImmDef’s CRP clients primarily live in California’s Los Angeles,
7 Orange, Riverside, San Bernardino, Ventura, Santa Barbara, and Kern counties. On
8 rare occasions, ImmDef has continued to represent clients after their transfer to
9 other states and service areas.

10 20. ImmDef’s attorneys and DYEP provide legal services to nearly 1,100
11 children annually who are detained in federal Office of Refugee Resettlement
12 (“ORR”) custody.⁷ DYEP provides “Know-Your-Rights” (“KYR”) presentations,
13 legal screenings, court preparation, and “Friend of the Court” appearances for
14 unrepresented minors on the Los Angeles Immigration Court juvenile detained
15 docket. DYEP is a component of ImmDef’s CRP and serves all UC in the nine
16 ORR-contracted shelters and foster care programs in the Los Angeles region and
17 surrounding counties.

18 21. Every year, ImmDef provides hundreds of locally detained and released
19 UC with various social and legal services including KYR presentations, legal
20 screenings and consultations, case management support, legal and community
21 referrals, and full-scope legal representation. ImmDef’s CRP leadership has been
22 working with UC since 2010, and has extensive knowledge and experience
23 representing children in immigration matters before USCIS, the immigration court,
24 the BIA, and California State Courts. As a universal representation program,

25
26 ⁷ ImmDef anticipates that this number will be lower in 2020 because CBP relied on
27 Title 42 to exclude unaccompanied minors. *See P.J.E.S. v. Wolf*, No. 20-cv-2245,
28 2020 WL 6770508, at *17 (D.D.C. Nov. 18, 2020) (granting request for a
preliminary injunction).

1 ImmDef’s CRP zealously advocates to ensure its UC clients receive the full benefit
2 of protections under the TVPRA, the *Flores* Settlement Agreement, and other
3 applicable law. ImmDef assists its UC clients in applying for all forms of relief for
4 which they may be eligible, including asylum, special immigrant juvenile status, U-
5 visas, T-visas, and family-based petitions. ImmDef advocates for the release and
6 reunification of locally-detained UC through legal avenues including habeas
7 petitions and bond motions, as well as its relationships with stakeholders such as
8 child advocates, ORR case managers, Field Office Juvenile Coordinators, and
9 Health and Human Services Federal Field Specialists.

10 22. The vast majority of ImmDef’s UC clients are in removal proceedings
11 under 8 U.S.C. § 1229a—*i.e.*, Section 240 of the INA—and are released from ORR
12 custody to reside in the greater Los Angeles area with a sponsor. ImmDef also
13 represents all UC who remain in ORR-custody in long-term foster care placements
14 and represents a subset of UC who are in short-term ORR-custody. ImmDef’s CRP
15 works with UC clients and their families or sponsors to pursue immigration
16 outcomes according to their clients’ stated interests.

17 **2. Refugee and Immigrant Center for Education and Legal**
18 **Services (“RAICES”)**

19 23. Plaintiff Refugee and Immigrant Center for Education and Legal
20 Services (“RAICES”) is a Texas-based 501(c)(3) nonprofit corporation. RAICES’s
21 mission is to defend the rights of immigrants and refugees; empower individuals,
22 families, and communities; and advocate for liberty and justice. RAICES promotes
23 justice by providing free and low-cost legal services to underserved immigrant
24 children, families, and persons through robust legal services, social programs, bond
25 assistance, and advocacy. RAICES’s Legal Department provides affirmative,
26 defensive, and litigation services, and its Social Services Department provides case
27 management, resettlement services, transit support, and connects migrants with
28 community resources.

1 24. Founded in 1986 as the Refugee Aid Project, RAICES has grown to be
2 the largest immigration legal services provider in Texas. With offices in Austin,
3 Corpus Christi, Dallas, Fort Worth, Houston, and San Antonio, RAICES is a
4 frontline organization in the debate about immigration and immigrants in the world.
5 As an organization that combines expertise developed from the daily practice of
6 immigration law with a deep commitment to advocacy, RAICES is unique among
7 immigration organizations. A diverse staff of 283 attorneys, legal assistants, social
8 workers, advocates, and support staff provide consultations, direct legal services
9 representation, social services assistance, and advocacy work on behalf of
10 immigrants throughout Texas. In 2019, RAICES managed 28,257 legal cases.

11 25. RAICES’s Children’s Program has thirty-eight attorneys and
12 thirty-five support staff who provide free legal services to UC either
13 currently or formerly detained in ORR shelters and emergency reception
14 centers (“EPC”) throughout Texas. In 2014, the Children’s Program
15 expanded to provide legal services to UC who have been released from
16 detention and reside within RAICES’s geographic service area. RAICES’s
17 Children’s Program provides a wide array of services to its clients and the
18 Texas immigrant community, including direct legal services, representation
19 in affirmative and defensive cases, as well as court support, general legal
20 guidance, KYR presentations, case management, resettlement services, transit
21 support, bond assistance, and assistance with social services.

22 26. RAICES’s Children’s Program staff work with some of the most
23 vulnerable population of UC and have expertise working with children with special
24 needs, including teens who are pregnant or parenting, sibling groups, tender-age
25 children, and children in need of a heightened level of supervision.

26 27. RAICES’s Detained Unaccompanied Children Services unit is housed
27 within the Children’s Program and serves the fourteen ORR-contracted shelters and
28 foster care programs in the San Antonio, Corpus Christi, and Waco area.

1 28. RAICES’s Release Unaccompanied Children Services unit is housed
2 within the Children’s Program. This unit provides legal screenings, immigration
3 representation, and case management support to UC who have been released from
4 an ORR shelter and now reside with an immediate family member, relative, or
5 family friend in the San Antonio, Austin, Dallas, Ft. Worth, Houston, and Corpus
6 Christi areas.

7 29. Each year, RAICES provides thousands of unaccompanied children
8 various social and legal services including KYR presentations and legal intakes,
9 preliminary legal consultations, social services support, referrals, and legal
10 representation. RAICES has extensive knowledge and experience representing
11 children in removal proceedings and represents unaccompanied children in matters
12 before USCIS, immigration courts, the BIA, Juvenile Texas State Courts, and the
13 U.S. Federal Courts. RAICES zealously advocates to ensure its UC clients receive
14 the full benefit of protections under the TVPRA, the *Flores* Settlement Agreement,
15 and other applicable law. RAICES advocates for the release and reunification of
16 unaccompanied children through legal avenues as well as its relationships with
17 stakeholders such as child advocates, ORR case managers, ICE’s Field Office
18 Juvenile Coordinators, and Health and Human Services Federal Field Specialists.

19 **B. Defendants**

20 30. Defendant Department of Homeland Security (“DHS”) is a federal
21 cabinet-level department of the U.S. government. It is responsible for implementing
22 and enforcing the Immigration and Nationality Act (“INA”) and an “agency” within
23 the meaning of the APA. *See* 8 U.S.C. § 1103; 5 U.S.C. § 551(1). Its components
24 include U.S. Customs and Border Protection (“CBP”), Immigration and Customs
25 Enforcement (“ICE”), and U.S. Citizenship and Immigration Services (“USCIS”).

26 31. Defendant Pete Gaynor is sued in his official capacity as the Acting
27 Secretary of Homeland Security and therefore the “head” of that agency. 6 U.S.C. §
28 271(a)(2). He directs each of the components within DHS, including those

1 responsible for enforcing U.S. immigration laws, and bears ultimate responsibility
2 for administering the immigration laws pursuant to 8 U.S.C. § 1103. He is
3 responsible for developing policies and programs to ensure that UC are, among
4 other things, given safe and secure placement, and, when appropriate, safely
5 repatriated. *See* 8 U.S.C. § 1232. He oversees the MPP.

6 32. Defendant United States Customs and Border Protection (“CBP”) is a
7 bureau within DHS and an “agency” within the meaning of the APA. *See* 5 U.S.C.
8 § 551(1); 6 U.S.C. § 271. CBP is responsible for the apprehension, detention, and
9 processing of noncitizens present at or between U.S. ports of entry, including
10 individuals subject to MPP. CBP is responsible for initial designation, screening,
11 and processing of UC. *See* 8 U.S.C. 1232(a).

12 33. Defendant Mark A. Morgan is sued in his official capacity as the
13 Acting Commissioner of CBP and therefore the “head” of that agency. 6 U.S.C. §
14 271(a)(2). He was appointed in “acting” capacity on July 5, 2019. In this capacity,
15 Defendant Morgan exercises authority over all CBP operations, policies, procedures,
16 and practices. He is responsible for overseeing CBP’s compliance with the
17 Constitution and relevant laws applicable to the apprehension of UC.

18 34. Defendant United States Immigration and Customs Enforcement
19 (“ICE”) is a bureau within DHS and an “agency” within the meaning of the APA.
20 *See* 5 U.S.C. § 551(1); 6 U.S.C. § 271. ICE is responsible for overseeing
21 immigration detention, initiating and prosecuting removal proceedings, and
22 executing removal orders. ICE components include Enforcement Removal
23 Operations (“ERO”). ICE is represented through its Office of Principal Legal
24 Advisor (“OPLA”) in immigration removal proceedings, including proceedings
25 involving the Migrant Protection Protocols and section 240 proceedings against UC.

26 35. Defendant Tae D. Johnson is sued in his official capacity as the Acting
27 Director of ICE and therefore the “head” of that agency. 6 U.S.C. § 271(a)(2).
28 Defendant Johnson is responsible for the administration and enforcement of federal

1 immigration laws, including implementing and complying with 8 U.S.C. §
2 1232(c)(2)(B).

3 36. Defendant ICE Enforcement and Removal Operations (“ERO”) is a
4 bureau within ICE and an “agency” within the meaning of the APA. *See* 5 U.S.C. §
5 551(1); 6 U.S.C. § 271. ERO is responsible for executing removal orders and
6 transporting UC from CBP custody to ORR custody. ERO oversees the job and
7 responsibilities of the Field Office Juvenile Coordinator (“FOJC”) who performs
8 case management duties, complete the appropriate release documents for UC and
9 their sponsors, and coordinates removal and safe repatriation of UC.

10 37. Defendant Henry Lucero is sued in his official capacity as the
11 Executive Associate Director ERO and therefore the “head” of that agency. 6
12 U.S.C. § 271(a)(2). He is responsible for overseeing more than 7,900 employees
13 assigned to twenty-four ERO field offices and headquarters.

14 38. Defendant U.S. Citizenship and Immigration Services (“USCIS”) is a
15 bureau within DHS and an “agency” within the meaning of the APA. *See* 5 U.S.C.
16 § 551(1); 6 U.S.C. § 271. USCIS is responsible for administering the nation’s
17 affirmative immigration system. To that end, it has jurisdiction over and processes
18 all affirmative immigration applications, including I-589 applications for asylum
19 filed under the TVPRA. *See* 8 U.S.C. § 1158(b)(c)(3).

20 39. Defendant Kenneth (Ken) T. Cuccinelli is sued in his official capacity
21 as the purported Acting Director of USCIS and therefore the “head” of that agency.
22 6 U.S.C. § 271(a)(2).⁸ He oversees USCIS’ administration of the immigration
23 system. He is also currently the person performing the duties of Deputy Secretary
24 for DHS. He was appointed in “acting capacity” in November 2019.

25 _____
26 ⁸ In August 2020, the U.S. Government Accountability Office issued a decision
27 holding unlawful the appointment of Ken Cuccinelli to the position of Deputy
28 Director of U.S. Citizenship and Immigration Services. *See* U.S. Dep’t Homeland
Sec., B-331650, 2020 WL 4923735 (Comp. Gen. Aug. 14, 2020),
<https://www.gao.gov/assets/710/708830.pdf>.

1 40. Defendant Department of Health and Human Services (“HHS”) is a
2 federal cabinet-level department responsible for developing policies for the care and
3 housing of UC children apprehended by DHS and an “agency” within the meaning
4 of the APA. *See* 5 U.S.C. § 551(1); 6 U.S.C. § 271; 8 U.S.C. § 1232(c). ORR is an
5 office with HHS.

6 41. Defendant Alex Azar II is sued in his official capacity as the Secretary
7 of HHS and oversees the Office of Refugee Resettlement (“ORR”) and is therefore
8 the “head” of those agencies. 6 U.S.C. § 271(a)(2). HHS is responsible for the care
9 and placement of UC in federal custody. *See* 8 U.S.C. § 1232(c); 6 U.S.C. § 279.
10 HHS and ORR enter into contracts with public and private entities to house, care
11 for, and provide legal assistance to UC apprehended by DHS pursuant to the INA.
12 *See* 6 U.S.C. § 279.

13 42. Defendant ORR is a bureau within the Administration for Children and
14 Families, an office within the Department of Health and Human Services and an
15 “agency” within the meaning of the APA. *See* 5 U.S.C. § 551(1); 6 U.S.C. § 271.
16 ORR provides rehabilitative, social, and legal services to refugees, asylees, and
17 other noncitizens to promote their integration into American society. ORR is
18 responsible for the care and placement of all UC.

19 43. Defendant Heidi Stirrup is sued in her official capacity as the Acting
20 Director of the ORR and therefore the “head” of that agency. 6 U.S.C. § 271(a)(2).
21 She is responsible for the care and custody of UC in ORR custody. She is also
22 currently the Deputy Assistant Secretary for Policy of the Administration for
23 Children and Families.

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FACTUAL ALLEGATIONS

I. FEDERAL LAW PROVIDES ROBUST AND MANDATORY PROTECTIONS FOR UNACCOMPANIED CHILDREN

44. If an immigrant child appears at the United States border and is designated as a UC, they are entitled to a panoply of rights and procedural safeguards pursuant to the *Flores* Settlement Agreement, the Homeland Security Act of 2002 (“HSA”), and the TVPRA. These three sources of law govern the treatment and administrative processing of UC. Together, they set forth various protections, including access to *pro bono* legal services provided by LSPs, like Plaintiffs, to ensure that no UC are subject to removal before having equal access to a developmentally-appropriate and child-accommodating immigration process.

A. The Flores Settlement Agreement

45. In 1997, a federal court in the Central District of California in *Flores v. Reno* approved a consent decree covering “[a]ll minors who are detained in the legal custody of the INS [Immigration and Naturalization Service].”⁹ Among other requirements, the *Flores* Settlement Agreement directs the INS to “treat all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors” and to “place each detained minor in the least restrictive setting appropriate to the minor’s age and special needs.” *Id.* at ¶ 11. It also requires that children “shall” be released “without unnecessary delay” to the custody of an adult caregiver, with parents and other family members given priority, and requires [the government] to undertake “prompt and continuous efforts” to effect family reunification. *Id.* at ¶¶ 11, 14, 18.

⁹ Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px), ¶ 10 (C.D. Cal. Jan. 17, 1997), <http://www.aila.org/File/Related/14111359b.pdf> [hereinafter the “*Flores* Settlement Agreement”]. After *Flores*, the INS was dissolved and subsumed into DHS, whereupon DHS inherited the INS’ obligations under the *Flores* Settlement Agreement.

1 46. The *Flores* Settlement Agreement established nationwide requirements
 2 governing the detention, treatment, and release of UC and recognized the unique
 3 vulnerability of unaccompanied immigrant children while detained without a parent
 4 or legal guardian present.¹⁰

5 **B. Homeland Security Act of 2002**

6 47. In 2002, the HSA divided responsibilities for the processing and
 7 treatment of UC between the HHS's sub-agency, ORR, and the then-newly created
 8 DHS. *See* 6 U.S.C. § 279(a). DHS was assigned general apprehension, transfer,
 9 and repatriation responsibilities. *See* Homeland Security Act, Pub. L. No. 107-296,
 10 § 462, 116 Stat. 2135 (2002). ORR was assigned certain functions “with respect to
 11 the care of unaccompanied alien children,” including “coordinating and
 12 implementing the care and placement” of UC in appropriate custody, reunifying UC
 13 with their parents abroad, if appropriate, maintaining and publishing a list of
 14 professionals “qualified to provide guardian and attorney representation services”
 15 for UC, and collecting statistical information on UC. *See* 6 U.S.C. §§ 279(a),
 16 (b)(1).¹¹ Section 462 of the HSA extended to all UC the key protections of the
 17 *Flores* Settlement Agreement, including its “least restrictive setting” requirement.
 18 Pub. L. No. 107-296, § 462, 116 Stat. 2143 (2002).

19 **C. Trafficking Victims Protection Reauthorization Act**

20 48. Congress passed the Trafficking Victims Protection Act of 2000
 21 (“TVPA”) to “combat trafficking in persons, especially into the sex trade, slavery,
 22 and involuntary servitude, to reauthorize certain Federal programs to prevent
 23 violence against women, and for other purposes.” Pub. L. No. 106-368, 114 Stat.

24
 25 ¹⁰ *See* Ruth. E. Wasem, *Asylum Policies for Unaccompanied Children Compared*
 26 *with Expedited Removal Policies for Unauthorized Adults: In Brief*, Cong. Res.
 Serv. 5 (July 30, 2014), <https://fas.org/sgp/crs/homsec/R43664.pdf>.

27 ¹¹ *See also* William A. Kandel, *Unaccompanied Alien Children: An Overview*,
 28 Cong. Res. Serv. 5 (Oct. 9, 2019), <https://fas.org/sgp/crs/homsec/R43599.pdf>.

1 1464 (2000). In 2008, Congress reauthorized the TVPA with the TVPRA. *See*
 2 William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L.
 3 No. 110-457, 122 Stat. 5044 (2008).

4 49. The TVPRA establishes certain rights for UC navigating the
 5 immigration process, reflecting Congress’s recognition that UC are a “particularly
 6 vulnerable population” to whom the country “owes a special obligation” to treat
 7 “humanely and fairly.”¹² The TVPRA imposes an affirmative obligation on DHS
 8 and HHS to develop policies and procedures to implement its dictates.

9 50. The TVPRA guarantees all UC several discrete procedural and
 10 substantive rights, including:

11 **1. Proper screening by CBP for signs of human trafficking and**
 12 **a fear of return**

13 51. Every child must be screened to determine whether they have been a
 14 victim of child trafficking, have a fear of returning to their country of nationality or
 15 of last habitual residence owing to a credible fear of persecution, or are not able to
 16 make an independent decision to withdraw the child’s application for admission to
 17 the United States. *See* 8 U.S.C. § 1232(a)(4).¹³

18 ¹² 154 Cong. Rec. S10866 (daily ed. Dec. 10, 2008) (statement of Sen. Feinstein).

19 ¹³ The TVPRA differentiates between UC arriving from non-contiguous countries
 20 and those arriving from contiguous countries (*i.e.*, Mexico and Canada). *See* 8
 21 U.S.C. § 1232(a)(2). The statute requires CBP to screen only Mexican and
 22 Canadian children, but CBP issued guidance in 2009 requiring officers to screen all
 23 UC for trafficking and persecution, regardless of nationality. *See* U.S. Gov’t
 24 Accountability Off., GAO-15-521, *Unaccompanied Alien Children: Actions Needed*
 25 *to Ensure Children Receive Required Care in DHS Custody*, 18 (2015),
 26 <https://www.gao.gov/assets/680/671393.pdf> (“Further, CBP’s March 2009
 27 memorandum requires that Border Patrol agents and OFO [Office of Field
 28 Operations] officers use CBP’s Form 93 to document that they conducted the
 required screening for all [UC] against criteria set forth in TVPRA”) (citing U.S.
 Customs and Border Protection, *Implementation of the William Wilberforce*
Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) (March 19,
 2009), <https://www.aila.org/infonet/cbp-issues-interim-guidance-for-processing-uac>
 (redacted copy)). The information obtained during the screening does not impact
 the custody of UC from *non-contiguous* countries, who must be transferred to ORR
 custody. But CBP may return UC to Mexico or Canada, as appropriate, if it
 determines that a Mexican or Canadian UC: (i) has not been trafficked; (ii) does not
 credibly fear persecution; and (iii) can make an independent decision to withdraw

1 **2. Placement “in the least restrictive setting that is in the best**
 2 **interest of the child”**

3 52. The TVPRA expressly provides that “an unaccompanied alien child in
 4 the custody of the Secretary of Health and Human Services shall be promptly placed
 5 in the least restrictive setting that is in the best interest of the child.” 8 U.S.C. §
 6 1232(c)(2)(A). It additionally states that “[a] child shall not be placed in a secure
 7 facility absent a determination that the child poses a danger to self or others or has
 8 been charged with having committed a criminal offense” and that “[t]he placement
 9 of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis.”
 10 *Id.*

11 **3. USCIS’ initial jurisdiction over TVPRA-asylum applications**

12 53. Typically, only the Immigration Courts—operated by the Executive
 13 Office for Immigration Review (“EOIR”) under the Department of Justice
 14 (“DOJ”)—have jurisdiction over an asylum application filed by an individual in
 15 removal proceedings. *See* 8 U.S.C. § 1229a(a). The TVPRA, however, gives
 16 USCIS initial jurisdiction over asylum applications filed by UC (“TVPRA-
 17 asylum”). *See* 8 U.S.C. § 1158(b)(3)(C) (amending INA § 208 to vest initial
 18 jurisdiction over “any asylum application filed by an unaccompanied alien child”
 19 with an asylum officer). This entitlement to initial adjudication by USCIS applies to
 20 all UC, even those who later reunited with a parent or legal guardian, originally filed
 21 an asylum application with the immigration court, or who were denied asylum and
 22 are appealing to the BIA or the federal courts. *See* 8 U.S.C. § 1158(b)(3)(c).¹⁴

23 _____
 24 his application for admission. *See* 8 U.S.C. § 1232(a)(2); *Trafficking Victims*
 25 *Protection Reauthorization Act: Renewing the Commitment to Victims of Human*
 26 *Trafficking: Hearing Before S. Comm. On the Judiciary*, 112th Cong. 9-10 (2011)
 (testimony of Acting Deputy Assistant Sec’y, Off. of Immigr. and Border Sec.,
 Kelly Ryan). For purpose of this Complaint, “UC” refers to unaccompanied
 children from non-contiguous countries, unless otherwise noted.

27 ¹⁴ *See also* U.S. Citizenship and Immigration Services, Questions and Answers:
 28 Updated Procedures for Determination of Initial Jurisdiction over Asylum
 Applications Filed by Unaccompanied Alien Children (June 10, 2013).

4. Age-appropriate asylum interview

54. The TVPRA further commands that asylum applications for UC “shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children’s cases.” 8 U.S.C. § 1232(d)(8). In response, USCIS issued guidance and training to officers regarding the special needs of children and accommodations that should be made for UC in their interviews and adjudications.

55. Thus, instead of facing cross examination in courtrooms by government attorneys and judges, UC have the right to appear for non-adversarial interviews with USCIS’ Asylum Officers, who are trained to apply child-sensitive and trauma-informed interview techniques that take into account the child’s age, language facility, and background.¹⁵ Moreover, when UC seek asylum as principal applicants before USCIS—as opposed to a derivative to a parent’s asylum claim—their claims must be adjudicated under a child-centric lens that acknowledges how children experience and are impacted by persecution.¹⁶

56. While asylum applicants generally must apply within one year of entering the United States, the TVPRA exempts UC from this deadline. *Compare* 8 U.S.C. §§ 1158(a)(2)(B) *with* 1158(a)(2)(E). Waiving the one-year filing requirement is consistent with Congress’ recognition that UC require special

<https://www.uscis.gov/sites/default/files/document/questions-and-answers/ra-qanda-determine-jurisdiction-uac.pdf>; Wasem, *supra* note [7], at 6.

¹⁵ See U.S. Citizenship and Immigr. Services, *Children’s Claims, RAIO Directorate – Officer Training* (Dec. 20, 2019), https://www.uscis.gov/sites/default/files/document/foia/Childrens_Claims_LP_RAIO.pdf.

¹⁶ See, e.g., *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1068 (9th Cir. 2017) (“[W]hen the petitioner is a child, [the adjudicator] must assess the alleged persecution from a child’s perspective.”) (quoting *Castro-Martinez v. Holder*, 674 F.3d 1073, 1081 (9th Cir. 2011), *overruled on other grounds* by *Bringas-Rodriguez*).

1 protections to safeguard their rights and to ensure they are not prematurely or
 2 unlawfully removed to a country where they face dangerous conditions. By waiving
 3 the one-year filing requirement, Congress gave UC time to recover from trauma; to
 4 regain stability in their lives and physical, mental, and emotional development; and
 5 to mature and age because developing an asylum claim is challenging. It requires the
 6 applicant to express a fear of return, articulate a legally cognizable basis for fearing
 7 harm, and provide corroborating evidence in support of their asylum claim.
 8 Moreover, the TVPRA directs USCIS to help make *pro bono* counsel available to
 9 UC seeking asylum to ameliorate these age- and trauma-related issues. *See* 8 U.S.C.
 10 § 1232(c)(5).

11 **5. Placement in TVPRA-proceedings under Section 240, right**
 12 **to pursue relief from removal, and right to counsel**

13 57. The TVPRA expressly forecloses DHS from removing UC without first
 14 placing them “in removal proceedings under section 240 of the Immigration and
 15 Nationality Act” (“TVPRA-proceedings”). 8 U.S.C. § 1232(a)(5)(D). TVPRA-
 16 proceedings are initiated when DHS issues and serves a Notice to Appear (“NTA”)
 17 on the UC and then files the NTA with the immigration court located in the child’s
 18 jurisdiction. 8 U.S.C. § 1229(a)(1). The TVPRA allows each unaccompanied child
 19 to appear before an immigration judge in a child-appropriate setting, to seek asylum
 20 and any other form of immigration relief available to him or her, and to be
 21 represented by counsel. 8 U.S.C. § 1229(a); 8 CFR § 239.1(a).¹⁷

22 58. By requiring DHS to place UC in TVPRA-proceedings, the TVPRA
 23 protects UC from expedited removal, provides a clearly delineated process for
 24 immigration proceedings that can be adopted with the oversight of an Immigration
 25 Judge to address child-centric needs, and affords opportunities to seek all avenues of

26 _____
 27 ¹⁷ Under 8 CFR § 239.1 and 8 CFR § 1.2, NTAs must be issued by “immigration
 28 officer[s],” *i.e.*, certain “employees of the Department of Homeland Security” or “or
 of the United States as designated by the Secretary of Homeland Security.”

1 relief including TVPRA-asylum, Special Immigrant Juvenile Status, protection for
 2 victims of human trafficking, and protection under the Violence Against Women
 3 Act (“VAWA”). Moreover, without placement in TVPRA-proceedings, UC cannot
 4 otherwise seek and obtain voluntary departure free of cost, a benefit Congress
 5 exclusively conferred upon UC seeking safe repatriation. 8 U.S.C. § 1232(a)(5)(D).

6 59. Also recognizing the burden and due process issues in expecting UC to
 7 represent themselves *pro se*, Congress tethered DHS placement of UC in TVPRA-
 8 proceedings to the requirement that UC have access to counsel in those proceedings.
 9 Congress mandated that HHS ensure UC have access to counsel to the “greatest
 10 extent practicable.” 8 U.S.C. § 1232(c)(5). To that end, Congress routinely
 11 appropriates funds to ORR for UC-related legal services. ORR then subcontracts
 12 with legal services providers (“LSPs”), including Plaintiffs, to represent UC in
 13 TVPRA removal proceedings.¹⁸ A child who is not designated UC has no similar
 14 right or access to subsidized counsel. *See C.J.L.G. v. Sessions*, 880 F.3d 1122, 1136
 15 (9th Cir. 2019), *rev’d en banc on other grounds*, 923 F.3d 622, 629 (9th Cir. 2019).

16 6. No reinstatement of prior removal orders

17 60. If an adult non-citizen reenters the United States after they were
 18 removed through execution of a prior removal order, they can be subject to
 19 reinstatement of the prior removal order. 8 U.S.C. § 1231(a)(5). Once a removal
 20 order is reinstated, an individual is typically removed without a hearing before a
 21 judge unless the individual can establish a reasonable fear of persecution or torture
 22 in their country of nationality or last habitual residence. These individuals are

23
 24 ¹⁸ Off. of Refugee Resettlement, *An Office of the Administration for Children &*
 25 *Families, About the Program* (Sept. 22, 2020),
 26 <https://www.acf.hhs.gov/orr/programs/ucs/about>. Office of Refugee Resettlement
 27 contracts with the Vera Institute of Justice for the provision of legal services to UC.
 28 Vera in turn subcontracts with various legal services organizations throughout the
 country. Plaintiffs are thus subcontractors of ORR. *See* Vera Institute of Justice
 (last visited Jan. 14, 2021), [https://www.vera.org/projects/legal-services-for-](https://www.vera.org/projects/legal-services-for-unaccompanied-children)
unaccompanied-children.

1 placed in “withholding-only” proceedings before the Immigration Court, in which
 2 the only available relief from removal is withholding of removal under the INA and
 3 protection under the Convention Against Torture. *See* 8 C.F.R. § 241.8

4 61. The TVPRA, on the other hand, categorically protects UC from
 5 reinstatement of prior removal orders. 8 U.S.C. § 1232(a)(5)(D). UC with
 6 previously effectuated removal orders can neither be removed on prior orders of
 7 removal nor placed in withholding-only proceedings. As defendants-appellants
 8 stated in connection with Ninth Circuit proceedings in *Flores v. Lynch*:

9 The detention requirements of the INA governing expedited removal
 10 and reinstatement of removal apply to all adults, including those who
 11 arrive with children, and to accompanied minors. ***They do not,
 however, apply to UACs, since they cannot be subjected to expedited
 removal or reinstatement.*** *See* 8 U.S.C. §§ 1232(a)(2)(B), (a)(3),
 12 (a)(5)(D).

13 Respondent's Motion to Exceed the Type-Volume Limitation by 4,744 Words at 18,
 14 *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016) (No. 15-56434), 2016 WL 330944, at
 15 *18 (emphasis added). This protection flows from the TVPRA, which requires UC
 16 be placed in TVPRA-proceedings where they can pursue multiple avenues of relief,
 17 and ensures all UC enjoy their right to seek TVPRA-asylum before USCIS in the
 18 first instance.

19 7. Safe repatriation

20 62. The TVPRA mandates safe repatriation for UC who seek voluntary
 21 departure or must be removed. To further protect UC from traffickers and other
 22 persons seeking to victimize children, the TVPRA requires DHS and HHS to work
 23 together to ensure “safe and sustainable repatriation and reintegration” of UCs into
 24 their countries of nationality or last habitual residence, “including placement with
 25 their families, legal guardians, or other sponsoring agencies.” 8 U.S.C. §§
 26 1232(a)(2), (c)(1), (a)(5).

1 **8. Categorical protections**

2 63. The TVPRA contains no exceptions to its protections. It does not
3 distinguish between UC who have or do not have prior immigration histories. More
4 specifically, it does not exclude from its reach UC who have prior removal orders,
5 or children who are currently in or have been through MPP proceedings.

6 64. The TVPRA recognizes the need to make otherwise complicated
7 immigration law and procedure more accommodating to the unique needs of
8 unaccompanied immigrant children. Indeed, when implemented, the TVPRA
9 protects UC from unlawful or premature removal to a country where they would
10 face persecution, victimization, and/or death. Accordingly, the TVPRA guarantees
11 UC two chances to seek asylum: (1) a non-adversarial interview with a USCIS
12 Asylum Officer; and (2) if USCIS’ declines to grant asylum, then through an age-
13 appropriate hearing before an Immigration Judge in formal TVPRA-proceedings.
14 *See* TVPRA, §§ 232(d)(7)(C), 235 (a)(5)(D).

15 65. These protections reflect the special circumstances of unaccompanied
16 children, many of whom have experienced violence and trauma, and thus require
17 special safeguards to ensure their legitimate opportunity to seek the safety of
18 asylum.

19 **II. BEFORE MPP, FEDERAL AGENCIES AND LEGAL SERVICE**
20 **PROVIDERS COORDINATED TO ENSURE UNACCOMPANIED**
21 **CHILDREN RECEIVED TVPRA PROTECTIONS**

22 66. The TVPRA guarantees specific protections for UC at every stage of
23 their proceedings, from their initial apprehension to when they are granted asylum
24 relief or removed and repatriated safely to their home country. Multiple
25 governmental agencies interact with and serve UC, and inter-agency coordination is
26 required to ensure that UC “receive humane and appropriate treatment while in the
27 custody of the U.S. government.”¹⁹

28 _____
¹⁹ 154 Cong. Rec. S10,886 (2008).

1 67. The TVPRA compels DHS and HHS to “enact regulations which take
2 into account the specialized needs of unaccompanied alien children and which
3 address both procedural and substantive aspects of handling unaccompanied alien
4 children’s cases.”²⁰ Each agency implements its own policies and guidelines that
5 reflect its obligations under the TVPRA. However, as a practical matter and as
6 commanded by statute, Defendants coordinate their efforts to ensure UC are
7 “humanely and fairly” treated as they are processed through the immigration system
8 and afforded the opportunity to seek asylum and other forms of immigration relief.²¹

9 68. As detailed below, prior to the Trump Administration’s implementation
10 of MPP, federal agencies and LSPs, like Plaintiffs, worked together to ensure UC
11 received TVPRA protections.

12 **A. CBP Typically Apprehends and is Responsible for Interviewing**
13 **Immigrant Children and Designating Them as UC**

14 69. Children fleeing persecution who present at or cross the United States
15 border are ordinarily met by a CBP officer who interviews the child and any
16 accompanying adults.²² The apprehending CBP officer is responsible for making a
17 threshold determination of the child’s age.²³ CBP must designate as an
18 unaccompanied child any non-citizen child for whom the officer has a “reasonable
19 claim or suspicion” that the child is: (1) under eighteen years of age; (2) lacks
20 immigration status; and (3) does not have a parent or guardian available to “provide
21 care and physical custody.”²⁴

22 ²⁰ 8 U.S.C. § 1232(d)(8).

23 ²¹ 154 Cong. Rec. S10,886.

24 ²² Kandel, *supra* note 8, at 6.

25 ²³ See U.S. Immigr. and Customs Enforcement, *Juvenile and Family Residential*
26 *Management Unit Field Office Juvenile Coordinator Handbook* 21–23 (2018)
[hereinafter JFRM Handbook], available at [https://www.aila.org/infonet/ice-](https://www.aila.org/infonet/ice-handbook-handling-minors-encountered-by-dhs)
27 [handbook-handling-minors-encountered-by-dhs](https://www.aila.org/infonet/ice-handbook-handling-minors-encountered-by-dhs); 8 U.S.C. § 1232(b)(4).

28 ²⁴ U.S. Customs and Border Prot., *Implementation of the William Wilberforce*
Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) (March 19,

1 **B. ICE, Through ERO, is Responsible For Issuing UC Notices to**
 2 **Appear Before Transferring UC to ORR Custody And Managing**
 3 **Their Cases**

4 70. ICE, through its sub-agency ERO, is responsible for transporting UC,
 5 initiating removal proceedings against UC, and safely repatriating UC, if
 6 appropriate. These duties are governed by federal regulations relating to the
 7 apprehension and release of minors under 8 C.F.R. § 236.3, as well as its JFRM
 8 Handbook, “an operational guide” for FOJC who work within ICE’s ERO.²⁵ The
 9 JFRM Handbook establishes procedures and best practices for FOJC in the
 10 “processing, transporting, managing, and removing minors” from the country.²⁶ It
 11 also imposes certain affirmative obligations on FOJC, including precise “case
 12 management” duties.²⁷

13 71. Once ORR confirms housing for UC, ERO takes custody of UC from
 14 CBP and transports them to their designated ORR placements.²⁸ DHS’s own
 15 policies for implementing the TVPRA require ERO to issue and serve the
 16 unaccompanied child an NTA prior to transferring the child’s custody from CBP to
 17 ORR.²⁹ ERO’s “TVPRA-NTA” policy and practice further requires FOJC to ensure
 18 that service on the child was legally sufficient, otherwise they must correct the
 19 mistake and re-serve the TVPRA-NTA.³⁰

20 72. The JFRM Handbook assigns ERO “case management” responsibility

21 _____
 22 2009), available at [https://www.aila.org/infonet/cbp-issues-interim-guidance-for-](https://www.aila.org/infonet/cbp-issues-interim-guidance-for-processing-uac)
 23 [processing-uac](https://www.aila.org/infonet/cbp-issues-interim-guidance-for-processing-uac) (redacted copy).

24 ²⁵ JFRM Handbook, *supra* note 23, at 2.

25 ²⁶ *Id.*

26 ²⁷ To the extent that ERO coordinates its activities with CBP, the JFRM Handbook
 27 also describes rules and best practices governing CBP.

28 ²⁸ *Id.* at 33.

²⁹ *Id.*

³⁰ *Id.* at 14.

1 over all UC in ORR custody.³¹ ERO has delegated this responsibility to its FOJC,
 2 who must, among other things, (a) track UC case updates in DHS’s cross-agency
 3 database, ENFORCE, which details a complete case history for each person
 4 apprehended, (b) update the ENFORCE profile, including the “transfer of Docket
 5 Control Office,” to reflect the location of UC upon transfer of custody, (c) maintain
 6 UC Alien-Files (“A-Files”) and convey UC-case information to ORR through the
 7 “UAC-Portal,” and (d) notify the Office of the Chief Counsel (“OCC”) of *any*
 8 custody changes for UC with pending cases before EOIR.³² OCC or its agency
 9 Office of the Principal Legal Advisor represents the U.S. government in
 10 immigration proceedings and is responsible for, among other things, “[p]roviding
 11 information to the IJ during immigration court proceedings and to the Board of
 12 Immigration Appeals when an IJ’s decision is appealed.”³³ FOJC retain custody of
 13 a child’s TVPRA-NTA, manage the child’s immigration court hearings, and are
 14 responsible for ensuring proper service.³⁴

15 73. ERO’s issuance and service of a TVPRA-NTA on UC serves an
 16 important function for Plaintiffs and other LSPs, who rely on TVPRA-NTAs to
 17 obtain and verify a child’s name, birthdate, country of origin, and Alien Number
 18 (“A-Number”). Plaintiffs also must verify if the TVPRA-NTA was properly issued
 19 and served on the minor because an improperly executed TVPRA-NTA is grounds
 20 for termination of the child’s removal proceedings.

21 74. As part of their representation, Plaintiffs routinely review a minor’s

22 ³¹ *Id.* at 11.

23
 24 ³² U.S. Immigr. and Customs Enforcement, Memorandum from John P. Torres,
 25 Acting Director, Office of Detention and Removal Operations, to Field Office
 26 Directors 160 (March 27, 2006), *available at*
https://www.ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf
 ; JFRM Handbook, *supra* note 23, at 11–14, 31, 38–39, 54, 59.

27 ³³ JFRM Handbook, *supra* note 23, at 59.

28 ³⁴ *Id.* at 13-14, 33.

1 TVPRA-NTA when screening the child for legal representation. Before MPP,
2 Plaintiffs experiences confirm ERO regularly executed new TVPRA-NTAs for UC,
3 including those with prior entries or removal orders. Other than the occasional
4 lapse, all UC apprehended at the border would arrive at their ORR housing
5 placement with a TVPRA-NTA reflecting the date and place of their most recent
6 entry or arrival.

7 **C. ORR is Responsible for Care and Custody of UC**

8 75. ORR, under HHS, is tasked with implementing the TVPRA’s policies
9 with respect to the care and custody of UC and ensuring that UC are placed in the
10 least restrictive setting. ORR’s policy manual for Children Entering the United
11 States Unaccompanied sets forth its policies and best practices for executing its
12 obligations under the TVPRA, including: ensuring that each child is placed in the
13 least restrictive setting; managing transfers between ORR placements; screening
14 sponsors; coordinating safe and timely releases of UC to approved sponsors; and
15 maintaining up-to-date case information.³⁵

16 76. To house UC who enter ORR custody, ORR sub-contracts with foster
17 care programs, shelters, and long-term residential or treatment facilities located
18 across the country. Case Managers employed at UC housing-sites are responsible
19 for facilitating reunification of UC with their family or approved sponsor. Case
20 Managers are also responsible for ensuring that UC in ORR custody appear for any
21 scheduled hearing or asylum interview.

22 **D. ORR Must Release UC to Sponsors or Family Without**
23 **Unnecessary Delay**

24 77. As required under *Flores* and the TVPRA, ORR must make “prompt
25 and continuous efforts” towards placing UC “in the least restrictive setting that is in

26 _____
27 ³⁵ Off. of Refugee Resettlement, *Children Entering the United States*
28 *Unaccompanied* (Dec. 20, 2019), <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied>

1 the best interest of the child,” prioritizing placements with “parents, guardians,
 2 relatives, or individuals designated by the child’s parents,” otherwise known as
 3 “sponsors.”³⁶ 8 U.S.C. § 1232(c)(2); *see Flores Settlement Agreement* ¶¶ 11, 14,
 4 16. No policies permit even unnecessary delay of a non-dangerous child’s release to
 5 a suitable sponsor, let alone intentional delay.³⁷

6 78. Case Managers at ORR placements are critical in facilitating the release
 7 of UC to sponsors. They are responsible for assessing potential sponsors, making
 8 transfer and release recommendations, and coordinating the release of UC from
 9 ORR custody. They must also coordinate with the local FOJC, who provides a
 10 recommendation on whether a minor should be released. ORR, however, ultimately
 11 decides whether to release a child.³⁸

12 79. Before MPP, UC who were neither a danger nor a flight risk and who
 13 had suitable sponsors could expect to be released from ORR custody in between two
 14 weeks to three months.³⁹ Aside from occasional compliance issues, ORR would
 15 promptly release children to parents or other close family members. Plaintiffs rarely
 16 saw ORR delay reunification because of a child’s prior immigration proceedings or
 17 because of circumstances within a child’s immigration proceeding.

18
 19 ³⁶ *Id.*

20 ³⁷ In fact, increases in the length of stays in ORR custody can lead to “a ballooning”
 21 of the number of children in ORR custody. In the past, such influxes have led to
 22 emergency use of facilities with limited access to educational, mental health, or
 23 legal services. *See* U.S. Conf. of Catholic Bishops, *The ORR and DHS Information-
 Sharing Agreement and its Consequences* (Oct. 3, 2019),
[https://justiceforimmigrants.org/what-we-are-working-on/unaccompanied-
 children/orr-and-dhs-information-sharing-agreement-its-consequences/](https://justiceforimmigrants.org/what-we-are-working-on/unaccompanied-children/orr-and-dhs-information-sharing-agreement-its-consequences/).

24 ³⁸ *Id.*

25 ³⁹ The average length of care provided by ORR to children who were released in
 26 September 2020 was 97 days. Prior to the COVID-19 pandemic, in October 2019,
 27 the average length of care for the same category of children was 69 days. *See* U.S.
 28 Dep’t of Health and Human Servs., *Latest UAC Data – FY2020* (Nov. 30, 2020),
[https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-
 uac-data-fy2020/index.html#overall-data](https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2020/index.html#overall-data).

1 **E. ORR Contracts With Plaintiffs and Other LSPs To Provide UC a**
2 **Right to Counsel as Required by the TVPRA**

3 80. ORR houses UC in facilities and programs located throughout the
4 country. ORR typically subcontracts with LSPs, like Plaintiffs, that are nonprofit
5 organizations providing *pro bono* assistance and representation to UC. In 2019–20,
6 ORR subcontracted with fifty-three (53) LSPs throughout the country to protect
7 UC’s right to access to counsel, as guaranteed by the TVPRA.⁴⁰ Those LSPs
8 located in jurisdictions near the U.S.-Mexico border, such as Plaintiffs, serve the
9 highest number of UC. In 2019, Plaintiffs served a couple thousand UC
10 combined.⁴¹

11 81. LSPs are critical to effectuating Congress’ intent to protect vulnerable
12 children from trafficking, exploitation, and violence. LSPs conduct their own
13 screening to identify UC who are victims of trafficking, exploitation, and
14 persecution, which may dictate the forms of relief available, the types of legal
15 assistance the child will require, and whether the child qualifies for UC-specific
16 benefit programs. LSPs assist UC by providing KYR presentations, appearing as
17 Friend of Court in immigration court, and representing UC in their immigration
18 proceedings. LSPs may also assist ORR Case Managers and sponsors in facilitating
19 the reunification process.

20 82. When LSPs perform their duties as contemplated by the TVPRA, they
21 help safeguard a child’s right to due process in their immigration proceedings. LSPs
22 are responsible for determining a child’s eligibility for relief, preparing applications
23 for relief where possible, and advocating for the child in court either as counsel or
24 Friend of Court. Finally, if warranted, LSPs help safely repatriate UC who do not

25 ⁴⁰ See 8 U.S.C. § 1232(c)(5).

26 ⁴¹ Plaintiffs do not yet have their numbers for 2020 but believe the numbers will be
27 lower because of Title 42, which CBP relied on to expel unaccompanied minor
28 children. See *P.J.E.S.*, 2020 WL 6770508, at *17 (granting the plaintiff’s request
for a preliminary injunction).

1 require protection under U.S. laws and desire return to their country of nationality or
2 last habitual residence to be reunited with a parent, relative, or guardian.

3 83. For LSPs to carry out their duties, communication and collaboration
4 with ORR and ICE stakeholders is critical. For example, as the designated LSP for
5 ORR-contract facilities throughout Greater Los Angeles, ImmDef relies on ORR to
6 provide a daily list of UC arriving at LA-area ORR-contract facilities. ORR
7 typically emails ImmDef a daily roster that includes the name, birth date, and the
8 unique nine-digit A-Number for incoming UC. ImmDef then uses this information
9 to screen UC and provide a KYR presentation within seven to ten days of the child's
10 arrival at the local ORR shelter.

11 84. Communication and coordination between the LSPs and ORR and ICE
12 is also necessary because LSPs cannot reasonably rely on UC to provide complete
13 information about their past immigration history or identify relevant information in
14 support of their immigration claim. LSPs often rely on ORR Case Managers and
15 FOJC to provide case information such as a copy of the child's NTA or medical
16 intake, information about the child's prior immigration history, or the location of a
17 separated family member. The relationship between LSPs, ORR, and ICE varies
18 across the country, but there is a common understanding nationwide that ORR and
19 ICE hold UC health and immigration case information that LSPs need to provide
20 even minimally effective representation, and LSPs have historically relied on that
21 information.

22 85. This mutual understanding is also critical for LSPs to provide timely
23 representation. If an ORR Case Manager or FOJC is unable to provide the
24 requested information for a child, LSPs must make formal records requests with
25 both agencies. These records requests can take several months to process, and
26 hamper an LSP's representation of a child, especially a child who is on an expedited
27 immigration docket because they are not released to a sponsor and remain in ORR
28

1 custody.⁴²

2 86. LSPs who represent UC on the juvenile detained docket can generally
3 anticipate having 60-to-120 days to prepare a child's applications for relief,
4 including a TVPRA-asylum application.⁴³ When ORR and an FOJC demand a
5 formal records request, they significantly delay an LSP's access to basic client
6 information. When LSPs do not receive the responsive records in advance of a
7 filing deadline, they may be forced to submit filings seeking immigration relief
8 without a complete understanding of a client's health and immigration history.

9 87. Importantly, it is infeasible for LSPs to represent all UC who enter
10 ORR custody given the high numbers of children in custody and the stringent
11 immigration court docketing deadlines that apply to children in ORR custody. Most
12 LSPs, such as Plaintiffs, prioritize and agree to represent children who they
13 reasonably expect will be released and reunified with a parent, guardian, or other
14 sponsor located within the LSP's geographic service area. Once UC are released
15 from ORR custody, their immigration case is transferred from the juvenile detained
16 docket to the non-detained docket. When a child's case is transferred to a non-
17 detained docket, an LSP can reasonably expect significantly more time to meet with
18 the client and help prepare their applications for relief.⁴⁴ Depending on the
19

20 ⁴² U.S. Department of Health and Human Services, *Requests for UAC Case File*
21 *Information* (Sept. 23, 2013),
22 [https://www.acf.hhs.gov/orr/resource/childrenentering-the-united-states-](https://www.acf.hhs.gov/orr/resource/childrenentering-the-united-states-unaccompanied)
23 [unaccompanied](https://www.acf.hhs.gov/orr/resource/childrenentering-the-united-states-unaccompanied); Immigrant Legal Resource Center, *Obtaining Office of Refugee*
Resettlement Records for Clients Who Were Detained as Children 4 (Nov. 2019),
https://www.ilrc.org/sites/default/files/resources/orr_records_pa_final.pdf.

24 ⁴³ This range may vary depending on the jurisdiction. For instance, EOIR is
25 running a pilot program in the Phoenix Immigration Court where detained juvenile
26 cases are being fast tracked. See Florence Immigrant & Refugee Rights Project,
Courts in Crisis: The State of Judicial Independence and Due Process in U.S.
27 *Immigration Courts* (Jan 28, 2020),
[https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-](https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-20200129-SD012.pdf)
28 [20200129-SD012.pdf](https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-20200129-SD012.pdf).

⁴⁴ Some exceptions may exist depending on jurisdiction.

1 immigration court jurisdiction, LSPs can anticipate between six to fifteen months to
 2 help prepare applications for relief for UC.⁴⁵ This is triple the time they have when
 3 representing children on the detained docket.

4 88. Nevertheless, many LSPs, like Plaintiffs, may be compelled to
 5 represent children in short-term custody who face an imminent threat of deportation,
 6 want voluntary departure, or are nearing their eighteenth birthday and are at risk of
 7 aging out of federal foster-care under ORR’s auspices. However, expedited
 8 docketing deadlines place enormous pressure on LSPs, so they must balance
 9 representing UC who are in short-term custody based on organizational resources
 10 and staffing capacity. Before MPP, Plaintiffs rarely encountered UC with orders of
 11 removal.

12 89. To that end, Plaintiffs’ resources, staffing capacity, and programmatic
 13 objectives have been designed to serve a high volume of detained UC requiring
 14 minimal time-sensitive assistance and representation in their TVPRA-proceedings.

15 **F. USCIS Has Jurisdiction Over UC Asylum Claims Which the**
 16 **TVPRA Ensures UC Can Affirmatively Pursue Without Deadline**
 17 **Given the Challenges Facing UC**

18 90. USCIS is responsible for adjudicating UC applications for asylum and
 19 does so pursuant to the Affirmative Asylum Procedures Manual (“AAPM”), the

20 ⁴⁵ If an LSP finds that a detained child is eligible for asylum and recommends filing
 21 an asylum application with USCIS, best practices dictate prioritizing the child’s
 22 release from custody over preparing the asylum application for three reasons. First,
 23 the process for applying for asylum is intense and the experience of preparing a
 24 child’s claim can be retraumatizing. If asylum is the only relief available, it is better
 25 for the child to not be in custody—and therefore not placed on the expedited
 26 “juvenile detained” docket—while preparing that application. The child will have
 27 more time to thoroughly prepare their claim with the support of a parent, relative, or
 28 sponsor. Second, UC who seek TVPRA-asylum while in ORR custody must submit
 to USCIS a change of address if and when they are released to a sponsor. USCIS
 construes this change of address as an “applicant-caused delay,” which may result in
 the loss of immigration benefits such as employment-authorization. Finally, many
 UC who are otherwise eligible for asylum may also become eligible for Special
 Immigrant Juvenile Status (“SIJS”) relief. The SIJS application process is not
 intense and is less likely to retraumatize the child. Most children seek SIJS after
 release and reunification with a sponsor.

1 primary guidance for USCIS asylum officers conducting affirmative asylum
2 interviews, with a section specifically dedicated to unaccompanied minors and their
3 rights under the TVPRA.⁴⁶ The AAPM establishes several principles not otherwise
4 reflected in statute. For example, it defines USCIS's jurisdictional scope as
5 encompassing all UC, even those currently in removal proceedings or on appeal
6 before the BIA or federal courts of appeal.⁴⁷

7 91. Typically, UC first encounter LSPs at KYR presentations, which allow
8 LSP staff to give the children basic information about their legal situation and their
9 options.⁴⁸ LSP staff then meet one-on-one with all newly arriving UC to screen
10 them for relief and ask them questions about their family, the circumstances that led
11 to their migration, and any ties they have to the United States. LSPs use this
12 information to evaluate a child's eligibility for release and for relief. The vast
13 majority of UC have fled violent and dangerous conditions and fear harm if
14 returned. LSPs work in partnership with UC, their families, and child advocates to
15 compile evidence and develop strong asylum claims.

16 92. Once UC securely reunify with a sponsor within an LSP's geographic
17 service area, LSPs begin to prepare the appropriate applications for relief, which can
18 be a slow and difficult process. Many UC are too young to fully understand the
19 circumstances of their flight to the United States. For these children, LSPs must rely
20 on information gleaned from relatives or witnesses in a child's home country, who
21 are often difficult to contact. Other UC are too traumatized to talk about their
22 experiences or are socialized to not discuss prior threats and violence by perceived
23

24 ⁴⁶ See generally U.S. Citizenship and Immigration Services, *Affirmative Asylum*
25 *Procedures Manual* (May 2016), available at
<https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf>.

26 ⁴⁷ See *id.* at 32-33.

27 ⁴⁸ Over the course of the pandemic, LSPs have shifted to providing KYR
28 presentations remotely.

1 authority figures, equating disclosure with future harm. LSPs must therefore devote
2 time to building relationships with UC and ensure they have access to mental
3 healthcare and emotional support. And even those children who can discuss their
4 past persecution often lack the vocabulary and sophistication necessary to articulate
5 their experiences in the form of a perfect asylum claim. LSPs must translate each
6 child's story into the language of a cognizable claim and support the child's
7 experience with corroborating evidence. Done appropriately, this process can take
8 months even under the best circumstances.

9 93. On average, preparation for a TVPRA-asylum filing takes Plaintiffs
10 between 35 and 60 hours. The time spent includes preparing declarations, obtaining
11 records, gathering evidence, and preparing the child for testimony. With each
12 Plaintiff organization representing hundreds of UC, Plaintiffs have managed to build
13 a sustainable practice by predominantly focusing on affirmative relief.

14 94. The LSP files the child's TVPRA-asylum application with USCIS by
15 mailing a paper copy of a Form I-589 Application for Asylum and Withholding of
16 Removal. Typically, Plaintiffs file the application form and will supplement the
17 application with supporting evidence after the child is given an interview date. The
18 application is filed with the Nebraska Service Center of USCIS and transferred to
19 the local office that has jurisdiction over the child at the time of filing. USCIS
20 usually responds with a receipt notice unless the application is rejected for being
21 incomplete. USCIS may subsequently reject the application for lack of jurisdiction.

22 95. Assuming the application is not rejected for lack of jurisdiction or other
23 reasons, USCIS will eventually schedule an asylum interview with the child.
24 Currently, the wait time for interviews is unpredictable across Plaintiffs' respective
25 jurisdictions and varies anywhere from one month to several years.⁴⁹ In February

26 _____
27 ⁴⁹ U.S. Citizenship and Immigr. Services, *Affirmative Asylum Interview Scheduling*
28 (last visited Jan. 11, 2021), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-interview-scheduling>.

1 2018, USCIS prioritized the scheduling of recently filed applications, which
 2 Plaintiffs refer to as a “last in first out” policy. Applications filed under USCIS’s
 3 last in first out policy may be scheduled within two months of filing the
 4 application.⁵⁰ However, USCIS’s policy has not necessarily meant that the agency
 5 is processing applications quickly. For instance, since the policy’s implementation,
 6 a majority of ImmDef’s UC clients who submitted their TVPRA-asylum
 7 applications, are still waiting for an interview date. In the meantime, while they
 8 await an asylum interview, UC may attend school, receive therapy, and recover
 9 from past trauma and grief. Once an interview is calendared, LSPs prepare UC for
 10 the interview. Depending on a particular child’s needs, an LSP may need to meet
 11 the child an additional one to three times in advance of the asylum interview to
 12 prepare them for the interview.

13 **G. ICE May Initiate Removal of UC Only After They Are Denied**
 14 **Relief by Both USCIS and EOIR Through Full TVPRA-**
 15 **Proceedings**

16 96. If ICE does not seek to remove an unaccompanied child, the TVPRA
 17 does not require the child be placed in Section 240 removal proceedings. 8 U.S.C. §
 18 1232(a)(5)(D). If, however, ICE intends to remove UC, the TVPRA requires ICE to
 19 initiate removal proceedings against a child by filing the charging document—e.g.,
 20 TVPRA-NTA—with EOIR. 8 C.F.R. §1003.14(a). EOIR is responsible for
 21 conducting immigration court proceedings, adjudicating immigration relief, and
 22 deciding administrative appeals.⁵¹ ⁵² When UC appear, an Immigration Judge must
 23 conduct hearings in accordance with child-sensitive criteria.⁵³

24 ⁵⁰ Since 2018, the majority of ImmDef’s cases have not been scheduled for
 25 interviews.

26 ⁵¹ 8 U.S.C. § 1229(a); 8 C.F.R. § 239.1(a).

27 ⁵² EOIR lacks authority to *sua sponte* initiate TVPRA-proceedings against UC.
 28 This authority is vested with DHS. 8 C.F.R. §1003.14.

⁵³ For example, EOIR memoranda directs direct Immigration Judges to, among other
 things:, (i) schedule “juvenile dockets” that occur separate from adult dockets; (ii)

1 97. UC in TVPRA-proceedings are explicitly guaranteed two opportunities
2 to seek asylum and other forms of relief before ICE may initiate removal. The first
3 opportunity is seeking TVPRA-asylum before USCIS, as described above. If a
4 USCIS officer does not grant asylum, the second opportunity is through the
5 TVPRA-proceedings before an Immigration Judge. ICE may begin the removal
6 process only after a child is denied all forms of relief from removal by both USCIS
7 and an IJ, and exhausts all appellate remedies.⁵⁴

8 98. Prior to the government’s imposition of MPP, UC released from ORR-
9 custody were generally not at risk of removal for months or years after their entry
10 into the United States.⁵⁵ Applications for asylum filed by UC may take years to
11 work their way through the system—first before USCIS, which due to processing
12 delays typically takes months to adjudicate I-589s⁵⁶; and then for children who are
13 referred to EOIR for TVPRA-proceedings, which generally takes years to finish the
14 hearing process.⁵⁷ And that timeline does not account for other forms of relief, such
15

16 _____
17 allow reasonable furniture modifications to the courtroom so that UC are
18 comfortable; (iii) employ “child-sensitive” questioning; and (iv) evaluate a child’s
19 testimony and applications for relief in light of their age and ability to understand
20 and convey the incidents underlying their claims for relief. See U.S. Dep’t of Just.,
21 Exec. Off. for Immigr. Rev., *Executive Office for Immigration Review: An Agency*
22 *Guide* (Dec. 2017), available at
23 https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download.

24 ⁵⁴ 8 U.S.C. § 1232(a)(5)(D).

25 ⁵⁵ In general, most removals of UC traditionally occurred if the child sought
26 voluntary departure pursuant to the TVPRA—involuntary removals of UC were
27 rare. UC maintain the right to seek voluntary departure even after having sought
28 asylum relief before USCIS. 8 U.S.C. § 1232(a)(5)(D)(ii); *see also* Kandel at 7.

⁵⁶ Processing times vary, but most of ImmDef’s released-UC clients are waiting
anywhere between six months and eighteen months.

⁵⁷ EOIR begins its 2021 fiscal year with the largest backlog to-date. *See* TRAC
Immigr., *FY 2021 Begins with Largest Immigration Court Backlog on Record*,
Transactional Records Access Clearinghouse, Syracuse University (Nov. 24, 2020),
<https://trac.syr.edu/whatsnew/email.201124.html>. The average wait-time in
Plaintiffs’ immigration court jurisdictions can range between 300 days to three
years. *See* TRAC Immigr., Immigration Court Backlog Tool, Transactional Records

1 as SIJS or U-visas, available under VAWA to victims of domestic violence. LSPs
2 therefore typically have years to prepare for potential removals of UC.

3 99. An unaccompanied child may properly become subject to a final
4 removal order only if USCIS *and* EOIR deny asylum, all other forms of relief are
5 unavailable or unavailing, and a BIA appeal is unsuccessful. If the BIA denies the
6 appeal, it will notify the child’s attorney, who may then exercise the child’s right to
7 seek federal circuit court judicial review of the final removal order and request a
8 discretionary stay of removal pending adjudication of the petition for review.

9 100. If the child exhausts all forms of review and still does not obtain relief,
10 then ICE, through its sub-agency ERO, has authority to remove the child. Per the
11 TVPRA and JFRM Handbook, ICE-ERO must coordinate with the child, their
12 sponsor, the appropriate consulate, and the child’s family in the home country.⁵⁸
13 ERO arranges and bears the costs of “a safe and supervised return.”⁵⁹ In addition,
14 ERO must verify kinship with the consulate, allow UC to communicate with a
15 consular official, and ensure UC will arrive during daylight hours in appropriate
16 clothing for local climate conditions, among other requirements.⁶⁰

17 **III. DEFENDANTS’ MIGRANT PROTECTION PROTOCOLS**
18 **CREATED A CRISIS FOR FAMILIES SEEKING ASYLUM AT THE**
BORDER AND ENDANGERED CHILDREN’S LIVES

19 101. On December 20, 2018, then-Secretary Nielsen of DHS announced a
20 new policy for processing asylum seekers at the southern border: the Migrant
21 Protection Protocols, often referred to as “MPP” or the “Remain in Mexico”
22
23

24 Access Clearinghouse, Syracuse University (last visited Jan. 14, 2021),
25 https://trac.syr.edu/phptools/immigration/court_backlog/.

26 ⁵⁸ JFRM Handbook, *supra* note 23, at 45.

27 ⁵⁹ *Id.*

28 ⁶⁰ *Id.* at 45-46.

1 program.⁶¹ Under MPP, individuals and their families who arrive at the southern
 2 border and request asylum—either at a port of entry or after crossing the border
 3 between ports of entry—receive NTAs informing them of when they must appear in
 4 immigration court and are promptly returned to Mexico, where they must remain for
 5 the duration of their immigration proceedings, instead of being permitted to pursue
 6 these proceedings while remaining in the United States. They are instructed to
 7 return to a specific port of entry at a specific date and time for their next court
 8 hearing. While these asylum seekers remain in Mexico, the United States does not
 9 provide them with food, shelter, personal protective equipment, work, funds,
 10 transportation to and from the U.S. border, or access to legal counsel.⁶² To date, the
 11 vast majority of asylum seekers presenting themselves at the southern border since
 12 the program’s implementation have been sent back to Mexico to await their asylum
 13 proceedings under MPP.⁶³

14 **A. MPP Exacerbated the Challenges Facing Immigrant Children**

15 102. MPP has created significant and severe hardships for immigrant
 16 children in three key ways.

17
 18
 19 ⁶¹ The MPP program has been the subject of numerous lawsuits, *see* Kate Morrissey,
 20 New lawsuit to challenge Trump’s ‘Remain in Mexico’ policy, SAN DIEGO UNION
 21 TRIBUNE (Oct. 28, 2020), *available at*
 22 <https://www.sandiegouniontribune.com/news/immigration/story/2020-10-28/new-lawsuit-to-challenge-remain-in-mexico-policy>, and its operation was temporarily
 enjoined in the Ninth Circuit. *Innovation Law Lab v. Wolf*, 951 F.3d 986 (9th Cir.
 2020).

23 ⁶² *See* Compl. for Inj. & Decl. Relief [Dkt. No. 1], *Immigr. Defs. Immigrant*
 24 *Defendants Law Ctr. Center et al. v. Chad Wolf et al.*, Case No. 2:20-cv-9893 (C.D.
 25 Cal. Oct. 28, 2020), *available at*: <https://innovationlawlab.org/media/Complaint-Dkt-1-Immigrant-Defenders-Law-Center-et-al-v.-Wolf-et-al.pdf>.

26 ⁶³ *See* TRAC Immigr., Details on MPP (Remain in Mexico) Deportation
 27 Proceedings, Transactional Records Access Clearinghouse, Syracuse University
 28 (Nov. 2020), <https://trac.syr.edu/phptools/immigration/mpp/> (official figure as of
 November 2020: 69,333; data based on court records obtained from EOIR using the
 Freedom of Information Act).

1 103. First, MPP proceedings are materially different than TVPRA-
2 proceedings that occur within the United States. Most notably, before the COVID-
3 19 outbreak, the Trump Administration created large tent facilities to operate as
4 “virtual immigration courtrooms” at certain ports of entry. Asylum seekers were
5 instructed to appear at these tents for immigration hearings that were conducted by
6 Immigration Judges appearing remotely by videoconference. In these proceedings,
7 asylum seekers in the tent courts do not receive the usual Legal Orientation Program
8 (“LOP”) benefits that other migrants who are housed in immigration detention
9 facilities nor have access to *pro bono* legal services. These LOP benefits include
10 group orientations, one-on-one meetings, workshops, and referrals to free or low-
11 cost legal services. Indeed, according to an independent analysis of data obtained
12 from EOIR, fewer than five percent of asylum seekers in MPP have an attorney. In
13 comparison, thirty-two percent of asylum seekers who remain in the United States
14 are able to obtain an attorney. Given that asylum seekers also are *five times* more
15 likely to obtain asylum when represented—a figure that increases to more than
16 *fourteen times* for women and children—the challenges involved in obtaining
17 representation in MPP are outcome-determinative, leaving meritorious asylum
18 claims unheard or denied.

19 104. Second, having to remain in Mexico under MPP significantly impairs
20 asylum seekers’ ability to attend their court hearings. *In absentia* removal orders are
21 all too common because asylum seekers in MPP face kidnapping, rape, and other
22 forms of violence along the border. Moreover, MPP forces asylum seekers into
23 temporary and unstable housing conditions, which means that there is often no way
24 for the immigration courts to notify them of the date, time, or location of their
25 hearings. Notices that do reach asylum seekers may not have accurate or complete
26 information regarding their hearings, including where and how to cross the border
27
28

1 into the United States to attend those hearings.⁶⁴ While nine out of ten immigrants
2 who are allowed to remain in the United States attend all their court hearings, at
3 least 50 percent of MPP asylum seekers fail to appear for their hearings. When the
4 applicant does not appear, the Immigration Judge will typically close the case and
5 issue a removal order *in absentia*. Children are particularly vulnerable to the harms
6 of *in absentia* removal orders because they are usually unaware of the substance or
7 procedure of their immigration proceedings, and their ability to appear for a court
8 hearing is often beyond their control. In 2018, 42,542 juveniles (including UC)
9 received *in absentia* removal orders; in 2019, when MPP was implemented, that
10 number skyrocketed to 55,882.⁶⁵

11 105. Third, after the Trump Administration implemented MPP across all
12 ports of entry on the southern border, conditions in Mexico quickly became dire for
13 asylum seekers, especially children. Because MPP cases usually take much longer
14 to adjudicate than cases that proceed in the United States, most asylum seekers
15 forced to await proceedings in Mexico must spend many months waiting to have
16 their asylum cases decided, living in squalid conditions and without basic necessities
17 like clean drinking water and adequate shelter, sanitation, and nutrition. These
18 conditions have worsened with the spread of COVID-19—without clean water,
19 health care, or basic cleaning and sanitation equipment, asylum seekers face a
20 heightened risk of COVID-19 exposure. Apart from physical hardship and
21 deprivation, migrants stranded in MPP must live in or travel through some of the

22 _____
23 ⁶⁴ See Michael G. Bochenek, *Like I'm Drowning: Children and Families Sent to*
24 *Harm by the US 'Remain in Mexico' Program*, Human Rights Watch (Jan. 6, 2021),
25 [https://www.hrw.org/report/2021/01/06/im-drowning/children-and-families-sent-](https://www.hrw.org/report/2021/01/06/im-drowning/children-and-families-sent-harm-us-remain-mexico-program)
26 [harm-us-remain-mexico-program](https://www.hrw.org/report/2021/01/06/im-drowning/children-and-families-sent-harm-us-remain-mexico-program) (reporting that by mid-May 2020, Human Rights
27 Watch had tracked “more than 1,100 reported cases of murder, rape, kidnapping,
28 torture, and assault of asylum seekers sent to Mexico under the MPP,” including 265
kidnappings or attempted kidnappings of children).

⁶⁵ TRAC Immigr., *Juveniles – Immigration Court Deportation Proceedings*,
Transactional Records Access Clearinghouse, Syracuse University (Dec. 2020),
<https://trac.syr.edu/phptools/immigration/juvenile/>.

1 most dangerous areas in Mexico, including Mexican states the State Department has
 2 designated as “no travel” zones, classified at the *same danger level* as Syria,
 3 Afghanistan, and Yemen—all countries with active combat zones. Human Rights
 4 First reports that as of December 15, 2020, there have been at least 1,314 publicly
 5 reported cases of murder, rape, torture, kidnapping, and other violent assaults
 6 against asylum seekers and migrants forced to return to Mexico since the start of
 7 MPP.⁶⁶ Of these cases, 318—nearly 25 percent—are children returned to Mexico,
 8 who were kidnapped or nearly kidnapped.⁶⁷

9 106. According to HHS data, between October 2019 and May 2020, at least
 10 500 children crossed the U.S.-Mexico border without their parents or legal
 11 guardians after spending time in Mexico pursuant to MPP.⁶⁸

12 **B. The Coronavirus and Title 42 Created Further Obstacles for**
 13 **Children at the Border**

14 107. On March 23, 2020, in response to the COVID-19 pandemic, DHS and
 15 EOIR suspended all MPP hearings. Implementation of the suspension was chaotic
 16 and confusing, leading some people to travel to ports of entry only to be turned
 17 away. Others missed the opportunity to get their notices of rescheduled hearings.
 18 DHS subsequently suspended MPP hearings indefinitely on July 17, 2020, issuing a

19 ⁶⁶ Human Rights First, *Delivered to Danger: Trump Administration sending asylum*
 20 *seekers and migrants to danger* (Dec. 15, 2020),
<https://www.humanrightsfirst.org/campaign/remain-mexico>.

21 ⁶⁷ *Id.*

22 ⁶⁸ See Lomi Kriel, *The Trump Administration Is Rushing Deportations of Migrant*
 23 *Children During Coronavirus*, ProPublica (May 18, 2020),
 24 [https://www.propublica.org/article/the-trump-administration-is-rushing-](https://www.propublica.org/article/the-trump-administration-is-rushing-deportations-of-migrant-children-during-coronavirus)
 25 [deportations-of-migrant-children-during-coronavirus](https://www.propublica.org/article/the-trump-administration-is-rushing-deportations-of-migrant-children-during-coronavirus) (reporting that HHS has
 26 tracked 571 children who crossed into the U.S. whose parents remained in Mexico
 27 through May 18, 2020); see also Priscilla Alvarez, *At least 350 children of migrant*
 28 *families forced to remain in Mexico have crossed over alone to US*, CNN (Jan. 24,
 2020), [https://www.cnn.com/2020/01/24/politics/migrant-children-remain-in-](https://www.cnn.com/2020/01/24/politics/migrant-children-remain-in-mexico/index.html)
[mexico/index.html](https://www.cnn.com/2020/01/24/politics/migrant-children-remain-in-mexico/index.html) (reporting that HHS has tracked 352 children who crossed into
 the U.S. whose parents remained in Mexico through January 13, 2020). Attorneys
 and advocates for unaccompanied children in the United States report that this figure
 has steadily increased in the months since May 2020.

1 public statement outlining criteria that DHS and DOJ would use to determine when
2 MPP hearings should resume. To date, DHS and DOJ have not resumed MPP
3 hearings nor provided information on when those hearings will resume. Immigration
4 hearings for those in MPP proceedings are postponed indefinitely.

5 108. Further exacerbating the dire circumstances faced by asylum seekers,
6 the pandemic has also effectuated a near-total shutdown of the country's southern
7 border. On March 20, 2020, HHS issued an emergency regulation under 42 U.S.C.
8 § 265 ("Title 42") permitting the Director of the Centers for Disease Control and
9 Prevention ("CDC") to "prohibit . . . the introduction" of individuals to the country
10 when the Director believes that "there is serious danger of the introduction of [a
11 communicable] disease into the United States."⁶⁹ The rule allows any customs
12 officers, including CBP officers, to implement any such order issued by the CDC.

13 109. Relying on this HHS regulation, CDC Director Robert R. Redfield
14 issued an order suspending the entry of certain individuals who have been in
15 "Coronavirus Impacted Areas." Citing this new CDC order, on March 20, 2020,
16 CBP adopted a policy allowing CBP agents to immediately "expel" individuals
17 arriving at the U.S.-Mexico border.⁷⁰ Under the policy, CBP agents do not ask
18 individuals whether they face harm or fear persecution if deported and returned to
19 Mexico. Instead, CBP relies on individuals to volunteer the information, and an
20 agent must seek approval from his or her supervisor before referring an asylum

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24 ⁶⁹ Order Suspending Introduction of Certain Persons From Countries Where a
Communicable Disease Exists, 85 Fed. Reg. 17,060, 17,061, 17,067 (Mar. 20,
2020).

25
26 ⁷⁰ See Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back*
Immediately—Ignoring Asylum Law, ProPublica (April 2, 2020),
27 [https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-](https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law)
28 [migrants-back-immediately-ignoring-asylum-law](https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law) (revealing internal CBP policy to
aggressively return unauthorized migrants to Mexico).

1 seeker for a non-refoulement interview with a USCIS asylum officer.⁷¹

2 110. According to CBP statistics, CBP has initiated 119,409 enforcement
3 actions under Title 42 between the expulsion order's implementation date and
4 November 2020.⁷² Before enjoined by a court, the government, under the apparent
5 authority of Title 42, expelled nearly 9,000 children and ejected any who were
6 discovered at the border seeking asylum.⁷³ These actions were taken in direct
7 conflict with the protections the TVPRA guarantees to unaccompanied children.

8 **C. MPP and the Pandemic Have Caused Unaccompanied Children**
9 **with MPP Ties to Present at the Border and Seek Protection**

10 111. The experience of the Doe Family illustrates the crisis that MPP has
11 caused for children. The Doe Family, which consists of three siblings aged sixteen,
12 eight, and four, fled their home country after suffering harm and threats from gangs.
13 Upon entering to the United States, CBP arbitrarily split their family unit in two for
14 purposes of placing them in MPP proceedings. The mother was placed as the lead in
15 one case with two of the children as derivatives. The father was designated as the

16 ⁷¹ See Nick Miroff, *Under Trump border rules, U.S. has granted refuge to just two*
17 *people since late March, records show*, Washington Post (May 13, 2020),
18 https://www.washingtonpost.com/immigration/border-refuge-trump-records/2020/05/13/93ea9ed6-951c-11ea-8107-acde2f7a8d6e_story.html (reporting
on leaked CBP memo detailing its COVID-19 asylum policies).

19 ⁷² See U.S. Customs & Border Prot., Protection, Nationwide Enforcement
20 Encounters: Title 8 Enforcement Actions and Title 42 Expulsions (Dec. 14, 2020),
21 <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics> (reporting expulsions under Title 42 U.S.C. § 265).

22 ⁷³ See *P.J.E.S. v. Wolf*, Case No. 20-cv-2245, 2020 WL 6770508, at *17 (D.D.C.
23 Nov. 18, 2020) (granting the plaintiff's request for a preliminary injunction); John
24 Burnett, *Judge Says Coronavirus Can't Be Used as Reason to Quickly Deport*
25 *Unaccompanied Minors*, NPR (Nov. 18, 2020),
26 <https://www.npr.org/2020/11/18/936312918/judge-says-coronavirus-cant-be-used-as-reason-to-deport-unaccompanied-minors> (reporting that prior to the injunction
27 the government had already expelled nearly 9,000 UACs). In addition, even after the
28 preliminary injunction against the unlawful expulsions of children, the Trump
Administration continued to expel children, in violation of the court's order. See
Nicole Narea, *The Trump administration expelled unaccompanied migrant children*
in violation of a court order, Vox (Dec. 14, 2020), See
<https://www.vox.com/2020/12/14/22174131/trump-unaccompanied-migrant-children-pandemic-expulsion>.

1 lead with the third child in another. This resulted in two different Immigration
2 Judges being assigned to what should have been a single, family unit case, and the
3 family thus was required to appear at two separate hearings.

4 112. The mother and two of the children were the first to be scheduled for a
5 merits hearing. Without so much as a KYR presentation, let alone access to counsel,
6 the family was unable to gather documents and supporting evidence for their case.
7 Rather than have their case heard as a single family unit, each parent's case was
8 assigned to a different immigration judge.

9 113. Forced to live in unsafe and squalid conditions in a shelter near the
10 Texas-Mexico border placed further stress on the family unit. The children's father
11 abandoned them and their mother entered into an abusive relationship with another
12 man. Soon the Doe Siblings found themselves trapped inside a dangerous home
13 within a dangerous country. After witnessing extreme violence, the eldest sibling
14 took the courageous decision to protect his younger siblings and fled. The Doe
15 Siblings entered the United States and were apprehended by CBP. After being
16 designated UC, the children were then transferred to ORR-custody.

17 114. While MPP has torn families apart, it has also deprived children of a
18 meaningful right to seek relief in those proceedings. Eleven-year-old A. Doe and his
19 mother fled from Honduras to the United States in August of 2019 after a
20 transnational gang targeted A. Doe with death threats, intimidation, and severe
21 physical abuse. On their harrowing journey to the southern border they were
22 kidnapped and held for ransom, imprisoned for several days, and finally escaped
23 when their captors were too intoxicated to stop them. When A. Doe and his mother
24 finally thought they were safe—when they made it to the United States border—
25 they were immediately sent back to the notoriously dangerous MPP camps of
26 Matamoros, Mexico and placed on the MPP docket.

27 115. The conditions in Matamoros, where 1,000 to 2,600 people live in tents
28 without access to clean water or proper sanitation, are particularly dire compared to

1 the other border towns.⁷⁴ Matamoros is one of the most dangerous cities in Mexico,
2 designated as a “Level 4: Do Not Travel” location by the U.S. Department of State.
3 In just a two-month span from November 2019 to January 2020, 80 migrants, 38 of
4 whom were children, were kidnapped or victims of attempted kidnappings. Here, A.
5 Doe and his mother would face dangerous conditions, food and shelter insecurity,
6 and lack of access to counsel.

7 116. After five long, arduous months of living together in the Matamoros
8 encampment, it was finally time for A. Doe and his mother’s first teleconference
9 hearing in September of 2019, where they were given an application for asylum.
10 During their second teleconference hearing in October of 2019, A. Doe and his
11 mother filed separate I-589 applications and his mother requested a non-refoulment
12 hearing, in hopes of escaping their dangerous living conditions. There is no record
13 of the outcome of that hearing.

14 117. At their third and final hearing, in January of 2020, A. Doe was not
15 even allowed to testify to the traumatizing abuse he suffered at the hands of gang
16 members. Instead, the judge treated him as a “rider” to his mother’s application for
17 relief, ignoring his independent asylum application. They were ordered deported
18 without any individualized consideration of A. Doe’s claim.

19 118. At the young age of eleven, A. Doe had already experienced far more
20 violence than any child should. Knowing that she would be unable to protect him
21 from the gangs who had already targeted him in Honduras and from the violence of
22 Matamoros, A. Doe’s mother made the difficult decision to send her son across the
23 border alone, where he might be reunited with his grandmother and have an
24

25 ⁷⁴ See Human Rights Watch, *US: ‘Remain in Mexico’ Harms Children, Families*,
26 Human Rights Watch (January 6, 2021), <https://www.hrw.org/news/2021/01/06/us-remain-mexico-harms-children-families#:~:text=%28Washington%2C%20DC%29%20%E2%80%93%20The%20United%20States%20government%E2%80%99s%20%E2%80%9CRemain,Rights%20Watch%20said%20in%20a%20report%20released%20today..>
27
28

1 opportunity to live out a childhood free of further violence.

2 **IV. Defendants Have Denied MPP-UC Their Rights Under the TVPRA, in**
 3 **Violation of Law and Defendants' Own Published Policies and Long-**
 4 **Standing Past Practice**

5 119. The TVPRA does not discriminate against children who, like the Doe
 6 Siblings and eleven-year old A. Doe, were once subject to MPP as part of their
 7 respective family units and thereafter presented at the border, alone, and were
 8 designated UC by CBP and ICE. Once designated UC, the Doe Siblings and A. Doe
 9 were automatically entitled to a panoply of statutory and procedural protections
 10 under the TVPRA and *Flores* Settlement, no matter their prior immigration history.

11 120. DHS seemingly agrees that UC should be exempt from MPP. After
 12 the January 2019 implementation of MPP, DHS and its constituent sub-agencies
 13 have issued memoranda and guidance documents that categorically exempt UC from
 14 MPP. First, on January 24, 2019, DHS issued a press release explicitly excluding
 15 UC from MPP:

16 With certain exceptions, MPP applies to aliens arriving in the U.S. on
 17 land from Mexico (including those apprehended along the border) who
 18 are not clearly admissible and who are placed in removal proceedings
 19 under INA § 240. This includes aliens who claim a fear of return to
 20 Mexico at any point during apprehension, processing, or such
 21 proceedings, but who have been assessed not to be more likely than not
 22 to face persecution or torture in Mexico. Unaccompanied alien
 23 children . . . will not be subject to MPP.⁷⁵

24 121. In their respective implementation documents, CBP and ICE also
 25 reiterated the categorical exemption of unaccompanied children from MPP.⁷⁶

26 _____
 27 ⁷⁵ U.S. Dep't of Homeland Sec., *supra* note 2.

28 ⁷⁶ *See, e.g.*, U.S. Customs & Border Prot., *supra* note 3 (“Aliens in the following
 categories are not amenable to MPP . . . [u]naccompanied alien children”); Mem.
 from the Deputy Dir. of the U.S. Immigr. & Customs Enf't to Exec. Assoc. Dirs.
 1 (February 12, 2019), *available at*
<https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy-Memorandum-11088-1.pdf> (“DHS will not use the INA section 235(b)(2)(C)
 process in the cases of unaccompanied alien children.”).

1 122. DHS reiterated this policy as recently as December 7, 2020, stating:

2 Any child who arrives at the border and is determined to be a UAC will
3 be processed as such by CBP in accordance with existing UAC
4 processing procedures, including transfer to the Department of Health
5 and Human Services (HHS) and generally processed for removal
6 proceedings pursuant to Section 240 of the Immigration and National
7 Act (INA). *UACs are not amenable to MPP.*⁷⁷

8 123. Separately and together, the TVPRA, the *Flores* Settlement Agreement,
9 and DHS’s written policies leave no question that UC are *not* to be included in or
10 processed through MPP.

11 124. Plaintiffs’ experiences representing MPP-UC, like the Doe Siblings and
12 A. Doe, however, tell a very different story. Contrary to Defendants’ public
13 statements, DHS, ICE, CBP, and ERO *do* subject UC to MPP. In the case of both
14 the Doe Siblings and A. Doe, and numerous other MPP-UC, Defendants continue to
15 prosecute children through their prior MPP proceedings despite their subsequent
16 classifications as UC. In so doing, Defendants either do not consider or willfully
17 ignore that subjecting UC to ongoing MPP proceedings and MPP removal orders
18 exposes MPP-UC to summary removal without any opportunity to access their
19 rights under the TVPRA. Defendants’ treatment of MPP-UC deprives these
20 children of due process and violates the TVPRA, as well as Defendants’ own
21 policies and past practices, which unequivocally extend robust protections to *all*
22 UC—even those with prior immigration histories or removal orders.

23 125. Defendants’ actions have created three categories of MPP-UC: (1) UC
24 with pending MPP proceedings who have an MPP hearing scheduled for after they
25 were designated UC (“UC in MPP proceedings”); (2) UC who were ordered
26 removed by an MPP Court but whose appellate rights have yet not lapsed (“UC with
27 MPP removal orders not yet final”); and (3) UC with final removal orders because
28 an MPP Court ordered them removed either (i) *in absentia*, or (ii) on the merits

⁷⁷ U.S. Dep’t of Homeland Sec., *supra* note 4.

1 (“UC with MPP removal orders”) (collectively, “MPP-UC”).

2 126. Defendants’ actions expose these vulnerable children to a heightened
3 risk of removal without due process. MPP-UC, through Plaintiffs, must overcome
4 myriad procedural hurdles to access the rights, processes, and procedures guaranteed
5 under the TVPRA and *Flores* Settlement Agreement. Each MPP-UC group faces its
6 own set of barriers based on its unique procedural posture, but all three groups rely
7 on Plaintiffs to defend against the same harm: Defendants unreasonably delaying, if
8 not entirely preventing, MPP-UC from accessing their rights under the TVPRA.

9 **A. ICE and ERO Deny MPP-UC Their Statutory Right to Issuance**
10 **and Service of the TVPRA-NTA**

11 **1. ERO Does Not Issue and Serve MPP-UC with a TVPRA-NTA**

12 127. It is official ERO policy and historical practice to issue and serve on
13 UC a TVPRA-NTA that reflects the child’s name, date of birth, manner and place of
14 entry, and the child’s unique, nine-digit A-number. In the fall of 2019, Plaintiffs
15 noticed that not all UC were arriving in ORR custody with a TVPRA-NTA
16 reflecting their most recent entry. Some children had an MPP-NTA. Other children
17 had a TVPRA-NTA. And some had no NTA at all.

18 128. After extensive investigation and advocacy to locate missing NTAs,
19 Plaintiffs discovered that ERO was not consistently issuing and serving NTAs for
20 children previously subject to MPP. This was a departure from ERO’s express
21 policy which requires issuance and proper service of a NTA reflecting the child’s
22 most recent entry before transferring the child from CBP to ORR custody. To date,
23 ERO has not explained or articulated this change in policy and practice.

24 129. ERO’s failure to consistently issue and provide MPP-UC their
25 TVPRA-NTAs also violates the TVPRA. When MPP-UC do not have a copy of
26 their TVPRA-NTA, Plaintiffs cannot provide the sound and informed legal counsel
27 that the TVPRA proscribes. For all UC, Plaintiffs require the NTA and nine-digit
28 A-number to verify a child’s name, date of birth, and method of entry. Without it,

1 Plaintiffs cannot evaluate and prepare a defense for their clients.

2 130. ERO creates further confusion for Plaintiffs and other LSPs when it
3 similarly fails to serve MPP-UC with a copy of their MPP -NTAs. This practice
4 causes MPP-UC to regularly arrive in ORR custody without any NTA. As a result,
5 Plaintiffs frequently do not know, and cannot readily discern, whether a child has
6 any ties to MPP.

7 131. ERO is not generating a TVPRA-NTA for all MPP-UC. Nor is ERO
8 issuing and properly serving all MPP-UC with a TVPRA-NTA. Moreover, ERO is
9 not issuing and properly serving all MPP-UC with a MPP-NTA. Based on
10 information and belief, ERO and its FOJCs possess copies of a child's prior MPP-
11 NTA and a copy of the TVPRA-NTA, if one exists. ORR, through its Case
12 Managers, may also possess a copy of the TVPRA-NTA, depending on if one exists
13 and ICE provided them a copy. Yet ImmDef and certain sister organizations have
14 observed that ERO and ORR do not consistently fulfill requests from LSPs, to
15 produce the MPP-NTA and, if one exists, the TVPRA-NTA. In response, Plaintiffs
16 must make a formal records request to ORR, which "may take several months to
17 respond,"⁷⁸ or to ICE through a Freedom of Information Act ("FOIA") request,
18 which likewise takes months to process. Short of this, Plaintiffs have no assured
19 way of timely obtaining NTAs for MPP-UC.

20 132. For example, ImmDef met siblings sixteen-year-old C.G.G. and
21 twelve-year-old B.G.G., in an ORR shelter. These siblings presented at the border
22 after being separated from and unable to find their mother in an MPP encampment.
23 They did not have MPP-NTA's, but believed they were scheduled for an MPP
24 hearing. Based on this information, ImmDef requested a copy of the MPP-NTA

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26 ⁷⁸ Andrew Craycroft, Immigrant Legal Resource Center, *Obtaining Office of*
27 *Refugee Resettlement Records for Clients who were Detained as Children*,
28 Immigrant Legal Resource Center (Nov. 2019), available at
https://www.ilrc.org/sites/default/files/resources/orr_records_pa_final.pdf.

1 from OPLA in order to prevent a future *in absentia* order. OPLA, however, did not
2 have the MPP-NTA and therefore could not confirm whether ERO had ever served
3 the MPP-NTA on the family. C.G.G. and B.G.G. also had not been served with a
4 TVPRA-NTA. Without either of C.G.G. and B.G.G.'s NTAs, Plaintiff-ImmDef did
5 not know when and where C.G.G. and B.G.G. entered the United States, whether
6 CGG and BGG were placed in TVPRA-removal proceedings, and whether C.G.G.
7 and B.G.G. would even be able to seek voluntary departure if they so elected.
8 Without the NTAs, ERO frustrated ImmDef's abilities to provide prompt and
9 effective counsel and advice.

10 **2. ERO's Failure to Issue and Properly Serve a TVPRA-NTA**
11 **Has Forced Plaintiffs to Expend Significant Resources to**
12 **Identify MPP-UC**

13 133. Because ERO regularly fails to issue and serve MPP-UC their TVPRA-
14 NTAs, and Plaintiffs have had no choice but to completely overhaul their screening
15 processes for UC. A pending MPP proceeding or outstanding MPP removal order
16 exposes UC to drastic consequences that create obstacles to UC ever being afforded
17 their rights under the TVPRA, including prompt release and seeking asylum. As a
18 result, Plaintiffs must now spend significant time and staff resources conducting in-
19 depth initial and follow-up interviews of every child just to determine if he or she
20 has MPP ties.

21 134. Plaintiffs have revised their UC screening processes to include new
22 interview questions and follow-up procedures to aid in determining whether a child
23 has been in MPP. To begin, Plaintiffs' routine screening interviews are now
24 significantly longer, as Plaintiffs' staff must ask additional questions designed to
25 elicit useful information from children who are young, traumatized, and often do not
26 have a full understanding of their immigration history. Because MPP-UC often
27 cannot articulate the procedural posture of their case, or even that they were in prior
28 MPP proceedings, Plaintiffs have also adopted supplemental investigatory
procedures intended to reconstruct a child's immigration history. For example,

1 Plaintiffs will screen the child’s A-number to discover a scheduled or missed
2 immigration court hearing; screen adjacent A-numbers to verify whether the child
3 was initially processed with family members; obtain contact information for parents
4 to determine their immigration history as well as the child’s; and if necessary,
5 request records from ORR or EOIR. These new intake questions and investigatory
6 processes add at minimum ten minutes to every screening, which in the aggregate
7 adds a significant burden, given the total number of screenings that Plaintiffs
8 conduct and the additional time required to train staff in these new procedures.

9 135. Conversations and collaboration with other LSPs across the country
10 have confirmed that they, like Plaintiffs, had to adopt similar supplemental
11 screening procedures to identify MPP-UC and promptly initiate defensive
12 representation to preserve their rights under the TVPRA. These new screening
13 procedures, however, are not foolproof, and LSPs are often alerted to a child’s ties
14 to MPP with little to no time to prepare the requisite defense.

15 136. In one case, Plaintiffs’ sister LSP, the Florence Immigrant and Refugee
16 Rights Project (“FIRRP”), learned through the EOIR hotline that its client was
17 subject to an MPP-removal order. Later that same day, the client’s potential sponsor
18 informed FIRRP that an ICE officer gave notice of its intent to remove the child that
19 very day. The ORR Case Manager knew that FIRRP represented the client, yet
20 neither ORR nor ICE made any effort to notify FIRRP that its client was scheduled
21 for removal that day. Even when LSPs discover an otherwise hidden MPP status
22 through their additional procedures, there is no guarantee that the information will
23 come soon enough to engage in the litigation that Defendants’ require to delay
24 removal.

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1 **B. ORR and ERO Conditioning Release and Reunification on**
 2 **Evidence of Plaintiffs’ Advocacy and Representation**

3 **1. ORR and ERO Condition the Release of MPP-UC on**
 4 **Appellate and Other Legal Action in Violation of the FSA**
 5 **and TVPRA.**

6 137. Consistent with the *Flores* Settlement Agreement, the TVPRA requires
 7 “an unaccompaniedchild in the custody of [ORR] [to]shall be promptly
 8 placed in the least restrictive setting that is the best interest in the child.”⁷⁹ 8 U.S.C.
 9 § 1232(c)(2)(A). Per these requirements, ORR, ERO, and ICE coordinate to release
 10 UC to sponsors between sixty and ninety days after the child is placed in ORR
 11 custody.⁸⁰ For MPP-UC, however, ORR, ERO, and ICE have departed significantly
 12 from their normal course, in violation of the *Flores* Settlement Agreement, the
 13 TVPRA, and their own policies and historical practice.

14 138. In an April 24, 2020, order, Judge Gee of the Central District of
 15 Californiathis District held in *Flores* that unless enforcement of an MPP-removal
 16 order is “imminent,” then ORR cannot unreasonably delay release of MPP-UC.
 17 *Jenny L. Flores, et al. v. William P. Barr, et al.*, No. CV-85-4544 DMG (AGRx),
 18 2020 WL 2758792, at *12–13 (C.D. Cal. April 24, 2020). The evidentiary record
 19 reflected “that numerous minors with a pending MPP case or removal order
 20 remain have remained in ORR care for months despite pending appeals of
 21 their initial removal orders under the MPP.” *Id.*, at *9. At that time, Defendant-
 22 ORR admitted to denying release and reunification for MPP-UC whose removal
 23 were “imminent,” without defining the term. *See id.*, at *9. ORR clarified it would
 24 not delay or deny release of UC whose MPP removal order has been ““reopened,
 25 appealed, or otherwise delayed for any other reason.”” *Id.*, at *9.

26 139. ORR’s position in *Flores* confirms that it is agency policy to prioritize

27 ⁷⁹ 8 U.S.C. § 1232(c)(2)(A).

28 ⁸⁰ This number reflects nation-wide ORR statistics. However, average release time
 may vary depending on jurisdiction, as noted by Plaintiff-ImmDef. *See supra* ¶ 88.

1 removal over release of MPP-UC in ORR custody absent evidence that the child is
2 challenging the MPP removal order. ORR has reiterated this position in writing to
3 RAICES, stating “MPP cases with final removal orders will be processed for
4 removal as per guidance from OPLA and JFRM[U], that is our standing order and
5 will be enforced on this and all future MPP cases with final orders.”

6 140. Two sibling clients of the Michigan Immigrant Resource Center
7 (“MIRC”) demonstrate Defendants’ refusal to release a child promptly, as required
8 by the TVPRA, if that child has an MPP removal order. Both siblings came into an
9 ORR shelter in MIRC’s geographic service area at the same time, but only one
10 sibling had a prior MPP removal. ORR identified a suitable sponsor for both
11 siblings but was willing to release only the sibling without an MPP removal order.
12 After four months of advocacy by MIRC, ORR, at the direction of ICE, finally
13 relented and reunified the children with their aunt as a sponsor.

14 141. Neither the *Flores* Settlement Agreement nor the TVPRA allow ORR
15 to condition a child’s release on future actions or advocacy. Nor do those
16 authorities permit ORR to pressure Plaintiffs into litigating matters for clients they
17 would not otherwise serve. ORR and ERO’s conduct have violated the relevant law,
18 caused unjust and harmful results for children, unreasonably interfered with
19 Plaintiffs’ duties to UC, and commandeered Plaintiffs into initiating representation
20 even where they otherwise would not.

21 **2. Defendant-ORR’s Conditioning of Release on Appellate and**
22 **Other Legal Action Further Burdens Plaintiffs’ Resource**
23 **Capacity**

24 142. Before MPP, Plaintiffs rarely engaged in advocacy around the release
25 of UC to sponsors, let alone represented UC who were likely to be released to
26 sponsors outside of Plaintiffs’ geographic service areas. After MPP, however,
27 Defendant-ORR’s conditioning reunification of MPP-UC on appellate and other
28 legal action has added a significant burden to LSPs across the country, including
Plaintiffs, who must now engage in time and resource-intensive advocacy to protect

1 MPP-UC’s right to be released to a sponsor without “unnecessary delay.”⁸¹ *Flores*
2 Settlement ¶ 14; *see also* 8 U.S.C. § 1232(c)(2)(B) (“... an unaccompanied minor in
3 the custody of the Secretary of Health and Human Services shall be promptly placed
4 in the least restrictive setting that is in the best interest of the of the child.”).

5 143. DHS has made clear to Plaintiffs and LSPs nationwide that
6 unaccompanied children with MPP removal orders will not be released because the
7 execution of their removal order is prioritized over their rights under the TVPRA.
8 ORR and ICE will allow release of an MPP-UC with a removal order only if
9 Plaintiffs provide some evidence that they are representing the child in the
10 underlying MPP proceeding and challenging the removal order. This strains and
11 diverts Plaintiffs’ resources by adding to their dockets UC clients who require
12 immediate defensive representation in MPP proceedings.

13 144. In early 2020, ImmDef staff identified five MPP-UC who were at risk
14 of removal. Two of those children had *in absentia* orders in their MPP-proceedings
15 for failing to appear while the other three had orders of removal not yet final.
16 Because of for the exigent circumstances that ORR imposed, none met ImmDef’s
17 standard criteria for representation of detained UC because they were awaiting
18 release to sponsors. For all five children, FOJC and ORR would not agree to release
19 the kids until and unless ImmDef showed proof of representation or legal challenge
20 in the child’s MPP proceedings. Once ImmDef initiated representation, ImmDef’s
21 staff spent hours investigating and preparing the filing and incurred nearly 100 more
22 hours in their continued litigation of some of those children’s cases. In two of the
23 cases on appeal, ImmDef attorneys and support staff logged over ninety hours
24 preparing appellate briefing and motions challenging each client’s MPP removal
25

26 ⁸¹ *Flores* Settlement Agreement, *supra* note 9, ¶ 14; *see also* 8 U.S.C.
27 § 1232(c)(2)(B) (“[A]n unaccompanied minor in the custody of the Secretary of
28 Health and Human Services shall be promptly placed in the least restrictive setting
that is in the best interest of the of the child.”).

1 order to prevent their removal and ensure their right to seek TVPRA-asylum in the
2 United States.

3 145. Even still, evidence of appellate action or legal advocacy is sometimes
4 not enough to persuade DHS and ORR to resume their normal release processes for
5 MPP-UC. For example, in email correspondence with DHS, RAICES sought
6 confirmation that DHS filed with EOIR the NTAs for three sibling MPP-UC whose
7 reunification process suddenly and without explanation stopped. DHS responded
8 that “per JFRMU guidance, these [UC]s will be removed using the existing orders.”
9 This exchange took place while the three siblings had TVPRA-asylum applications
10 pending before their local asylum office as well as application for Special Immigrant
11 Juvenile Status pending before USCIS. The need for this constant communication
12 with Defendants is itself burdensome but also often leads to more scrambling in a
13 desperate effort to protect children from being deported and deprived of all their
14 TVPRA rights, including the right to TVPRA-asylum. This also strains Plaintiffs’
15 already limited resources and burdens their ability to represent UC not encumbered
16 by MPP.

17 146. The work necessary to protect the TVPRA rights of MPP-UC is so
18 burdensome that attorneys must clear out a significant period of time to devote to
19 MPP-UC’s representation. To do so, the MPP-unaccompanied child’s attorney must
20 often find coverage for any hearings, client meetings, and other deadlines. This
21 practice is unsustainable for Plaintiffs.

22 **C. ICE Jeopardizes MPP-UC’s Right to TVPRA Protections by**
23 **Failing to Affirmatively Notify EOIR of the Child’s ORR-Custody**
24 **Status**

25 **1. ICE Allows MPP-UC to Be Ordered Removed in Absentia**

26 147. Plaintiffs and other LSPs routinely encounter MPP-UC who were
27 ordered removed *in absentia* at an MPP Court hearing that occurred *while the*
28 *children were in ORR custody*. To avoid this result, ICE need only follow its own
policies and federal regulations, which require it to provide notice of a child’s

1 change in custody status to OPLA’s local attorney, who then must notify EOIR.

2 148. By their own policies, DHS, CBP, and ICE each have several discrete
3 investigatory and reporting obligations wherein they screen individuals upon
4 apprehension or during enforcement. CBP, for example, must query immigration
5 and criminal databases to identify whether UC have previously been in removal
6 proceedings, such as MPP, and log its findings into databases shared with ICE and
7 ERO.⁸² When UC are then transferred to ORR custody, ERO-FOJC must inform
8 the OPLA, the attorneys who appear on behalf of ICE in immigration removal
9 proceedings. This triggers OPLA’s duty to notify EOIR of the change and to
10 separately move to change venue upon any changes to a respondent’s custody
11 status—for example, an MPP respondent becoming a UC in ORR custody.⁸³

12 149. Based on information and belief, ICE, through its FOJC, does not
13 timely notify OPLA when MPP-UC are placed in ORR custody, in violation of its
14 case management responsibilities. If ICE did provide this information, Plaintiffs
15 would never encounter MPP-UC with *in absentia* removal orders that were entered
16 while the child was in ORR custody. In Plaintiffs’ general experience, when OPLA
17 informs EOIR that a *pro se* child-respondent is in ORR custody, EOIR will not
18 order the child removed *in absentia* and will instead require OPLA to file a change
19 of venue.

20 150. ICE’s and ERO’s failures to follow their policy and notify OPLA when
21 a child previously in MPP is transferred to ORR custody means, for example, that a

22 _____
23 ⁸² JFRM Handbook, *supra* note 23, at 6 & n.28; *see also* U.S. Dep’t of Homeland
24 Sec., *supra* note 4 at 3 (contemplating CBP discovering an unaccompanied child
UC’s prior involvement in MPP).

25 ⁸³ *See* 8 C.F.R. § 1003.19(g) (requiring DHS to “immediately adviseof a
26 change in respondent/applicant’s custody location or of release from Service
27 custody, or subsequent taking into Service custody, of a respondent/applicant.”);
28 Off. of the Chief Immigr. J., Immigration Court *Practice Manual*, ¶ 2.2(d)(i) & (ii)
 (“DHS is obligated to notify the Immigration Court when an alien is moved between
detention facilities. . . . [DHS] is responsible for notifying the Immigration Court
when an alien is released from custody.”).

1 child detained in California is still expected to appear at a hearing scheduled in
2 Texas. A child’s failure to appear results in a removal order *in absentia*, which then
3 makes the child a “removal priority,” subject to imminent summary removal.
4 Ultimately, an unaccompanied child’s unknowing failure to appear in MPP Court
5 has the domino effect of ultimately preventing the child from accessing his or her
6 rights under the TVPRA, including the rights to prompt release, reunification, and
7 TVPRA-asylum.

8 151. The breakdown in Defendants’ normal reporting requirements means
9 that, in the context of MPP, one hand (i.e., the immigration courts presiding over
10 MPP proceedings and possibly the OPLA attorneys representing ICE in those
11 proceedings) does not know what the other (i.e., CBP, ERO, and ORR) is doing. As
12 a result, when the child invariably fails to appear, these agencies deploy a variety of
13 legal sanctions without giving the child notice or an opportunity to defend against
14 the outcome. ICE, ERO, and FOJC then compound this injury when designating the
15 child a “removal priority,” subject to imminent removal again without an
16 opportunity to exercise his or her rights under the TVPRA to seek TVPRA-asylum
17 and prompt release from custody.

18 **2. Plaintiffs Engage in Time-Consuming Litigation Against *in*** 19 ***absentia* Removal Orders**

20 152. Plaintiffs have encountered MPP-UC with *in absentia* removal orders
21 either because ICE failed to notify EOIR about the child’s designation and ORR-
22 custody status, or because the child’s family missed their hearing before the MPP
23 Ccourt. In both scenarios, MPP-UC are at risk of imminent removal unless and until
24 the child, through counsel, moves to reopen the MPP proceedings.

25 153. A motion to reopen an *in absentia* removal order is not a *pro forma*
26 filing—it is a substantive one that often requires resource-intensive briefing and
27 evidence. Because no child can be expected to prepare such a filing on their own,
28 Plaintiffs must prepare the motion or risk ERO deporting the child.

1 154. After discovering an *in absentia* order—which can be nearly
2 impossible because by definition the client was not in court when it was entered—
3 Plaintiffs must immediately assemble evidence that explains the child’s absence.

4 155. For *in absentia* orders entered against children while they are in ORR
5 custody, Plaintiffs must provide evidence proving the child was in custody at the
6 time of the hearing. This could include an NTA issued after the child’s entry and
7 designation as a UC, an I-213 reflecting the child’s UC entry, or the child’s profile
8 on ORR’s UAC Portal, which tracks the custody status of all UC. These records,
9 however, are not always at Plaintiffs’ disposal, as neither ERO nor ORR make these
10 documents readily available. Plaintiffs must consequently devote substantial staff
11 time searching for these documents or rely on the good-will of individual OPLA
12 attorneys or court personnel. Plaintiffs then must prepare the legal and factual
13 arguments for the motion, compile and attach this and any other corroborating
14 evidence, and file it with the MPP Court that entered the removal order.

15 156. For children ordered removed in absentia after their family was unable
16 to attend their MPP hearing due to circumstances beyond the child’s control,
17 Plaintiffs must show either exceptional circumstances or lack of notice.⁸⁴
18 Exceptional circumstances include “battery or extreme cruelty to the alien or any
19 child or parent of the alien, serious illness of the alien, or serious illness or death of
20 the spouse, child, or parent of the alien, but not [] less compelling circumstances.”⁸⁵
21 Lack of notice requires that the government failed to effect notice “reasonably
22 calculated to reach and inform” MPP-UC or counsel.⁸⁶

23
24
25 ⁸⁴ 8 U.S.C. § 1229a(b)(5)(C).

26 ⁸⁵ *Id.* § 1229a(e)(1); *see also Reyes v. Ashcroft*, 358 F.3d 592, 596–97 (9th Cir.
27 2004) (finding ineffective assistance of counsel an exceptional circumstance).

28 ⁸⁶ *Khan v. Ashcroft*, 374 F.3d 825, 829 (9th Cir. 2004).

1 157. Plaintiffs must gather evidence related to DHS' efforts to give the child
2 and her family notice of the MPP hearing and the circumstances surrounding the
3 child's inability to attend her MPP hearing. Especially with tender-age children,
4 Plaintiffs' ability to meet the child's burden often turns on evidence available only
5 from difficult-to-reach family members stuck in MPP encampments. Plaintiffs must
6 additionally compile compelling documentation or corroborating evidence to show
7 that the child's circumstances meet the standards for reopening.

8 158. For example, ImmDef has filed three motions to reopen *in absentia*
9 removal orders for MPP-UC. In most cases, staff attorneys learned of their clients'
10 *in absentia* orders through calling the EOIR hotline—a measure ImmDef
11 implemented to detect MPP removal orders. After discovering these orders,
12 ImmDef attorneys drafted motions to reopen based on changed circumstances,
13 insufficient notice, extraordinary circumstances, and the court's *sua sponte*
14 authority. All three motions were granted.

15 159. RAICES has filed seven motions to reopen *in absentia* removal orders
16 for MPP-UC. In each of these cases, staff attorneys learned of their clients' *in*
17 *absentia* orders through their expanded intake process. Because children often do
18 not know whether they have been placed in MPP proceedings, RAICES staff are
19 required to corroborate the child's version of events with an adult relative if they can
20 be located. Then, attorneys draft motions to reopen arguing insufficient notice,
21 exceptional circumstances, and that DHS failed to meet their burden of
22 removability, among other arguments. In total, each of these motions represented
23 forty or more hours of work.

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1 **D. DHS’s and ICE’s Continued Prosecution of MPP Against UC**
2 **Compels Plaintiffs to Represent the Child in the MPP Proceedings**
3 **and Diverts Resources Away from Representation on the Child’s**
4 **TVPRA Protection**

5 **1. DHS Treats MPP-UC as Removal Priorities**

6 160. DHS and ICE have expressly stated that they consider UC with MPP
7 removal orders to be “removal priorities,” and thus subject to immediate and
8 summary removal, without the full TVPRA-proceedings guaranteed by the
9 TVPRA.⁸⁷ This position not only subjects UC to MPP proceedings, in violation of
10 Defendants’ own express policies, but it also allows enforcement of a removal order
11 issued in proceedings not contemplated by the TVPRA. Children in MPP
12 proceedings have no benefit of counsel, cannot seek TVPRA-asylum relief, and
13 have no guarantee that their applications for relief will be reviewed under child-
14 specific standards.

15 161. Moreover, an unaccompanied child is the principal applicant on their
16 asylum claim under the TVPRA, and so their claim must be adjudicated through a
17 child-centric lens. Children do not receive this benefit in MPP proceedings. In
18 MPP, children are almost always treated as derivatives of their parents’ asylum
19 applications, even when they have their own independent asylum claims and file
20 their own asylum applications. Even in the rare cases where an MPP Court purports
21 to consider a child’s claim separate and apart from their parents, that process is void
22 of the safeguards guaranteed to children under the TVPRA and EOIR’s own
23 policies.

24 162. RAICES, in the same Doe Family case, encountered a sibling group
25 who described having been ordered removed with their family by an MPP
26 Court. RAICES obtained the removal order, but was unable to obtain a copy of the
27 record of proceedings before filing its motion to reopen. Knowing only that the

28 ⁸⁷ See 8 U.S.C. § 1232(5)(D)(i).

1 child did not recall having testified in MPP Court, RAICES moved to reopen
 2 proceedings, arguing, among other issues, that the MPP Court violated its regulatory
 3 duty to develop the record for the children’s asylum claim when it failed to take the
 4 children’s testimony. The MPP Court rejected the motion, holding, among other
 5 things, that it did develop the record, as evidenced by, (a) one of the children signing
 6 his own application, and (b) the transcript of proceedings showed that one of the
 7 children had an opportunity to develop his claim when he answered “no” to the IJ’s
 8 question, “because you are fifteen years old, is there something you would like to
 9 say that your mother has not said?”

10 163. Defendants’ summary enforcement of MPP removal orders against UC
 11 without any process directly violates the TVPRA and contravenes Congress’ intent
 12 to guarantee UC multiple opportunities to seek immigration relief under a fair and
 13 child-appropriate process.

14 164. When ICE enforces an MPP removal order against a UC, the
 15 government is effectively “removing very young children to no one.”⁸⁸ The parent
 16 or caregiver responsible for the child’s best interests is stuck in Mexico, caught in
 17 the morass of MPP. As a result, MPP children are often returned to a home country
 18 where they have no parent or caregiver. Thus, Defendants’ prioritization of MPP-
 19 UC for removal further reflects—at best—a disregard for the TVPRA’s demand for
 20 the “safe repatriation” of unaccompanied children.⁸⁹

21 **2. Plaintiffs Engage in Time-Consuming Litigation to Protect**
 22 **MPP-UC from Removal**

23 165. Because the threat of imminent and summary removal hangs over any
 24 UC with an MPP removal order, Plaintiffs, and most other LSPs, must shift their

25 ⁸⁸ Lomi Kriel, *The Trump administration is rushing deportations of migrant*
 26 *children during coronavirus*, Texas TribuneTex. Trib. (May 18, 2020),
 27 [https://www.texastribune.org/2020/05/18/trump-deportations-migrant-children-](https://www.texastribune.org/2020/05/18/trump-deportations-migrant-children-texas-coronavirus/)
 28 [texas-coronavirus/](https://www.texastribune.org/2020/05/18/trump-deportations-migrant-children-texas-coronavirus/).

⁸⁹ 8 U.S.C. § 1232(a)(1).

1 representation priorities to preventing that unlawful removal before pursuing asylum
2 and other forms of immigration relief available under the TVPRA. Because DHS
3 continues to enforce MPP removal orders against UC, Plaintiffs must do whatever
4 they can to protect these MPP-UC. Plaintiffs and their sister organizations must
5 strenuously defend against MPP removal orders and represent UC in matters beyond
6 the scope of Plaintiffs' expertise, often on an emergency and expedited basis.
7 Depending on an MPP-UC's circumstances, the representation necessary to prevent
8 the child's unlawful removal can involve moving to reopen the child's MPP
9 proceedings; moving to sever the child's proceedings from the parent's MPP
10 proceedings; and moving to change venue from the MPP Court to the immigration
11 court in the jurisdiction to which ORR has transferred the child. These are all
12 motions that Plaintiffs had no occasion to file before MPP, and consequently have
13 no expertise in preparing or filing. Plaintiffs may also need to defend the child's
14 MPP proceedings and represent MPP-UC on appeal even though Plaintiffs did not
15 represent the child before the MPP Court and do not have access to the
16 administrative record. Defendants' threats of summary deportation have even
17 forced Plaintiffs and other LSPs to seek emergency federal habeas relief as the only
18 recourse in the face of Defendants' expedited enforcement timelines.

19 166. These filings impose a significant briefing and evidentiary burden on
20 LSPs and strain their staffing and resource capacities. Moreover, Defendants'
21 actions and inactions have compounded the obstacles impairing Plaintiffs' ability to
22 provide effective representation of these children, including:

- 23 • a substantially accelerated timeframe for the child's defense, based on
24 the threat of summary removal without notice;
- 25 • Defendants' failure or refusal to share timely information about an
26 MPP -UC's immigration history, the hearing transcripts from the MPP
27 Court proceeding, and/or or the administrative record, thereby forcing
28 Plaintiffs to litigate their clients' cases without any reasonable

- 1 understanding of the merits;
- 2 • ICE-OPLA’s refusal to affirmatively file motions to change venue and
- 3 to sever an MPP-UC’s case from her parent’s MPP proceedings at the
- 4 time MPP-UC enter ORR ;
- 5 • the need for Plaintiffs to contact family members to explore extra-
- 6 record facts that may be relevant to grounds of relief, which is time-
- 7 and resource-consuming;
- 8 • the need to file such motions and briefs and, in some instances, to
- 9 appear in immigration courts outside of Plaintiffs’ own jurisdictions,
- 10 which requires Plaintiffs to expend time and resources reviewing the
- 11 rules of a foreign jurisdiction and/or consulting sister LSPs located in
- 12 that jurisdiction because local and judge-specific rules are not publicly
- 13 available; and
- 14 • the pandemic and the restrictions on in-person meetings with MPP-UC
- 15 in custody increase the time to prepare declarations.

16 167. Thus, whenever Plaintiffs encounter an MPP-UC with a removal order,

17 they must engage in time-consuming defensive litigation and brief complex and

18 often novel legal issues, often with little to no advanced notice and limited staffing

19 capacity. If they do not, UC will be removed before they can exercise their rights

20 under the TVPRA.

21 168. For example, ImmDef dedicated more than eighty hours over eleven

22 days to filing an appeal and motion to remand on behalf of J. Doe. Because J. Doe

23 was treated as a derivate to his mother’s application for relief, ImmDef had to both

24 appeal the MPP Court’s decision denying relief to his mother, and separately file a

25 motion to remand requesting J. Doe be given an opportunity to present his own case.

26 ImmDef had to reconstruct the administrative record below through interviews with

27 the child and his parents because the BIA did not timely send the administrative

28

1 record or transcript from the MPP Court.

2 169. Thus, Defendants have left Plaintiffs with no choice but to engage in
3 emergency representation of MPP-UC to prevent their summary removal.
4 Defendants' actions prevent Plaintiffs from fulfilling their contractual duty to
5 represent UC in their applications for TVPRA-asylum and other forms of
6 immigration relief pursuant to the TVPRA, and they divert Plaintiffs' time and
7 resources toward time-sensitive litigation and away from building trust with
8 traumatized clients and developing the necessary facts. Plaintiffs must divert their
9 resources and attention to filing multiple, resource-intensive, and often emergency
10 motions to prevent the imminent and unlawful removal of MPP-UC.

11 **E. ICE, ERO, and USCIS'S Failure to Guarantee MPP-UC's Right to**
12 **Seek TVPRA-asylum Creates Instability and Uncertainty for MPP-**
UC and Plaintiffs Tasked to Serve Them

13 **1. USCIS Rejects Jurisdiction Over Asylum Applications Filed**
14 **by MPP-UC With Removal Orders, and Is Silent as to How it**
Treats All Other MPP-UC

15 170. Defendants' designation of MPP-UC as "removal priorities" means no
16 MPP-UC has recourse to TVPRA's explicit guarantee of TVPRA-asylum relief.

17 171. First, by designating MPP-UC as "removal priorities," Plaintiffs must
18 quickly initiate representation to defend against an MPP-unaccompanied child's
19 summary removal. If the LSPs' defense of these MPP-UC fails, these children will
20 likely be removed without ever having the opportunity to seek TVPRA-asylum in
21 the United States, despite the TVPRA's plain language and congressional intent.

22 172. Second, since MPP was implemented, USCIS has arbitrarily and
23 capriciously rejected some MPP-UC asylum applications for lack of jurisdiction
24 while seemingly accepting others. In fact, when an ALIA Liason asked USCIS if it
25 would accept jurisdiction over a TVPRA-asylum application filed by MPP-UC,
26 USCIS in October 2020 answered that "it would depend on the circumstances of the
27 case and whether USCIS is presented with an application that it determines to have
28 been filed by a UAC."

1 173. ImmDef, for example, has had at least one asylum application for an
2 MPP-UC client with a final removal order denied for lack of jurisdiction, while
3 other MPP-UC's asylum applications who do not have a MPP final order of removal
4 remain pending with no apparent rejection. USCIS's inconsistent adjudication of
5 MPP-UC asylum applications has sown confusion and uncertainty about MPP-UC's
6 right to seek TVPRA-asylum. And when coupled with ICE and ERO's
7 demonstrated willingness to remove MPP-UC on short notice and without first
8 placing them in full TVPRA-proceedings, Defendants' effectively deny MPP-UC
9 their statutory right to multiple opportunities to seek asylum.

10 174. Defendants have provided no explanation for USCIS' uneven treatment
11 of MPP-UC asylum applications. RAICES, for example, has filed TVPRA-asylum
12 applications for some of its MPP-UC clients with final MPP removal orders. The
13 asylum office accepted some applications, which remain pending. Others were
14 rejected, including that of one sibling group, whose application was abruptly
15 rejected in October 2020 for lack of jurisdiction, citing the children's final removal
16 order.

17 175. When USCIS rejects initial jurisdiction over a child's asylum
18 application expressly because an MPP removal order controls, it violates DHS's
19 policies by "subjecting" the child to MPP. It also construes MPP as stripping
20 USCIS of its initial jurisdiction obligations under the TVPRA. This exception is
21 directly at odds not only with the TVPRA's plain text and judicial interpretation of
22 the same, but also USCIS's own practice of previously accepting jurisdiction over
23 TVPRA-asylum applications even where a child has a prior order of removal.

24 176. Compounding the lack of process, USCIS's actions in denying asylum
25 applications are final. When USCIS rejects jurisdiction over TVPRA-asylum
26 applications filed by MPP-UC, those children have no appellate recourse or other
27 administrative remedies to challenge USCIS's error.

28

1 **2. USCIS’s Actions and ERO’s Silence Interfere with Plaintiffs’**
2 **Abilities to Provide MPP-UC with Effective Counsel**

3 177. USCIS’s arbitrary and capricious treatment of MPP-UC’s asylum
4 applications, coupled with the ever-present threat of removal from ICE, leaves
5 Plaintiffs in the dark on how best to advocate for MPP-UC. Because of the finality
6 of removal, Plaintiffs have been compelled to adopt a defense-first model; the
7 TVPRA is of no use to an unaccompanied child if she has been removed before she
8 can benefit from its protections. With their limited resources, however, it is nearly
9 impossible for Plaintiffs to mount an effective defense for MPP-UC with removal
10 orders and invest the necessary staff time and resources to prepare legitimate asylum
11 applications for these children.

12 178. ICE’s and USCIS’s unlawful refusal to afford MPP-UC with the right
13 to pursue TVPRA-asylum prevents Plaintiffs from meaningfully developing an
14 attorney-client relationship and fully investigating and developing a child’s
15 applications for affirmative relief. By organizational design and as contemplated by
16 the TVPRA, Plaintiffs’ primary role is to help children access their affirmative
17 benefits under a child-sensitive timeframe. The TVPRA, for example, requires
18 USCIS to accept initial jurisdiction over a TVPRA application filed by UC before
19 their eighteenth birthday, giving Plaintiffs flexibility to decide when to prepare and
20 file applications for UC. *See M-A-C-O-*, 27 I.&N. Dec. 477 (BIA 2018). Plaintiffs
21 ordinarily use this delayed timeline to the child’s benefit by waiting until a child is
22 released to begin the fact investigation and application preparation.

23 179. On average, Plaintiffs may require anywhere between 35 to 60 hours to
24 prepare a child’s TVPRA-asylum application. However, this time is spread over
25 weeks, if not months or years, depending on how long it takes USCIS to grant an
26 interview after an application is filed. Plaintiffs prepare declarations, obtain records,
27 gather evidence, and prepare the child for the asylum office interview, among other
28 things. Because of the flexible timeframe that UC have historically had to assert

1 their TVPRA-asylum claims, each Plaintiff is able to represent hundreds of UC
2 annually.

3 180. For MPP-UC, Plaintiffs must dedicate sometimes hundreds of hours
4 defending against the lingering effects of the MPP proceedings before they can even
5 consider preparing the robust asylum claim they ordinarily would for other UC. In
6 some instances, Plaintiffs may even have to forestall preparation of the asylum
7 claim until they can thwart the possibility of MPP-UC's imminent removal.

8 181. Defendants' departure from their published policies and long-standing
9 practices have caused divergent strategies among LSPs, including Plaintiffs, as they
10 seek to secure for their MPP-UC clients the statutory protections to which they are
11 entitled.

12 182. When ImmDef began encountering MPP-UC in ORR-custody, ImmDef
13 quickly realized that it would not be sustainable or practical to initiate representation
14 for all children, especially those who might not be released outside of ImmDef's
15 geographic service area. To offset the burden, ImmDef reached out to its local
16 OPLA-attorney to ascertain whether OPLA could take affirmative action. OPLA
17 agreed and has since successfully filed motions to sever and change venue in the
18 child's MPP proceedings which in turn has helped ImmDef.

19 183. As a result, ImmDef modified its policy to automatically initiate
20 representation only for MPP-UC with removal orders, given their imminent risk of
21 removal. Within a short period of meeting an unaccompanied child with MPP ties,
22 ImmDef enters its appearances and begins preparing a child's motion to reopen or
23 remand and any BIA briefing. To that end, ImmDef must obtain statements from
24 family and monitor the child's release status and court hearings on a daily basis. To
25 complete this labor-intensive work within Defendants' strict timeline, ImmDef's
26 attorneys and support staff must drop everything, focus on the MPP unaccompanied
27 child's case, and deprioritize all other UC clients who need their services. And
28 during all this, ImmDef cannot begin preparing the child's TVPRA-asylum claim.

1 ImmDef’s CRP attorneys carry a fifty-to-seventy-client caseload. They and the
2 program at large do not have the time, resources, or personal capacity to devote long
3 stretches of time to one single client.

4 184. RAICES, for its part, has been forced to compromise its commitment to
5 trauma-sensitive practices because of the twin pressures created by USCIS and
6 ICE/ERO policies. Before MPP, RAICES waited until UC were released to
7 sponsors to begin building their asylum claims over several meetings. Released
8 children are surrounded by support systems and can better handle the difficult,
9 sometimes painful discussions that attorneys must have with clients to develop their
10 asylum claims. For MPP-UC, however, RAICES attorneys do not have the benefit
11 of waiting to complete a child’s TVPRA-asylum application under their normal
12 timeline.

13 185. USCIS’s inconsistent adjudication of MPP-UC asylum applications—
14 as well as ICE’s and ERO’s unpredictable enforcement of MPP removal orders—
15 means that Plaintiffs are always on the back foot. Unable to predict what will
16 happen to their clients, Plaintiffs struggle to effectively represent MPP-UC and seek
17 for them the full panoply of immigration relief that the TVPRA provides.

18 **V. PLAINTIFFS WILL CONTINUE TO DIVERT RESOURCES AND**
19 **TAKE DRASTIC MEASURES TO ENSURE DEFENDANTS DO NOT**
20 **THWART TVPRA RIGHTS FOR MPP-UC.**

21 186. Defendants’ failure to comply with the TVPRA and their own policies
22 and past practice has forced Plaintiffs to undertake extraordinary efforts to
23 effectively represent MPP-UC in a manner that allows the children to access their
24 TVPRA rights. Defendants’ acts and omissions deprive MPP-UC of the opportunity
25 to seek asylum, obtain prompt release from federal custody and placement with
26 sponsors, and receive due process prior to removal to countries where they may face
27 danger and trauma.

28 187. Although DHS announced that unaccompanied children are not
“amenable to MPP” and would not be “subject to MPP,” DHS’s ongoing

1 prosecution of MPP proceedings against an unaccompanied child makes clear that
2 neither this policy nor the TVPRA is being enforced. Defendants have shown that
3 they can and will enforce MPP proceedings against MPP-UC without providing the
4 child any TVPRA protections. As such, Plaintiffs must go to extraordinary lengths
5 to defend a child's MPP proceedings while simultaneously exploring all avenues to
6 preserve a child's rights under the TVPRA.

7 188. Defendants' actions are unprecedented. Prior to MPP, Plaintiffs never
8 bore responsibility as part of their LSP obligations to represent children in
9 immigration proceedings initiated before the child was apprehended and designated
10 as an unaccompanied child. Defendants' actions have therefore driven Plaintiffs to
11 engage in litigation outside of their normal areas of expertise and significantly
12 burdened their already-stretched staff capacity and resources.

13 189. To grapple with the needs of MPP-UC, Plaintiffs must divert critical
14 resources away from other cases and clients because representation of an MPP
15 unaccompanied child requires far more time and resources to litigate. The addition
16 of even one new MPP-UC case can require an exorbitant amount of time and
17 resources depending on the case's procedural posture and the complexity of the
18 issues involved.

19 190. ImmDef may devote anywhere between twenty-two and eighty-one
20 hours representing MPP-UC in just one action to satisfy Defendants' demands. For
21 example, over just six days in July 2020, ImmDef spent more than sixty-two hours
22 researching Fifth Circuit authority to draft 12-year-old A. Doe's brief on appeal
23 from an MPP removal order. ImmDef identified A. Doe's MPP ties during intake
24 on January 23, 2020, and learned his brief on appeal was due July 6, 2020. The BIA
25 did not respond to ImmDef's requests for production of the record below or a
26 briefing extension, so ImmDef had no option but to set aside most all other cases
27 and devote more than sixty hours over six days to preserve A. Doe's rights on
28 appeal and defend against an MPP removal order. ImmDef had to separately

1 prepare a 133-page motion to remand to argue for A. Doe’s rights under the
2 TVPRA.

3 191. To represent MPP-UC, ImmDef has had to divert resources away from
4 filing TVPRA-asylum applications and other forms of immigration relief for its
5 other UC clients. ImmDef has also had to abandon advocacy on other
6 unaccompanied children’s related matters because of the time and resources
7 required to serve MPP-UC clients.

8 192. RAICES, likewise, has suffered increased burdens because of the
9 dilemmas and uncertainties created from Defendants disparate and inconsistent
10 treatment of MPP-UC. One case required a total of four attorneys and four legal
11 assistants to prevent the removal of two MPP-UC. In less than two days, the team
12 prepared declarations and state court documents for two of the children while
13 preparing I-360 packets as well. The Litigation Department then filed a mandamus
14 petition and a request for a temporary restraining order in federal court to prevent
15 removal of the children.

16 193. Similar to ImmDef, RAICES has also had to reallocate existing staff
17 and pull them from their previous roles so they could work on MPP-UC cases. In
18 most instances, because of the emergency nature of the work, RAICES cannot
19 complete the work required on an MPP unaccompanied child’s case without
20 requiring its staff to work longer hours.

21 194. Plaintiffs’ breakneck efforts to protect MPP-UC clients frustrates their
22 representation of other vulnerable children. Every time a Plaintiff organization has
23 no option but to drop everything to assemble a motion to reopen or investigate a
24 client’s MPP ties, dozens of other unaccompanied children’s TVPRA-asylum
25 applications or SIJS filings must be put on hold. And the impact has stretched far
26 beyond individual cases. Plaintiffs’ need to retool their practices to represent MPP-
27 UC prevents them from focusing the same type of energy on other initiatives to
28 benefit UC, such as strategic litigation. If Defendants did not disregard MPP-UC

1 rights under the Due Process Clause of the Fifth Amendment, the INA, and the
2 TVPRA, then Plaintiffs would not be forced to turn their backs on their other non-
3 MPP UC clients in order to devote hundreds of hours to secure MPP-UC the bare
4 minimum of protections.

5 **FIRST CLAIM FOR RELIEF**

6 **Violation of Procedural Due Process Clause of the**
7 **Fifth Amendment to the U.S. Constitution**

8 **(All Plaintiffs Against All Defendants)**

9 195. Plaintiffs reallege and incorporate the allegations of all the preceding
10 paragraphs.

11 196. This claim is brought by Plaintiffs, ImmDef and RAICES, on behalf of
12 themselves.

13 197. The Procedural Due Process clause of the Fifth Amendment provides
14 that the government shall not “deprive any person of life, liberty, or property
15 without due process of law.” U.S. Const. amend V.

16 198. By virtue of their placement in ORR custody, MPP-UC are UC entitled
17 to the protections of the TVPRA. MPP-UC therefore have a protected property
18 interest in their statutory entitlements under the TVPRA. The TVPRA expressly
19 grants robust rights to UC and directs both DHS and DHHS to establish procedures
20 to provide and protect those rights.

21 199. The TVPRA expressly provides UC *inter alia*, (1) the right to prompt
22 placement in the least restrictive setting; (2) the right to seek asylum through a non-
23 adversarial process before a USCIS asylum officer (“TVPRA-asylum”); (3) the right
24 to have USCIS exercise initial jurisdiction over the child’s TVPRA-asylum
25 applications rather than the immigration court; and (4) waiver of the one-year filing
26 requirement for children under the age of eighteen. *See* 8 U.S.C. §§ 1158(a)(2)(E),
27 (b)(3)(C), 1232(a)(5)(D), (c)(2), (d)(8).
28

1 200. MPP-UC also have a separate and distinct fundamental liberty interest
2 in their continued presence in the United States and in not being removed without
3 due process.

4 201. Defendants have failed to provide any safeguards to protect MPP-UC's
5 ability to access their rights under the TVPRA. Defendants' failure to afford MPP-
6 UC due process exposes MPP-UC to summary removal. ICE's failure to
7 affirmatively notify EOIR that a child, who was previously an MPP-respondent, is
8 now designated as an unaccompanied child and in the custody of ORR, subjects that
9 child to imminent risk of removal and deprivation of the child's TVPRA rights.
10 ERO withholds from both MPP-UC and Plaintiffs, who are tasked to serve them,
11 basic, critical information about an MPP-unaccompanied child's prior MPP
12 proceedings. DHS subjects MPP-UC to the forthcoming or continued effects of
13 their MPP proceedings by aggressively opposing Plaintiffs' efforts to defend their
14 MPP-UC clients in their immigration proceedings. These include but are not limited
15 to moving to sever MPP-UC from their MPP proceedings, moving to change venue
16 from MPP Court to the appropriate Immigration Court, seeking reversal and remand
17 from the BIA, and moving for the MPP Court to reopen MPP proceedings so MPP-
18 UC may seek the full array of benefits available to them under the TVPRA.

19 202. Plaintiffs and their sister organizations are the first and only line of
20 defense for UC subject to MPP. As a result, Plaintiffs have had to develop policies
21 and procedures to safeguard MPP-UC from often imminent risk of summary
22 removal based on their MPP proceedings and to prevent DHS, ICE, ERO, USCIS,
23 and ORR from denying MPP-UC their rights under the TVPRA. Defendants have
24 therefore caused and continue to cause Plaintiffs to divert organizational resources
25 to protect MPP-UC from Defendants' unlawful policies and have frustrated and
26 continue to frustrate Plaintiffs' organizational missions.

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SECOND CLAIM FOR RELIEF

Violation of Administrative Procedure Act, 5 U.S.C. § 706(1)

**Failure to Act as Required Under TVPRA
8 U.S.C. §§ 1158(a)(2)(E), (b)(3)(C),
1232(a)(5)(D), (c)(2)(A), (d)(8).**

(All Plaintiffs Against All Defendants)

203. Plaintiffs reallege and incorporate the allegations of all the preceding paragraphs.

204. The Court shall “compel agency action unlawfully withheld or unreasonably delayed” 5 U.S.C. § 706(1). Agency action is unlawfully withheld or unreasonably delayed if “an agency failed to take a discrete agency action that it is required to take.” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (emphasis omitted).

205. Defendants continually fail to take three discrete, nondiscretionary actions mandated by the TVPRA upon a child’s UC designation.

206. *First*, ICE and ERO fail to issue and serve a legally sufficient TVPRA-NTA on MPP-UC after a child is designated UC but before she is transferred to ORR custody. The failure to issue and serve a NTA deprives the child, Plaintiffs, and all other LSPs serving UC with crucial information necessary to pursue immigration relief and exercise the child’s rights under the TVPRA.

207. *Second*, USCIS has failed to exercise jurisdiction over affirmative asylum applications filed by UC. Under the TVPRA, UC are entitled to seek asylum affirmatively before the USCIS asylum office. 8 U.S.C. § 1158(b)(3)(C) (“[a]n asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien”) (emphasis added). The TVPRA further provides that the USCIS asylum process “*shall* be governed by regulations which take into account the specialized needs” of UC. 8 U.S.C. § 1232(d)(8) (emphasis added). UC

1 are entitled to seek TVPRA-asylum any time before their eighteenth birthday. *See* 8
2 U.S.C. § 1158(a)(2)(E). By subjecting UC to MPP, Defendants are violating their
3 own express policies and preventing MPP-UC from exercising their statutory right
4 to seek TVPRA-asylum under USCIS’s jurisdiction, in violation of the TVPRA.

5 208. *Third*, ERO and ORR have failed to promptly place UC in the least
6 restrictive settings that are in the best interest of the child. The TVPRA provides
7 that UC “*shall* be promptly placed in the least restrictive setting that is in the best
8 interest of the child.” 8 U.S.C. § 1232(c)(2)(A) (emphasis added). The *Flores*
9 Settlement Agreement also requires defendants to release unaccompanied children
10 from ORR custody “without unnecessary delay” and undertake “prompt and
11 continuous efforts . . . toward family reunification.” *Flores* Settlement Agreement
12 ¶¶ 11, 14, 16. Defendants have disregarded these requirements and instead
13 conditioned the release of UC on advocacy and representation by counsel in the
14 child’s MPP proceedings—which proceedings have nothing to do with the TVPRA.

15 209. Rather than taking these statutorily required action, Defendants
16 continue to deny UCs their TVPRA rights.

17 210. Defendants’ failure to act is final agency action that is reviewable under
18 5 U.S.C. §§ 702 and 706.

19 211. Defendants’ violation of the APA causes ongoing harm to Plaintiffs
20 who must divert organizational resources to protect UC clients’ rights under the
21 TVPRA and *Flores* Settlement Agreement.

22 212. Plaintiffs have no adequate alternative remedy at law and accordingly
23 seek a court order under 5 U.S.C. § 706(1) compelling Defendants to take actions
24 required by the TVPRA.

THIRD CLAIM FOR RELIEF

Violation of Administrative Procedure Act, 5 U.S.C. § 706(2)

Failure to Implement Policies in Violation of TVPRA

**8 U.S.C. §§ 1158(a)(2)(E), (b)(3)(C),
1232(a)(5)(D), 1232(c)(2)(A), 1232(d)(8)**

(Against All Defendants)

213. Plaintiffs reallege and incorporate the allegations of all the preceding paragraphs.

214. Defendants' actions are arbitrary and capricious or otherwise not in accordance with law when they disregard the requirements of the TVPRA by failing to enact or enforce policies assuring access to TVPRA rights for MPP-UC. 5 U.S.C. §§ 706(2)(A).

215. The TVPRA directs Defendants to effectuate the rights of UC through UC-specific policies and procedures. *See generally* 8 U.S.C. § 1232. Accordingly, Defendants developed policies that govern their treatment of UC. CBP, for example, implemented special screening and processing protocols for children who enter the United States unaccompanied; ICE accepted case management responsibility over UC's immigration cases; ORR established processes to ensure UC are promptly released to suitable sponsors; and USCIS adopted child-sensitive standards and implemented trauma-informed interviewing techniques for UC's TVPRA-asylum applications.⁹⁰

216. But where UC have prior ties to MPP, Defendants abandon their policies and longstanding practices that ensure a child's access to TVPRA protections. Defendants subject UC to their MPP proceedings and have no cohesive approach toward Plaintiffs' attempts to defend MPP-UC from the effects of their MPP proceedings, seek TVPRA-asylum on behalf of MPP-UC, and secure the

⁹⁰ *See generally* JFRM Handbook, *supra* note 23; Off. Of Refugee Resettlement, *supra* note 35.

1 prompt release of MPP-UC from ORR custody. *See Motor Vehicle Mfrs. Ass'n of*
2 *U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). (action is
3 arbitrary and capricious where the agency “entirely failed to consider an important
4 aspect of the problem”).

5 217. Defendants’ actions disregard the requirements of the TVPRA and are
6 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
7 law” in violation of the APA. 5 U.S.C. § 706(2)(A).

8 218. Defendants’ failure to implement any policy or procedure to afford UC
9 access to TVPRA rights is final agency action that is reviewable under 5 U.S.C.
10 §§ 702 and 706.

11 219. Defendants’ violation of the APA causes ongoing harm to Plaintiffs
12 who must divert organizational resources to protect UC clients’ rights under the
13 TVPRA and *Flores* Settlement Agreement.

14 220. Plaintiffs have no adequate alternative remedy at law and accordingly
15 seek review and injunctive relief under 5 U.S.C. § 706(2).

16 **FOURTH CLAIM FOR RELIEF**

17 **Violation of MPP Policies; *Accardi* Doctrine and Administrative Procedure**
18 **Act—5 U.S.C. § 706(2) By Relying On MPP Proceeding to Deny UCs TVPRA**
19 **Protections**

20 **(Against All Defendants)**

21 221. Plaintiffs reallege and incorporate the allegations of all the preceding
22 paragraphs.

23 222. Defendants’ use of UC’s prior involvement in MPP proceedings to
24 deny them their rights under the TVPRA contravenes their own policies in violation
25 of the *Accardi* principal and the APA. *United States ex rel. Accardi v. Shaughnessy*,
26 347 U.S. 260 (1954) (ruling that administrative agencies are obliged to follow their
27 own regulations); 5 U.S.C. § 706(2)(A).

28 223. Defendants continue to subject UC to the processes and outcomes of

1 MPP hearings that began before their entry and designation as UC. This treatment
 2 violates agency policy and procedures, including but not limited to DHS’s January
 3 24, 2019, Migrant Protection Protocols Policy, which unequivocally states that
 4 “[u]naccompanied alien children . . . will not be subject to MPP”;⁹¹ CBP’s January
 5 28, 2019 MPP Guiding Principles, which unequivocally states that
 6 “[u]naccompanied alien children” are included in the categories of individuals “not
 7 amenable to MPP”;⁹² and ICE’s February 12, 2019 Memorandum, which
 8 unequivocally states “DHS will not use the INA section 235(b)(2)(C) process in the
 9 cases of unaccompanied alien children.”⁹³ Indeed, as recently as December 7, 2020,
 10 DHS repeated its unequivocal exclusion of unaccompanied children from MPP in its
 11 Supplemental Policy Guidance: “UACs are not amendable to MPP.”⁹⁴

12 224. Defendants have provided no reasoned explanation for violating the
 13 TVPRA, or their own policies. *See FCC v. Fox Television Stations, Inc.*, 556 U.S.
 14 502, 515 (2009) (affirming that agencies must provide “reasoned explanation” for
 15 action and may not “depart from a prior policy *sub silentio* or simply disregard rules

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 17 ⁹¹ U.S. Dep’t of Homeland Sec., Migrant Protection Protocols (January 24, 2019),
 18 <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> (emphasis
 added).

19 ⁹² U.S. Customs and Border Prot., MPP Guiding Principles 1 (Jan. 28, 2019),
 20 [https://www.cbp.gov/sites/default/files/assets/documents/2019-
 Jan/MPP%20Guiding%20Principles%201-28-19.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf).

21 ⁹³ U.S. Immigration and Customs Enf’t, Implementation of the Migrant Protection
 22 Protocols, Memorandum from the Deputy Director of the U.S. Immigration and
 Customs Enforcement to Executive Associate Directors 1 (February 12, 2019),
 23 [https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy-
 Memorandum-11088-1.pdf](https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy-Memorandum-11088-1.pdf) (“DHS will not use the INA section 235(b)(2)(C)
 process in the cases of unaccompanied alien children”).

24 ⁹⁴ U.S. Dep’t of Homeland Sec., Supplemental Policy Guidance for Additional
 25 Improvement of the Migrant Protection Protocols (Dec. 7, 2020),
 26 [https://www.dhs.gov/sites/default/files/publications/supplemental_policy_guidance.
 pdf](https://www.dhs.gov/sites/default/files/publications/supplemental_policy_guidance.pdf) (emphasis added); *see also* U.S. Dep’t of Homeland Sec., Migrant Protection
 27 Protocols (last published December 15, 2020), [https://www.dhs.gov/migrant-
 protection-protocols](https://www.dhs.gov/migrant-protection-protocols) (noting that UC are not amendable to MPP); U.S. Customs and
 28 Border Prot., Migrant Protection Protocols FY2021,
<https://www.cbp.gov/newsroom/stats/migrant-protection-protocols>.

1 that are still on the books”). Their actions therefore violate *Accardi* and are
2 arbitrary and capricious under 5 U.S.C. § 706(2).

3 225. Defendants’ failure to comply with their own policies and procedures is
4 final agency action that is reviewable under 5 U.S.C. §§ 702 and 706.

5 226. Defendants’ actions cause ongoing harm to Plaintiffs who must divert
6 organizational resources to protect UC clients’ rights under the TVPRA.

7 227. Plaintiffs have no adequate alternative remedy at law and accordingly
8 seek review and injunctive relief under 5 U.S.C. § 706(2).

9 **FIFTH CLAIM FOR RELIEF**

10 **Administrative Procedure Act, 5 U.S.C. § 706(2)(A)**

11 **Conditioning Access to the TVPRA in Violation of TVPRA, 8 U.S.C. §§ 1158,**
12 **1229a(b)(4), 1362**

13 **(Against All Defendants)**

14 228. Plaintiffs reallege and incorporate the allegations of all the preceding
15 paragraphs.

16 229. The APA provides that courts “shall . . . hold unlawful and set aside
17 agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not
18 in accordance with law . . . ; [or] in excess of statutory jurisdiction, authority, or
19 limitations, or short of statutory right.” 5 U.S.C. §§ 706(2)(A), (C).

20 230. Defendants’ practice of requiring MPP-UC provide proof of legal
21 challenge or representation of their MPP removal orders interferes with Plaintiffs’
22 ability to deliver access to counsel on TVPRA-related benefits as contemplated by
23 the TVPRA. 8 U.S.C. §§ 1158, 1229a(b)(4), 1362. Defendants’ actions are
24 therefore not in accordance with law and in excess of their statutorily prescribed
25 authority in violation of §706(2) of the APA.

26 231. Defendants’ actions are arbitrary and capricious because, in adopting
27 its policies of conditioning a MPP-unaccompanied child’s release from ORR-
28 custody on proof of legal representation or challenge of their MPP removal order,

1 Defendants failed to consider the obstacles that Plaintiffs would face.

2 232. Defendants' practice constitutes final agency actions that are
3 reviewable under 5 U.S.C §§702 and 706.

4 233. Defendants' violation of the APA causes ongoing and imminent harm
5 to Plaintiffs who must divert organizational resources to litigate a child's MPP
6 proceeding in order to protect MPP-UC clients' rights under the TVPRA. By
7 forcing Plaintiffs to enter into representation of clients they otherwise would not
8 service and file emergency appellate action and motions to protect MPP-UC from
9 deportation, Defendants have frustrated Plaintiffs' core missions, impaired their
10 efforts, and forced them to divert substantial resources away from existing
11 programs.

12 234. Plaintiffs have no adequate remedy at law and therefore seek
13 immediate review under the APA and injunctive relief.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiffs ImmDef and RAICES respectfully request that this Court:

- 16 a. Assume jurisdiction of this matter;
- 17 b. Issue a judgement declaring that Defendants are in violation of the
18 following:
- 19 i. The Due Process Clause of the Fifth Amendment;
- 20 ii. The William Wilberforce Trafficking Victims Protection
21 Reauthorization Act of 2008, 8 U.S.C. § 1232;
- 22 iii. The Immigration and Nationality Act, based on Defendants' violations
23 of 8 U.S.C. §§ 1129a, 1158 and 1362;
- 24 iv. The Flores Settlement Agreement;
- 25 v. Section 706(1) of the Administrative Procedure Act, based on
26 Defendants' unlawful withholding of actions required by the TVPRA,
27 including 8 U.S.C. §§ 1232(c)(2)(A) and 1158(b)(3)(C), and by the
28 *Flores* Settlement Agreement; and

- 1 vi. Section 706(2) of the Administrative Procedure Act.
- 2 c. Issue injunctive relief requiring Defendants to comply with the laws
- 3 and regulations cited above;
- 4 d. Issue injunctive relief prohibiting Defendants and any of their officers,
- 5 agents, successors, employees, representatives, and any and all persons acting in
- 6 concert with them or on their behalf, from engaging in the unlawful policies,
- 7 practices, acts, and omissions described herein;
- 8 e. Issue injunctive relief requiring Defendant to prospectively implement
- 9 procedures to ensure all UC have access to the full protections of the TVPRA,
- 10 regardless of prior placement in MPP proceedings;
- 11 f. Issue injunctive relief requiring Defendants to provide new avenues to
- 12 access TVPRA protections for MPP-UC previously denied those rights;
- 13 g. Award Plaintiffs their reasonable attorneys' fees, costs, and other
- 14 expenses pursuant to 28 U.S.C. § 2412 and other applicable law; and
- 15 h. Grant any and all such other relief as the Court deems just and
- 16 equitable.

17 Dated: January 14, 2021

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