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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.

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

DEFENDANTS' TRIAL BRIEF

Pre-Trial Conference: November 3, 2023 at 10:00 am

Trial Date: November 7, 2023 at 9:00 am

Judge: Hon. Fernando M. Olguin

Pursuant to Local Rule 16-10 and this Court's May 15, 2023 Order (ECF No. 185), Defendants submit the following trial brief. Since the Court has not directed the parties to brief any additional issues (L.R. 16-10(b)), this brief updates Defendants' Amended Memorandum of Contentions of Law and Fact (Dkt. 218) by citing newly decided cases (L.R. 16-10(a)) and replying to Plaintiffs' memoranda of contentions of law and fact (Dkts. 208, 230) (L.R. 16-10(c)).

I. Updates to Defendants' Amended Memorandum of Contentions of Law and Fact (Dkt. 218)

A. Claims and Defenses [L.R. 16-4.1(a)-(b)] (Dkt. 218 at 2)

On August 3, 2023, the Ninth Circuit reaffirmed that (1) Article III standing "is a threshold jurisdictional requirement and 'may be raised at any time during the proceedings, including on appeal'" and (2) Plaintiffs must "establish each element of standing 'with the manner and degree of evidence required at the successive stages of the litigation.'" *Ernest Bock, LLC v. Steelman*, 76 F.4th 827, 834-35 (9th Cir. 2023) (citations omitted).

B. Issues of Law [L.R. 16-4.1(i)] (Dkt. 218 at 11)

On June 30, 2023, the United States Supreme Court issued its opinion in *Dep't of Educ. v. Brown*, 143 S. Ct. 2343 (2023). In *Brown*, the plaintiffs brought an APA challenge to a loan forgiveness program promulgated under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), but the plaintiffs' purported injury was not receiving loan relief under the Higher Education Act (HEA). *Id.* at 2352-53. The Supreme Court held that the plaintiffs could not satisfy the traceability (second) prong for Article III standing. *Id.* at 2353. The Supreme Court reasoned that the injury the plaintiffs claimed (not receiving loan relief under the HEA) was entirely "independent" of the allegedly unlawful plan (under the HEROES act). *Id.* "Put differently, the Department's decision to give *other* people relief under a *different* statutory scheme did not *cause* respondents not to obtain the benefits they want." *Id.*

Plaintiffs in this case cannot establish traceability for the same reason. They

challenge the lawfulness of a purported policy of not issuing new NTAs to MPP-UC.[1] But their claimed injury—having to divert extra resources to represent MPP-UC—is wholly "independent" of the allegedly unlawful behavior. Plaintiffs' *own* submissions illustrate this point: they claim diversion of resources when a new NTA *is not issued* (which is the purported policy they challenge) and when a new NTA *is issued* (which is the very relief they request). *See* Dkt. 233 at 5 (Defendants' opening statement); Dkt. 232-1 at 12-13 (Defendants' [Proposed] Findings of Fact and Conclusions of Law); Dkt. 206 (Declaration of Marian Donovan-Kaloust), ¶¶ 30, 35-36, 40, 42-43, 48. As such, Plaintiffs' claimed injury cannot be traceable to the purported policy they challenge.

II. Reply to Plaintiffs' Memoranda of Contentions of Law and Fact (Dkts. 208, 230)

At the outset, it should be noted that Plaintiffs' "Amended Memorandum of Contentions of Law and Fact" (Dkt. 230) is identical to Plaintiffs' Memorandum of Contentions of Law and Fact (Dkt. 208), except that it adds three pages of prefatory argument to the first three pages that respond to Defendants' operative Amended Memorandum of Contentions of Law and Fact (Dkt. 218). *Compare* Dkt. 208, *with* Dkt. 230 at 6-26; *see also* Dkt. 230 at 3-6 (prefatory argument). Therefore, Plaintiffs' "Amended Memorandum of Contentions of Law and Fact" appears to be a trial brief, rather than an amended memorandum of contentions of law and fact as it is styled. *See* L.R. 16-10(c) (providing that a trial brief is the place to reply to the opposing party's memorandum of contentions of law and fact).[2]

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[1] As noted previously, "MPP-UC" is a term created by Plaintiffs to refer to the population at issue in this case: 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. Defendants do not adopt this term but use it for ease of reference only.

[2] Defendants, conversely, were required to file an amended memorandum of contentions of law and fact after receiving Plaintiffs' memorandum because, in their memorandum, Plaintiffs' articulated their claims in new ways, which affected the content of the information Defendants were required to provide pursuant to L.R. 16-4—including their factual and legal position on Plaintiffs' newly-articulated claims. *See generally* Dkt. 218.

Defendants respond briefly to Plaintiffs' "Amended Memorandum of Contentions of Law and Fact" to note that the Exhibit A Plaintiffs submitted with this filing does not show that "Plaintiffs' Memo presents no new claims." Dkt. 230 at 4. To the contrary, Plaintiffs' Exhibit A shows that Plaintiffs' Memorandum of Contentions of Law and Fact *does* present new claims. Again, Plaintiffs assert that their Trial Claims 1 & 2 comport with FAC Claim 3, and their Trial Claim 3 comports with their FAC Claim 1. In their Exhibit A, however, Plaintiffs do not cite any allegations in the FAC—much less allegations in the paragraphs of the FAC asserting FAC Claims 1 or 3 (FAC ¶¶ 234-242, 243-250)—challenging the lawfulness of the purported "Policy," that is, "Children who re-enter the United States after previously being processed into MPP with a parent or legal guardian are still subject to their family's previously initiated Section 240 proceedings, including any pending proceedings and/or final orders of removal issued at these Section 240 proceedings." To the contrary, Plaintiffs' Exhibit A simply collects a significant number of generally conclusory allegations scattered throughout the FAC—and none of which articulate the statutory argument Plaintiffs now seek to present to the Court: that the TVPRA mandates that MPP-UC cannot be subject to their prior removal orders or removal proceedings and instead must be issued a new NTA.

As another example, and as Defendants noted previously, Plaintiffs' Memorandum of Contentions of Law and Fact identified a new set of purported TVPRA rights upon which their Due Process claim hinges, including to "provide each child with the opportunity to elect voluntary departure and thus avoid a ten-year bar on re-entry." Dkt. 218 at 13; Dkt. 208 at 5. Plaintiffs' Exhibit A, however, identifies only a single allegation in the FAC that makes reference in passing to "voluntary departure," and that allegation says nothing about, and the FAC does not otherwise further clarify: (1) what in the TVPRA specifically provides MPP-UC with the ability to obtain voluntary departure or (2) how the purported policy somehow subverts the ability of MPP-UC to elect voluntary departure. *See* Dkt. 230-1 at 2, 5; FAC ¶ 71 ("Moreover, without placement in TVPRA-proceedings, UC cannot otherwise seek and obtain voluntary

departure free of cost, a benefit Congress exclusively conferred upon UC seeking safe repatriation. 8 U.S.C. § 1232(a)(5)(D).").

What's more, and further adding to the confusion, Plaintiffs claim that Defendants have mischaracterized their claims because "Plaintiffs' Memo never even *mentions* Notices to Appear, nor do they form the centerpiece of Plaintiffs' claims as Defendants repeatedly suggest." Dkt. 230 at 3. But Plaintiffs' *own* memorandum makes clear that new NTAs *are* the "centerpiece" of their claims. As they explain in the same document, "[t]he Policy is contrary to TVPRA provisions that require DHS to . . . place unaccompanied children into Section 240 proceedings as unaccompanied children." *Id.* at 8-9. As Plaintiffs are well-aware, all of the MPP-UC at issue in this case were initially placed in Section 240 proceedings as parts of family units—and not unaccompanied children. As Plaintiffs are also well-aware, an NTA is what starts removal proceedings. *See* 8 U.S.C. §1229(a). Thus, based on Plaintiffs' Memorandum of Contentions of Law and Fact, the centerpiece of Plaintiffs' newly formulated claims is that MPP-UC must be given new NTAs to commence new removal proceedings. And, if anything, Plaintiffs' "Amended" Memorandum of Contentions of Law and Fact only underscores that Plaintiffs' claims continue to be a moving target on the eve of trial.

In addition to Plaintiffs' prefatory argument, Defendants respond to Plaintiffs' verbatim memoranda of Contentions of Law and Fact (Dkts. 208, 230) as follows:

A. <u>Issues of Law [L.R. 16-4.1(i)]</u>

A. <u>Are the Provisions of the TVPRA, 8 U.S.C. §§ 1232(a)(5)(D), 1158(a)(2)(E), (a)(3)(C), Mandatory or Discretionary?</u>

Defendants agree that the language "shall" in 8 U.S.C. § 1232(a)(5)(D) is mandatory, but for the reasons stated below, in Defendants' Opening Statement (Dkt. 233), and in Defendants' Proposed Findings of Fact and Conclusions of Law (Dkt. 232-1), the language of this provision does not support Plaintiffs' position—that a *new* NTA and second (successive or concurrent) Section 240 proceedings are required for MPP-UC.

With respect to 8 U.S.C. §§ 1158(a)(2)(B), (E), Defendants agree that the word "shall" is also used and makes clear that unaccompanied children, including MPP-UC, are not subject to the one-year filing deadline for asylum applications. However, this provision is wholly irrelevant to Plaintiffs' FAC and their recently reformulated claims. At no point have Plaintiffs alleged or contended, much less pointed to anything in the record demonstrating, that MPP-UC have been or are being subjected to the one-year filing deadline.

With respect to 8 U.S.C. § 1158(a)(3)(C), that provision does not exist. Defendants note, however, that 8 U.S.C. § 1158(a)(3) provides that "No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2)." This means that, to the extent Plaintiffs are arguing that MPP-UC are subject to the one-year filing deadline, the Court would lack jurisdiction to review such determinations. It also means that the Court lacks jurisdiction to review (a) determinations that MPP-UC could be removed to a "safe third country" (8 U.S.C. § 1158(a)(2)(A)), (b) determinations that MPP-UC cannot apply for asylum again after being denied asylum previously (8 U.S.C. § 1158(a)(2)(C)), or (c) determinations that the circumstances of MPP-UC had changed such that they could reapply for asylum after it being previously denied (8 U.S.C. § 1158(a)(2)(D)).

B. Does the TVPRA, 8 U.S.C. § 1232(a)(5)(D)(i) Require that any Unaccompanied Child Sought to be Removed by DHS Shall be Placed in Removal Proceedings as an Unaccompanied Child?

As stated more fully in Defendants' Opening Statement, the text of Section 1232(a)(5)(D)(i), the overall statutory framework, and the stated purpose of the TVPRA do not support Plaintiffs' position that MPP-UC must be issued a new NTA and be placed in second (successive or concurrent) Section 240 proceedings. Dkt. 230 at 10-13. Moreover, to the extent this provision is deemed ambiguous, Defendants' interpretation is a permissible construction of the statute, given that the INA contemplates one removal proceeding, 8 U.S.C. § 1229a(a)(3), and the Government's statutory authority to execute

removal orders, 8 U.S.C. §1231(a)(1)(A)-(B). *Id.* at 13.

Plaintiffs' argument appears to be that the present tense of the word "shall" in Section 1232(a)(5)(D) suggests that unaccompanied children already in Section 240 removal proceedings or subject to removal orders must be placed *again* into *new* Section 240 removal proceedings. But such an interpretation of this provision would add language to the statute that does not exist: "new" and/or "again." *See United States v. Great N. Ry. Co.*, 343 U.S. 562, 575 (1952) ("It is our judicial function to apply statutes on the basis of what [the legislature] has written, not what [the legislature] might have written."); *Mann v. MediaNet Digital, Inc.*, 2013 WL 12141398, at *4 (C.D. Cal. 2013) ("It is a fundamental cannon of statutory construction that courts should not read words into a statute that do not appear on its face."); *see also Brierly v. Aluise Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000) ("We are naturally reluctant to read additional words into the statute, however. If Congress had intended the 30-day removal period to commence upon service of the first defendant, it could have easily so provided.").

Plaintiffs also urge that their interpretation of Section 1232(a)(5)(D)(i) is consistent with the overall statutory framework and purpose of the TVPRA. But since the text does not support their interpretation, the Court need not go further. As Defendants have explained previously (Dkt. 233 at 7-8), and as reflected in the cases Plaintiffs themselves cite, in determining whether the action is not in accordance with the TVPRA, the Court first considers "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 669 (9th Cir. 2021) (citation omitted). If, on the other hand, the statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 671 (citation omitted). "Whether an agency action is 'not in accordance with law' is a question of statutory interpretation, rather than an assessment of reasonableness in the instant case." *Singh v. Clinton*, 618

F.3d 1085, 1088 (9th Cir. 2010).

Plaintiffs' overall statutory framework argument, which points only to Section 1232(d)(8), also fails on its own terms. That provision merely provides: "Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases." 8 U.S.C. § 1232(d)(8). This provision, which merely indicates to-be-promulgated regulations,[3] sheds absolutely no light on the proper interpretation of Section 1232(a)(5)(D)(i), and Plaintiffs offer no explanation for how it possibly could.

Plaintiffs' statutory "purpose" argument likewise fails. Plaintiffs do not even identify what the TVPRA's "purpose" is, much less cite any laws or legislative history materials demonstrating such "purpose" or anything in the record suggesting "the Policy" subverts this "purpose." Moreover, as Defendants explain more fully in their Opening Statement, Congress's primary concerns in enacting the TVPRA appear to have been with trafficking and unsafe repatriation, such that Congress wanted unaccompanied children to have the benefits of Section 240 proceedings instead of being subject to expedited removal proceedings—further supporting *Defendants'* interpretation of Section 1232(a)(5)(D)(i). *See* Dkt. 233 at 11-12; *see also D.B. v. Cardall*, 826 F.3d 721, 738-39 (4th Cir. 2016).

Finally, Plaintiffs argue that Defendants' interpretation produces "absurd results" because it results in "the removal of unaccompanied children through even less process than adults in expedited removal proceedings." Dkt. 230 at 21. There are many problems with this argument. First, as a legal matter, the text of the statute itself does not support Plaintiffs, and so the Court should stop there and need not turn to the absurdity doctrine—which is applied "only under rare and exceptional circumstances" and where

[3] Notably, Plaintiffs abandoned their "failure to implement policies" claim, and instead have elected to proceed on a challenge to the purportedly unlawful purported "Policy."

the "absurdity" is "so gross as to shock the general moral or common sense." *United States v. Paulson*, 68 F.4th 528, 542 (9th Cir. 2023) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)). Second, as a matter of Plaintiffs' own pleadings and characterizations of their own claims, Plaintiffs' assertion here is inaccurate. According to Plaintiffs themselves, the MPP-UC in this case either (1) remain subject to Section 240 proceedings; or (2) already went through Section 240 proceedings that resulted in an order of removal. Plaintiffs' suggestion, therefore, that MPP-UC who already went through full Section 240 proceedings and received removal orders have less process than "adults in expedited removal proceedings" is inaccurate. Third, as a factual matter, Plaintiffs have not identified any instance *anywhere in the record* or in their own (improper) evidentiary submissions even remotely suggesting a single MPP-UC was removed without process. Plaintiffs' request that the Court rewrite a statute based on an unsupported factual assertion must be swiftly rejected.

C. Can 8 U.S.C. § 1232(a)(5)(D), be Satisfied Retroactively by Section 240 Proceedings Initiated in MPP When the Child was Part of a Family Unit?

Plaintiffs' argument again appears to be that the present tense of the word "shall" in Section 1232(a)(5)(D) suggests that unaccompanied children already in Section 240 removal proceedings or subject to removal orders must be placed *again* into *new* Section 240 removal proceedings. As noted above, such an interpretation of this provision would add language to the statute that does not exist: "new" and/or "again." *See Great Northern Ry. Co.*, 343 U.S. at 575; *Mann*, 2013 WL 12141398, at *4; *see also Brierly*, 184 F.3d at 533). Moreover, as explained more fully in Defendants' Opening Statement, when considering the overall statutory framework and stated purpose of the TVPRA, Congress enacted this provision to ensure unaccompanied children had the benefit of Section 240 proceedings as opposed to expedited removal proceedings. Dkt. 233 at 11-12. And to the extent the statute is ambiguous, Defendants' purported policy would be a permissible construction of the statute, given that the INA contemplates one removal proceeding, 8

U.S.C. § 1229a(a)(3), and the Government's statutory authority to execute removal orders, 8 U.S.C. §1231(a)(1)(A)-(B). *Id.* at 13.

D. Is Defendants' Policy Consistent with the Text and Purpose of the TVPRA?

Whether Defendants' purported policy is consistent with the purpose of the TVPRA is a secondary consideration. What matters most in this APA case is the statutory text. As Defendants' have explained previously (Dkt. 233 at 7-8), and as reflected in the cases Plaintiffs themselves cite, in determining whether the action is not in accordance with the TVPRA, the Court first considers "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *East Bay Sanctuary Covenant*, 993 F.3d at 669 (citation omitted); *see also Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) ("Going behind the plain language of a statute in search of a possibly contrary congressional intent is a 'step to be taken cautiously' even under the best of circumstances.") (citation omitted). If, on the other hand, the statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 671 (citation omitted). "Whether an agency action is 'not in accordance with law' is a question of statutory interpretation, rather than an assessment of reasonableness in the instant case." *Singh v. Clinton*, 618 F.3d 1085, 1088 (9th Cir. 2010). Here, the agency's actions were based on permissible constructions of the relevant statutes.

With respect to text, Plaintiffs offer nothing more than a conclusory assertion that the relevant statutory text favors their interpretation. Such an omission is telling and fatal to their claims. *See* Dkt. 233 at 10-13 (why the text of the statutes themselves do not support Plaintiffs' claims).

And with respect to purpose, Plaintiffs again offer only a general, vague, and unsupported assertion of the TVPRA's purpose—"to provide greater protections to unaccompanied children" (Dkt. 230 at 22)—and do not explain how the purported policy

subverts that purpose. As explained above, in enacting the TVPRA, Congress was concerned with the trafficking of children and unsafe repatriation. Plaintiffs nowhere explain how the purported policy subverts these stated purposes.

E. Does the TVPRA, 8 U.S.C. § 1232, Conflict with the INA, 8 U.S.C. § 1229a?

Defendants agree that there is no apparent conflict between 8 U.S.C. § 1232 and 8 U.S.C. § 1229a. However, it is unclear what point Plaintiffs are trying to make, or why they raise this as an issue. 8 U.S.C. § 1232(d)(8) simply provides as follows: "Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases." To the extent Plaintiffs are arguing that Section 1232(d)(8) creates independent TVPRA proceedings that replace Section 240 proceedings, their argument is wholly unsupported by the text of Section 1232(d)(8). To the extent Plaintiffs are arguing that Defendants are violating regulations promulgated pursuant Section 1232(d)(8), Plaintiffs' argument likewise fails. To date, Plaintiffs have not (a) identified any such regulations, (b) explained how Defendants have violated any such regulations, or (c) explained how a regulation could possibly trump a statute (it cannot). Finally, Plaintiffs are plainly wrong in arguing that Section 1232(d)(8)—which simply directs the Secretary to implement regulations and does not provide any specifics about removal proceedings—is more specific than Section 1229a—which *does* include specifics about removal proceedings.

F. To the Extent that the TVPRA, 8 U.S.C. § 1232 Conflicts with the INA, 8 U.S.C. § 1229c, Which Provision Governs the Rights of MPP-Unaccompanied Children?

For the reasons previously stated, this question is improperly raised for the first time on the eve of trial, as the FAC did not assert any claims based on the subversion of

the right to elect voluntary departure. The Court also need not resolve this question because (a) Plaintiffs have not identified any conflict and (b) there clearly is no conflict. 8 U.S.C. § 1232 does not say anything about voluntary departure or otherwise modify 8 U.S.C. § 1229c, except to provide that any relief under Section 1229c be at "no cost to the child." 8 U.S.C. § 1232(a)(5)(D)(ii). That modification does not create a conflict.

G. Is Defendants' Policy legally required?

This question is not germane to Plaintiffs' APA or Due Process Claims. Even assuming the purported policy was a final agency action under the APA (which Defendants dispute), the question is not whether it is legally required, but whether it is "arbitrary and capricious" or "not in accordance with law."

H. Do Unaccompanied Children have a Constitutionally Protected Property Right in the Ability to Apply for Affirmative Asylum and Seek Voluntary Departure?

Whether unaccompanied children have a constitutionally protected property right in the ability to apply for affirmative asylum is not germane to this case, based on Plaintiffs' own recent reformulation of their claims. Plaintiffs claim a right to a new NTA and new removal proceedings for MPP-UC. The new removal proceedings Plaintiffs seek are defensive in nature and contrast to affirmative asylum. Moreover, Plaintiffs abandoned their prior claim that USCIS was unlawfully declining to exercise jurisdiction over affirmative asylum applications of MPP-UC, in response to May 2021 guidance issued by USCIS confirming it would exercise jurisdiction over such applications.

Whether unaccompanied children have a constitutionally protected property right in voluntary departure is also not germane to this case. This case is not about unaccompanied children generally, but MPP-UC. For the reasons previously stated, it is also improperly raised for the first time on the eve of trial, as the FAC did not assert any claims based on the subversion of the right to elect voluntary departure.

Even if the question were properly formulated and germane to the case, the Court

(a) must answer this question in the negative for one category of MPP-UC and (b) need not reach this question for the other category of MPP-UC. According to Plaintiffs, MPP-UC fall into one of two categories: (1) those with ongoing Section 240 proceedings; and (2) those with final orders of removal coming from Section 240 proceedings. The latter group has no such right to voluntary departure. "The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title." 8 U.S.C. § 1229c(a)(1). Thus, MPP-UC with final orders of removal do not have a protected property interest in voluntary departure. And, as to the former category (MPP-UC with ongoing MPP Section 240 proceedings), there is nothing in the certified administrative record (or even Plaintiffs' objectionable evidentiary submissions) indicating that MPP-UC with ongoing MPP Section 240 proceedings are unable to seek voluntary departure.

I. Does the Court Need to Consider Whether *Dept't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020) Applies in this Case?

As Plaintiffs appear to concede, *Thuraissigiam* confirms that the procedural rights afforded to MPP-UC are those provided by the TVPRA and INA. Should the Court agree with Defendants that the procedural "rights" Plaintiffs seek to vindicate are not mandated by these statutes, then the Court *will* need to consider *Thuraissigiam* and conclude that Plaintiffs are not entitled to any relief, as the procedural protections contemplated by the Plaintiffs would be extra-statutory in nature. *See Thuraissigiam*, 140 S. Ct. at 1983 ("an alien [who tries to enter the country illegally and is detained shortly thereafter] has only those rights regarding admission that Congress has provided by statute" and "nothing more").

J. Does 8 U.S.C. § 1252(f) Preclude Relief in this Case?

Plaintiffs' first argument is that the TVPRA is not a provision covered by Section 1252(f). Dkt. 230 at 24. But Plaintiffs' assertion is overbroad. Only *portions* of the

TVPRA are not covered by Section 1252(f). *See* Dkt. 146 at 5-6. Also, their argument is irrelevant. Plaintiffs are not seeking to restrain the operation of the TVPRA. Instead, Plaintiffs are seeking to cloak MPP-UC in the purported protections of the TVPRA and are seeking to restrain the operation of various provisions in the INA that are outside of the TVPRA entirely, including provisions related to removal proceedings.

Next, Plaintiffs assert that any injunctive relief they are seeking "would vindicate the TVPRA" and "any effect it may have on a covered provision would be collateral at most." Dkt. 230 at 24. Unfortunately, Defendants and the Court are in no position to evaluate this contention because Plaintiffs continue to hide the ball on the injunctive relief they are seeking. *See* Dkt. 186 at 6 (representing that the proposed order at Dkt. No. 139-1 is not "the specific relief that Plaintiffs will seek at trial, which has not yet been presented to the Court"); *see also* Dkt. 227-1. However, if the injunctive relief they are seeking resembles the relief that they previously requested in this litigation, then it *directly* restrains the operation of covered provisions. *See* Dkt. 146 at 8-11.

Finally, Plaintiffs contend that "the provisions covered by § 1252(f) confirm the elevation of the TVPRA." Dkt. 230 at 25. But in making such a contention, Plaintiffs only confirm they are seeking to do what Section 1252(f) prohibits—enjoining operation of covered provisions like Section 1229(a). *See Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2066 (2022) (holding that Section 1252(f)'s bar on enjoining "operation" of covered provisions includes both lawful and unlawful operation).

Dated: October 31, 2023

Respectfully submitted,

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