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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

IMMIGRANT DEFENDERS LAW CENTER; *et al.*,

Plaintiffs,

v.

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

Defendants.

Case No. 2:21-cv-00395-FMO-RAO

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

Defendants concede that the Trafficking Victims Protection Reauthorization Act ("TVPRA") guarantees specific statutory rights to unaccompanied children. Yet, Defendants move to dismiss Plaintiffs' claims that would protect the TVPRA rights of unaccompanied children who had previously been placed in the Trump Administration's Migrant Protection Protocols (referred to as "MPP-unaccompanied children"). Plaintiffs' First Amended Complaint ("Complaint") alleges numerous ways that Defendants have subjected—and continue to subject—unaccompanied children to MPP, exposing them to the instability, uncertainty, and danger of removal to countries where they have no one to care for them. Defendants' actions have irreparably harmed Plaintiffs, legal service providers ("LSPs") whose mission is to serve unaccompanied children.

Defendants seek dismissal through a series of convoluted justiciability and jurisdictional arguments, which, if accepted, would leave Plaintiffs and their MPP-unaccompanied child clients with no recourse before this, or any other, Court. At bottom, Defendants' position is that MPP-unaccompanied children are first and foremost MPP respondents whose entitlements under the TVPRA are secondary and, thus, disposable. But Congress, the courts, and Defendants' own regulations and policies require otherwise. MPP-unaccompanied children are unaccompanied children who are entitled to the full benefit of the TVPRA. Defendants have no discretion to dilute, let alone deny, these rights. Plaintiffs have sufficiently pled facts showing they continue to divert organizational resources and take drastic measures to preserve their clients' rights under the TVPRA. There is no jurisdictional bar prohibiting Plaintiffs' claims. This Court should therefore deny Defendants' motion.

BACKGROUND

In January 2019, the Trump Administration began implementing MPP. Under that policy, asylum seekers were forced to return to Mexico to await their

immigration proceedings, often in dangerous and unsanitary encampments where they were vulnerable to kidnapping, rape, assault, and illness. First Amended Complaint ("FAC") ¶ 120. As a result of this policy, some children who were previously processed through MPP with their parents were later separated and entered the United States alone. *Id.* ¶ 5.[1]

Given their inherent vulnerability, children who enter the United States alone are designated "unaccompanied" and automatically entitled to a panoply of rights and protections under the TVPRA. *See* Motion to Dismiss ("MTD") at 2-3; FAC ¶¶ 57-78. These rights include guaranteed access to non-adversarial asylum proceedings; the right to be placed in the least restrictive setting that is in the best interest of the child; access to counsel to the "greatest extent practicable"; protection from the reinstatement of prior removal orders; and, if necessary, the right to "safe and sustainable repatriation" to the child's home country. 8 U.S.C. §§ 1158(a)(2)(E), (b)(3)(C); 1232(a)(2), (a)(5)(D), (c)(1), (c)(2)(A), (c)(5), (d)(8); *see also* FAC ¶¶ 57-78. Congress guaranteed these rights to all unaccompanied children, regardless of any prior immigration proceedings. *Id.* ¶¶ 9, 62, 69. These children are also connected to LSPs, like Plaintiffs, that are sub-contracted by the Office of Refugee Resettlement ("ORR") to ensure these children receive the full benefit of their TVPRA protections. FAC ¶ 72.

Defendants deny MPP-unaccompanied children their guaranteed rights under the TVPRA. *Id.* ¶¶ 140-214. Despite Defendants' stated policy that "[u]naccompanied [] children . . . will not be subject to MPP," Defendants use MPP-unaccompanied children's prior MPP proceedings to bar access to their TVPRA rights by, among other things: (i) failing to issue legally sufficient Notices

[1] Thus, for example, some children who were initially "riders" to their parents' asylum applications in MPP—without the opportunity to advance claims of their own—later found themselves in U.S. custody, compelled to navigate any immigration claims alone. *Id.* ¶¶ 127, 133, 180.

To Appear ("NTA") reflecting each child's most recent entry; (ii) unreasonably delaying children's release to sponsors; (iii) enforcing MPP removal orders; (v) failing to ensure safe repatriation; and (vi) failing to guarantee children's access to affirmative asylum (collectively referred to as the "Practice"). *Id.* ¶¶ 150-53, 159-63, 169-78, 186-92, 197, 205-25.

Defendants' unlawful Practice harms Plaintiffs and their unaccompanied child clients, forcing Plaintiffs to divert resources and take extraordinary measures to ensure MPP-unaccompanied children receive their TVPRA rights and protections as Congress intended. *Id.* ¶¶ 150-53, 159-63, 169-78, 186-92, 197, 205-25, 241, 249, 256, 263.

ARGUMENT

Courts may not dismiss a complaint for failure to state a claim where a plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A court must accept all well-pled factual allegations in a complaint as true; construe those allegations "in the light most favorable" to plaintiffs, *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1003 (9th Cir. 2008) (citation omitted); and "then determine whether they plausibly give rise to an entitlement to relief," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *see also Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010) (same). Although "*Iqbal* demands more of plaintiffs than bare notice pleading," "it does not require [the court] to flyspeck complaints looking for any gap in the facts." *Lacey v. Maricopa Cty.*, 693 F.3d 896, 924 (9th Cir. 2012).[2]

[2] Defendants make the extraordinary argument that the Complaint violates Rule 8 of the Federal Rules of Civil Procedure because it is "prolix." MTD at 24. The Ninth Circuit has recognized that even a complaint with "excessively detailed factual allegations" should not be dismissed where it sets forth "coherent, well-organized, and [] legally viable claims." *Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1127 (9th Cir. 2008) (vacating dismissal of plaintiff's 81-page complaint); *see also Dichter-Mad Fam. Partners, LLP v. United States*, 707 F. Supp. 2d 1016, 1019 (C.D. Cal. 2010) (denying dismissal, over defendant's Rule 8 arguments, of plaintiff's "unusually long" complaint), *aff'd*, 709 F.3d 749 (9th Cir. 2013). To the extent Defendants seek to be "relieve[d]" of their own obligations under Rule 8, *see*

I. PLAINTIFFS HAVE STANDING

A. Plaintiffs Have Adequately Pled Article III Standing

The Supreme Court has long held that, where a defendant's "practices have perceptibly impaired" an organizational plaintiff's service of their clients, "there can be no question that the organization has suffered injury in fact." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *see also El Rescate Legal Servs., Inc. v. Exec. Off. of Immigr. Rev.*, 959 F.2d 742, 748 (9th Cir. 1992). In other words, an organization has Article III standing where "the defendant's behavior has frustrated [the organization's] mission and caused it to divert resources in response to that frustration of purpose." *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021) ("*EBSC III*") (citing *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)). The Complaint satisfies this standard.

Rather than engage with the relevant legal standard and Plaintiffs' factual allegations demonstrating organizational standing, Defendants argue that Plaintiffs lack standing because they allegedly have not been "forced to divert resources" or shown "that any Government actions have jeopardized their client base or funding." MTD at 4. The Ninth Circuit, however, has never *required* such a showing. *Cf. East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 766-67 (9th Cir. 2018) ("*EBSC I*") (explaining that "los[s of] a substantial amount of funding" is an alternative way to show standing).

In any event, Plaintiffs have adequately pled facts showing they have "expended additional resources that they would not otherwise have expended, and in ways that they would not have expended them." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039–41 (9th Cir. 2015); FAC ¶¶ 150-53, 159-63, 169-78, 186-92, 194-97, 205-25. Plaintiffs' shared core mission is to provide legal services to unaccompanied children. FAC ¶¶ 17, 24, 31, 37. The Complaint details

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MTD at 24, they fail to cite a single example from the Complaint of purportedly "irrelevant" material.

the ways in which Plaintiffs have built their legal services models in reliance on the TVPRA's guarantees. *Id.* ¶¶ 93-102. However, Plaintiffs' systems of serving unaccompanied clients have had to undergo drastic changes since the United States Department of Homeland Security ("DHS") started violating its policy of exempting unaccompanied children from MPP. *Id.* ¶¶ 143-225, 246. Plaintiffs had to change their screening procedures, re-organize staffing, and create new trainings and procedures to address the unique needs of their new MPP-unaccompanied child client base. *See* FAC ¶¶ 150-63, 169-78, 186-192. Because Defendants abandoned their TVPRA obligations to MPP-unaccompanied children, Plaintiffs must represent MPP-unaccompanied children in MPP courts outside of Plaintiffs' jurisdictions and in proceedings that are beyond the scope of Plaintiffs' operations and legal expertise. *EBSC I*, 932 F.3d at 766; *Nat'l Council of La Raza*, 800 F.3d 1032 at 1039-41; *see* FAC ¶¶ 143-225, 246.

These allegations show how Defendants' unlawful Practice has "perceptibly impaired" Plaintiffs' ability to provide services as contemplated by their missions and the TVPRA, which is sufficient to show a diversion of resources for Article III standing at this stage. *El Rescate Legal Services*, 959 F.2d at 748 (holding that an organization established to provide specific services suffers injuries where defendants' practice impairs its ability to provide those services); *cf. Nat'l Council of La Raza v*, 800 F.3d 1032 at 1040 ("The Court has also made clear that a diversion-of-resources injury is sufficient to establish organizational standing at the pleading stage, even when it is 'broadly alleged.'" (citation omitted)).

Defendants also argue that Plaintiffs lack standing because their injuries are "not out of necessity to prevent harm to their organizations or their missions." MTD at 5. Defendants are wrong. This is not a situation where Plaintiffs "manufacture[d] the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *La Asociación de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083,

1088 (9th Cir. 2010); *see* MTD at 5. Plaintiffs are ORR-subcontracted LSPs responsible for serving all unaccompanied children detained in their respective geographic service areas. FAC ¶¶ 93-95, 100, 192. Plaintiffs are tasked with ensuring their unaccompanied child clients can effectuate their TVPRA rights. When Defendants deny or prevent an MPP-unaccompanied child from accessing his or her TVPRA rights, Plaintiffs must defend that child. Plaintiffs' injuries are thus not "self-inflicted"; they are caused by Defendants withholding TVPRA protections from Plaintiffs' clients.

Ultimately, Defendants cannot escape that Plaintiffs' injuries are materially identical to the frustration of mission and diversion of resources that have long sufficed to show organizational standing in the Ninth Circuit.[3] *See Nat'l Council of La Raza*, 800 F.3d at 1039-41 (finding organizational standing where Plaintiffs "changed their behavior" and "expended additional resources that they would not otherwise have expended" as a result of the state's violation); *EBSC III*, 933 F.3d at 663(same, where organization had to represent clients outside their core client base); *El Rescate Legal Services*, 959 F.2d at 748 (holding that plaintiffs established standing by pleading that their collective missions to represent migrants in immigration proceedings were "perceptibly impaired" by EOIR's practice and policy of using incompetent translators and its failure to translate portions of the proceedings).

B. Plaintiffs Are Within the Immigration and Nationality Act's ("INA's") Zone of Interests

Courts apply the zone of interests test to "determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action

[3] Defendants also argue that Plaintiffs lack standing because their injuries arise from a "change in the law." MTD at 5. Notwithstanding that Plaintiffs do not challenge a *change* but a *violation* of the law, Defendants' out-of-circuit authority is inapposite. *See Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (rejecting organizational standing based on hypothetical injuries); *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) (same).

encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014). Defendants concede that the zone of interests test under the Administrative Procedure Act ("APA") is "not 'especially demanding'" and that it "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.'" MTD at 6 (quoting *Static Control Components*, 572 U.S. at 130; *see also Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396 (1987); *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 471-72 (D.C. Cir. 1995) (finding American citizen sponsors were within zone of interests protected by the INA because the INA authorized the immigration of their family members, and "the zone of interest test does not necessarily require a specific congressional purpose to benefit the would-be plaintiff"), *vacated on other grounds*, 519 U.S. 1 (1996). Plaintiffs clear this low bar.

Defendants do not argue that Plaintiffs' interests are "inconsistent with" the purpose of the TVPRA or that they are "so marginally related to" the purposes implicit in the statute. *Clarke*, 479 U.S. at 396; *see* MTD at 6-7. Instead, Defendants sidestep this standard entirely and rest their argument on Justice O'Connor's in-chambers opinion in *INS v. Legalization Assistance Project*, 510 U.S. 1301 (1993), which the Ninth Circuit has expressly rejected as "non-binding" and "concededly 'speculative.'" MTD at 6-7 (citing *Legalization Assistance Project*, 510 U.S. at 1305 (O'Connor, J., on application for a stay)); *EBSC I*, 932 F.3d at 769 n.10 ("We reject the Government's invitation to rely on *INS v. Legalization Assistance Project*[.]").

Defendants' attempt to distinguish *EBSC I* also falls flat. *See* MTD at 7 n.4. Just as those plaintiff "[o]rganizations' interest in aiding immigrants seeking asylum is consistent with the INA's purpose to 'establish[ ] . . . [the] statutory procedure for granting asylum to refugees,'" *EBSC I*, 932 F.3d at 768, Plaintiffs'

interest in ensuring that unaccompanied children are afforded the protections guaranteed by the TVPRA is consistent with the TVPRA's purpose of "[p]reventing the trafficking of unaccompanied alien children found in the United States by ensuring that they are not repatriated into the hands of traffickers or abusive families, and are well cared for." H.R. Rep. No. 110-430, at 35 (2007). Indeed, Plaintiffs here are subcontracted by ORR specifically to fulfill the TVPRA's Congressional mandate to "provide[] for pro bono legal representation for unaccompanied alien children in their immigration matters, where possible[.]" 154 Cong. Rec. S10887 (daily ed. Dec. 10, 2008); *see also* 8 U.S.C. § 1232(c)(5) (requiring that unaccompanied children be given access to counsel to the greatest extent practicable). Defendants' actions adversely affect Plaintiffs because they cannot perform their duties as contemplated by Congress.[4]

II. THE INA DOES NOT BAR REVIEW OR RELIEF

A. Section 1252(b)(9) Does Not Foreclose Jurisdiction

Defendants contend that Section 1252(b)(9) strips this Court of jurisdiction to review any actions "linked to removal proceedings and orders of removal." MTD at 10. But that is not the standard. The operative inquiry is instead whether Plaintiffs' claims raise *legal questions* that "arise from" actions taken to remove an immigrant. *See Jennings v. Rodriguez*, 138 S.Ct. 830, 841, 841 n.3 (2018) (plurality opinion recognized as controlling in *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S.Ct. 1891, 1907 (2020)); *Al Otro Lado, Inc. v. McAleenan*, 423 F. Supp. 3d 848, 863 (S.D. Cal. 2019). Legal questions that do *not* arise from such actions are collateral to removal proceedings, unreviewable on a petition for review ("PFR"), and not barred. *Las Americas Immigrant Advoc. Ctr. v. Trump*,

[4] Defendants' contention that Plaintiffs assert "'no judicially cognizably interest' in the 'enforcement of the immigration laws'" is also misplaced. MTD at 8 (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984)). *Sure-Tan* describes "limitations on third-party, not organizational, standing," and third-party standing is not at issue here. *EBSC III*, 993 F.3d at 664 n.6.

475 F. Supp. 3d 1194, 1208 (D. Or. 2020) (explaining that § 1252(b)(9) does not bar "claims that [are] unreviewable through the PFR process," which are "necessarily independent and collateral"). Because Plaintiffs' claims do not arise from removal proceedings and are unreviewable in the PFR process, they are not barred.

Before *Jennings*, the Ninth Circuit treated Section 1252(b)(9) and its counterpart Section 1252(a)(5) as channeling through the PFR process "*any* issue—whether legal or factual—arising from *any* removal-related activity." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016). But the Supreme Court rejected this "expansive interpretation of § 1252(b)(9) [because it] would lead to staggering results," *Jennings*, 128 S.Ct. at 840, and the Ninth Circuit has since corrected course. *See Gonzalez v. U.S. Immigr. & Customs Enf't*, 975 F.3d 788, 810 (9th Cir. 2020) (discussing effect of *Jennings*). Defendants nevertheless rely on outdated authority, describing Section 1252(b)(9) as "broad" and "capacious," *see* MTD at 9-10, despite this Circuit now construing the provision as "targeted and narrow," *Gonzalez*, 975 F.3d at 810 (quoting *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S.Ct. at 1907).

The legal questions raised in Plaintiffs' claims do not "arise from" removal actions because Plaintiffs do not ask this Court to directly "review . . . an order of removal; . . . the decision . . . to seek removal; . . . [or] any part of the process by which . . . removability will be determined."[5] *Jennings*, 138 S.Ct. at 841, 841 n.3; *see also Al Otro Lado*, 423 F. Supp. 3d at 863. Rather, Plaintiffs ask this Court to hold Defendants to their obligations under the TVPRA and their own regulations

[5] Full vindication of Plaintiffs' clients' rights may "have an impact on some removals." *NWDC Resistance v. Immigr. & Customs Enf't*, 493 F. Supp. 3d 1003, 1013 (W.D. Wash. 2020). But that does not condemn Plaintiffs' claims. Even where a litigant's "ultimate goal" is to "overturn [a] final order of removal," this Court retains jurisdiction over the type of collateral issues raised by the Complaint. *See Singh v. Gonzales*, 499 F.3d 969, 979 (9th Cir. 2007).

and policies, which together ensure that unaccompanied children receive due process. FAC ¶¶ 64-72. Courts within this Circuit have previously found challenges requesting identical relief to survive Section 1252(b)(9). *See Al Otro Lado*, 423 F. Supp. 3d at 863 (exercising jurisdiction where the "very relief Plaintiffs seek is to commence [removal] proceedings and have their asylum claims adjudicated").

Jurisdiction is especially appropriate because Plaintiffs have no other means of challenging Defendants' Practice.

> Plaintiffs are not individual [noncitizens] and they are not bringing claims on behalf of any [noncitizen]. They therefore do not have access to the PFR process for their asserted claims. Allowing organizational plaintiffs to bring claims alleging systemic problems, independent of any removal orders, that allegedly cause harms specific to those organizations does not thwart the purpose of § 1252(b)(9)).

Las Americas Immigrant Advoc. Ctr, 475 F. Supp. 3d at 1208-09. Release from ORR custody—like detention—cannot be challenged via PFR. *See Jennings*, 138 S.Ct. at 840-41 (observing that prolonged detention claims are effectively unreviewable on PFR and holding § 1252(b)(9) does not strip jurisdiction); *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018) (affirming district court jurisdiction over detention claim). Access to asylum before USCIS is likewise "collateral to" removal proceedings and unreviewable on PFR. *EBSC III*, 993 F.3d at 667 (describing affirmative asylum as "collateral to the process of removal" and exercising jurisdiction over plaintiffs' claims). In sum, Plaintiffs' claims cannot be remedied by a circuit court's "determination that the BIA or IJ acted contrary to law," so they are not jurisdictionally barred under Section 1252(b)(9). *Torres v. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1049 (C.D. Cal. 2019); *see also E.O.H.C. v. Sec'y U.S. Dep't of Homeland Sec.*, 950 F.3d 177, 186 (3d Cir. 2020) (holding § 1252(b)(9) "does not strip jurisdiction when [noncitizens] seek relief that courts cannot meaningfully provide alongside review of a final order of removal").

B. Section 1252(f) Does Not Foreclose Injunctive Relief

Defendants also overlook the exceptions to Section 1252(f)'s limits on "enjoin[ing] or restrain[ing] the operation of" Sections 1221 through 1232. 8 U.S.C. § 1252(f). The Ninth Circuit has held that "Section 1252(f) prohibits only injunction of 'the operation of' the detention statutes, not injunction of a *violation* of the statutes." *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) (emphasis added); *see also Ali v. Ashcroft*, 346 F.3d 873, 886 (9th Cir. 2003) (same), *vacated on unrelated grounds sub nom. Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005). Because Plaintiffs seek only to enjoin statutory *violations*, this Court may remedy their injuries by ordering Defendants to meet their TVPRA obligations without constraining the proper operation of Sections 1221 through 1232. *See* FAC ¶¶ 232-33, 236-40, 246-47, 253-54, 260, 264. Section 1252(f) therefore does not prohibit injunctive relief. *See Ali*, 346 F.3d at 886.[6]

Additionally, Plaintiffs' claims arise under the TVPRA and its implementing regulations, which are codified outside the statutory sections subject to Section 1252(f). *See* FAC ¶ 15 (citing 8 U.S.C. § 1158 and agency regulations as bases for claims). The INA does not restrict the type of relief available for these challenges. *Gonzalez*, 975 F.3d at 813 ("[T]he statute's plain text makes clear that its limitations on injunctive relief do *not* apply to *other* provisions of the INA" or administrative regulations or policies) (emphasis in original).

C. Section 1252(g) Does Not Foreclose Jurisdiction

Nor is this Court's jurisdiction foreclosed under Section 1252(g), which bars review of the Attorney General's discretionary decision to "commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. § 1252(g); *see* MTD at 13-

[6] Should the Court grant declaratory relief, Defendants' Section 1252(f) arguments are further inapposite. *See Rodriguez*, 591 F.3d at 1119 ("It is simply not the case that Section 1252(f) bars . . . declaratory relief . . ."); *Las Americas Immigrant Advoc. Ctr.*, 475 F. Supp. 3d at 1211.

16. Defendants' attempt to stretch Section 1252(g) fails for two independent reasons. First, Defendants ignore that Section 1252(g) exempts constitutional challenges to agency policies and practices (Plaintiffs' First Claim) as well as purely legal questions concerning non-discretionary acts (Plaintiffs' remaining APA claims). *See Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998); *Arce v. United States*, 899 F.3d 796, 800-01 (9th Cir. 2018). Second, even if these exemptions do not apply, Defendants' arguments fare no better because Plaintiffs' claims do not fall within the scope of Section 1252(g) as they do not challenge the Attorney General's decision to "commence . . . , adjudicate . . . , or execute removal . . . ." 8 U.S.C. § 1252(g); *see also M.M.M. v. Sessions*, 347 F. Supp. 3d 526, 532 (S.D. Cal. 2018). For either of these independent reasons, Section 1252(g) does not apply.

1. Section 1252(g) Does Not Bar Plaintiffs' Constitutional Claims

Plaintiffs' procedural due process claim is a "'general collateral challenge[] to unconstitutional practices and policies used by the agency.'" *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998) (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492 (1991)). It is brought by organizational plaintiffs and it does not challenge the validity of any underlying MPP removal orders or proceedings. *See* FAC ¶¶ 226-33; *NWDC Resistance*, 493 F. Supp. 3d at 1011 ("A narrow reading of Section 1252(g) does not apply to constitutional challenges brought by one who is not the [noncitizen] subject to the three discrete decisions articulated in that statute, or one who is not bringing a challenge to such actions on the [noncitizen's] behalf."). It seeks only a meaningful opportunity to restore "the administrative system that exists to litigate meritorious" claims for relief under the TVPRA's child-centric standards. *Chhoeun v. Marin*, 306 F. Supp. 3d 1147, 1159 (C.D. Cal. 2018) (rejecting government's § 1252(g) argument where "[t]he relief Petitioners request . . . is limited to 'a day in court' to comport with due process."); *see* FAC ¶¶ 226-33. This constitutional challenge therefore is beyond Section 1252(g)'s

purview. *See id.*; *Walters*, 145 F.3d at 1052 (exercising jurisdiction where plaintiff sought to enforce due process rights in removal proceedings, rather than review of removal proceedings on the merits).

2. Section 1252(g) Does Not Bar Plaintiffs' APA Claims

Plaintiffs' APA claims are also exempt from Section 1252(g)'s jurisdictional bar because they involve "purely legal question[s] that [do] not challenge the Attorney General's discretionary authority." *United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc). TVPRA rights are universal and mandatory, and Defendants have no discretion to deny unaccompanied children those rights. *See* FAC ¶ 62; 8 U.S.C. § 1232. Defendants do not dispute this fact but instead try to insulate themselves from judicial review by recasting their decision to circumvent the TVPRA as "prosecutorial discretion." *See* MTD at 15. Where, as here, the statutory mandates are clear, "the Attorney General totally lacks the discretion . . . , [and] § 1252(g) is simply not implicated."[7] *Arce*, 899 F.3d at 801.

3. Even if Section 1252(g) Applies, None of Plaintiffs' Claims "Arise From" the Three Prerequisite Categories

Notwithstanding the above exemptions that apply to Plaintiffs' claims, Section 1252(g) still does not foreclose review here. Defendants' arguments rest on an erroneously broad interpretation of the statute's key terms that is contrary to "instructions of the Supreme Court, [Ninth Circuit] precedent, and common sense, all of which require [the Court] to read the statute narrowly." *Arce*, 899 F.3d at 800 (alterations added). Plaintiffs' claims do not "arise from" the Attorney General's discretion to "'*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Wong v. United States*, 373 F.3d 952, 963-64 (9th Cir. 2004) (quoting

[7] This is true even if the legal questions underlying Plaintiffs' claims form "the backdrop against which the Attorney General later will exercise discretionary authority." *Hovsepian*, 359 F.3d at 1155.

Reno v. American–Arab Anti–Discrimination Committee, 525 U.S. 471, 482 (1999)) (emphasis in original).

First, Defendants' "commencement-based" arguments ignore that "commence" in Section 1252(g) only reaches DHS's discretionary decision to *initiate* proceedings. Indeed, Defendants broadly construe "commence" to encompass: (1) the failure of United States Immigration and Customs Enforcement ("ICE") component Enforcement and Removal Operations ("ERO") to issue and serve a new NTA on an MPP-unaccompanied child before transfer to ORR custody; and (2) DHS's and ICE's "intent to continue to subject [unaccompanied children] to Section 1229(a) removal proceedings" that were initiated before the child was designated unaccompanied. *See* MTD at 14-16. The first argument fails by way of 8 C.F.R. § 1003.14, which provides that "[j]urisdiction vests, *and proceedings before an Immigration Judge commence*, when a charging document is *filed* with the Immigration Court by [DHS]." *Id.* (emphasis added). Plaintiffs' claims concern "issuing" and "serving" a charging document, which are temporally distinct from "filing" and thus "commencing" proceedings.[8] *See Wong*, 373 F.3d at 965; *Balgun v. Sessions*, 330 F. Supp. 3d 1211, 1217-18 (C.D. Cal. 2018) (collecting cases illustrating the "temporal disconnect" of what occurs before proceedings commence). Defendants' second argument fails on its own terms because the decision "to *continue* to subject [unaccompanied children] to section 1229(a) proceedings" cannot also be the decision to "commence" those same proceedings. MTD at 15 (emphasis and alteration added).

Second, Defendants' "execution"-based arguments fail for similar reasons. Defendants recast Plaintiffs' First, Third, and Fourth claims as challenges to the

[8] U.S. Immigr. and Customs Enf't, *Juvenile and Family Residential Management Unit Field Office Juvenile Coordinator Handbook* 14, 21, 33–34 (2018) [hereinafter JFRM Handbook], *available at* https://www.aila.org/infonet/ice-handbook-handling-minors-encountered-by-dhs.

underlying MPP removal orders themselves to bring those claims under the statute's "execution" bar.[9] *See* MTD at 16. Plaintiffs, however, do not ask this Court to invalidate MPP removal orders issued against their clients. They only ask this Court to require Defendants to discharge their non-discretionary obligations under the TVPRA and ensure due process. FAC ¶¶ 230-33, 245-50, 253-57, p. 91. These duties include ensuring that every MPP-unaccompanied child is promptly placed in the least restrictive setting, may pursue asylum before USCIS and, if necessary and appropriate, is safely repatriated. FAC ¶¶ 58, 65-75. Plaintiffs' claims therefore do not arise from Defendants' decision to execute removal orders; they arise from Defendants' mandatory obligations under the TVPRA and the Constitution.

Third, and lastly, Defendants' "adjudication"-based argument fails as a matter of law. DHS and ICE claim to make an "adjudicatory" decision when they continue to subject MPP-unaccompanied children to MPP proceedings. MTD at 15. This argument fails under *Barahona-Gomez v. Reno*, where the Ninth Circuit articulated the rule "that after the case has been initiated before an IJ, there is no longer any discretion as to whether a matter should be adjudicated or not." 236 F.3d 1115, 1120 (9th Cir. 2001). *Barahona-Gomez* squarely dispenses with Defendants' arguments.

[9] Defendants also argue that ORR's failure to promptly release MPP-unaccompanied children is tied to a decision to execute a removal order and is thus barred from review. *See* MTD at 14–15. As the Supreme Court has described it, "'Section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion.'" *Hovsepian*, 359 F.3d at 1155 (quoting *Reno*, 525 U.S. at 485 n.9 (1999)). The United States Department of Health and Human Services ("HHS") and ORR are not prosecuting agencies and thus do not exercise prosecutorial discretion, notwithstanding the legally and factually inapposite authority Defendants cite. *See* MTD at 15 (citing *Flores v. Johnson*, 2015 WL 12656240, at *2 (C.D. Cal., Sept. 30, 2015) (addressing stays of removal); *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007) (addressing § 1252(g) and commencement of proceedings)).

III. PLAINTIFFS HAVE STATED CLAIMS UPON WHICH RELIEF MAY BE GRANTED

A. Plaintiffs Sufficiently Allege a Procedural Due Process Claim

Defendants' sole substantive qualm with Plaintiffs' procedural due process claim rests on the legally inapposite principle that Plaintiffs failed to demonstrate prejudice. *See* MTD at 18. Prejudice, however, is only an element in collateral attacks to deportation proceedings. *Compare id.* (citing *Gomez-Velazco v. Sessions*, 879 F.3d 989, 993–94 (9th Cir. 2018), and *Luna-Arenas v. Garland*, 842 Fed. App'x 144, 145 (9th Cir. 2021)), *with Zerezghi v. USCIS*, 955 F.3d 802, 807, 808-13 (9th Cir. 2020) (applying *Mathews* framework, which lacks a prejudice element, to due process challenge to USCIS and BIA's denial of affirmative application for lawful permanent residency); *see also Medina v. California*, 505 U.S. 437, 442-46 (1992) (departing from the *Mathews* framework to evaluate due process challenge to criminal proceedings); *Montes-Lopez v. Holder*, 694 F.3d 1085, 1090-94 (9th Cir. 2012) (detailing Ninth and sister Circuits' jurisprudence concerning whether to require prejudice as an element of due process claim concerning the denial of counsel in immigration proceedings). In that context, the additional prejudice element "rests on the view that the results of a proceeding should not be overturned if the outcome would have been the same even without the violation." *Gomez-Velazco*, 879 F.3d at 993. This principle does not apply to Plaintiffs' affirmative procedural due process claim, which does not challenge or seek to invalidate the outcome of the underlying MPP proceedings. *See Zerezghi*, 955 F.3d at 807, 808-13; *Hernandez v. Sessions*, 872 F.3d 976, 993-94 (9th Cir. 2017) (reviewing due process challenge to immigration judge bond determination process under *Mathews* and not requiring separate showing of prejudice). Defendants' only argument in support of dismissing Plaintiffs' due process claim thus fails as a matter of law.

B. Plaintiffs Sufficiently Allege that Defendants Fail to Take Discrete Action in Violation of APA Section 706(1)

Plaintiffs' Second Claim alleges that Defendants fail to perform three discrete, non-discretionary duties that Defendants owe to all unaccompanied children under the TVPRA and their own regulations. *See* 5 U.S.C. § 706(1); *see also Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64-66 (2004). Defendants only challenge two of Plaintiffs' claims: (1) that ICE and ERO fail to issue and serve legally sufficient NTAs on MPP-unaccompanied children before their transfer to ORR custody in violation of the TVPRA; and (2) that ERO and ORR fail to promptly place MPP-unaccompanied children in the least restrictive setting that is in their best interest. *See* FAC ¶¶ 237, 239; MTD at 19.[10] Defendants' arguments are without merit.

First, Defendants argue that Plaintiffs "have not identified—and cannot identify—any 'unequivocal command' concerning the issuance of a 'TVPRA-NTA[.]'" MTD at 19. But that is exactly what Plaintiffs have identified. *See* FAC ¶¶ 70-72, 83-87, 109-12. As set forth in the Complaint, the TVPRA imposes on ICE the non-discretionary and discrete duty to issue and serve a legally sufficient TVPRA-NTA[11] on all unaccompanied children before it may seek to remove any such child. *See* 8 U.S.C. §§ 1232(a)(5)(D)(i), (d)(8) (providing that any unaccompanied child sought to be removed "shall" be placed in section 240

[10] Defendants do not argue that Plaintiffs have failed to sufficiently plead USCIS's failure to perform a discrete duty owed to MPP-unaccompanied children. Defendants merely note USCIS's May 7, 2021 policy memorandum clarifying that USCIS will accept jurisdiction of an I-589 application filed by an MPP-unaccompanied child. *See* MTD at 19-20, 19 n.7. This policy was issued several months after Plaintiffs filed the Complaint and after negotiations between the parties.

[11] Defendants claim there is no such thing as a TVPRA-NTA, but this semantic quibble misses the mark. As explained in the Complaint, Plaintiffs use the term to distinguish the NTA issued in MPP proceedings (referred to as "MPP-NTA") from the NTA issued to a child upon entry to the United States and designation as unaccompanied (i.e., TVPRA-NTA).

proceedings tailored to their "specialized needs" as required by the TVPRA), 1229(a) (stating that NTAs "shall" be given to all individuals in section 240 removal proceedings); 8 C.F.R. § 1003.14(a) (stating that Section 240 jurisdiction does not vest until a legally sufficient NTA has been filed and served);[12] *SAS Institute, Inc. v. Iancu*, 138 S.Ct. 1348, 1351 (2018) ("The word '*shall*' generally imposes a nondiscretionary duty[.]"); *see also Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 690-91 (9th Cir. 2003) (same); FAC ¶¶ 70-72, 109-12.[13]

Second, ORR's implementing regulations impose a discrete, nondiscretionary legal duty to "release[] [an unaccompanied child] to an approved sponsor without unnecessary delay." 45 C.F.R. § 410.301(a); *see also* 8 U.S.C. § 1232(c)(2)(A) (same). In *Flores v. Rosen*, ORR conceded that this obligation is "not . . . optional . . . [but] *mandatory*." 984 F.3d 720, 731 (9th Cir. 2020) (emphasis added). Defendants do not dispute this legal requirement or Plaintiffs' allegations. Instead, they stake their defense on a factual quarrel that goes to the merits of the claim, which has no place in a motion to dismiss. *See* MTD at 19-20 (discussing imminent removal); *Iqbal*, 556 U.S. at 679. Plaintiffs' factual allegations sufficiently establish that ORR delays release of MPP-unaccompanied children to approved sponsors in violation of its mandatory duty. FAC ¶¶ 154-58.

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[12] Because the TVPRA categorically protects unaccompanied children from reinstatement of prior removal orders, 8 U.S.C. § 1232(a)(5)(D), it is unlawful for ICE to remove any unaccompanied child based on a prior-issued charging document (NTA) or removal order. FAC ¶¶ 71, 73-74. To the extent that Defendants do pursue such removals based on prior MPP removal orders, not only does this violate the TVPRA, but it also confirms that Defendants wrongly subject unaccompanied children to MPP. *See infra* Section III.C.

[13] Further, ICE's and ERO's internal policies unequivocally mandate: "ERO will accept custody of the [unaccompanied children] from CBP *only after* the following conditions have been satisfied: [the unaccompanied child] has been processed, charging documents have been issued and served; . . . ."[13] FAC ¶¶ 83–84. *See Vietnam Veterans of Am. v. Cent. Intel. Agency*, 811 F.3d 1068, 1071 (9th Cir. 2016) (finding internal Army regulations to confer judicially enforceable duties under 706(1)).

For instance, Plaintiffs offer the example of a child whom Defendants held in custody for *four months* before finally releasing him to an approved sponsor in the United States. FAC ¶ 157. The Complaint satisfies Plaintiffs' burden to overcome a motion to dismiss, and Defendants offer no cognizable argument as to why Plaintiffs fail to state a claim for relief.[14] MTD at 19-20.

Finally, Plaintiffs do not launch a "programmatic attack" of the kind addressed by *Lujan*. *See* MTD at 19, 21-22 (quoting *Norton*, 542 U.S. at 64 (referencing *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990)). Defendants "confuse aggregation of similar, discrete purported injuries—claims that many people were injured in similar ways by the same type of agency action—for a broad programmatic attack." *See Ramirez v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 7, 21 (D.D.C. 2018).

C. Plaintiffs Sufficiently Allege that Defendants Fail to Enact or Enforce Policies Required by the TVPRA in Violation of APA Section 706(2)

Plaintiffs allege that Defendants act arbitrarily, capriciously, and contrary to the law when they: (1) fail to enforce or adopt policies ensuring MPP-unaccompanied children receive their TVPRA protections; and (2) deprive MPP-unaccompanied children their rights under the TVPRA. FAC ¶¶ 243-50. Defendants offer no persuasive reason to dismiss Plaintiffs' Third Claim for Relief under Section 706(2)(A).

First, the plain text of the APA refutes Defendants' argument that their "purported inaction is not a cognizable claim under Section 706(2) of the APA."

[14] This Court should reject Defendants' passing argument that only Judge Gee has authority to remedy this claim because it is related to *Flores* settlement. MTD at 17; *see also Flores v. Reno*, No. CV 85-4544 RJK (Px) (C.D. Cal. 1997). Judge Gee denied Plaintiffs' notice of related case on this precise ground, holding that this case and *Flores* "do not arise from a closely related transaction, happening, or event;" "do not call for a determination of the same, substantially related, or similar questions of law and fact;" and that "declining to transfer this case would not entail substantial duplication of labor." *See* Dkt. 12 (Judge Gee's order declining to transfer this case to her calendar).

MTD at 20. The APA expressly defines "agency action" to include the "failure to act," and thus authorizes challenges to "inaction by an agency if an agency arbitrarily and capriciously withholds action or if such inaction constitutes an abuse of discretion or is not in accordance with law under Section 706(2)(A)." 5 U.S.C. § 551(13); *Raymond Proffitt Found. v. U.S. Army Corps of Eng'rs*, 128 F. Supp. 2d 762, 771 (E.D. Pa. 2000).[15]

Second, Defendants seek to recast Plaintiffs' claim as only alleging inaction, when Plaintiffs also allege that "Defendants subject UC to their MPP proceedings," in violation of the TVPRA. FAC ¶ 246. As set forth throughout the Complaint, Plaintiffs challenge as arbitrary, capricious, and unlawful Defendants' Practice that prioritizes enforcement of MPP over the provision of non-discretionary statutory duties to MPP-unaccompanied children. *See, e.g.*, FAC ¶ 5 ("Defendants thereafter have failed to implement policies necessary to ensure that these UC receive the protections guaranteed them by law and, instead, have taken affirmative steps to restrict access to these protections."), 160, 179, 216, 232, 246, 252. Similar claims routinely fall within the ambit of 706(2). *See, e.g.*, *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1180 (S.D. Cal. 2019) (finding a section 706(2) claim based on an allegation that United States Customs and Border Protection ("CBP") "denied" asylum seekers access to the asylum process); *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 149-55 (D.D.C. 2018) (finding DHS's failure to comply with internal guidance in denying parole requests was likely arbitrary and capricious).[16]

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[15] *See also A Cmty. Voice v. EPA*, No. 19-71930, 2021 WL 1940690, at *8-9 (9th Cir. May 14, 2021) (finding EPA "inaction" to be arbitrary and capricious where the agency abandoned an ongoing statutory duty to update soil-lead hazard standards); *Ramirez*, 310 F. Supp. 3d at 25-30 (holding that ICE's consistent failure to apply certain factors in making custody decisions under the TVPRA was reviewable under APA § 706(2)); *Friends of Yosemite Valley v. Scarlett*, 439 F. Supp. 2d 1074, 1089 (E.D. Cal. 2006) ("[W]hether Plaintiffs rely on Section 706(1) or 706(2) is immaterial, because, as explained in *SUWA*, an agency action includes both action and inaction."), *aff'd sub nom. Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024 (9th Cir. 2008).

[16] Nor do Plaintiffs launch a "programmatic attack" of the kind challenged in *Lujan*.

Third, and finally, Plaintiffs have adequately alleged final agency action. The Supreme Court in *Bennett v. Spear* set forth two conditions required for final agency action: (1) "the action must mark the 'consummation' of the agency's decision-making process"; and (2) "the action must be one by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" 520 U.S. 154, 177 (1997) (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) and *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Courts evaluate "the 'finality' element in a pragmatic way," with the goal of not "meddl[ing] in the agency's ongoing deliberations[.]" *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *San Francisco Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 578 (9th Cir. 2019).

Defendants do not claim—or even suggest—that they are "in the middle of trying to figure out [their] position . . . and that this action somehow prematurely inserts the courts into the mix." *San Francisco Herring Ass'n*, 946 F.3d at 578 (citing *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 411, 414 (D.C. Cir. 2011); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986); *see also Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990)). And as Plaintiffs have alleged, nothing about Defendants' Practice was "merely tentative." *Bennett*, 520 U.S. at 178. Defendants have issued *in absentia* removal orders to MPP-unaccompanied children for failing to appear before MPP judges, delayed family reunification based on MPP ties, and deported children "to no one" on MPP removal orders—and in the process have denied these children various rights guaranteed by the TVPRA. *See* FAC ¶¶ 156, 164, 195, 243-47. The first prong is therefore met because "[t]he FAC includes specific factual allegations demonstrating that these policies and/or practices are not tentative or interlocutory

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See supra Section III.B.

in nature, *as [Defendants have] already implemented them*."[17] *Lucas R. v. Azar*, No. 18-cv-5741, 2018 WL 7200716, at *8 (C.D. Cal. Dec. 27, 2018) (emphasis added) (denying defendants' motion to dismiss).

Plaintiffs also satisfy the second prong of the *Bennett* inquiry. There can be no dispute that the denial of statutory and procedural rights is a decision from which "legal consequences will flow." *Bennett*, 520 U.S. at 177-78. And Defendants do not dispute that, based on the policies and actions challenged here, children have been kept in ORR custody longer, made to appear in their MPP proceedings, and removed to their home countries without processes afforded to other unaccompanied children, including the opportunity to seek asylum or voluntary departure. FAC ¶¶ 111, 148-156, 164, 195; 8 U.S.C. § 1232; Pub. L. No. 110-457, 122 Stat. 5076-77; *see also L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 612, n.7 (S.D.N.Y. 2018) (finding final agency action where challenged conduct caused an extension in the process by which ORR released unaccompanied children); *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 139 (D.D.C. 2018) (finding DHS's rejection of parole requests constituted final agency action). In fact, Defendants admit that MPP-unaccompanied children are subject to MPP removal proceedings and removal orders. *See* MTD at 23. Ultimately, Defendants' arguments in support of dismissing this claim fail.

D. Plaintiffs Sufficiently Allege an *Accardi* Claim

Defendants fail to cite a single case in support of their argument that Plaintiffs' *Accardi* claim should be dismissed. Instead, Defendants base their request for dismissal entirely on a linguistic sleight of hand, arguing that Plaintiffs have alleged that Defendants have violated their own policy that unaccompanied

[17] Defendants' position taken for the purpose of this litigation does not bear on the Court's analysis. *See Abramowitz v. EPA*, 832 F.2d 1071, 1075 (9th Cir. 1987) ("We do not believe the Agency's own designation of its action determines the jurisdictional issue."), *superseded by statute on other grounds*.

minors will "not be subject to MPP," but "the FAC does not allege that any unaccompanied minors are being placed in MPP[.]" MTD at 22. Apparently, it must be said: being unlawfully subject to a program and being unlawfully placed in that program are different and distinct actions—Plaintiffs here challenge the former, not the latter. This semantic clarification alone should dispose of Defendants' dubious argument.

Rather than address Plaintiffs' claims as pled, Defendants describe the dispute as one turning on geography, protesting that they are not returning these children to Mexico a second time under MPP. *See* MTD at 22. This is misdirection. As the FAC details, "MPP" refers not only to Defendants' policy of returning asylum seekers to Mexico, but also to Defendants' adjudication of those individuals' cases through truncated removal proceedings that are woefully short of the affirmative asylum and child-centric section 240 proceedings guaranteed to unaccompanied children in the United States. *See* FAC ¶¶ 118–20, 140-42, 179-92. The Complaint is clear: Plaintiffs' challenge Defendants' Practice of subjecting unaccompanied children to MPP proceedings in violation of Defendants' own policy. *Id.*

Indeed, "Defendants' briefing leaves the distinct impression that Defendants concede the existence of a policy from which Plaintiffs' alleged injuries flow." *Al Otro Lado*, 394 F. Supp. 3d at 1208. By their own words, Defendants subject MPP-unaccompanied children to MPP. *See* MTD at 12 (admitting that MPP-unaccompanied children "proceed" in "the removal proceedings that previously commenced" in MPP), 15 (arguing that Defendants' custody determinations as to MPP-unaccompanied children "directly arise from a 'decision' to 'execute removal orders'" from MPP). Defendants thus fail to offer legal grounds to dismiss this claim or an explanation as to how their treatment of MPP-unaccompanied children

does not violate their own express policy that unaccompanied children "will not be subject to MPP."[18]

E. Plaintiffs Sufficiently Allege that Defendants Condition Access to the TVPRA in Violation of APA Section 706(2)(A)

Plaintiffs final claim for relief shows that Defendants place unlawful conditions on MPP-unaccompanied children's access to their TVPRA rights. *See* FAC ¶¶ 258-64. Defendants, however, misconstrue Plaintiffs' claim as alleging "interfer[ence] with access to counsel" and insist the claim should be dismissed because it "lacks plausible factual support." MTD at 23. Defendants' argument lacks merit and ignores the factual allegations supporting Plaintiffs' claim.

The TVPRA requires unaccompanied children be placed in the "least restrictive setting that is in the best interest of the child" without undue delay. *See* 8 U.S.C. § 1232(c)(2)(A); *see also* FAC ¶¶ 65, 90-92. As set forth in the Complaint, however, Defendants condition release of MPP-unaccompanied children to approved sponsors, or placement in the "least restrictive setting," on evidence that Plaintiffs are representing the child in the MPP proceeding. *See* FAC ¶¶ 154-58. Plaintiffs, in turn, must enter representation on an MPP case outside their area of expertise and engage in time-consuming emergency motion practice and advocacy just to secure the MPP-unaccompanied child's release. *See* FAC ¶¶ 159-63**.**

The TVPRA's command, however, is absolute: all unaccompanied children "*shall* be promptly placed in the least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(c)(2)(A) (emphasis added); *see SAS Inst., Inc.*, 138

[18] Plaintiffs have sufficiently alleged an *Accardi* claim against Defendant CBP. FAC ¶¶ 165-68, 251-57. Plaintiffs have detailed CBP's "discrete investigatory and reporting obligations." FAC ¶ 165. Plaintiffs further allege that the "breakdown in Defendants' normal reporting requirements" causes immigration courts to not know what "CBP, ERO, and ORR" are doing, which has directly led to immigration consequences for Plaintiffs' clients. FAC ¶ 168. This satisfies Plaintiffs' obligation "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.'" MTD at 24 (quoting *Landers v. Quality Commc'ns, Inc.*, 771 F.3d 638, 640 (9th Cir. 2014)).

S.Ct. at 1351 (explaining "shall . . . imposes a nondiscretionary duty "). It does not condition a child's release on any ground, let alone proof of existing legal representation. The Complaint thus plausibly alleges that Defendants' "conditioning an MPP-unaccompanied child's release from ORR custody on proof of . . . challenge of their MPP removal order," FAC ¶ 261, violates Defendants' duties under the TVPRA and thus is "contrary to law." 5 U.S.C. § 706(2)(A); *EBSC III*, 993 F.3d at 669-71 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

CONCLUSION

Defendants' motion to dismiss should be denied. To the extent Defendants' motion is not denied outright, Plaintiffs respectfully request leave to amend the Complaint. *See Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (holding that leave to amend shall be granted with "extreme liberality").

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ECF Certification

Pursuant to L.R. 5-4.3.4(a)(2)(i), the filer attests that all other signatories listed, and on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

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