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

18 IMMIGRANT DEFENDERS LAW
 CENTER; *et al.*,
 19
 Plaintiffs,
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 v.
 21 U.S. DEPARTMENT OF HOMELAND
 SECURITY; *et al.*,
 22
 Defendants.

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

**DECLARATION OF MARION
 DONOVAN-KALOUST IN
 SUPPORT OF PLAINTIFFS’
 AFFIRMATIVE CASE**

Date: August 14, 2023
 Time: 9:00 A.M.
 Ctrm: 6D
 Judge: Hon. Fernando M. Olguin

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**DECLARATION OF MARION DONOVAN-KALOUST IN SUPPORT OF
PLAINTIFFS’ AFFIRMATIVE CASE**

I, **MARION DONOVAN-KALOUST**, declare as follows:

I make this declaration based on personal knowledge and a review of the records related to my position as Legal Services Director at Immigrant Defenders Law Center (“ImmDef”). If called as a witness, I could and would competently testify thereto under oath to the following.

1. I am an attorney licensed to practice law in California. I have worked at ImmDef for over seven years. In my current position as Legal Services Director, I oversee the Children’s Representation Project, which includes our Detained Youth Empowerment Project (“DYEP”), to ensure that the organization achieves its overall mission of defending the rights of immigrants in removal proceedings. I started at ImmDef as a staff attorney, and over the years was promoted to a managing and then directing attorney of DYEP. During my time as directing attorney, ImmDef’s DYEP tripled in size to serve thousands of children per year. As Legal Services Director, I both supervise attorneys who represent detained and non-detained immigrant youth and continue to represent clients myself.

I. ImmDef Continues to be One of the Largest Legal Service Providers for Unaccompanied Children in Southern California

2. ImmDef is the largest removal defense nonprofit in Southern California. Our Children’s Representation Project is ImmDef’s largest project. The goal of the Children’s Representation Project is to provide quality representation to unaccompanied minors in removal proceedings.

3. DYEP contributes to this mission by providing Know Your Rights Presentations and legal screenings to unaccompanied children in facilities run by the Office of Refugee Resettlement (“ORR”).

1 4. ImmDef currently serves eighteen (18) short-term ORR facilities for
2 unaccompanied children. ImmDef has agreed to serve two (2) additional facilities
3 that will be opening soon.

4 **II. MPP-Unaccompanied Children Continue to be Treated Differently from**
5 **Unaccompanied Children with Prior Removal Orders**

6 5. Since my last declaration in this case, submitted on November 23, 2021
7 (Dkt. 69-5, Exh. 19¹), ImmDef has continued to encounter MPP-unaccompanied
8 children through our work as a contracted Legal Service Provider with ORR. MPP-
9 unaccompanied children continue to be treated differently at nearly every stage of
10 their immigration proceedings compared to other unaccompanied minors with prior
11 removal orders, beginning from when they enter the country.

12 **A. DHS inconsistently issues a new Form I-862, Notice to Appear**
13 **(“NTA”), to MPP-unaccompanied children, causing confusion and**
14 **resulting in a lack of notice as to any previous ties to MPP.**

15 6. In my prior role as a managing and directing attorney at ImmDef, I
16 supervised attorneys representing unaccompanied children who entered the United
17 States with prior removal orders. In my experience, the Department of Homeland
18 Security (“DHS”) historically made no distinction in how they prosecuted removal
19 cases against unaccompanied children entering the United States for the first time
20 and those entering with prior removal orders. In both scenarios, DHS would
21 typically file with the Executive Office for Immigration Review (“EOIR”) an NTA
22 with the unaccompanied child’s most recent entry reflected, initiating the child’s
23 new Section 240 proceedings. ImmDef’s unaccompanied child clients with prior
24 removal orders were never placed in reinstatement proceedings—where the
25 government would try to reinstate the prior removal order and expedite removal—

26 _____
27 ¹ All citations to exhibits in this declaration refer to the exhibits in the Pretrial
28 Exhibit Stipulation filed pursuant to Dkt. 41 at 5.

1 but rather were placed in new Section 240 proceedings pursuant to the Trafficking
2 Victims Protection Reauthorization Act (“TVPRA”).

3 7. By contrast, DHS prosecutes MPP-unaccompanied children previously
4 in MPP proceedings, effectively reinstating those proceedings and/or removal
5 orders. For an MPP-unaccompanied child with *ongoing* MPP proceedings, even
6 when ImmDef successfully severs that child’s case from their parent’s MPP
7 proceedings and changes venue to the Los Angeles Immigration Court, the removal
8 proceedings usually continue before the court based on the NTA issued while the
9 child was in MPP. This means that the child would not receive the protections
10 provided for unaccompanied children under the TVPRA, such as the right to enter
11 pleadings and make challenges to the NTA in new Section 240 proceedings, with
12 certain child-sensitive safeguards, because that NTA does not reflect their most
13 recent entry as an unaccompanied child. It also means that ImmDef attorneys must
14 act quickly to identify MPP-unaccompanied children and file emergency motions or
15 appeals before they are removed without these protections.

16 8. In cases where DHS files a new NTA and assigns a child a new A-
17 number when he or she reenters unaccompanied, DHS fails to notify the child, his or
18 her guardian, or his or her attorney of any prior MPP ties, which sows confusion and
19 requires ImmDef attorneys to expend greater resources to determine the current
20 posture of an MPP-unaccompanied child client’s case.

21 **B. ICE seeks to remove MPP-Unaccompanied minors in ORR custody**
22 **with prior removal orders unless the child’s attorney intervenes.**

23 9. I have never seen an unaccompanied child who entered the United
24 States with a prior removal order threatened with removal while in ORR custody,
25 except when that child has a prior MPP removal order. DHS Field Office Juvenile
26 Coordinators have indicated to me on multiple occasions that ICE intends to execute
27 MPP removal orders of MPP-unaccompanied children in ORR custody unless 1) a
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1 Motion to Reopen is filed with the immigration court that issued the MPP removal
2 order or 2) a Notice of Appeal is filed with the Board of Immigration Appeals
3 (“BIA”). Given the severity of this threat—i.e., the threat of the child being removed
4 before accessing his or her rights under the TVPRA, including the ability to seek
5 affirmative asylum and access to informed counsel—ImmDef staff members have to
6 draft these motions on truncated timelines despite the burden this places on our own
7 organizational resources.

8 **C. ImmDef expends considerable resources trying to quickly gather**
9 **information on an MPP-unaccompanied child’s case that DHS**
10 **should provide.**

11 10. MPP-unaccompanied child cases require significantly more resources
12 and more urgent attention than other unaccompanied child cases. As soon as an
13 MPP-unaccompanied child is identified, ImmDef staff are forced to move quickly
14 and prioritize this child’s case over other unaccompanied children’s cases to avoid
15 *in absentia* removal orders or the execution of existing MPP-removal orders.

16 11. In my experience, when ImmDef has served unaccompanied children
17 detained in ORR facilities outside of Southern California and under the jurisdiction
18 of other immigration courts, who are later transferred to ORR facilities in our
19 service area, DHS takes responsibility for ensuring that EOIR has the most up-to-
20 date information regarding the unaccompanied child’s detention status at the earlier
21 stages of their proceedings. Once the child is represented, it is the duty of the child’s
22 attorney to update EOIR moving forward.

23 12. This has not been DHS’s practice, as far as I have observed, with MPP-
24 unaccompanied children. Rather, these children’s MPP proceedings continue
25 unchanged by their subsequent entry and status in ORR custody. Their hearings
26 generally move forward with their parents’ cases in other states, even while they are
27 detained in California. In this situation, the child may receive an *in absentia* removal
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1 order for missing their hearing in another state. Whether they have an *in absentia*
2 removal order, an unexecuted removal order, or a pending MPP removal
3 proceeding, ImmDef staff must act quickly—prioritizing these cases over others—to
4 prevent the possible removal of MPP-unaccompanied children without the
5 protections they are owed under the TVPRA, including the ability to affirmatively
6 apply for asylum, access to non-adversarial proceedings.

7 13. Further, the representation process is made more complicated by our
8 need to communicate with courts and the DHS Office of the Principal Legal Advisor
9 (“OPLA”) outside of our jurisdiction—circumstances unique to representing
10 children with ongoing MPP proceedings. Logistics alone adds considerable time and
11 effort to these cases. For instance, for MPP-unaccompanied children whose
12 proceedings are ongoing before the MPP immigration courts in Texas, we need to
13 investigate how to appear telephonically in case the judge does not grant a change of
14 venue motion, what other motions need to be filed to appear telephonically, how to
15 file by mail to courts in Texas, and how to communicate with and serve ICE. This
16 information is not always accessible online and requires considerable time spent
17 reaching out to practitioners in Texas for their guidance.

18 14. Understanding the procedural posture of a case is also incredibly
19 important, but burdensome as to MPP-unaccompanied children. Unlike all other
20 unaccompanied children, who are placed into Section 240 proceedings when they
21 are designated unaccompanied, DHS prosecutes MPP-unaccompanied children
22 according to their prior MPP proceedings. In order to represent them, we have to
23 understand the history and procedural posture of those proceedings. For this
24 information, ImmDef relies on the EOIR record of proceedings (“ROP”)—but this
25 can be challenging to obtain, especially on the expedited basis through which DHS
26 seeks to remove MPP-unaccompanied children. In one case, for example, repeated
27 emails and calls to EOIR in Texas to request the ROP went ignored. This is because,
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1 for MPP cases, the ROP is physically located in MPP courts (outside of our service
2 area) and not available to us online. We cannot review the ROP in person because
3 staff cannot travel to MPP courts, so our only practical resort is to beg the
4 government to provide it to us—we repeatedly send emails and make phone calls to
5 the MPP immigration court to request the ROP. We also contact DHS to request
6 copies of any filings and ask whether pleadings have been taken, a change of
7 address or change of venue motion has already been filed and, in some cases, try to
8 determine the basis of an MPP removal order. Often it takes several attempts before
9 we obtain any information, which when we do is often incomplete, leaving us
10 unsure about our MPP-unaccompanied child client’s procedural history. This is
11 especially concerning when DHS requires us to engage in emergency motion
12 practice without those records because the child could be immediately removed
13 without any process as an unaccompanied child.

14 15. If an MPP-unaccompanied child has already received a removal order,
15 ImmDef attorneys rush to file a Motion to Reopen or a Notice of Appeal with the
16 BIA. When doing so, we often have limited time before an appeal is due and little
17 information about the case, which makes it impossible to raise all grounds for
18 appeal. For most Children’s Representation Attorneys in this position, it is their first
19 time practicing before the BIA. In addition to a Motion to Reopen or a Notice of
20 Appeal, attorneys may file motions to reopen or remand, arguing for our clients’
21 rights under the TVPRA. ImmDef attorneys are thus forced into an emergency
22 posture and required to expend additional resources on MPP-unaccompanied
23 children’s cases that are in a complicated or confusing posture.

24 16. Moreover, to avoid the risk of imminent removal of the child, ImmDef
25 attorneys have entered appearances and initiated representation for MPP-
26 unaccompanied child clients who were not going to remain within our service area
27 because they wished to reunify with sponsors in other parts of the country—
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1 diverting precious resources we would otherwise not expend. Attorneys are also
2 forced to file motions and appeals with limited information, harming our mission of
3 providing quality legal representation.

4 **III. ImmDef Continues to Employ Additional Screening and Investigative**
5 **Measures to Identify MPP-Unaccompanied Children and Provide**
6 **Effective Representation**

7 17. ImmDef has maintained the changes to its practices to identify and
8 represent children with MPP ties outlined in my previous declarations. *See* May 14,
9 2021 Marion Donovan-Kaloust Declaration (“May 14, 2021 Declaration”) (Dkt. 29-
10 20), Exh. 11 at ¶¶ 32-60; November 23, 2021 Marion Donovan-Kaloust Declaration
11 (“November 23, 2021 Declaration”) (Dkt. 69-5), Exh. 19 at ¶¶ 5-7. This is because
12 DHS still does not consistently or timely notify us that a child we serve has ongoing
13 MPP proceedings or an MPP removal order. If we do not know this information, we
14 are at an even greater disadvantage in attempting to protect these children’s access
15 to TVPRA rights, such as affirmative asylum, before they are removed without
16 further process.

17 18. Based on my personal experiences and review of our organization’s
18 internal databases and client files, it is still our policy to: (a) screen every new child
19 for ties to MPP; (b) enter immediate representation for children with removal orders
20 issued through MPP; (c) file motions to reopen and change venue for these children;
21 (d) where necessary, file motions to sever children’s cases from their parents’ cases;
22 and (e) coordinate with out-of-state courts to obtain records and information.

23 19. ImmDef staff under my supervision or under the supervision of staff I
24 supervise continue to ask questions in initial legal screenings with all
25 unaccompanied children to attempt to identify whether they were previously
26 subjected to MPP. In instances where a staff member I supervise believes that a
27 child may have been enrolled in MPP based on a legal screening, we investigate
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1 further. This investigation always includes running the child’s A-number and
2 adjacent A-numbers through the EOIR Automated Case Information portal. This
3 process adds roughly five minutes per case. May 14, 2021 Declaration (Dkt. 29-20),
4 Exh. 11 ¶ 6. Although this may not sound like much additional time, DYEP
5 conducts approximately 385 legal screenings per month. In the aggregate, this is a
6 significant burden. To date, ImmDef has flagged almost 100 unaccompanied
7 children as having potential MPP ties prior to their designation as unaccompanied.

8 20. Checking the EOIR Automated Case Information portal is only one
9 method ImmDef uses to screen for MPP ties, and it is not foolproof. In my
10 experience, there have been cases where MPP information has not appeared on the
11 EOIR portal—either because EOIR does not input it, or because DHS assigns the
12 child a new A-number when he or she reenters the United States unaccompanied—
13 so we need to employ additional screening measures. *See* May 14, 2021 Declaration
14 (Dkt. 29-20), Exh. 11 ¶ 24. For example, I have directed Children’s Representation
15 Project attorneys to follow up with the parents and sponsors of unaccompanied
16 children we believe may have MPP ties to confirm whether the child was ever
17 enrolled in MPP. Children themselves are often unable to provide the facts needed
18 to determine whether they were in MPP, so these additional steps are necessary.
19 Attorneys also submit a Freedom of Information Act request to Customs and Border
20 Protection (“CBP”) to determine whether there are records of additional entries for
21 the child.

22 21. Through my supervisory position at ImmDef and my review of our
23 records, I am aware of at least one instance in which a pair of siblings went through
24 our initial screening process without us being alerted that they were part of MPP. It
25 was only once they were released, and their sponsor spoke with an attorney, that
26 they were identified as MPP-unaccompanied children and were referred back to
27 ImmDef. November 23, 2021 Declaration (Dkt. 69-5), Exh. 19 at ¶ 10. It is
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1 impossible to know how many others we failed to identify, thereby frustrating our
2 mission to provide quality representation to unaccompanied children in removal
3 proceedings.

4 22. Other current and former border policies, such as Title 42,² continue to
5 make it more difficult to identify MPP-unaccompanied children because a child's
6 experience with MPP and with Title 42 can sound very similar. *Id.* at ¶ 11.

7 23. Most recently, the new CBP One application, which requires
8 noncitizens to register with the U.S. government and obtain an appointment with
9 CBP to seek asylum, has caused many families to wait, sometimes for months, at the
10 border. ImmDef has started to see unaccompanied children whose parents are
11 enrolled in CBP One sent ahead because of the wait and dangerous conditions at the
12 border, as we saw happen with MPP. We can only determine whether the child was
13 enrolled in CBP One or MPP through additional screening. Trying to figure out
14 exactly what program a child is referencing can be difficult because the experiences
15 sound similar and the children have trouble distinguishing them or they do not know
16 exactly what prevented them from entering the country. But the distinction is
17 incredibly consequential and can be the difference between the child facing
18 summary removal or not.

19 24. We anticipate that in the coming months, screening will become even
20 more complicated as more children enter who spent time waiting in Mexico either
21 under MPP, Title 42, CBP One, or any combination of these policies.

24 2 The Title 42 process was a COVID-era border policy that allowed CBP to expel
25 migrants at the southern border under a public health law. The policy ended on May
26 11, 2023, but it is still difficult to distinguish under what policy unaccompanied
27 children were previously expelled. Even though unaccompanied children were
28 exempt from the Title 42 process, if they were previously traveling with family
members, they could have been turned back under this policy.

1 **IV. ImmDef Has Continued to Encounter MPP-Unaccompanied Children**

2 25. When ImmDef encounters children with MPP ties, it is still our practice
3 to enter representation immediately to prevent them from being removed if they
4 have existing removal orders or from being erroneously ordered removed if they are
5 in active MPP proceedings. Again, these are all steps we do not have to immediately
6 take with other unaccompanied children.

7 26. Typically, the next step after entering an appearance is to file a motion
8 to reopen or Notice of Appeal at the BIA if a child has a removal order, or a motion
9 to change venue if the child is in ongoing MPP proceedings.

10 27. When an MPP-unaccompanied child moves out of our service area,
11 ImmDef may remain in contact with the child's new counsel to support the child's
12 effective representation, in alignment with our mission to provide quality
13 representation, because we have more knowledge about these cases than most legal
14 service providers.

15 28. DHS's treatment of MPP-unaccompanied children continues to be
16 exceedingly opaque, which contributes significantly to the challenges we face—and
17 the resources we must divert from our other programmatic work—when
18 representing MPP-unaccompanied children.

19 29. For example, ImmDef has taken on the representation of two new
20 MPP-unaccompanied children—the "M.H. siblings." I have reviewed the records
21 related to their cases, both in my role supervising the attorney directly representing
22 them, and more recently while drafting this declaration.

23 30. The M.H. siblings initially presented at the Nuevo Laredo, Mexico Port
24 of Entry at the U.S.-Mexico Border in November 2019 with their parents and a third
25 sibling. The family was subsequently enrolled in MPP and issued NTAs that
26 scheduled them for a Master Calendar Hearing (a scheduling conference with the
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1 immigration judge) in February 2020. The family then returned to Nuevo Laredo to
2 wait for their hearing.

3 31. While waiting in Nuevo Laredo for their Master Calendar Hearing, the
4 family was kidnapped and ransomed for a significant amount of money. Their
5 kidnapper threatened the family with death if they did not pay the ransom. A family
6 friend paid for their release and the family immediately fled to Monterey, Mexico,
7 for their personal safety.

8 32. The family missed their Master Calendar Hearing because they had fled
9 to Monterey. As has been well-documented in MPP, the immigration judge ordered
10 their removal *in absentia*.

11 33. In the summer of 2021, the family relocated to Tijuana, Mexico, in
12 hopes of presenting themselves at the San Ysidro, Mexico Port of Entry.

13 34. The parents and youngest sibling crossed into the United States in April
14 2022, while the M.H. siblings stayed in Tijuana with other relatives.

15 35. In May 2022, the M.H. siblings, then aged seven and fourteen years
16 old, crossed at the San Ysidro Port of Entry and were issued new NTAs under their
17 prior MPP A-numbers. The siblings were subsequently transferred to an ORR
18 facility within ImmDef's service area and released to their mother on May 12, 2022.
19 On that same day, their mother signed a *pro se* Motion for Change of Venue with
20 the San Antonio Immigration Court.

21 36. On June 6, 2022, the San Antonio Immigration Court issued a notice
22 that it had rejected the request to change venue and other case filings because the
23 "Case [was] not Pending," as the family was "ORDERED REMOVED ON
24 2/18/2020 BACK TO HONDURAS."

25 37. In the following months, ImmDef regularly checked the EOIR
26 Automated Case Information portal for updated information on the M.H. siblings'
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1 immigration proceedings. For months, the portal consistently indicated that the
2 children were ordered removed in February 2020.³

3 38. Near the end of October 2022, the EOIR Automated Case Information
4 portal changed to show that the M.H. siblings were scheduled for a Master Calendar
5 Hearing at the Los Angeles, California Immigration Court in May 2023.

6 39. To this day, ImmDef does not know how the M.H. sibling's cases
7 ended up in the Los Angeles Immigration Court. No documents were served on
8 either the M.H. siblings or counsel on the matter that indicate any procedural moves
9 on the part of DHS, such as a motion to reopen and rescind the MPP *in absentia*
10 removal order or a motion to change venue. The clients' electronic records of
11 proceedings are likewise silent on that mystery. The only reason ImmDef staff were
12 alerted to the change was through their constant monitoring of the EOIR portal.

13 40. This exemplifies DHS's lack of transparency towards MPP-
14 unaccompanied children that causes considerable confusion, and therefore requires
15 additional work, for our attorneys. Moreover, because there is no record of the *in*
16 *absentia* removal order being rescinded, we have no guarantee or comfort that DHS
17 will not attempt to remove the M.H. siblings based on that removal order. As such,
18 the attorney of record must proceed with caution and be alert to any attempts to
19 remove the child based on the MPP *in absentia* removal order. This looming and
20 uncertain threat of imminent removal, and corresponding vigilance, is not something
21 ImmDef experiences with its other unaccompanied children clients.

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³ ImmDef did not file a Motion to Reopen or Appeal with the BIA during this time because the siblings were released to a sponsor.

1 **V. Previously Identified MPP-Unaccompanied Child Cases Continue to**
2 **Drain Organizational Resources**

3 41. Once an MPP-unaccompanied child is identified, ImmDef attorneys
4 continue to devote considerable time and effort to their representation beyond what
5 a typical Children's Representation Project case requires.

6 42. One such client is J.O.O. Per my review of her case file, ImmDef first
7 filed a motion to reopen for J.O.O.'s MPP case in March 2021, after an MPP judge
8 in Harlingen, Texas, denied her and her mother's asylum applications. May 14, 2021
9 Declaration (Dkt. 29-20), Exh. 11 at ¶ 24. The same day that J.O.O. filed her
10 motion to reopen with the BIA, ICE in Harlingen agreed to file a joint motion to
11 reopen the child and mother's proceedings with the original MPP immigration court.
12 *Id.* As far as ImmDef knows, the judge in Harlingen never responded to this motion.

13 43. Around the same time, J.O.O. was placed in an entirely separate set of
14 removal proceedings under her same MPP A-number but as an unaccompanied child
15 before an immigration court in Los Angeles, California, after ORR released her to a
16 sponsor in the area. An immigration judge terminated these proceedings on March
17 30, 2021, after J.O.O. filed an asylum application with United States Citizenship and
18 Immigration Services.

19 44. In May 2022, however, the BIA issued an order granting J.O.O.'s
20 motion to reopen the MPP case and remanded it to the original Harlingen MPP
21 immigration judge.

22 45. In January 2023, the ImmDef attorney now representing J.O.O., Carson
23 Scott, received an email from J.O.O.'s prior counsel in New York, stating that her
24 office had received a hearing notice in the mail scheduling J.O.O. for a court date in
25 Harlingen on May 23, 2023.

1 46. Ms. Scott then attempted to contact the court in Harlingen numerous
2 times over the course of several weeks to confirm the hearing because the EOIR
3 Automated portal did not show any scheduled hearings.

4 47. After confirming the hearing was indeed scheduled in Harlingen, Ms.
5 Scott rushed to file a motion to substitute counsel and for a change of venue to Los
6 Angeles.

7 48. In total, Ms. Scott and other ImmDef staff have spent approximately 86
8 hours on J.O.O.'s case, and much of this time was spent on MPP-specific issues.
9 J.O.O. is only one of fourteen (14) MPP-unaccompanied children that Ms. Scott
10 represents.

11 49. It is my belief that, unless Defendants change their policy towards
12 MPP-unaccompanied children, ImmDef will need to maintain its additional
13 screening measures and engage in extraordinary and often emergency motion
14 practice for the foreseeable future. We will also continue to face challenges
15 protecting the rights of the MPP-unaccompanied children we already serve and
16 diverting significant staffing resources to do so.

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1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct.

3 Executed on June 20, 2023, at Riverside, California.
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7 Marion Donovan-Kaloust
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