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[Additional counsel listed below]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

IMMIGRANT DEFENDERS LAW CENTER, *et al.*,

Plaintiff,

v.

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

Defendants.

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

PLAINTIFFS' TRIAL BRIEF

Date: November 7, 2023
Time: 9:00 a.m.
Ctrm: 6D
Hon. Fernando M. Olguin

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PLAINTIFFS' TRIAL BRIEF

Pursuant to this Court's Scheduling and Case Management Order (Dkt. 41 at 4) and Local Rule 16-10, Plaintiffs hereby submit the following trial brief in advance of the trial in the above captioned action scheduled to take place November 7, 2023.

I. Introduction

This lawsuit seeks to ensure the fundamental rights and safety of one of the most vulnerable populations in this country: unaccompanied immigrant children ("unaccompanied children"). Our law mandates a duty of stewardship to these vulnerable children who arrive at the U.S. border without a parent or legal guardian to help them navigate our complex immigration system. In addition to due process protections, Congress enacted the William Wilberforce Trafficking Victims Protection Reauthorization Act ("TVPRA") specifically to protect this "particularly vulnerable population" to whom our country "owes a special obligation" to treat "humanely and fairly." [1] Indeed, the TVPRA's mandatory provisions ensure that we "give unaccompanied minors ***more protection***" than other noncitizens in asylum and removal proceedings.[2]

Defendants Department of Homeland Security ("DHS"), Immigration and Customs Enforcement ("ICE"), and Customs and Border Protection ("CBP") interfere with these express protections as to a specific population of children—"MPP-unaccompanied children." MPP-unaccompanied children are those children previously processed into the "Remain in Mexico" or so-called Migrant Protection Protocols ("MPP") program when they were part of a family unit, and who subsequently present at the border and enter the United States without a parent or legal guardian. Although the Biden Administration has decried MPP for the human suffering it inflicted and its

[1] Pub. L. No. 110-457, 122 Stat. 5044 (2008).

[2] 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008) (statement of Sen. Dianne Feinstein) (emphasis added).

inadequate legal process—including the likelihood that it resulted in removal orders for individuals with meritorious claims for asylum[3]—Defendants have adopted a policy that:

> 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.[4]

(the "Policy" or "Defendants' Policy"). By implementing and applying the Policy, Defendants deny MPP-unaccompanied children certain rights guaranteed by the TVPRA, including their rights to: (1) navigate the immigration process with the assistance of counsel; (2) affirmatively pursue initial adjudication of any asylum claim before the United States Citizenship and Immigration Service ("USCIS"), through non-defensive, child-sensitive proceedings; (3) exemption from the one-year asylum application filing deadline, to allow them time to develop their claims for immigration relief with their counsel; (4) to the extent DHS seeks to remove an unaccompanied child, new, child-sensitive Section 240 removal proceedings; and (5) the option to seek voluntary departure.[5]

Plaintiffs are nonprofit pro bono legal service providers ("LSPs") that collectively serve tens of thousands of unaccompanied children each year. For nearly three years, Defendants have subjected MPP-unaccompanied children to their non-public Policy, effectively depriving them of their TVPRA protections. Plaintiffs, in turn, have fought to restore those rights to their MPP-unaccompanied child clients. But, despite Plaintiffs'

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[3] Department of Homeland Security, *Explanation of the Decision to Terminate the Migrant Protection Protocols*, (Oct. 29, 2021), https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-justification-memo-508.pdf.

[4] Dkt. 232-1 ¶ 6; *see also* Dkt. 187 at 6.

[5] 8 U.S.C. §§ 1158(a)(2)(E), (b)(3)(C); 1232(a)(2), (a)(5), (a)(5)(D), (c)(1), (c)(5), (d)(8). Voluntary departure is an important benefit to unaccompanied children who elect it, as it is not considered deportation and thus does not create a ten-year bar on re-entry.

efforts, Defendants' Policy has resulted in grave consequences, including deportation of at least 26 unaccompanied children without access to their TVPRA rights and without due process.[6] In an attempt to prevent additional—and potentially catastrophic—harm to their clients, Plaintiffs have overhauled their policies and practices in hopes of identifying MPP-unaccompanied children and providing them extraordinary and often emergency representation to combat Defendants' Policy.

Despite Defendants' repeated attempts to avoid accountability in this case, the time has come for Plaintiffs' day in court. Plaintiffs' trial evidence has now been submitted, establishing their standing, success on the merits, and entitlement to relief. Plaintiffs seek vacatur of Defendants' Policy; a declaration that Defendants' Policy violates the TVPRA; and an injunction requiring Defendants to provide safeguards to ensure MPP-unaccompanied children's access to their TVPRA and due process rights. This relief is not only appropriate and justified—it is required to bring Defendants into compliance with the TVPRA.

II. Status of the Case

The parties have filed several pretrial motions. The Court has already ruled on the majority of the parties' motions,[7] and the remaining motions are each ripe for this Court's adjudication ahead of trial.

a. Defendants' Motion Regarding "Subject Matter Jurisdiction"

On May 18, 2023, Defendants filed a motion purporting to challenge this Court's subject matter jurisdiction on the asserted basis of standing. Dkt. 186. Plaintiffs opposed, as the Supreme Court has made clear that questions regarding entitlement to specific forms of relief do not concern subject matter jurisdiction. Dkt. 187. The Motion remains pending.

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[6] Dkt. 102-5 at 23.

[7] The Court ruled in Plaintiffs' favor on Plaintiffs' Motions in Limine 4 and 5, and Defendants' Motions in Limine 1 and 2, see Dkts. 256, 259, and denied Defendants' *Ex Parte* Motion Seeking an Order Quashing the Trial Subpoena for Immigration and Customs Enforcement Attorney Norman E. Parkhurst Valderas, see Dkt. 261.

b. Plaintiffs' Motion in Limine No. 3 to Exclude Defendants' Evidence Extraneous to Discovery Record

Throughout the discovery period, Defendants obstructed Plaintiffs' efforts to discover relevant facts exclusively in their possession. Consequently, to the extent that Defendants intend to produce witnesses or evidence not provided through the discovery process, Plaintiffs moved to exclude such testimony and evidence. Dkts. 197, 223. The Motion remains pending.

III. Update on Newly Decided Cases

After Plaintiffs submitted their Amended Memorandum of Contentions of Fact and Law, Dkt. 230 ("Plaintiffs' Amended Memorandum"), the Northern District of California issued a highly relevant opinion in *E. Bay Sanctuary Covenant v. Biden*, enjoining a different federal policy that limited asylum access. 2023 WL 4729278 (N.D. Cal. July 25, 2023) ("*East Bay 2023*"). In this recent case challenging the Biden administration's asylum ban, the court discussed four topics relevant here: (i) organizational standing; (ii) the Section 1252(f)(1) jurisdictional bar; (iii) Administrative Procedure Act ("APA") claims challenging the validity of a federal action that limited access to asylum; and (iv) the scope of relief in such a case. *See id*. As to each of these four topics, the *East Bay 2023* court's opinion bolsters the arguments Plaintiffs have advanced throughout their pre-trial filings.[8]

a. Article III Standing

With respect to Article III standing, the court reaffirmed longstanding precedent: "[U]nder *Havens Realty*, 'a diversion-of-resources injury is sufficient to establish organizational standing,' if the organization shows that, independent of the litigation, the challenged 'policy frustrates the organization's goals and requires the organization to expend resources in representing clients they otherwise would spend in other ways.'" *Id*. at *4 (citations omitted).

[8] The government has filed an appeal of the decision and requested a stay pending appeal.

Exactly as in this case, the plaintiffs in *East Bay 2023* "are immigration legal services organizations that represent noncitizens seeking asylum," including named Plaintiff Immigrant Defenders Law Center, which is a plaintiff in both cases. *Id*. at *5. In response to the challenged DHS policy, "Plaintiffs will need to overhaul their screening and intake processes to determine" if and how the policy would apply to potential clients. *Id*. As to the clients to whom the policy would apply, the *East Bay 2023* plaintiffs would need to provide "far more time-and resource-intensive" services than those they provide to their typical clients. *Id*. And the rule would "frustrate their organizational goals" because it would make it more difficult for the plaintiffs' clients to access asylum. *Id*. at *5-6.

The court's standing analysis is on all fours with the facts in this case. Here, too, Plaintiffs are legal service providers serving noncitizens seeking asylum and other immigration relief. In response to Defendants' Policy, Plaintiffs have overhauled their screening procedures and continue to employ more time-consuming and complex processes to identify clients affected by the Policy. As for children to whom the Policy applies, Plaintiffs need to provide "far more time-and resource-intensive" services than those they provide to other unaccompanied child clients—including representing children sooner than they otherwise would, and representing children they would not typically take on as clients—because these MPP-unaccompanied children are at greater risk of imminent removal. The Policy makes it more difficult for Plaintiffs' child clients to be treated with child-sensitive procedures and to access potential relief, including asylum, and the Policy directly frustrates Plaintiffs' organizational goals.

The recent opinion in *East Bay 2023* confirms that, consistent with Ninth Circuit precedent, Plaintiffs have Article III standing in this case.

b. 8 U.S.C. § 1252(f)(1) Jurisdictional Bar

In rejecting defendants' arguments under Section 1252(f)(1), the *East Bay 2023* court made several findings that directly support Plaintiffs' arguments here. First, as to the government's claim that Section 1252(f)(1) barred vacatur under the APA, the court

in *East Bay 2023* began by noting that it was "not aware of any" binding authority that Section 1252(f)(1) bars relief under the APA. *Id*. at *8. Second, the *East Bay 2023* court explained that, "even if Section 1252(f)(1) did bar relief under the APA, the asylum statute is not among the statutory provisions specified in Section 1252(f)(1)." *Id.* Third, the court rejected the government's argument that the case was still barred under Section 1252(f)(1) because "vacating or enjoining the Rule would effectively 'enjoin or restrain the operation' of those removal statutes in violation of Section 1252(f)(1) by preventing the agencies from applying the Rule's presumption in removal proceedings." *Id*. Relying on the same Ninth Circuit authorities that Plaintiffs have presented in this case, the court there explained that, even where an "injunction would have a collateral effect on the conditions for asylum eligibility as applied during removal proceedings[, it] does not bring it within the bar . . . Congress expressly limited the jurisdictional bar of Section 1252(f)(1) to 'the provisions of part IV of this subchapter,' which do not include the asylum statute." *Id*. (citing *Gonzales v. DHS*, 508 F.3d 1227, 1233 (9th Cir. 2007); *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2067 n.4 (2022); *Gonzalez v. ICE*, 975 F.3d 788, 813 (9th Cir. 2020)).

This Court should reach the same conclusion here. As in *East Bay 2023*, Plaintiffs seek vacatur under the APA, which is not barred by Section 1252(f)(1), full stop. The limited injunction Plaintiffs seek, which is focused on safeguards for vulnerable children pursuant to the asylum statute and the TVPRA, is also not barred. This is because, just as in *East Bay 2023*, the asylum statute and the TVPRA are not provisions covered by Section 1252(f)(1); even if such an injunction would have a collateral effect on covered provisions, that "does not bring it within the bar." *Id*.

c. APA Claims[9]

In finding the challenged policy[10] contrary to law, the *East Bay 2023* court wrote: "Regulations imposing additional conditions on asylum must be consistent with the core principle of the safe-third-country and firm-resettlement bars. This Rule is not." *Id.* at *10. The court went on to note that the policy was contrary to law because it limited asylum access in a particular way "despite Congress's clear intent" otherwise. *Id.* at *11.

For the same reasons, Defendants' Policy is contrary to law here. Defendants' Policy, which inhibits unaccompanied children's access to protections afforded by the TVPRA, is inconsistent with the "core principle" of the TVPRA and "Congress's clear intent" to guarantee unaccompanied children special protections throughout the entire immigration process. *Id.* at *10-11. Likewise, because the Policy relies on factors "which Congress did not intend the agencies to consider[,]" the Policy is also arbitrary and capricious. *Id.* at *10-11.

d. Scope of Relief

Finally, *East Bay 2023* confirmed that vacatur is the appropriate remedy for an APA violation because "[t]he agencies cannot adopt the same rule on remand; as described above, the Rule is contrary to law." *Id.* at *18. Similarly, the "severity of the agencies' errors . . . counsels strongly in favor of vacatur." *Id.* For the same reasons, vacatur of Defendants' Policy is appropriate here. *See* Plaintiffs' Amended Memorandum, Dkt. 230.

IV. Reply to Defendants' Memoranda of Contentions of Fact and Law

Consistent with Local Rule 16-10(c), Plaintiffs respond to the inadequacies and incorrect statements in Defendants' Memorandum of Defendants' Contentions of Fact and Law, Dkt. 211 ("Defendants' Memorandum"), and Defendants' Amended

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[9] The *East Bay 2023* plaintiffs did not assert any constitutional claims.

[10] The policy the *East Bay 2023* plaintiffs challenged "applies a presumption of asylum ineligibility to noncitizens who traveled through a country other than their own before entering the United States through the southern border with Mexico." *Id.* at *1.

Memorandum of Contentions of Fact and Law, Dkt. 218 ("Defendants' Amended Memorandum"). First, Plaintiffs address Defendants' erroneous assertions in their recent filings. Second, we explain how we will support each claim at trial. Finally, we refute Defendants' three key erroneous arguments.

a. Defendants Now Assert Obvious Misstatements

In their Memorandum and Amended Memorandum, Defendants advance the following erroneous statements of fact and law:

Defendants' Erroneous Assertions:	**Reality:**
Plaintiffs seek to try "three *new* claims[.]" Dkt. 218 at 1 (emphasis in original).	Plaintiffs have narrowed the five claims set forth in their First Amended Complaint ("FAC") to three more focused claims for trial, each of which derives directly from the FAC. *See generally* Dkt. 230; *see also* Dkt. 14.
Plaintiffs only seek injunctive and declaratory relief. Dkt. 218 at 4.	Plaintiffs also seek APA vacatur of Defendants' unlawful Policy. Dkt. 208 at 4-5; Dkt. 230 at 8.
Plaintiffs mischaracterize Defendants' Policy, which "is not a 'policy' choice by any government agency." Dkt. 218 at 2.	Defendants have expressly stipulated to the Policy. ***In their words***: "The parties have stipulated as follows: 'Children who re-enter the United States unaccompanied 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' ('The Policy')." Dkt. 232-1 ¶ 6; *see also* Dkt. 187-2.
Plaintiffs' claims "are all based on their argument that the [TVPRA] mandates the issuance of a new Notice to Appear [('NTA') to MPP-unaccompanied children]." Dkt. 218 at 1-2.	Plaintiffs assert no claims or demands based on a requirement to issue new NTAs. *See generally* Dkt. 208 (nowhere asserting that the TVPRA requires new NTAs).

	Defendants ignore Plaintiffs' actual claims. *See infra* Section IV(b).
Plaintiffs have only shown past injury. Dkt. 211 at 2 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)); Dkt. 218 at 4 (same).	Defendants ignore that standing is determined at the time the complaint was filed and, in any event, Plaintiffs are currently experiencing and will continue to experience ongoing irreparable harm because Defendants' Policy is still being enforced against MPP-unaccompanied children. *See infra* Section IV(c).
Section 1252(f)(1) divests this Court of subject matter jurisdiction. Dkt. 218 at 10, referencing Dkt. 186.	Section 1252(f)(1) has nothing to do with subject matter jurisdiction. *Biden v. Texas*, 142 S. Ct. 2528, 2540 (2022) ("In short, we see no basis for the conclusion that section 1252(f)(1) concerns subject matter jurisdiction.").
Because the government stopped new enrollments in MPP after the FAC was filed, Plaintiffs lack Article III standing. Dkt. 218 at 14, referencing Dkt. 186.	Article III standing is determined based on a plaintiff's injury at the time of the complaint; a claim that changing circumstances divest the court of subject matter jurisdiction is a question of mootness, governed by different legal standards. *Or. Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1116-18 (9th Cir. 2003). Defendants concede that they do not argue this case is moot, Dkt. 188 at 8 n.7, nor could they: even in the face of changed circumstances following the filing of a complaint, a "case is not moot as long as the continued existence of the policy is uncontested." *Id*. at 1118. As Defendants stipulated, the Policy at issue in this case remains ongoing. *See infra* at 18.

b. Defendants' Memoranda of Contentions of Fact and Law Misstate Plaintiffs' Claims, which are Consistent with the FAC

On June 29, 2023, and without any attempt to confer with Plaintiffs, Defendants filed an Amended Memorandum of Contentions of Fact and Law advancing the erroneous position that Plaintiffs' Memorandum of Contentions of Law and Fact had asserted new claims and thus sought to amend the FAC. Dkt. 218 at 1-2, 10-13. To refute Defendants' unfounded assertion, Plaintiffs filed an Amended Memorandum of Contentions of Fact and Law that showed how each of the narrowed claims set forth in their Memorandum aligned with assertions in the FAC. *See* Dkt. 230 at 1-4, Ex. A. Defendants' attack is yet another in a series of attempts to avoid accountability for their Policy at trial. Defendants additionally assert—wrongly—that all of Plaintiffs' claims reduce to a single demand: that Defendants issue new NTAs to all MPP-unaccompanied children. Dkt. 218 at 1-2. That assertion is created out of whole cloth. Plaintiffs do not assert that the TVPRA requires new NTAs, and Defendants' insistence to that effect is merely an ill-disguised red herring. *See* Dkt. 14, Prayer for Relief at 91-92 (nowhere mentioning NTAs); Dkt. 208 (nowhere asserting that the TVPRA requires new NTAs).

To be sure, Plaintiffs will explain, once again, how their three remaining claims mirror the claim articulations in the FAC and are based in several rights of MPP-unaccompanied children, none of which claims a TVPRA requirement to issue new NTAs:

Claim 1: Administrative Procedure Act, 5 U.S.C. § 706(2), not in accordance with law

Plaintiffs' first claim for resolution at trial asserts that Defendants violate the APA through their implementation of the Policy, which causes them to take action and inaction toward MPP-unaccompanied children that are not in accordance with the TVPRA, 8 U.S.C. §§ 1158(a)(2)(E), (b)(3)(C), 1232(a)(5)(D), and 1232(d)(8); *see also Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Singh v. Clinton*, 618 F.3d 1085, 1088 (9th Cir. 2010); *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 669 (9th Cir.

2021).[11]

The Policy is contrary to TVPRA provisions that require DHS to: (1) provide unaccompanied children with access to non-adversarial adjudication of their asylum claims before USCIS in the first instance ("affirmative asylum"); (2) exempt unaccompanied children from the one-year filing deadline for asylum applications; (3) place unaccompanied children into Section 240 proceedings as unaccompanied children, incorporating access to counsel and child-sensitive proceedings, if DHS seeks to remove the child; and (4) provide each child with the opportunity to elect voluntary departure and thus avoid a ten-year bar on re-entry. *See* 8 U.S.C. § 1158(a)(2)(E), (b)(3)(C); 1232(a)(2), (a)(5), (a)(5)(D), (c)(1), (c)(5), (d)(8); Dkt. 45 at 2-3.

Defendants' Policy is also inconsistent with the overall statutory scheme, which was designed to treat unaccompanied children differently, and with greater time and care, than similarly situated adults, including factoring in the child's traumatic history and unique vulnerabilities. The Policy causes Defendants to take actions that frustrate the TVPRA's mandate to provide additional protections to unaccompanied children beyond those set forth in other Immigration and Nationality Act ("INA") provisions and DHS policies that apply generally to adults and families. 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008) (statement of Sen. Dianne Feinstein); *Flores v. Sessions*, 862 F.3d 863, 880-81 (9th Cir. 2017).

Plaintiffs will prove this claim at trial through Plaintiffs' testimony and exhibits including Dkts. 203 (Menza Dec.), 204 (Rodriguez Dec.), 205 (Tafur Dec.), 206 (Donovan-Kaloust Dec.), 207 (Korolev Dec.), 29-18 (Flamm Dec.), and Exhibits 4, 6-7, 31, 51-69, 72, 100-101, 138, 140, 180, 189, 191. For example:

- Dkt. 205 (Tafur Dec.) ¶¶ 114-124 (discussing DHS's attempts to remove an MPP-unaccompanied child within weeks of the child's arrival, well before

[11] Plaintiffs' Amended Memorandum Dkt. 230, Ex. A at 1-7; FAC, Dkt. 14 ¶¶ 5-6, 8, 61-62, 66-72, 139-40, 142-48, 150-51, 169, 172, 175-79, 182, 184-92, 198-99, 205-06, 208, 212-13, 216-25, 244-47, 249, Prayer for Relief b(ii), b(vi), h.

he could have applied for affirmative asylum or other forms of immigration relief);

- Dkt. 206 (Donovan-Kaloust Dec.) ¶ 7 ("DHS prosecutes MPP-unaccompanied children previously in MPP proceedings, effectively reinstating those proceedings and/or removal orders.");
- Ex. 6 (ICE flow chart directing officers to "take[] necessary action towards removal" of unaccompanied children with MPP removal orders, without any additional proceedings);
- Ex. 7 (USCIS guidance that "specifies how service centers should treat such potential [unaccompanied children] who are in removal proceedings or who have final removal orders, including those who were enrolled in the Migrant Protection Protocols[,]" confirming that USCIS "should accept the asylum applications" of these children, even those "with a final removal order");
- Ex. 62 (ICE's Amended Responses to Plaintiffs' Interrogatories Nos. 1-9, identifying at least 1,245 MPP-unaccompanied children and confirming that at least 26 had been removed based on removal orders issued in MPP, before the child was designated unaccompanied);
- Ex. 138 (email correspondence between ICE and RAICES in which ICE informs RAICES that, less than two weeks after an MPP-unaccompanied child had arrived in the United States, that particular ICE officer had received guidance that the child would be removed based upon the child's MPP removal order issued years prior);
- Ex. 191 (Defense counsel agreeing to stipulate to the following "policy language": "Children who re-enter the United States unaccompanied 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").

Claim 2: Administrative Procedure Act, 5 U.S.C. § 706(2), arbitrary and capricious

In addition to being contrary to law, Defendants' implementation of the Policy was arbitrary and capricious for three independent reasons. First, Defendants failed to provide any reasoned explanation—or any explanation at all—for the Policy. Second, Defendants failed to consider important factors in adopting the Policy, including whether or how the Policy would comport with the TVPRA, how it would be implemented, or whether it would undermine Plaintiffs' reliance interests. *See Bennett*, 520 U.S. at 177-78; *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). These first two failings are apparent on the face of the Administrative Record ("AR" or "Certified Administrative Record"), which contains only two documents concerning implementation of the Policy, and no evidence of a reasoned explanation for the Policy or consideration of the Policy's impact on unaccompanied children's TVPRA protections or LSPs' reliance interests. Third, the Policy is arbitrary and capricious because it departs from Defendants' separate—publicly stated—overarching MPP policies that unaccompanied children shall "not be subject to MPP."[12]

Plaintiffs will prove this claim at trial through Plaintiffs' testimony and exhibits, including: Dkts. 203 (Menza Dec.), 204 (Rodriguez Dec.), 205 (Tafur Dec.), 206 (Donovan-Kaloust Dec.), 207 (Korolev Dec.), 29-18 (Flamm Dec.) and Exhibits 1, 3, 7, 40, 46, 69, 71, 72, 174-175, 180, 191. For example:

- Dkt. 207 (Korolev Dec.) ¶ 24 ("[C]hildren whose immigration cases are tied to parents who are no longer available often have no way to communicate to ProBAR about their immigration history and the pleadings and admissions that have already been entered in their case. Nonetheless, these children's immigration proceedings are often tied to the existing record.");

[12] Plaintiffs' Amended Memorandum Dkt. 230, Ex. A at 8-14; FAC, Dkt. 14 ¶¶ 7-8, 136-40, 143-48, 150-51, 169, 172, 175-78, 184-92, 205-06, 208-09, 212-13, 216-25, 244-47, 249, Prayer For Relief b(vi), h.

- Ex. 71, DHS Explanation of the Decision to Terminate the Migrant Protection Protocols (explaining "inherent problems with" MPP "including the vulnerability of migrants to criminal networks, and the challenges associated with accessing counsel and courts across an international border");
- Ex. 72, Department of Homeland Security, "Complaints Related to the Implementation of [MPP]" (stating "Families have been separated during the MPP process," and "that it is [United States Customs and Border Protection] procedure to separate one parent from the rest of the family[,]" notwithstanding that it "may [] impact any claims for relief filed by the family");
- Ex. 174, RAICES Childrens' Program Policy Manual regarding MPP-Unaccompanied Children ("This MPP Policy Manual is a strategic response to children affected by MPP. When MPP was first implemented in December 2018, RAICES was unprepared to address the special needs of the children affected by this inhumane policy. This policy will ensure RAICES is prepared by improving our work product, quality of our services, and avoid burnout within the team when responding to these special needs.").

Claim 3: Procedural Due Process[13]

Finally, Plaintiffs will show that Defendants' Policy violates the Fifth Amendment's Due Process Clause by failing to provide any—let alone adequate—safeguards to prevent against the erroneous deprivation of MPP-unaccompanied children's rights to access their constitutionally protected property rights in affirmative asylum and voluntary departure, and their liberty interest in a continued presence in the United States while they pursue those rights. *See Mathews v. Eldridge*, 424 U.S. 319

[13] Dkt. 230, Ex. A at 14-15; Dkt. 14 at 91-92 ("Prayer for Relief," (b)(i), (e), (h)); *see also* ¶¶ 229, 231-33.

(1976); *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998). Under the Policy, Defendants categorically enforce MPP-removal orders against MPP-unaccompanied children, without considering, *inter alia*, whether the child and their attorney have notice of, and a meaningful opportunity to address, the MPP removal order; whether the child has had an opportunity to seek affirmative asylum before USCIS or other forms of relief; and whether the child received child-sensitive Section 240 proceedings with the assistance of counsel.

Plaintiffs will prove this claim at trial through Plaintiffs' testimony and exhibits, including testimony describing Plaintiffs' experiences attempting to defend the TVPRA rights of MPP-unaccompanied children without adequate notice of prior or pending MPP proceeding or an adequate opportunity to pursue defensive measures: Dkts. 203 (Menza Dec.), 204 (Rodriguez Dec.), 205 (Tafur Dec.), 206 (Donovan-Kaloust Dec.), 207 (Korolev Dec.), 29-18 (Flamm Dec.), 201 (Dr. Giri Dec.), and Exhibits 1, 2, 3, 6, 38, 39, 56, 57, 59, 60, 61, 62, 64, 65, 68, 77, 97, 100, 101, 174. For example:

- Dkt. 205 (Tafur Dec.) ¶ 11 ("[I]n my experience—prior to the implementation of MPP—ORR and DHS typically provide us with the relevant information associated with the child's case, including the posture of the case, venue, and any updates on the child's release from ORR custody. In my years of practice, my team and I have relied on this information to properly prepare ourselves and the children for any hearings and/or filings."), ¶¶ 16-19 (describing untimely and substantively deficient notice of UC's prior MPP ties and resulting harm to the ability to defend client), ¶ 25 (explaining why motions to reopen—the sole method for MPP-unaccompanied children to reopen their MPP proceedings—are unreliable, do not prevent against deportation, and are procedurally harmful); and
- Dkt. 206 (Donovan-Kaloust Dec.) ¶¶ 14-15 (describing the barriers to defending MPP-UC against MPP legacy proceedings caused by a lack of adequate and timely notice from Defendants about the MPP proceedings);

- Dkt. 207 (Korolev Dec.) ¶¶ 8-15 (describing ProBar's screening measures and inability to guarantee that MPP ties are always identified).

Plaintiffs will also rely on Defendants' own written policies and other policy statements, proving their categorical enforcement of MPP removal orders against MPP unaccompanied children and lack of consistent policies for identifying an unaccompanied child's prior MPP ties and notifying Plaintiffs of the same. For example:

- Ex. 6 (Defendants' flowchart policy directing categorical enforcement of MPP removal orders against MPP-unaccompanied children);
- Ex. 97 (J. Axe email stipulating to Policy of subjecting MPP-unaccompanied children to their MPP removal proceedings and orders);
- Ex. 24 (Cubas Dec.) (describing expedited timelines caused by Defendants' Policy as preventing development of attorney-client relationship necessary to effectively represent traumatized children);
- Ex. 100 (CBP Amended Responses to Targeted Questions) at 8 (acknowledging difficulties in ascertaining an unaccompanied child's MPP ties through interviewing the child); and
- Ex. 174 (RAICES's policy with regard to MPP-unaccompanied children, detailing various methods for defending against prior MPP ties and noting their comparative likelihood of success).

c. Contrary to Defendants' Memoranda, Plaintiffs Have Satisfied their Burden to Establish Standing as well as Entitlement to Injunctive and Declaratory Relief

Defendants continue to wrongly assert that Plaintiffs lack Article III standing. Not so. As the case law establishes, Plaintiffs unquestionably have standing. Plaintiffs' pretrial filings *establish with evidence* that Plaintiffs had standing at the time they filed the FAC, which is what the standing inquiry demands. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000) (explaining that standing is

assessed as of "the time the complaint was filed"). To be sure, Plaintiffs' pretrial evidence conclusively establishes that, had they filed their FAC today, Plaintiffs would still unquestionably have Article III standing.

Plaintiffs' testimony documents in detail how they continue to experience ongoing injury, including frustration to their missions and a resulting diversion of resources. *See* Dkt. 203 (Menza Dec.) ¶¶ 13, 19, 26-29, 33-34; Dkt. 206 (Donovan-Kaloust Dec.) ¶¶ 5, 48-49; Dkt. 207 (Korolev Dec.) ¶¶ 6, 8, 16, 25; Dkt. 205 (Tafur Dec.) ¶¶ 23, 33, 40-41; Dkt. 204 (Rodriguez Dec.) ¶¶ 23, 28. Just as in *East Bay 2023*, here: (i) Plaintiffs have overhauled their screening and intake processes to determine if and how the Policy applies to potential clients; (ii) Plaintiffs must provide affected clients "far more time- and resource-intensive" services; and (iii) Plaintiffs' organizational goals are frustrated by barriers to access asylum and other forms of immigration relief that their MPP-unaccompanied children encounter under the Policy. 2023 WL 4729278 at *5-6; *supra* Section III(a), Claim 1 and Claim 2.

Thus, Plaintiffs' evidence demonstrates that, in response to Defendants' Policy, which remains in effect today, Plaintiffs continue to divert resources to prevent catastrophic harm to their young clients, including, (i) continued representation of MPP-unaccompanied children; (ii) ongoing deployment of extended screening procedures to identify MPP-unaccompanied children; and (iii) continued use of MPP-specific trainings and policies. Dkt. 203 (Menza Dec.) ¶ 13 (listing "burdensome changes to the Detained Minors Project's intake model and related staff training; labor-intensive investigations to identify MPP-unaccompanied children and gather critical information about their MPP cases; and emergency litigation outside of The Door's service model and areas of expertise"), *see also id.* ¶¶ 19, 26-29, 33-34; Dkt. 206 (Donovan-Kaloust Dec.) ¶¶ 5, 48-49 ("[U]nless Defendants change their policy towards MPP-unaccompanied children, ImmDef will need to maintain its additional screening measures and engage in extraordinary and often emergency motion practice for the foreseeable future."); Dkt. 207 (Korolev Dec.) ¶ 7 ("ProBAR developed and continues to use a monitoring system

and provides [Know Your Rights] presentations tailored to determining whether an unaccompanied child should be considered an MPP-unaccompanied child in response to the government's failure to provide MPP-unaccompanied children with protections under the TVPRA."), *see also id*. ¶¶ 8, 16, 25; Dkt. 205 (Tafur Dec.) ¶¶ 23, 32 ("The manual I drafted outlines additional duties and responsibilities that attorneys and legal assistants must complete when they encounter an MPP case, no matter the case category."), *see also id*. ¶¶ 40, 41; Dkt. 204 (Rodriguez Dec.) ¶¶ 2, 28 ("RAICES also continues to serve several MPP-unaccompanied children—often in ways we would not need to serve other unaccompanied children").

Yet, like a broken record, Defendants continue to argue that Plaintiffs lack standing because they assert only past injury, relying on *Lyons*. *See, e.g.*, Dkt. 218 at 4. But as explained above, Plaintiffs' evidence, and Defendants' own admissions, prove that Plaintiffs' injuries are ongoing because Defendants' Policy is ongoing. *Lyons*, therefore, gets Defendants nowhere. *Lyons* applies where a party seeks injunctive relief based on a past harm and cannot prove that their future harm is more than "conjectural" or hypothetical." 461 U.S. 95 at 102; *see also Friends of the Earth*, 528 U.S. at 180-81, 84 (2000) (finding standing because, "in contrast [to *Lyons*], it is undisputed that [defendant's] unlawful conduct . . . was occurring at the time the complaint was filed"). And here, Defendants admit that, unlike in *Lyons*, the Policy Plaintiffs challenge here is still ongoing.

Further, Defendants attempt to argue that Plaintiffs lack standing because MPP has ended. *See* Dkt. 233 at 2-3. But, again, any argument that other facts have changed as to divest the Court of jurisdiction would require Defendants to advance and prove *mootness*, which they admittedly do not seek to do. Dkt. 188 at 8 n.7; *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987) ("In seeking to have a case dismissed as moot . . . the defendant's burden 'is a heavy one.'") (citations omitted). In any event, the case is undisputedly not moot because there is no dispute that Defendants' Policy continues to exist today. Dkt. 218 at 13 ("Plaintiffs challenge the

decision to subject MPP-UC to their prior immigration proceedings or removal orders."); *Or. Advoc. Ctr.*, 322 F.3d at 1118 ("[E]ven if the particular situation that precipitates an organization's challenge to a government policy resolves itself at some point during the litigation, the case is not moot as long as the continued existence of the policy is uncontested.").

Finally, Defendants persist in ignoring the Supreme Court's clear statement that "the question whether a court has jurisdiction to grant a particular remedy is different from the question whether it has subject matter jurisdiction over a particular class of claims." *Biden*, 142 S. Ct. at 2540 (2022); *cf.* Dkt. 186 at 1 ("Defendants challenge this Court's subject matter jurisdiction on two grounds: (1) Plaintiffs' requests for injunctive relief are barred by 8 U.S.C. § 1252(f) and (2) Plaintiffs lack Article III standing to pursue declaratory and injunctive relief."). Plaintiffs' entitlement to particular forms of relief is simply not a jurisdictional question.

Plaintiffs have established standing and this Court's subject matter jurisdiction to adjudicate Plaintiffs' claims.

d. Contrary to Defendants' Memoranda, Plaintiffs Have Satisfied their Burden to Establish Entitlement to Injunctive and Declaratory Relief

Defendants argue that "any requests for injunctive relief by Plaintiffs are barred by 8 U.S.C. § 1252(f)," Dkt. 218 at 10, but, as Plaintiffs have repeatedly explained, any injunctive relief they seek would enforce and safeguard *only* the rights set forth in the TVPRA, 8 U.S.C. § 1232, and the asylum statute, 8 U.S.C. § 1158. Because neither the TVPRA, § 1232, nor the asylum statute, § 1158, is covered by Section 1252(f), the relief Plaintiffs seek is not barred by that section.

Federal courts, including the Supreme Court, have repeatedly confirmed as much. *See Aleman Gonzalez*, 142 S. Ct. at 2067 n.4 ("[A] court may enjoin the unlawful operation of a provision *that is not specified in § 1252(f)(1)* even if that injunction has some collateral effect on the operation of a covered provision[.]") (emphasis in original);

Galvez v. Jaddou, 52 F.4th 821, 831 (9th Cir. 2022) ("Accordingly, we hold . . . that the jurisdictional bar of § 242(f)(1) of the INA, codified at 8 U.S.C. § 1252(f)(1), does not apply to an order that 'enjoin[s] or restrain[s] the operation of' § 235(d)(2) of the TVPRA, codified at 8 U.S.C. § 1232(d)(2)."); *Al Otro Lado, Inc. v. Mayorkas*, 2022 WL 3142610, at *23 (S.D. Cal. Aug. 23, 2022) ("[*Garland*] explicitly did not displace" the "Ninth Circuit precedent" that "stand[s] for the premise that lower courts may 'enjoin the unlawful operation of a provision that *is not specified in § 1252(f)(1)* even if that injunction has some collateral effect on the operation of a covered provision.'") (emphasis in original) (citations omitted). Indeed, the propriety of injunctive relief vindicating the TVPRA, despite potential impacts on covered provisions, is further confirmed by the recent decision in *East Bay 2023*. *Supra* Section III(b), quoting *East Bay 2023*, 2023 WL 4729278, at *8 ("Congress expressly limited the jurisdictional bar of Section 1252(f)(1) to 'the provisions of part IV of this subchapter,' which do not include the asylum statute.").

Defendants' Amended Memorandum therefore is simply incorrect in asserting that "any requests for injunctive relief by Plaintiffs are barred by 8 U.S.C. § 1252(f)[.]" Dkt. 218 at 10.

e. Notwithstanding Defendants' Memoranda, Defendants' Policy Constitutes Final Agency Action and Plaintiffs are Entitled to APA Vacatur

Agency action is final when it meets two conditions: (1) an agency's decisionmaking process is complete rather than ongoing, and (2) legal consequences flow from the action. Plaintiffs easily meet both requirements here, as confirmed by Defendants' agreement: "Here is the language Defendants are willing to stipulate to regarding ***the policy*** language:

> *Children who re-enter the United States unaccompanied 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."*

(emphasis added). Dkt. 187, Ex. A at 2; *see also* Dkt. 232-1 ¶ 6. This statement alone confirms that the Policy has been formed (*i.e.*, the decisionmaking process is not ongoing) and that legal consequences flow from that Policy (*i.e.*, children are subject to prior legal proceedings despite their change in status from accompanied to unaccompanied). Yet, in Defendants' recent pretrial filings, Defendants seek to walk back this admission, claiming they have no policy at all. Dkt. 218 at 2; *see also* Dkt. 233 at 7 (arguing that the Policy "is not really a policy at all, much less 'a consummation of the agency's decisionmaking process.'") (citing *Bennett*, 520 U.S. at 177-78).

Irrespective of Defendants' ***own words*** describing the Policy as a "policy," the Policy is further borne out by reality: Defendants have decided that MPP-unaccompanied children will still be subject to their family's MPP proceedings and removal orders. Defendants do not argue that this decision is interlocutory or in flux, nor could they. As Defendants do not dispute that legal consequences flow from this Policy, Plaintiffs have established final agency action. Dkt. 230 at 9.

Having established final agency action, Plaintiffs will show at trial that Defendants' Policy is inconsistent with the "core principle" of the TVPRA: to provide *additional* substantive and procedural protections to unaccompanied children *beyond those provided in other provisions of the INA*. *Supra* Section I, Section IV(b); Dkt. 230 at 18-20. The Policy therefore is independently contrary to law as well as arbitrary and capricious, and Plaintiffs are entitled to vacatur of the Policy under the APA. *350 Montana v. Haaland*, 50 F.4th 1254, 1273 (9th Cir. 2022) ("[V]acatur is the presumptive remedy under the APA") (citing *Alliance for the Wild Rockies v. United States Forest Service*, 907 F.3d 1105, 1121-22 (9th Cir. 2018)); *East Bay 2023*, 2023 WL 4729278 at *18 (same); *supra* Section III(b).

Defendants continue to ignore that Plaintiffs seek this relief. Dkt. 218 at 4-5; *see generally* Dkt. 186. Although vacatur is unavailable at the preliminary injunction stage, and therefore was not included in the Proposed Order filed with Plaintiffs' Renewed Motion for a Preliminary Injunction, Dkt. 139-1, which is no longer pending, that does

not render it unavailable after a trial on the merits. *See, e.g., Cook Cnty., Illinois v. Wolf*, 498 F. Supp. 3d 999, 1006 (N.D. Ill. 2020) ("[I]in the preliminary injunction posture[,] —the district courts . . . could not have vacated the Rule at that early juncture"). To the contrary, Defendants cannot ignore that vacatur is the default remedy in the Ninth Circuit for APA violations. *350 Montana*, 50 F.4th at 1273 (9th Cir. 2022) ("[V]acatur is the presumptive remedy under the APA"), . . . and '[w]e order remand without vacatur only in 'limited circumstances[.]'") (citing *Alliance for the Wild Rockies*, 907 F.3d at 1121-22 (9th Cir. 2018) and *Pollinator Stewardship Council v. U.S. Environmental Protection Agency*, 806 F.3d 520, 532 (9th Cir. 2015)). Indeed, vacatur is the appropriate remedy here because Defendants' Policy is contrary to law and arbitrary and capricious.

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L.R. 11-6.2 Certificate of Compliance

The undersigned, counsel of record for Plaintiffs, certifies that this brief contains 6,651 words, which complies with the word limit of L.R. 11-6.1.

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