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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

IMMIGRANT DEFENDERS LAW CENTER, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

No. 2:21-cv-00395 FMO (RAOx)

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Hearing Date: June 17, 2021
Hearing Time: 10:00 a.m.
Ctrm: 6D
Hon. Fernando M. Olguin

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

PLEASE TAKE NOTICE that, on June 17, 2021, at 10:00 a.m., or as soon thereafter as they may be heard, Defendants will, and hereby do, move this Court for an order dismissing Plaintiffs' First Amended Complaint. This motion will be made in the First Street Federal Courthouse before the Honorable Fernando M. Olguin, United States District Judge, located at 350 W. 1st Street, Los Angeles, CA 90012.

Defendants brings this motion to dismiss Plaintiffs' First Amended Complaint on the grounds that Plaintiffs lack standing to pursue their claims, this Court lacks jurisdiction over Plaintiffs' claims, and Plaintiffs have failed to state claims for relief against any of the Defendants.

This motion is made upon this Notice, the attached Memorandum of Points and Authorities, and all pleadings, records, and other documents on file with the Court in this action, and upon such oral argument as may be presented at the hearing of this motion.

This motion is made following the conference of counsel pursuant to Local Rule 7-3 which was held on April 28, 2021.

Dated: May 13, 2021

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On February 12, 2021, Plaintiffs Immigrant Defenders Law Center ("ImmDef"), Refugee And Immigrant Center For Education And Legal Services ("RAICES"); South Texas Pro Bono Asylum Representation Project ("ProBar"), and The Door, all legal service providers, filed a First Amended Complaint ("FAC") for declarative and injunctive relief alleging the following claims for relief:

(1) Violation of Procedural Due Process Clause of the Fifth Amendment;

(2) Violation of Administrative Procedures Act ("APA"), 5 U.S.C. § 706(1), Failure to Act Under TVPRA, 8 U.S.C. §§ 1158(a)(2)(E), (b)(3)(C), 1232(a)(5)(D), (c)(2)(A), (d)(8);

(3) Violation of APA, 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);

(4) Violation of MPP Policies; *Accardi* Doctrine and APA—5 U.S.C. § 706(2) By Relying on MPP Proceeding to Deny UC TVPRA Protections; and

(5) APA, 5 U.S.C. § 706(2)(A) Conditioning Access to the TVPRA in Violation of TVPRA, 8 U.S.C. §§ 1158, 1229a(b)(4), 1362.

The allegations in the FAC concern unaccompanied noncitizen children ("UC") who previously entered the United States with their families, were placed into removal proceedings with their families, were sent to Mexico pursuant to the Migrant Protection Protocols, and who then returned to the United States unaccompanied. (*See* FAC at ¶¶ 5, 116-117.) Plaintiffs' FAC is subject to dismissal for the reasons set forth herein.

II. FACTUAL AND LEGAL BACKGROUND

A. Migrant Protection Protocols

On January 20, 2021, Defendant U.S. Department of Homeland Security ("DHS") announced the suspension of new enrollments in the Migrant Protection Protocols

("MPP"), effective January 21, 2021.[1] On February 11, 2021, DHS announced that, beginning on February 19, 2021, it would begin "phase one of a program to restore safe and orderly processing at the southwest border. DHS will begin processing people who had been forced to 'remain in Mexico' under the Migrant Protection Protocols (MPP)."[2] The announcement explained that "[t]his new process applies to individuals who were returned to Mexico under the MPP program and have cases pending before the Executive Office for Immigration Review (EOIR)," but does not apply to (a) individuals outside the United States "who were not returned to Mexico under MPP," (b) individuals outside the United States "who do not have active immigration court cases," and (c) individuals "in the United States with active MPP cases." *Id.* "To date, DHS—in coordination with interagency and international organization partners as well as the Government of Mexico—has processed over 10,000 migrants subject to MPP into the United States at six ports of entry along the Southwest Border while comporting with public health guidance regarding COVID-19."[3]

B. TVPRA

In 2008, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"). *See* Pub L. No. 110-457 § 235(d), 122 Stat. 5044 (2008). Included in the provisions enacted by the TVPRA are the following subsections, identified in the FAC as at issue by Plaintiffs:

- 8 U.S.C. § 1158(a)(2)(E) (making inapplicable certain provisions concerning asylum to UC);

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[1] Press Release, U.S. Dep't of Homeland Security, DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), available at https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program (last accessed May 13, 2021).

[2] Press Release, U.S. Dep't of Homeland Security, DHS Announces Process to Address Individuals in Mexico with Active MPP Cases (Feb. 11, 2021), available at https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases (last accessed May 13, 2021).

[3] Testimony of Alejandro N. Mayorkas, Secretary of Homeland Security, May 13, 2021, available at https://www.hsgac.senate.gov/hearings/dhs-actions-to-address-unaccompanied-minors-at-the-southern-border (last accessed May 13, 2021).

- 8 U.S.C. § 1158(b)(3)(C) (providing that asylum officers shall have initial jurisdiction over asylum applications filed by UC);
- 8 U.S.C. § 1232(a)(5)(D) (UC from noncontiguous countries who DHS seeks to remove must be placed in removal proceedings, are eligible for voluntary departure at no cost, and are provided with access to counsel);
- 8 U.S.C. § 1232(c)(2)(A) (UC are to be promptly placed in the least restrictive setting that is in the best interest of the child); and
- 8 U.S.C. § 1232(d)(8) (asylum applications and other relief from removal by UC governed by regulations taking into account specialized needs of UC).

C. Access to Counsel

In 1952, Congress enacted 8 U.S.C. § 1362 as part of the Immigration and Nationality Act ("INA"), which provides that in removal proceedings before an immigration judge and appeals therefrom, noncitizens have the privilege of being represented, at no expense to the Government, by counsel. *See* P.L. 82-414, 66 Stat. 163, 235.

In 1996, Congress enacted the following statutes:

- 8 U.S.C. § 1158(d)(4), which provides that when noncitizens file applications for asylum, they are to be advised of the privilege of being represented by counsel and provided a list of persons who have indicated their availability to represent noncitizens in asylum proceedings on a pro bono basis;
- 8 U.S.C. § 1229a(b)(4)(A), which provides in removal proceedings noncitizens with the privilege of being represented, at no expense to the Government, by counsel of their choosing.

See P.L. 104-208, 110 Stat. 3009.

III. ARGUMENT

A. Plaintiffs Lack Standing to Pursue Their Claims

To have standing, Plaintiffs "must allege personal injury fairly traceable to a defendant's allegedly unlawful conduct and likely to be redressed by the requested

relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). "[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Ests, Inc.*, 137 S. Ct. 1645, 1650 (2017). When an organization seeks to sue on its own behalf, it must establish standing in the same manner as a private individual. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

1. Plaintiffs Lack Article III Standing

An organization may assert standing on its own behalf without invoking the rights of third-party individuals. *See East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 662 (9th Cir. 2021) ("*EBSC III*"). But to do so, it must show that a defendant's behavior has "frustrated its mission and caused it to divert resources in response to that frustration of purpose." *Id.* at 663 (citing *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)). An organizational plaintiff must also show it has been "perceptibly impaired" in its ability to perform its services to prevail on its burden to prove standing. *Id*. Organizations cannot "manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *Id.* (citing *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010)).

In *EBSC III*, the Ninth Circuit found that two organizations, whose missions to assist noncitizens seeking asylum were directly affected by Government action, had established concrete, redressable harms that they could challenge, including that their funding was jeopardized by that action. *Id.* at 663-64. Here, Plaintiffs are legal service organizations who utilize hundreds of lawyers to provide broad legal services to thousands of noncitizens. (FAC at ¶¶ 17-42.) In the FAC, Plaintiffs assert that they "must now divert their organizational resources to protect MPP-UC's TVPRA rights from evisceration." (FAC at ¶ 10.) But other than this conclusory assertion, the FAC does not adequately allege that Plaintiffs have been *forced* to divert resources or that any Government actions have jeopardized their client base or funding, as in *EBSC III*.

Prior to the implementation of MPP, Plaintiffs ImmDef, RAICES, and ProBAR

"rarely engaged in advocacy around the release of UC to sponsors, let alone represented UC who were likely to be released to sponsors outside of Plaintiffs' geographic service areas." (FAC at ¶ 159.) Yet Plaintiffs allege that they have standing here because representing "even one MPP-unaccompanied child means having to put on hold the needs of other children who need Plaintiffs' services." (FAC at ¶ 11, *see also* FAC at ¶¶ 150-151, 281, 225.) But by their own factual allegations, Plaintiffs' asserted injuries are only based on their chosen desire to provide a form of assistance to UC that they were not providing prior to MPP, and not out of necessity to prevent harm to their organizations or their missions. *See, e.g.*, FAC at ¶ 219 (describing the amount of time spent by ImmDef in handling appellate briefing under Fifth Circuit authority after never having prepared such briefing before). Plaintiff ImmDef alleges, for example, that with respect to its representation of *five* MPP-UC, none of them met ImmDef's "standard criteria for representation." (FAC at ¶ 161.) Yet the decision to represent these UC was a choice made by ImmDef, and not something it was "forced" to do in a manner that would afford it standing as to the claims it brings in the FAC.

In effect, Plaintiffs argue that they must spend more time and resources to litigate on behalf of their clients. (*See, e.g.* FAC at ¶ 218.) But if such "injuries" could confer standing, then any legal services or advocacy organization could sue in federal court whenever there is a change in the law, simply by alleging that the organization must get up to speed on the impact of the change. Such impacts on legal representation do not satisfy Article III. *See, e.g.*, *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015); *see also Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) ("The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization."). Therefore, Plaintiffs' allegations are insufficient to demonstrate that any Government actions impaired their ability to provide services by inhibiting their daily operations. *See, e.g.*, *Turlock Irr. Dist. v. F.E.R.C.*, 786 F.3d 18, 24 (D.C. Cir. 2015); *People for the Ethical Treatment of*

Animals v. U.S. Dep't of Agric., 797 F.3d 1087, 1094 (D.C. Cir. 2015).

2. Plaintiffs' APA Claims Fail Because They Are Outside the Zone of Interests for the Asserted Statutory Provisions

Courts generally require that plaintiffs fall within the "zone of interests" protected by a statute in question to bring their claims in federal court. *EBSC III*, 993 F.3d at 667 (citing *Lexmark Int'l, Inc., v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014)). The breadth of the zone-of-interests test varies, depending on the provisions of law at issue. *Id.* Under the APA, the test is not "especially demanding." *Id.* at 130. The zone-of-interests analysis forecloses suit "only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Id.* However, the APA does not "allow suit by every person suffering injury in fact." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 395 (1987). It provides a cause of action only to one "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The zone-of-interests test is, in other words, a "tool for determining who may invoke the cause of action" created in the statute at issue. *Lexmark Int'l, Inc.*, 572 U.S. at 130; *see also Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147, 1155 (9th Cir. 2015).

Here, Plaintiffs are outside the zone of interests for the statutes they have cited in their FAC as forming the basis of their action, and therefore they cannot use those statutes as the basis for their APA claims. The "pivotal question" is whether Congress intended to create a cause of action encompassing Plaintiffs' claims when it enacted the statutory provisions cited by Plaintiffs in the FAC. *See Pit River Tribe*, 793 F.3d at 1156. The Court must answer this question "not by reference to the overall purpose of the [statutes] in question . . . , but by reference to the particular provision[s] of law upon which [Plaintiffs] rel[y]." *Bennett v. Spear*, 520 U.S. 154, 175–76 (1997).

Courts have recognized that immigration statutes are directed at noncitizens, not the organizations advocating for them. When confronted with a similar argument by

"organizations that provide legal help to immigrants," Justice O'Connor explained that the Immigration Reform and Control Act "was clearly meant to protect the interests of undocumented aliens, not the interests of [such] organizations," and the fact that a "regulation may affect the way an organization allocates its resources . . . does not give standing to an entity which is not within the zone of interests the statute meant to protect." *INS v. Legalization Assistance Project of L.A. Cty.*, 510 U.S. 1301, 1305 (1993) (O'Connor, J., in chambers); *but see East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 769 n.10 (9th Cir. 2018) (rejecting in a footnote the Government's invitation to rely on Justice O'Connor's opinion in that case).[4] Therefore, Plaintiffs, as immigrant advocacy organizations, are outside the zone of interests of the statutes that form the basis of their allegations. *See, e.g.*, *Fed'n for Am. Immigr. Reform, Inc. v. Reno*, 93 F.3d 897, 900–04 (D.C. Cir. 1996); *Nw. Immigrant Rts. Project v. United States Citizenship & Immigr. Servs.*, 325 F.R.D. 671, 688 (W.D. Wash. 2016).

Here, the statutory provisions cited by Plaintiffs were not enacted to prevent organizations that assist UC from expending resources to handle any additional effort in that endeavor. Nothing in "the relevant provisions [can] be fairly read to implicate [] Plaintiffs' interest in the efficient use of resources" or a requirement that proceedings in immigration court be scheduled to serve such an interest. *See Nw. Immigrant Rights Project*, 325 F.R.D. at 688 (citing *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001)) ("In addition to [Article III's standing] requirements, a plaintiff bringing suit under the Administrative Procedure Act for a violation of [a statute] must show that his alleged injury falls within the 'zone of interests' that [the statute] was designed to protect."); *Oberdorfer v. Jewkes*, 583 F. App'x 770, 773 (9th Cir. 2014) ("[The plaintiff]'s economic injury . . . suffices for Article III standing but does not fall within

[4] In *East Bay*, although the plaintiff legal service providers were found to be advancing claims that fell within the INA's zone of interests, the facts of that case differ from this case. In *East Bay*, the organizations had been formed to aid asylum seekers, and thus the Government actions affected their core and ongoing practice. Here, Plaintiffs concede that they changed their practice to aid UCs in response to MPP.

[the statute]'s zone of interests. [The plaintiff]'s environmental injury . . . is within [the statute]'s zone of interests but will not be redressed by a favorable decision, since the damage in question occurred in the past."); *Yount v. Salazar*, 2014 WL 4904423, at *6 (D. Ariz. 2014) (citing *Lexmark Int'l, Inc.*, 134 S. Ct. at 1387) (concluding that applying the "single-injury requirement," which requires that the injury that confers constitutional standing is also the injury that falls within the relevant statute's zone of interests, comports with the purposes of the statutory standing doctrine—ascertaining and heeding congressional intent); *Kanoa Inc. v. Clinton*, 1 F. Supp. 2d 1088, 1095 (D. Haw. 1998) ("Plaintiff's injuries, economic losses, are not within the zone of interests that the [statute] was enacted to protect.")); *see also Situ v. Leavitt*, 2006 WL 3734373, at *10 (N.D. Cal. 2006) ("[T]he organizational plaintiffs in this case fail to satisfy the zone of interests test because they have failed to rebut Defendant's argument that the Medicare statutory scheme is intended to protect individuals, not advocacy organizations.").

The applicable statutory provisions do not provide recourse for advocates' diverted resources. *See Nw. Immigrant Rights Project*, 325 F.R.D. at 688. Nor can the text of the relevant provisions be fairly read to implicate Plaintiffs' interests in the efficient use of resources. *Id.* The immigration provisions that form the basis of Plaintiffs' allegations are directed at noncitizens, not the organizations advocating for them. Therefore, Plaintiffs are not within the zone of interests of the relevant statutes.

3. Plaintiffs Have No Judicially Cognizable Interest in the Enforcement of Immigration Laws

Organizations have "no judicially cognizable interest" in the "enforcement of the immigration laws," in preventing the Government from applying the law to third parties, or in seeking to have immigration courts grant asylum to a higher percentage of applicants. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984). The INA confers no "legally cognizable interests" on advocacy organizations in the scheduling or other aspects of third-party noncitizens' hearings in immigration court. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). In fact, it does the opposite. The INA channels

determinations of removability into removal proceedings before an immigration judge. *See* 8 U.S.C. § 1229a(a)(1). Decisions by the immigration judges in removal proceedings may be appealed to the Board of Immigration Appeals ("BIA"), *see* 8 C.F.R. § 1240.15, and individual noncitizens may file a petition for review ("PFR") to the federal courts of appeals. *See* 8 U.S.C. § 1252(a)(5), (b)(9). Claims regarding the sufficiency of the NTA are appropriately handled through the petition for review process. *See Kohli v. Gonzales*, 473 F.3d 1061, 1065 (9th Cir. 2007) ("The sufficiency of the NTA is a question of law, which is reviewed de novo."). Plaintiffs do not allege the existence of a statutory provision that regulates their conduct or creates any benefits for which they are eligible. As Plaintiffs acknowledge in the FAC, the issues they have encountered with noncitizens are specific to each noncitizen and are therefore best raised in individual proceedings by each noncitizen. Therefore, Plaintiffs cannot proceed on any claims that by statute can only be advanced by individual noncitizens.

B. This Court Lacks Jurisdiction Pursuant to 8 U.S.C. § 1252(b)(9)

This Court additionally lacks jurisdiction to review Plaintiffs' claims under 8 U.S.C. § 1252(b)(9), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

Id. Section 1252(b)(9) is an "unmistakable zipper clause" that channels judicial review of "all questions of law and fact," including both "constitutional and statutory" challenges into a PFR once administrative immigration proceedings have ended. *Reno v. Am.-Arab Anti Discrim. Comm.*, 525 U.S. 471, 482-83 (1999); *Martinez v. Napolitano*, 704 F.3d 620, 622 (9th Cir. 2012) (citing to 8 U.S.C. § 1252(b)(9)); *see also E.O.H.C. v. Sec'y United States Dep't of Homeland Sec.*, 950 F.3d 177, 186 (3d Cir. 2020) (barring statutory right-to-counsel claim).

The reach of this provision is capacious. *See J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) ("Section 1252(b)(9) is . . . breathtaking in scope and vise-like in grip and therefore swallows up virtually all claims that are tied to removal proceedings."); *see also Aguilar v. U.S. Immigr. & Customs Enf't Div. of Dep't of Homeland Sec.*, 510 F.3d 1, 9 (1st Cir. 2007) ("By its terms, the provision aims to consolidate *all* questions of law and fact that arise from either an action or a proceeding brought in connection with the removal of an alien." (internal quotations omitted)).

The broad reach of section 1252(b)(9) is consistent with the Congressional purpose underpinning its enactment, namely to "streamline immigration proceedings" and "eliminate[] the previous initial step in obtaining judicial review—a suit in a District Court," so that "'review of a final removal order is the *only mechanism* for reviewing any issue raised in a removal proceeding.'" *Singh v. Gonzales*, 499 F.3d 969, 975–76 (9th Cir. 2007) (emphasis added) (quoting H.R. Rep. No. 109-72 at 173 (May 3, 2005)); *Aguilar*, 510 F.3d at 9 ("In enacting section 1252(b)(9), Congress plainly intended to put an end to the scattershot and piecemeal nature of the review process that previously had held sway in regard to removal proceedings.").

With regard to an APA challenge in the district court, "[w]hen a claim by an alien, however it is framed, challenges the procedure and substance of an agency determination that is 'inextricably linked' to the order of removal, it is prohibited by section 1252(a)(5)." *Martinez*, 704 F.3d at 623. Accordingly, "[t]aken together, § 1252(a)(5) and § 1252(b)(9) mean that any issue – whether legal or factual – arising from any removal-related activity can be reviewed *only* through the [petition for review] process." *J.E.F.M.*, 837 F.3d at 1031 (emphasis internal).

Here, Plaintiffs challenge a number of agency actions that are linked to removal proceedings and orders of removal. To the extent that the challenged actions are linked to removal proceedings and orders of removal, they are barred by section 1252(b)(9). *See J.E.F.M.*, 837 F.3d at 1033-34; *E.O.H.C.*, 950 F.3d at 187-88.

C. The Court Lacks Jurisdiction Pursuant to 8 U.S.C. § 1252(f)

8 U.S.C. Section 1252(f) provides:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV [Sections 1221-1232] of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

"One cannot come away from reading this section without having the distinct impression that Congress meant to allow litigation challenging the new system by, and only, by, aliens against whom the new procedures have been applied." *Am. Immigr. Laws. Ass'n v. Reno*, 199 F.3d 1352, 1359–60 (D.C. Cir. 2000).

Here, Plaintiffs seek to "enjoin or restrain the operation of the provisions of part IV of this subchapter," and are not "an individual against whom proceedings under this part have been initiated" (since they are organizational plaintiffs). 8 U.S.C. § 1252(f). Specifically, Plaintiffs seek an injunction to "prohibit[] Defendants and any of their officers, agents, successors, employees, representatives, and any and all persons acting in concert with them or on their behalf, from engaging in the unlawful policies, practices, acts, and omissions described herein." (FAC, Prayer for Relief at ¶ (d).) Those "unlawful policies, practices, acts, and omissions" include:

"ERO's failure to consistently issue and provide MPP-UC their TVPRA-NTAs." (FAC at ¶ 145.) The alleged failure to "issue and provide MPP-UC their TVPRA-NTAs" stems from the alleged decision to keep these individuals in their prior section 1229a removal proceedings that commenced in connection with MPP, or execute orders of removal issued in connection with section 1229a removal proceedings conducted while the individuals were subject to MPP. An injunction to require the issuance of a *new* NTA would work to "enjoin or restrain the operation of the

provisions" of Section 1229 (governing the issuance of a NTA), Section 1229a (governing removal proceedings), and Section 1231 (governing removal of noncitizens ordered removed), all of which fall within the ambit of Section 1252(f). 8 U.S.C. § 1252(f).

Moreover, the issuance of a new NTA would not nullify or supersede the removal proceedings that previously commenced; rather they would proceed in parallel until they each reach a conclusion. *See, e.g.*, *Escobar-Lopez v. Att'y Gen. United States*, 831 F. App'x 614 (3d Cir. 2020) (remanding for fact-finding where the record contains two NTAs and suggesting the first NTA may be the controlling one); *In re Armijo-Sanchez*, 2017 WL 4118935 (BIA 2017) (noting that the Board issued separate decisions on the same day in two sets of proceedings involving the same respondent).[5]

Plaintiffs have not—and cannot—identify any statutory authority for the proposition that UC already subject to removal proceedings or an unexecuted final order of removal must be issued a "TVPRA-NTA" anew. "Because Congress, in its judgment, chose not to mandate [a new NTA in this circumstance], an injunction imposing one where the statute is *silent* would displace that judgment in a way that would enjoin or restrain the method or manner of Section 1229(b)'s functioning. Accordingly, Section 1252(f)(1) strips the Court of jurisdiction to issue the injunction [Plaintiffs seek] here." *Vazquez Perez v. Decker*, 2019 WL 4784950, at *6 (S.D.N.Y. 2019) (denying motion for preliminary injunction seeking to require a master calendar hearing within a specific timeframe after issuance of a NTA and taking class members into detention).

DHS and ICE's intent to continue to subject UC to removal proceedings that were initiated before the UC returned to the United States unaccompanied. (FAC

[5] "Once jurisdiction vests with the Immigration Judge, neither party can compel the termination of proceedings without a proper reason for the Immigration Judge to do so." *Matter of Sanchez-Herbert*, 26 I. & N. Dec. 43, 45 (BIA 2012). DHS can move for the dismissal of the proceedings "if there is a valid reason specified in the regulations." *In Re W-C-B-*, 24 I. & N. Dec. 118, 122 (BIA 2007); *see* 8 C.F.R. § 239.1(a), 1239.2(c); *see also Matter of Sanchez-Herbert*, 26 I. & N. Dec. at 45. But once jurisdiction have vested "the Notice to Appeal cannot be cancelled" by unilateral DHS action, such as the issuance of another NTA. *In Re W-C-B-*, 24 I. & N. Dec. at 122.

at ¶ 179.)[6] An injunction concerning the continued prosecution of pending removal proceedings would be one that "enjoin[s] or restrain[s] the operation of the provisions" of Section 1229a, which governs removal proceedings and likewise falls within the ambit of Section 1252(f). 8 U.S.C. § 1252(f).

"Defendants' summary enforcement of MPP removal orders against UC without any process directly violates the TVPRA and contravenes Congress's intent to guarantee UC multiple opportunities to seek immigration relief under a fair and child-appropriate process." (FAC at ¶ 182.) An injunction concerning enforcement of removal orders would be one that "enjoin[s] or restrain[s] the operation of the provisions" of Section 1231, which governs removal of noncitizens ordered removed and falls within the ambit of Section 1252(f). 8 U.S.C. § 1252(f). As non-individuals who are not themselves subject to removal proceedings, Plaintiffs may not pursue claims seeking injunctive relief to enjoin or restrict any of the foregoing acts, as the Court lacks jurisdiction to hear such claims.

D. <u>The Court Lacks Jurisdiction Pursuant to 8 U.S.C. § 1252(g)</u>

8 U.S.C. Section 1252(g) provides:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

With respect to commencement decisions, Section 1252(g)'s bar includes "not only a decision . . . *whether* to commence, but also *when* to commence a proceeding." *Jimenez-*

[6] As noted, supra n.4, once removal proceedings have commenced, DHS can only request dismissal of the proceedings. The immigration judges and BIA possess the authority to decide that the proceedings will be dismissed or terminated.

Angeles v. Ashcroft, 291 F.3d 594, 599 (9th Cir. 2002). With respect to adjudication decisions, "[t]he meaning of a discretionary decision to 'adjudicate' is readily apparent: the discretionary, quasi-prosecutorial decisions by asylum officers and INS district directors to adjudicate cases or to refer them to IJs for hearing are not reviewable under § 1252(g)." *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1120 (9th Cir. 2001). "By affording asylum officers discretion to grant relief, Congress did not wish to open the door to judicial review of this purely discretionary, quasi-prosecutorial act. Thus, the asylum officer's 'decision to adjudicate' is immunized from judicial review." *Id.* And with respect to execution decisions, the "decision not to delay [a] removal . . . constitutes a challenge to [the] decision to execute a removal order." *Garcia-Herrera v. Asher*, 585 F. App'x 439, 440 (9th Cir. 2014): *see also Balogun v. Sessions*, 330 F. Supp. 3d 1211, 1215–16 (C.D. Cal. 2018) ("[A] challenge to ICE's refusal to stay removal is the paradigmatic claim arising from a decision to execute a removal order.")

Here, the FAC challenges specific acts or omissions concerning decisions to "commence proceedings, adjudicate cases, or execute removal orders," including the following:

First, the FAC challenges "ERO's failure to consistently issue and provide MPP-UC their TVPRA-NTAs." (FAC at ¶ 145.) The alleged failure to serve a new NTA is a decision *whether and when* to commence a proceeding, and Plaintiffs' claim premised on this alleged failure is barred by Section 1252(g). *See Jimenez-Angeles*, 291 F.3d at 598–99 ("We hold at the outset that we lack jurisdiction to address Jimenez-Angeles' argument that the INS should have commenced deportation proceedings against her immediately upon becoming aware of her illegal presence in the United States."); *Balogun*, 330 F. Supp. 3d at 1215 ("If ICE's enforcement discretion is to mean anything, it must include the discretion to decide whether and when to start removal proceedings and execute removal orders.").

Second, the FAC challenges "delays in release" from custody of UC who are subject to removal orders, and specifically those who are not "challenging the MPP

removal order." *See* FAC at ¶ 155; *see also id.* at ¶¶ 154, 156-58. These custody determinations directly arise from a "decision" to "execute removal orders," and are thus not subject to judicial review. *See Flores v. Johnson*, 2015 WL 12656240, at *2 (C.D. Cal. 2015) (claims seeking a "stay of his detention and removal until the BIA renders its decision on his Motion to Reopen" barred by Section 1252(g) because it "arises . . . from the decision or action to execute removal orders against Petitioner") (internal alterations and quotations omitted); *cf. Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007) (claims challenging detention barred by Section 1252(g) where they "arose from [Defendant's] decision to commence expedited removal proceedings").

Third, the FAC challenges DHS and ICE's intent to continue to subject UC to section 1229a removal proceedings that were initiated before the UC returned to the United States unaccompanied. (FAC at ¶ 179.) To the extent this paragraph of the FAC is challenging a decision of action, it is a challenge to a "decision or action by the [Secretary] to commence proceedings" and to "adjudicate cases" and thus barred by Section 1252(g). *See Barahona-Gomez*, 236 F.3d at 1119 ("Section 1252(g) was aimed at preserving prosecutorial discretion."); *Martinez v. United States*, 2014 WL 12607787, at *3 (C.D. Cal. 2014) (malicious prosecution claim based on DHS's commencement and prosecution of removal proceedings fell "squarely within § 1252(g)'s ambit"); *Boldmyagmar v. Barr*, 839 F. App'x 72, 75 (9th Cir. 2020) (denying petition for review over claim that DHS abused its discretion when it "declined to exercise its prosecutorial discretion not to remove [the petitioner] or to grant his Application for a Stay of Deportation or Removal under 8 C.F.R. § 241.6" because the court is "barred by § 1252(a) from reviewing discretionary, quasi-prosecutorial decisions by DHS to adjudicate cases or refer them for prosecution").

Fourth, the FAC challenges "Defendants' summary enforcement of MPP removal orders against UC without any process" because it "directly violates the TVPRA and contravenes Congress's intent to guarantee UC multiple opportunities to seek immigration relief under a fair and child-appropriate process." (FAC at ¶ 182.) This is a

challenge to a "decision" to "execute removal orders" and falls squarely into the jurisdictional bar of Section 1252(g). 8 U.S.C. § 1252(g); *see Balogun*, 330 F. Supp. 3d at 1215–16 ("[A] challenge to ICE's refusal to stay removal is the paradigmatic claim arising from a decision to execute a removal order.").

Moreover, the following claims for relief by Plaintiffs challenge decisions whether and when to "commence proceedings, adjudicate cases, or execute removal orders":

1. First Claim (Procedural Due Process), Third Claim (APA for Failure to Implement Policies in Violation of TVPRA), and Fourth Claim (APA for Violation of MPP Policies)

As noted above, the UC Plaintiffs described in the FAC fall into one of two categories: (1) minors who returned to the United States unaccompanied while their removal proceedings remain pending; and (2) minors who returned to the United States unaccompanied after already being subject to a final order of removal while subject to MPP. For this latter group, Plaintiff's First, Third, and Fourth Claims are all challenges to Defendants' decision to execute prior removal orders against them in the alleged circumstances, namely, that such execution deprives UC of their TVPRA procedural rights. *See* FAC at ¶¶ 232 ("Defendants' failure to afford MPP-UC due process exposes MPP-UC to summary and unsafe removal."), 246 ("Defendants subject UC to their MPP proceedings" and fail to "take appropriate steps to ensure safe repatriation of MPP-UC"). Challenges to decisions to execute removal orders are squarely barred under 1252(g). *See AADC.*, 525 U.S. at 482.

2. Second Claim (APA - Failure to Act as Required Under TVPRA)

Plaintiffs' second claim challenges, among other things, the alleged failure of ICE ERO "to issue and serve a legally sufficient TVPRA-NTA on MPP-UC." (FAC at ¶ 237.) The alleged failure to serve a new NTA is a decision whether, when, or how "to commence" a proceeding, and Plaintiffs' claim premised on this alleged failure is barred by Section 1252(g). *See Jimenez-Angeles*, 291 F.3d at 598–99 ("We hold at the outset that we lack jurisdiction to address Jimenez-Angeles' argument that the INS should have

commenced deportation proceedings against her immediately upon becoming aware of her illegal presence in the United States."); *Balogun*, 330 F. Supp. 3d at 1215 ("If ICE's enforcement discretion is to mean anything, it must include the discretion to decide whether and when to start removal proceedings and execute removal orders.").

E. The Court Lacks Jurisdiction to Enforce any Portion of the *Flores* Settlement Agreement

In the FAC, Plaintiffs assert that their lawsuit seeks to enforce rights enshrined in the "*Flores* Settlement Agreement." The *Flores* Settlement Agreement is a consent decree entered into in this Court in the case of *Flores v. Reno*, No. CV 85-4544 RJK (Px) (C.D. Cal. 1997), which is currently pending before the Honorable Dolly M. Gee. (FAC at 18 n.15.) In the FAC, Plaintiffs reference the *Flores* Settlement Agreement in their Second and Third claims for relief. (FAC at ¶¶ 239, 241, 249.) Plaintiffs seek a judgment declaring that Defendants are in violation of that Agreement. (FAC at ¶¶ 1, 13, Prayer for Relief.) The court that issued an injunctive order "alone possesses the power to enforce compliance with and punish contempt of that order." *See Alderwoods Group, Inc.*, 682 F.3d 958, 970 (11th Cir. 2012) (citing *In re Debs*, 158 U.S. 564, 595 (1895)). Here, to the extent that Plaintiffs are attempting in this action to seek an order related to the *Flores* Settlement Agreement, the proper court in this district before which to bring an action seeking enforcement of the *Flores* Settlement Agreement is the Honorable Dolly M. Gee. *See, e.g.*, *Flores v. Barr*, 407 F. Supp. 3d 909 (C.D. Cal. 2019); *Flores v. Sessions*, 2018 WL 10162328 (C.D. Cal. 2018); *see also K.M.H.C. v. Barr*, 437 F. Supp. 3d 786, 793 (S.D. Cal. 2020) (court lacked subject matter jurisdiction over breach of *Flores* settlement agreement claims). Therefore, to the extent Plaintiffs' action contains claims seeking to enforce the *Flores* Settlement Agreement or declaratory relief related to it, those claims (or portions thereof) should be dismissed.

F. Plaintiffs' First Claim for Relief for Violation of the Fifth Amendment Due Process Clause Claim Must Be Dismissed

Plaintiffs' first claim for violation of due process alleges that the manner in which

Defendants execute prior orders of removal against UC who were previously in MPP and returned to the United States unaccompanied fails to afford these UC their procedural rights under the TVPRA. *See* FAC at ¶ 232 ("ICE's failure to affirmatively notify EOIR that a child, who was *previously* an MPP-respondent, is now designated as an unaccompanied child and in the custody of ORR, subjects that child to *imminent risk of removal* and deprivation of the child's TVPRA rights."). Plaintiffs allege that, as a result, they are harmed because they "have had to develop policies and procedures." *Id.* at ¶ 233.

Setting aside Plaintiffs' lack of standing to bring this claim (*see supra*), Plaintiffs' due process claim fails as a matter of law. "As a general rule, an individual may obtain relief for a due process violation only if he shows that the violation caused him prejudice," *i.e.*, that the violation adversely affected the outcome. *Gomez-Velazco v. Sessions*, 879 F.3d 989, 993–94 (9th Cir. 2018); *see also Luna-Arenas v. Garland*, 842 F. App'x 144, 145 (9th Cir. 2021) (denying petition for review regarding failure to provide a "Notice of Intent to Issue a Final Administrative Removal Order" in his native language because he was inadmissible and thus could not be prejudiced by this failure).

Here, Plaintiffs do not allege—and could not allege—prejudice to UC because of Defendants' actions. Those who have yet to be removed cannot claim prejudice because the complained-of harm—allegedly unlawful removal—has not yet occurred. The FAC itself details avenues for relief that this group of UC may and are taking to *prevent* the complained of prejudice from occurring, including "motions to reopen," "emergency stay motions," and "appeals . . . to the BIA" concerning "removal orders for MPP-UC." FAC at ¶ 178. To the extent any of these individuals have already suffered prejudice, they may raise such due process claims in the same forums—with the immigration judge, the BIA, and the United States Court of Appeals for the Ninth Circuit through the petition for review process. *See* 8 U.S.C. §§ 1252(a)(2)(D) ("Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional

claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."), 1252(a)(5) ("a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e)").

G. Plaintiffs' Second Claim for Relief for Violation of the APA for Failure to Act as Required Under the TVPRA Must Be Dismissed

Plaintiffs' Second claim is an APA Section 706(1) "failure to act" claim that challenges the following three practices Plaintiffs claim are inconsistent: (1) "ICE and ERO fail to issue and serve a legally sufficient TVPRA-NTA on MPP-UC;" (2) "USCIS has failed to exercise jurisdiction over affirmative asylum applications filed by UC;" and (3) "ERO and ORR have failed to promptly place UC in the least restrictive settings that are in the best interests of the child." (FAC at ¶¶ 237-39.)[7]

"A court can compel agency action under this section only if there is 'a specific, unequivocal command' placed on the agency to take a discrete agency action,' and the agency has failed to take that action." *Vietnam Veterans of Am. v. Cent. Intel. Agency*, 811 F.3d 1068, 1075 (9th Cir. 2016) (citation omitted). "The limitation to discrete agency action precludes the kind of broad programmatic attack [the Supreme Court] rejected in *Lujan v. National Wildlife Federation*, 497 U.S. 871 [] (1990)." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

Here, Plaintiffs have not identified—and cannot identify—any "unequivocal command" concerning the issuance of a "TVPRA-NTA" (which does not exist) or a second NTA after a minor returns unaccompanied to the United States after already being subject to removal proceedings or a final order of removal. With respect to the

[7] Relevant to this claim against USCIS, on May 7, 2021, USCIS issued a memorandum entitled "Updated Service Center Operations Guidance for Accepting Forms I-589 Filed by Applicants Who May Be Unaccompanied Alien Children," available under "Related Links" at https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/minor-children-applying-for-asylum-by-themselves (last accessed May 13, 2021).

least restrictive setting requirement, Plaintiffs do not allege any Defendant has refused to release children to the least restrictive setting, except where removal is "imminent." But Plaintiffs cite no authority prohibiting custody of noncitizens whose removal is imminent. Nor do Plaintiffs cite any authority requiring release within a statutorily prescribed period of time for noncitizens who are not subject to imminent removal.

Fundamentally, the challenges Plaintiffs bring concerning Defendants' "inconsistent" practices outlined above run far afield from the APA's "discrete agency action" requirement. Rather than challenge a particular failure, Plaintiffs challenge what they consider to be a broken system that brings inconsistent results, which would require the Court to broadly review "inconsistent" actions on an aggregate level, rather than any particular, discrete agency action or inaction, as the APA contemplates.

H. Plaintiffs' Third Claim for Relief for Violation of the APA for Failure to Implement Policies in Violation of the TVPRA Must Be Dismissed

Plaintiff's Third Claim is brought under Section 706(2) of the APA and challenges—as a "final agency action"—Defendants' alleged failure to implement TVRPA policies specific to UC with ties to MPP. (FAC at ¶¶ 242-48.) But Plaintiffs' challenge to Defendants' purported *inaction* is not a cognizable claim under Section 706(2) of the APA. Two conditions must be satisfied for agency action to be "final" under the APA: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177–78. Neither condition is met here.

Plaintiffs' complaint concerns the exact opposite of the "consummation of the agency's decisionmaking process," namely, the failure to implement unspecified policies that lead to "no cohesive approach toward Plaintiffs' attempts to defend MPP-UC from the effects of their MPP proceedings." (FAC at ¶ 246.) Nowhere does the FAC allege that Defendants have reached any sort of final decision *not* to provide UC subject to

MPP with any of the alleged protections afforded to them through the TVPRA. Nor is there action from which "rights or obligations have been determined, or from which legal consequences will flow." Again, Plaintiffs complain that a *lack* of decisionmaking has resulted in inconsistent outcomes of UC previously subject to MPP. *See* FAC at ¶¶ 201 ("USCIS's inconsistent adjudication of MPP-UC asylum applications has sown confusion and uncertainty about MPP-UC's right to seek TVPRA-asylum."), 144 ("Plaintiffs discovered that ERO was not consistently issuing and serving TVPRA-NTAs for children previously subject to MPP."), 193 ("Plaintiffs are informed and believe that ICE-ERO neglects to make basic safe repatriation efforts such as consulting with a child's attorney or using Department of State's Country Reports and Trafficking Reports to assess whether to repatriate an unaccompanied child to a particular country.").

Even had Plaintiffs brought this claim pursuant to Section 706(1) for agency inaction, it would still fail as a matter of law. "[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton*, 542 U.S. at 64. "The limitation to discrete agency action precludes" any "kind of broad programmatic attack." *Id.* "The limitation to *required* agency action rules out judicial direction of even discrete agency action that is not demanded by law (which includes, of course, agency regulations that have the force of law)." *Id.* at 65. "[W]hen an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." *Id.* at 65.

Here, none of the statutory provisions Plaintiffs cite require any Defendant to implement any particular regulations or policies within a specified time, much less when such changes would be in response to other developments in immigration laws and programs. *Norton*, 542 U.S. at 64; 8 U.S.C. §§ 1232(a)(1) (no specified time), 1232(c)(1) (no specified time). Moreover, they all leave to the agency's discretion the "manner of its" action. 8 U.S.C. §§ 1232(a)(1) ("shall develop policies and procedures to ensure that unaccompanied alien children in the United States are safely repatriated to

their country of nationality or of last habitual residence"), 1232(c)(1) ("shall establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity . . ."). And the relief Plaintiffs request is a "broad programmatic attack," requesting an order "requiring Defendant to prospectively implement procedures to ensure all UC have access to the full protections of the TVPRA, regardless of prior placement in MPP proceedings" and "requiring Defendants to provide new avenues to access TVPRA protections for MPP-UC previously denied those rights, including repatriated MPP-UC." *Norton*, 542 U.S. at 64; FAC, Prayer for Relief at ¶¶ (e), (f). Such claims are not subject to APA review.

I. Plaintiffs' Fourth Claim for Relief for Violation of MPP Policies, the *Accardi* Doctrine, and the APA Must Be Dismissed

Plaintiffs' Fourth Claim should be dismissed because it is unsupported by the facts they allege. In the FAC, Plaintiffs argue that Defendants violate their own policies, citing agency guidance stating that unaccompanied minors will "not be subject to MPP." (FAC at ¶ 253.) But the FAC does not allege that any unaccompanied minors are being placed in MPP; to the contrary, the FAC reveals that the "MPP-UC" described in the FAC are not being placed in MPP. Here, the "MPP-UC" described in the FAC are minors who accompanied their parents to the United States, were sent with their parents to Mexico pursuant to MPP, and then later returned to the United States unaccompanied. *See, e.g.*, FAC at ¶¶ 127-34. Nowhere does the FAC allege that any of the "MPP-UC" are being returned to Mexico again pursuant to MPP. Instead, the FAC complains that these children are subject to their prior removal proceedings or removal orders and, in fact, acknowledges that they simply have past "MPP ties." *See* FAC at ¶¶ 135 ("The TVRPA does not discriminate against children who, like the Doe Siblings and eleven-year old A. Doe, *were once subject to MPP* as part of their respective family units and thereafter presented at the border alone, and were designated UC by CBP and ICE." (emphasis added)), 3, 150, 224-25.

The removal proceedings and removal orders that the "MPP-UC" are subject to exist as a product of operation of the INA, and irrespective of the existence of MPP. *See* 8 U.S.C. §§ 1229a, 1231. What Plaintiffs complain of is a situation they believe was caused by MPP—a critical mass of unaccompanied children returning to the United States who are already subject to removal proceedings or removal orders. But that is a different matter entirely from *subjecting unaccompanied minors* to MPP, which the FAC itself does not allege is happening.

J. Plaintiffs' Fifth Claim for Relief for Violation of the APA for Conditioning Access to the TVPRA Must Be Dismissed

Plaintiffs argue in their fifth claim that Defendants' "practice of requiring MPP-UC to provide proof of legal challenge or representation of their MPP removal orders interferes with Plaintiffs' ability to deliver access to counsel on TVPRA-related benefits as contemplated by the TVPRA." (FAC at ¶ 260 (citing 8 U.S.C. §§ 1158, 1229a(b)(4), 1362).) Plaintiffs argue that Defendants' actions are "arbitrary and capricious because, in adopting its policies of conditioning a MPP-unaccompanied child's release from ORR custody on proof of legal representation or challenge of their MPP removal order, Defendants failed to consider the obstacles that Plaintiffs would face." (FAC at ¶ 261.)

Plaintiffs' fifth claim lacks plausible factual support. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Here, Plaintiffs offer very little by way of specific, factual allegations regarding how the defendants actually interfere with access to counsel.[8]

[8] *See Flores et al. v. Garland*, Case No. 2:85-cv-04544 DMG (AGRx), Dkt. 1084-1 at 33 (March 5, 2021 ORR Juvenile Coordinator Report) ("The Juvenile Coordinator did not identify any cases from the reporting period where an MPP removal order was a sole basis for a minor's non-release"); *see also* Dkt. 932-2 at 9 (August 24, 2020 ORR Juvenile Coordinator Report) (same); Dkt. 996-2 at 9 (October 2, 2020 ORR Juvenile Coordinator Report) (same); Dkt. 1060-1 at 21 (January 15, 2021 ORR Juvenile Coordinator Report) (same).

Plaintiffs have not alleged that any of the UC need to be released from custody to be represented. Additionally, deportation officers generally require that a lawyer have a G-28 on file with the immigration court as representing a particular noncitizen before they will provide that lawyer information about that noncitizen's proceedings. To the extent that Plaintiffs' claim is based on interference with access to counsel, minor administrative requirements to establish proof of representation, and the fact of a noncitizen's detention during representation, are normal parts of the immigration process and not unlawful hurdles to representation.

K. Plaintiffs Have Failed to State a Claim Against CBP

In Plaintiffs' five claims, the only mention of CBP occurs in the fourth claim, with a citation to CBP's MPP Guiding Principles. (FAC at ¶ 253.) In the factual allegations, Plaintiffs alleged that CBP properly designated UC as not amenable to MPP and transferred them to ORR. (FAC at ¶¶ 129, 135, 184.) Plaintiffs have failed to adequately allege that CBP has violated its own policies. Therefore, Defendants CBP and Troy Miller should be dismissed from this action.

L. The FAC Violates Rule 8 of the Federal Rules of Civil Procedure

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that each claim in a pleading be supported by "a short and plain statement of the claim showing that the pleader is entitled to relief." *See Landers v. Quality Commc'ns, Inc.*, 771 F.3d 638, 640 (9th Cir. 2014), *as amended* (Jan. 26, 2015). The FAC contains large numbers of paragraphs that are "prolix in evidentiary detail" and "fail to perform the essential functions of a complaint." *See Pebble Ltd. P'ship v. Env't Prot. Agency*, 2015 WL 12030515, at *6 (D. Alaska 2015) (citing *McHenry v. Renne*, 84 F.3d 1172, 1180 (9th Cir. 1996)). If this Court does not dismiss Plaintiffs' FAC in full, it should relieve Defendants from answering the irrelevant introductory allegations, irrelevant statutory background allegations, unnecessary factual detail, and irrelevant allegations. *See id.*

IV. CONCLUSION

For these reasons, the Court should grant Defendants' motion to dismiss.

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Respectfully submitted,

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