

1 HARRISON J. FRAHN, IV (206822)  
hfrahn@stblaw.com  
2 STEPHEN P. BLAKE (260069)  
sblake@stblaw.com  
3 SIMPSON THACHER &  
BARTLETT LLP  
4 2475 Hanover Street  
Palo Alto, California 94304  
5 Telephone: (650) 251-5000  
Facsimile: (650) 251-5002

6 BROOKE E. CUCINELLA  
7 (*pro hac vice* forthcoming)  
brooke.cucinella@stblaw.com  
8 SIMPSON THACHER &  
BARTLETT LLP  
9 425 Lexington Avenue  
New York, New York 10017  
10 Telephone: (212) 455-3070  
Facsimile: (212) 455-2502

11 *Attorneys for Plaintiffs Immigrant*  
12 *Defenders Law Center; Refugee and*  
13 *Immigrant Center for Education and*  
14 *Legal Services; South Texas Pro Bono*  
15 *Asylum Representation Project, a*  
16 *project of the American Bar*  
17 *Association; and The Door*

18 *[Additional counsel listed below]*

19 **UNITED STATES DISTRICT COURT**  
20 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
21 **WESTERN DIVISION**

22 IMMIGRANT DEFENDERS LAW  
23 CENTER; REFUGEE AND  
24 IMMIGRANT CENTER FOR  
25 EDUCATION AND LEGAL SERVICES;  
26 SOUTH TEXAS PRO BONO ASYLUM  
27 REPRESENTATION PROJECT, a project  
28 of the American Bar Association; and THE  
DOOR,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND  
SECURITY; ALEJANDRO  
MAYORKAS, in his official capacity as  
Secretary of the U.S. Department of  
Homeland Security; U.S. CUSTOMS

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

**AMENDED COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

Honorable Fernando M. Olguin  
Courtroom 6D

1 AND BORDER PROTECTION; TROY  
 2 A. MILLER, in his official capacity as  
 3 Senior Official Performing the Duties of  
 4 the Commissioner of U.S. Customs and  
 5 Border Protection; U.S. IMMIGRATION  
 6 AND CUSTOMS ENFORCEMENT; TAE  
 7 D. JOHNSON, in his official capacity as  
 8 Acting Director of U.S. Immigration and  
 9 Customs Enforcement; U.S.  
 10 ENFORCEMENT AND REMOVAL  
 11 OPERATIONS; COREY A. PRICE, in his  
 12 official capacity as Acting Executive  
 13 Associate Director of U.S. Enforcement  
 14 and Removal Operations; U.S.  
 15 CITIZENSHIP AND IMMIGRATION  
 16 SERVICES; TRACY RENAUD, in her  
 17 official capacity as Senior Official  
 18 Performing the Duties of the Director of  
 19 U.S. Citizenship and Immigration  
 20 Services; DEPARTMENT OF HEALTH  
 21 AND HUMAN SERVICES; NORRIS  
 22 COCHRAN, in his official capacity as  
 23 Acting Secretary of the Department of  
 24 Health and Human Services; U.S. OFFICE  
 25 OF REFUGEE RESETTLEMENT; KEN  
 26 TOTA, in his official capacity as Acting  
 27 Director of the Office of Refugee  
 28 Resettlement,

Defendants.

18 KAREN C. TUMLIN (234691)  
 karen.tumlin@justiceactioncenter.org  
 19 ESTHER H. SUNG (255962)  
 esther.sung@justiceactioncenter.org  
 20 JANE BENTROTT (323562)  
 jane.bentrott@justiceactioncenter.org  
 21 DANIEL J. TULLY (309240)  
 daniel.tully@justiceactioncenter.org  
 22 JUSTICE ACTION CENTER  
 P.O. Box 27280  
 Los Angeles, California 90027  
 23 Telephone: (323) 316-0944

MUNMEETH KAUR SONI (254854)  
 meeth@immdef.org  
 HANNAH K. COMSTOCK (311680)  
 hcomstock@immdef.org  
 CAITLIN E. ANDERSON (324843)  
 caitlin@immdef.org  
 IMMIGRANT DEFENDERS  
 LAW CENTER  
 634 S. Spring Street, 10th Floor  
 Los Angeles, California 90014  
 Telephone: (213) 634-7602  
 Facsimile: (213) 282-3133

24 *Attorneys for Plaintiffs Immigrant*  
 25 *Defenders Law Center; Refugee and*  
 26 *Immigrant Center for Education and*  
 27 *Legal Services; and The Door*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
INTRODUCTION .....	1
JURISDICTION AND VENUE .....	5
PARTIES .....	6
A. Plaintiffs .....	6
1. Immigrant Defenders Law Center (“ImmDef”) .....	6
2. Refugee and Immigrant Center for Education and Legal Services (“RAICES”) .....	8
3. South Texas Pro Bono Asylum Representation Project, a project of the American Bar Association (“ProBAR”) .....	11
4. The Door .....	13
B. Defendants.....	14
FACTUAL ALLEGATIONS .....	17
I. FEDERAL LAW PROVIDES ROBUST AND MANDATORY PROTECTIONS FOR UNACCOMPANIED CHILDREN .....	17
A. The <i>Flores</i> Settlement Agreement .....	17
B. Homeland Security Act of 2002 .....	18
C. Trafficking Victims Protection Reauthorization Act.....	19
1. Proper screening by CBP for signs of human trafficking and a fear of return.....	19
2. Placement “in the least restrictive setting that is in the best interest of the child”.....	20
3. USCIS’s initial jurisdiction over TVPRA-asylum applications .....	21
4. Age-appropriate asylum interview .....	21

1                   5.     Placement in TVPRA-proceedings under Section 240, the  
2                   right to pursue relief from removal, and the right to  
3                   counsel .....22  
4                   6.     No reinstatement of prior removal orders .....24  
5                   7.     Safe repatriation.....25  
6                   8.     Categorical protections .....25  
7     **II.    BEFORE MPP, FEDERAL AGENCIES AND LEGAL SERVICE**  
8     **PROVIDERS COORDINATED TO ENSURE UNACCOMPANIED**  
9     **CHILDREN RECEIVED TVPRA PROTECTIONS ..... 26**  
10            A.     CBP Typically Apprehends and Is Responsible for Interviewing  
11            Immigrant Children and Designating Them as UC ..... 26  
12            B.     ICE, Through ERO, Is Responsible for Issuing UC Notices to  
13            Appear Before Transferring UC to ORR Custody and Managing  
14            Their Cases..... 27  
15            C.     ORR Is Responsible for Care and Custody of UC..... 29  
16            D.     ORR Must Release UC to Sponsors or Family Without  
17            Unnecessary Delay..... 30  
18            E.     ORR Contracts with Plaintiffs and Other LSPs to Provide UC a  
19            Right to Counsel as Required by the TVPRA ..... 31  
20            F.     USCIS Has Jurisdiction over UC Asylum Claims Which the  
21            TVPRA Ensures UC Can Affirmatively Pursue Without  
22            Deadline Given the Challenges Facing UC ..... 35  
23            G.     ICE May Initiate Removal of UC Only After They Are Denied  
24            Relief by Both USCIS and EOIR Through Full TVPRA-  
25            Proceedings ..... 38  
26            H.     ICE and ERO Must Ensure Safe Repatriation Before Removing a  
27            Child..... 40  
28     **III.  DEFENDANTS’ MIGRANT PROTECTION PROTOCOLS**  
**CREATED A CRISIS FOR FAMILIES SEEKING ASYLUM AT THE**  
**BORDER AND ENDANGERED CHILDREN’S LIVES ..... 41**

1           A.    ICE and ERO Deny MPP-UC Their Statutory Right to Issuance  
2                    and Service of the TVPRA-NTA ..... 52

3                    1.    ERO Does Not Consistently Issue and Serve MPP-UC  
4                            with a TVPRA-NTA.....52

5                    2.    ERO’s Failure to Issue and Properly Serve a TVPRA-  
6                            NTA Has Forced Plaintiffs to Expend Significant  
7                            Resources to Identify MPP-UC .....55

8           V.    PLAINTIFFS WILL CONTINUE TO DIVERT RESOURCES AND  
9                    TAKE DRASTIC MEASURES TO ENSURE DEFENDANTS DO  
10                    NOT THWART TVPRA RIGHTS FOR MPP-UC ..... 78

11   FIRST CLAIM FOR RELIEF ..... 82

12   SECOND CLAIM FOR RELIEF ..... 84

13   THIRD CLAIM FOR RELIEF ..... 86

14   FOURTH CLAIM FOR RELIEF ..... 87

15   FIFTH CLAIM FOR RELIEF ..... 89

16   PRAYER FOR RELIEF ..... 91

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**INTRODUCTION**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1. This lawsuit seeks to ensure that unaccompanied immigrant children (“UC”)—a vulnerable population struggling to navigate the byzantine United States immigration system without the help of a parent or guardian—are restored the protections enshrined by the William Wilberforce Trafficking Victims Protection Reauthorization Act (“TVPRA”), the Due Process Clause of the Fifth Amendment to the United States Constitution, and the *Flores* Settlement Agreement.

2. Plaintiffs are legal services providers whose mission is to provide *pro bono* legal services and advocacy to immigrants. They are tasked with ensuring that UC have unfettered access to their TVPRA protections. Plaintiffs are both border-based and interior legal services organizations and collectively serve the vast majority of UC in the country.

3. Defendants are agencies of the federal government and their responsible officers, who over the last two years in connection with their implementation of the Trump Administration’s Migrant Protection Protocols (“MPP,” or the “Remain in Mexico Program”) have systematically failed in their stewardship of UC with MPP ties (“MPP-UC”). Defendants’ actions and failings have frustrated Plaintiffs’ missions and led to a diversion of resources that are otherwise needed to protect the interests of vulnerable UC.

4. Historically—and as legally mandated—Defendants provided UC with a variety of protections, triggered upon designation by U.S. Customs and Border Protection (“CBP”) as an “unaccompanied alien child” under the Immigration and Nationality Act (“INA”).<sup>1</sup> These protections include, among others, the right to seek asylum through an age-appropriate and trauma-sensitive, non-adversarial

---

<sup>1</sup> The INA defines UC as children under the age of eighteen with no lawful immigration status and no parent or legal guardian in the United States, or no parent or legal guardian in the United States available to provide care and physical custody. See 6 U.S.C. § 279(g)(2).

1 process under the jurisdiction of U.S. Citizenship and Immigration Services  
 2 (“USCIS”); release from federal custody for placement with a parent, guardian or  
 3 sponsor; and access to counsel. These protections have extended, by statutory  
 4 command and historical practice, to all UC, regardless of how they came to the  
 5 United States or their prior immigration history.

6 5. Since the Trump Administration introduced MPP, however, immigrant  
 7 children have faced increasingly dire circumstances along the southern border.  
 8 Under MPP, immigrant children who initially came to the United States with a  
 9 parent were forced to remain in Mexico—often in squalid refugee camps lacking  
 10 basic necessities and facing an ever-present threat of violence. Once in MPP, they  
 11 must await their hearings before so-called “tent courts” hastily constructed to handle  
 12 MPP proceedings. Hardship, danger, and other violent and unsafe circumstances in  
 13 MPP have forced these children to enter the United States on their own—with the  
 14 gut-wrenching result that many are separated from a parent or caregiver.<sup>2</sup>

15  
 16 <sup>2</sup> On January 20, 2021, the Department of Homeland Security (“DHS”) under the  
 17 Biden Administration announced the suspension of new enrollments in the MPP  
 18 program. For those currently in MPP and residing in Mexico, DHS requires them to  
 19 “remain where they are, pending further official information from U.S. government  
 20 officials.” See U.S. Dep’t of Homeland Sec., *DHS Statement on the Suspension of*  
 21 *New Enrollments in the Migrant Protection Protocols Program* (Jan. 20, 2021),  
 22 <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program#:~:text=Protection%20Protocols%20Program-,DHS%20Statement%20on%20the%20Suspension%20of%20New,the%20Migrant%20Protection%20Protocols%20Program&text=Today%2C%20DHS%20is%20announcing%20the,adding%20individuals%20into%20the%20program.>  
 23 On February 11, 2021, DHS announced that beginning on February 19, DHS will  
 24 begin processing people who have been forced to “remain in Mexico” under MPP.  
 25 U.S. Dep’t of Homeland Sec., *DHS Announces Process to Address Individuals in*  
 26 *Mexico with Active MPP Cases* (Feb. 11, 2021),  
 27 <https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases>. Recent media reports state that while the Biden  
 28 Administration will soon begin allowing those who have been forced to remain in  
 Mexico to enter at certain ports of entry, the administration cautioned that the  
 process will be slow and most immigrants will still be turned away at the border.  
 See Hamed Aleaziz, *Biden Is Planning To Bring Back Immigrants Who Were*  
*Forced To Wait In Dangerous Mexico Border Towns*, BuzzFeed (Feb. 11, 2021),  
<https://www.buzzfeednews.com/article/hamedaleaziz/biden-plan-remain-in-mexico-immigrants>.



1 Compounding this state-imposed crisis, Defendants thereafter have failed to  
2 implement policies necessary to ensure that these UC receive the protections  
3 guaranteed them by law and, instead, have taken affirmative steps to restrict access  
4 to these protections.

5 6. All UC<sup>3</sup> who present alone at the United States border are legally  
6 entitled to, and ordinarily receive, processes designed to protect their wellbeing and  
7 safeguard their legal rights, including basic due process required by the  
8 Constitution. No such certainty exists for MPP-UC. Contrary to DHS’s policies  
9 excluding UC from MPP, Defendants are enforcing MPP against UC.

10 7. Without notice or explanation, Defendants have abandoned their legal  
11 duties to MPP-UC by delaying their reunification with appropriate caregivers,  
12 allowing MPP Courts to retain jurisdiction over UC even after they have been  
13 transferred to the custody of the U.S. Office of Refugee Resettlement (“ORR”), and  
14 preventing UC from seeking TVPRA-asylum in the United States. Defendants  
15 recognize the children are UC but have failed to adopt necessary procedures to  
16 ensure that MPP-UC are able to access their rights under the TVPRA. Defendants  
17 pick and choose among MPP-UC, fast-tracking removal of some while allowing  
18 others to proceed as ordinary UC.

19 8. Defendants’ actions contravene the TVPRA, as well as their repeated  
20 pronouncements such as: “[u]naccompanied [] children . . . will not be subject to  
21  
22  
23

---

24 <sup>3</sup> CBP must designate as an unaccompanied child any non-citizen child for whom  
25 the officer has a “reasonable claim or suspicion” that the child is: (1) under eighteen  
26 years of age; (2) lacks immigration status; and (3) does not have a parent or  
27 guardian available to “provide care and physical custody.” U.S. Customs and  
28 Border Prot., *Implementation of the William Wilberforce Trafficking Victims  
Protection Reauthorization Act of 2008 (TVPRA)* (March 19, 2009),  
<https://www.aila.org/infonet/cbp-issues-interim-guidance-for-processing-uac>  
(redacted copy).



1 MPP”;<sup>4</sup> “are not amenable to MPP”;<sup>5</sup> and again, as recently as recently as December  
2 7, 2020, “[UC] are not amenable to MPP.”<sup>6</sup>

3 9. Defendants’ have created a situation where MPP-UC—children whom  
4 Congress has recognized as a “particularly vulnerable population” to whom our  
5 country “owes a special obligation” to treat “humanely and fairly”—regularly  
6 receive less process before removal than adults who reenter the United States with  
7 prior removal orders.

8 10. Plaintiffs—whose practice is ordinarily limited to representing UC in  
9 accessing their TVPRA benefits—must now divert their organizational resources to  
10 protect MPP-UC’s TVPRA rights from evisceration.

11 11. In aggregate, Defendants’ actions have the potential to harm hundreds,  
12 if not more, MPP-UC nationwide.<sup>7</sup> For Plaintiffs, representing even one MPP-  
13 unaccompanied child means having to put on hold the needs of other children who  
14 need Plaintiffs’ services. Defendants’ actions detract from Plaintiffs’ missions and  
15 force Plaintiffs to deplete precious resources to advocate for UC with ties to prior  
16

17 <sup>4</sup> U.S. Dep’t of Homeland Sec., *Migrant Protection Protocols* (Jan. 24, 2019),  
18 <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> (emphasis  
19 added); *see also* Memorandum from the Deputy Dir. of the U.S. Immigr. and  
20 Customs Enf’t to Exec. Assoc. Dirs. 1 (Feb. 12, 2019),  
[https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy-  
Memorandum-11088-1.pdf](https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy-Memorandum-11088-1.pdf) (“DHS will not use the INA section 235(b)(2)(C)  
process in the cases of unaccompanied [] children”).

21 <sup>5</sup> U.S. Customs and Border Prot., *MPP Guiding Principles* (Jan. 28, 2019),  
22 [https://www.cbp.gov/sites/default/files/assets/documents/2019-  
Jan/MPP%20Guiding%20Principles%201-28-19.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf).

23 <sup>6</sup> U.S. Dep’t of Homeland Sec., *Supplemental Policy Guidance for Additional*  
24 *Improvement of the Migrant Protection Protocols* (Dec. 7, 2020),  
[https://www.dhs.gov/sites/default/files/publications/supplemental\\_policy\\_guidance.  
pdf](https://www.dhs.gov/sites/default/files/publications/supplemental_policy_guidance.pdf).

25 <sup>7</sup> Camilo Montoya-Galvez, *700 children crossed the U.S. border alone after being*  
26 *required to wait in Mexico with their families*, CBS News (Jan. 15, 2021),  
27 [https://www.cbsnews.com/news/children-who-crossed-the-u-s-border-after-their-  
families-were-required-to-wait-in-mexico-are-being-denied-legal-safeguards-suit-  
says/](https://www.cbsnews.com/news/children-who-crossed-the-u-s-border-after-their-families-were-required-to-wait-in-mexico-are-being-denied-legal-safeguards-suit-says/).

1 MPP proceedings.

2 12. These realities remain true even with the change in administration.  
3 Though the Biden Administration has promised to end MPP, and DHS has  
4 announced it would halt new enrollments in MPP, President Biden’s executive  
5 actions to date do not remedy the harm MPP-UC face. Nor are MPP-UC necessarily  
6 protected under the recently enjoined-moratorium on deportations, which did not  
7 protect MPP-UC who entered after November 1, 2020<sup>8</sup> and may be subject to final  
8 orders of removal from MPP.<sup>9</sup> As of filing, the Biden Administration and DHS  
9 have not taken any steps to address the harm Plaintiffs have suffered and will  
10 continue to endure because of Defendants’ ongoing failures to ensure MPP-UC have  
11 unfettered access to their TVPRA protections.

12 13. Through this action, Plaintiffs seek a judgment declaring that  
13 Defendants are in violation of the Due Process Clause of the Fifth Amendment, the  
14 TVPRA, the INA, the *Flores* Settlement Agreement, and the APA, and injunctive  
15 relief requiring Defendants to comply with the laws and regulations cited herein and  
16 stop differentiating between MPP-UC and UC generally.

17 **JURISDICTION AND VENUE**

18 14. This Court has subject matter jurisdiction under 28 U.S.C. § 1331  
19 (federal question) and § 1346 (United States as defendant). Defendants have waived  
20 sovereign immunity with respect to the claims alleged in this case. *See* 5 U.S.C. §  
21 702. This Court has jurisdiction to enter declaratory and injunctive relief under 28  
22 U.S.C. §§ 2201 and 2202, Federal Rules of Civil Procedure 57 and 65, and the  
23 Court’s inherent equitable powers.

24 \_\_\_\_\_  
25 <sup>8</sup> U.S. Dep’t of Homeland Sec., *Review of and Interim Revision to Civil*  
26 *Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021),  
[https://www.dhs.gov/sites/default/files/publications/21\\_0120\\_enforcement-  
memo\\_signed.pdf](https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf).

27 <sup>9</sup> *Texas v. United States*, No. 6:21-CV-00003, 2021 WL 247877, at \*1 (S.D. Tex.  
28 Jan. 26, 2021).



1 individuals.<sup>10</sup>

2 19. The Children’s Representation Project (“CRP”) is ImmDef’s largest  
3 direct representation program and one of the largest programs of its kind in the  
4 United States. ImmDef is a subcontracted-ORR Legal Services Provider (“LSP”).  
5 ImmDef’s CRP currently provides full-scale legal representation, case management  
6 support, and other legal services to more than 900 UC through its staff of eight  
7 directing and managing attorneys, twenty staff attorneys, and thirty-one support  
8 staff, including a six-person, non-attorney “Detained Youth Empowerment  
9 Program” (“DYEP”). In response to an anticipated influx of UC and the opening of  
10 new ORR-contracted shelters in its geographic service area in the coming year,  
11 ImmDef has secured additional funding to hire one new managing attorney, one  
12 additional DYEP coordinator, and four additional DYEP associates.

13 20. ImmDef’s CRP clients primarily live in California’s Los Angeles,  
14 Orange, Riverside, San Bernardino, Ventura, Santa Barbara, and Kern counties. On  
15 rare occasions, ImmDef has continued to represent clients after their transfer to  
16 other states and service areas.

17 21. ImmDef’s attorneys and DYEP provide legal services to nearly 1,100  
18 children annually who are detained in federal ORR custody.<sup>11</sup> DYEP provides  
19 “Know-Your-Rights” (“KYR”) presentations, legal screenings, court preparation,  
20 and Friend of Court appearances for unrepresented minors on the Los Angeles  
21 immigration court juvenile detained docket. DYEP is a component of ImmDef’s  
22 CRP and serves all UC in the nine ORR-contracted shelters and foster care

23  
24 <sup>10</sup> ImmDef has not yet compiled its 2020 client count.

25 <sup>11</sup> ImmDef anticipates that this number will be lower in 2020 because CBP relied on  
26 Title 42 to exclude unaccompanied minors. *See P.J.E.S. v. Wolf*, No. 20-cv-2245,  
27 2020 WL 6770508, at \*17 (D.D.C. Nov. 18, 2020) (granting request for a  
28 preliminary injunction). The preliminary injunction of Title 42 was recently stayed  
pending appeal. *P.J.E.S. v. Pekoske*, No. 20-cv-22245 (D.C. Cir. Jan. 29, 2021),  
available at <https://www.aclu.org/legal-document/dc-appeals-court-stay-order>.

1 programs in the Los Angeles region and surrounding counties.

2 22. Every year, ImmDef provides hundreds of locally detained and released  
3 UC with various social and legal services including KYR presentations, legal  
4 screenings and consultations, case management support, legal and community  
5 referrals, and full-scope legal representation. ImmDef’s CRP leadership has been  
6 working with UC since 2010, and has extensive knowledge and experience  
7 representing children in immigration matters before USCIS, the immigration court,  
8 the BIA, and California State Courts. As a universal representation program,  
9 ImmDef’s CRP zealously advocates to ensure its UC clients receive the full benefit  
10 of protections under the TVPRA, the *Flores* Settlement Agreement, and other  
11 applicable law. ImmDef assists its UC clients in applying for all forms of relief for  
12 which they may be eligible, including asylum, Special Immigrant Juvenile Status  
13 (“SIJS”), U-Visas, T-Visas, and family-based petitions. ImmDef advocates for the  
14 release and reunification of locally-detained UC through legal avenues including  
15 habeas petitions and bond motions, as well as its relationships with stakeholders  
16 such as child advocates, ORR case managers, Field Office Juvenile Coordinators,  
17 and Health and Human Services Federal Field Specialists.

18 23. The vast majority of ImmDef’s UC clients are in removal proceedings  
19 under 8 U.S.C. § 1229a—i.e., Section 240 of the INA—and are released from ORR  
20 custody to reside in the greater Los Angeles area with a sponsor. ImmDef also  
21 represents all UC who remain in ORR custody in long-term foster care placements  
22 and represents a subset of UC who are in short-term ORR custody. ImmDef’s CRP  
23 works with UC clients and their families or sponsors to pursue immigration  
24 outcomes according to their clients’ stated interests.

25 **2. Refugee and Immigrant Center for Education and Legal**  
26 **Services (“RAICES”)**

27 24. Plaintiff Refugee and Immigrant Center for Education and Legal  
28 Services (“RAICES”) is a Texas-based 501(c)(3) nonprofit corporation. RAICES’s

1 mission is to defend the rights of immigrants and refugees; empower individuals,  
2 families, and communities; and advocate for liberty and justice. RAICES promotes  
3 justice by providing free and low-cost legal services to underserved immigrant  
4 children, families, and persons through robust legal services, social programs, bond  
5 assistance, and advocacy. RAICES's Legal Department provides affirmative,  
6 defensive, and litigation services, and its Social Services Department provides case  
7 management, resettlement services, transit support, and connects migrants with  
8 community resources.

9 25. Founded in 1986 as the Refugee Aid Project, RAICES has grown to be  
10 the largest immigration legal services provider in Texas. With offices in Austin,  
11 Corpus Christi, Dallas, Fort Worth, Houston, and San Antonio, RAICES is a  
12 frontline organization in the debate about immigration and immigrants in the world.  
13 As an organization that combines expertise developed from the daily practice of  
14 immigration law with a deep commitment to advocacy, RAICES is unique among  
15 immigration organizations. A diverse staff of 283 attorneys, legal assistants, social  
16 workers, advocates, and support staff provide consultations, direct legal services  
17 representation, social services assistance, and advocacy work on behalf of  
18 immigrants throughout Texas. In 2019, RAICES managed 28,257 legal cases.<sup>12</sup>

19 26. RAICES is an ORR-subcontracted LSP. RAICES's Children's  
20 Program has thirty-eight attorneys and thirty-five support staff who provide free  
21 legal services to UC either currently or formerly detained in ORR shelters and  
22 emergency reception centers throughout Texas. In 2014, the Children's Program  
23 expanded to provide legal services to UC who have been released from detention  
24 and reside within RAICES's geographic service area. RAICES's Children's  
25 Program provides a wide array of services to its clients and the Texas immigrant  
26 community, including direct legal services, representation in affirmative and

27 \_\_\_\_\_  
28 <sup>12</sup> See n. 10, *supra*.



1 defensive cases, as well as court support, general legal guidance, KYR  
2 presentations, case management, resettlement services, transit support, bond  
3 assistance, and assistance with social services.

4 27. RAICES's Children's Program staff work with some of the most  
5 vulnerable population of UC and have expertise working with children with special  
6 needs, including teens who are pregnant or parenting, sibling groups, tender-age  
7 children, and children in need of a heightened level of supervision.

8 28. RAICES's Detained Unaccompanied Children Services unit is housed  
9 within the Children's Program and serves the fourteen ORR-contracted shelters and  
10 foster care programs in the San Antonio, Corpus Christi, and Waco areas.

11 29. RAICES's Released Unaccompanied Children Services unit is housed  
12 within the Children's Program. This unit provides legal screenings, immigration  
13 representation, and case management support to UC who have been released from  
14 an ORR shelter and now reside with an immediate family member, relative, or  
15 family friend in the San Antonio, Austin, Dallas, Ft. Worth, Houston, and Corpus  
16 Christi areas.

17 30. Each year, RAICES provides thousands of UC with various social and  
18 legal services including KYR presentations and legal intakes, preliminary legal  
19 consultations, social services support, referrals, and legal representation. RAICES  
20 has extensive knowledge and experience representing children in removal  
21 proceedings and represents UC in matters before USCIS, immigration courts, the  
22 BIA, Juvenile Texas State Courts, and the U.S. Federal Courts. RAICES zealously  
23 advocates to ensure its UC clients receive the full benefit of protections under the  
24 TVPRA, the *Flores* Settlement Agreement, and other applicable law. RAICES  
25 advocates for the release and reunification of UC through legal avenues as well as  
26 its relationships with stakeholders such as child advocates, ORR case managers,  
27 Field Office Juvenile Coordinators, and Health and Human Services Federal Field  
28



1 Specialists.

2 **3. South Texas Pro Bono Asylum Representation Project, a**  
3 **project of the American Bar Association (“ProBAR”)**

4 31. Plaintiff South Texas Pro Bono Asylum Representation Project, a  
5 project of the American Bar Association<sup>13</sup> (“ProBAR”), is a legal services  
6 organization whose mission is to empower immigrants and refugees through legal  
7 education, representation, and connection to integrated services. Founded in 1989 in  
8 response to the overwhelming need for *pro bono* legal representation of Central  
9 American asylum-seekers detained in South Texas, ProBAR serves immigrants in  
10 the Rio Grande Valley border regions with a particular focus on the legal needs of  
11 adults and UC in federal custody.

12 32. In 2003, ProBAR established the Immigrant Children’s Assistance  
13 Project (“Children’s Project”), focused on providing direct services and legal  
14 representation to UC clients detained in South Texas ORR shelters. ProBAR is a  
15 leading expert on representing and assisting detained UC and has developed guides  
16 and videos on best practices for effectively engaging with young clients, providing  
17 KYR presentations, and conducting effective individual screening processes.

18 33. ProBAR is an ORR-subcontracted LSP and serves the largest number  
19 of detained UC in the country. In 2019, ProBAR served 19,807 children in local  
20 ORR facilities.<sup>14</sup> Currently, ProBAR provides services to detained UC held across  
21 nineteen ORR-subcontracted facilities along the Rio Grande Valley border region in  
22 South Texas. These facilities can house up to approximately 4,700 children at any  
23 given time.

24 \_\_\_\_\_  
25 <sup>13</sup> The American Bar Association (ABA) is a 501(c)(6) voluntary professional  
26 association comprised of judges, lawyers, and law students. Founded in 1878, the  
27 ABA’s mission is to advocate for the legal profession, promote full and equal  
28 participation in the justice system, and advance the rule of law. Through its  
Commission on Immigration, the ABA established ProBAR.

<sup>14</sup> See n. 10, *supra*.

1           34. ProBAR serves detained UC through its Shelter Services Department,  
2 Legal Department, and Release Support Department. The Shelter Services  
3 Department, with approximately forty staff members, is the first-in-line responder,  
4 and its staff meet with an unaccompanied child shortly after the child's placement in  
5 ORR custody. The Shelter Services staff provides detained UC with primary legal  
6 information and conducts initial screenings of individual children. The Legal  
7 Department then reviews the screenings, prepares children for court, appears in  
8 court with children either as a direct representative or through a Friend of Court  
9 appearance, and assists in the development of a child's legal claims for relief until  
10 the child is released from ORR custody or the child's case concludes. The Legal  
11 Department has over eighty employees, with a dedicated team of over twenty  
12 attorneys, twelve paralegals, and twenty legal assistants working with the UC  
13 population. The Release Support Department has sixteen employees who assist  
14 children who are transferred out of ProBAR's service area and children who are  
15 released from ORR custody by providing legal orientations to sponsors and making  
16 referrals for attorneys and other services. The Release Support staff also work to  
17 secure holistic services for children when needed, including transportation  
18 arrangements, counseling services, crisis intervention, school enrollment, and  
19 parental guidance to the children's sponsors.

20           35. ProBAR's UC clients are among the most vulnerable individuals to  
21 cross the United States' southern border. Their ages range from newborn to  
22 seventeen years old, have an extremely limited grasp of the English language, and  
23 have little to no knowledge of the U.S. immigration system. Many are survivors of  
24 trauma, abuse, or neglect. ProBAR's services fill an area of acute need for  
25 immigrant children who are detained in remote facilities, separated from their  
26 families, and otherwise unable to afford private counsel.

27           36. ProBAR represents its UC clients before USCIS, the Executive Office  
28 for Immigration Review ("EOIR"), the BIA, local state probate and family courts,

1 and federal circuit courts. ProBAR regularly represents UC clients in affirmative  
2 applications for asylum, petitions for SIJS including associated state court  
3 proceedings, and petitions and applications for U-Visas and T-Visas. ProBAR also  
4 represents UC clients in defensive applications for asylum, and in seeking  
5 withholding of removal, and protection under the Convention Against Torture when  
6 needed. ProBAR has extensive experience working with clients of all ages in these  
7 applications for relief and consistently partners with and provides expertise to other  
8 LSPs.

#### 9 **4. The Door**

10 37. Plaintiff The Door is a New York-based 501(c)(3) nonprofit  
11 organization. Founded in 1972, The Door aims to empower New York City's  
12 diverse and rapidly growing population of disconnected youth by providing them  
13 the tools they need to become successful. In service of that mission, The Door  
14 offers wraparound services including legal assistance, health care, educational  
15 assistance, and other comprehensive social services to the nearly 11,000 youth it  
16 serves annually.

17 38. The Door's Legal Services Center provides legal and case management  
18 services to youth in need of immigration and other civil legal assistance. The Door  
19 is staffed with twenty-four attorneys, four social workers, eight paralegals, and three  
20 support staff members.

21 39. The Door's Affirmative Team provides holistic immigration services to  
22 New York youth who are seeking immigration benefits, including (but not limited  
23 to) Deferred Action for Childhood Arrivals ("DACA"), SIJS, asylum, U-Visas, T-  
24 Visas, adjustment of status, and work authorization. The Affirmative Team also  
25 provides holistic immigration representation to youth in foster care.

26 40. The Door's Removal Defense Team represents young people who are  
27 placed in removal proceedings, some of whom were previously in ORR custody.  
28 This team represents UC and other young adults who are fleeing violence and

1 mistreatment in their home countries. In many cases, these young people are  
2 eligible for SIJS, asylum, and other forms of humanitarian immigration relief. This  
3 team represents clients before the New York City Immigration Courts and New  
4 York State Family Courts.

5 41. The Door is also an ORR-subcontracted LSP, providing representation  
6 and other legal services to UC detained by ORR in several New York-area facilities.  
7 In this capacity, The Door provides detained UC with KYR trainings and legal  
8 screenings, and represents UC in their removal proceedings, on affirmative  
9 applications for relief, and where necessary, in federal court. The Door provides  
10 referrals to minors upon their release from custody and offers ongoing  
11 representation to those released locally. The Door collaborates with other  
12 organizations and *pro bono* attorneys to protect the rights of minors in government  
13 custody. The Door has 13 staff members working on behalf of detained UC.

14 42. Together with their *pro bono* partners, The Door's attorneys handle  
15 upwards of 1,500 immigration cases per year. Since November 2020, The Door has  
16 seen over 400 UC arrive in ORR shelters in its service area.

17 **B. Defendants**

18 43. Defendant Department of Homeland Security is a federal cabinet-level  
19 department of the U.S. government. It is responsible for implementing and  
20 enforcing the INA, and is an "agency" within the meaning of the APA. *See* 8  
21 U.S.C. § 1103; 5 U.S.C. § 551(1). Its components include CBP, Immigration and  
22 Customs Enforcement ("ICE"), and USCIS.

23 44. Defendant Alejandro Mayorkas is sued in his official capacity as the  
24 Secretary of Homeland Security and therefore the "head" of that agency. 6 U.S.C. §  
25 271(a)(2). He directs each of the components within DHS, including those  
26 responsible for enforcing U.S. immigration laws, and bears ultimate responsibility  
27 for administering the immigration laws pursuant to 8 U.S.C. § 1103, including  
28 overseeing the implementation of MPP. He is responsible for developing policies

1 and programs to ensure that UC are, among other things, protected from trafficking  
2 and exploitation, and, when appropriate, safely repatriated. *See* 8 U.S.C. § 1232.

3 45. Defendant U.S. Customs and Border Protection is a bureau within DHS  
4 and an “agency” within the meaning of the APA. *See* 5 U.S.C. § 551(1); 6 U.S.C. §  
5 271. CBP is responsible for the apprehension, detention, and processing of  
6 noncitizens present at or between U.S. ports of entry, including individuals subject  
7 to MPP. CBP is responsible for initial designation, screening, and processing of  
8 UC. *See* 8 U.S.C. 1232(a).

9 46. Defendant Troy A. Miller is sued in his official capacity as the senior  
10 official performing the duties of the Commissioner of CBP and therefore the “head”  
11 of that agency. *See* 6 U.S.C. § 271(a)(2). In this capacity, Defendant Miller  
12 exercises authority over all CBP operations, policies, procedures, and practices. He  
13 is responsible for overseeing CBP’s compliance with the Constitution and relevant  
14 laws applicable to the apprehension of UC.

15 47. Defendant U.S. Immigration and Customs Enforcement is a bureau  
16 within DHS and an “agency” within the meaning of the APA. *See* 5 U.S.C. §  
17 551(1); 6 U.S.C. § 271. ICE is responsible for overseeing immigration detention,  
18 initiating and prosecuting removal proceedings, and executing removal orders.  
19 ICE’s components include Enforcement Removal Operations (“ERO”). ICE is  
20 represented through its Office of Principal Legal Advisor (“OPLA”) in immigration  
21 removal proceedings, including proceedings involving MPP and Section 240  
22 proceedings against UC.

23 48. Defendant Tae D. Johnson is sued in his official capacity as the Acting  
24 Director of ICE and therefore the “head” of that agency. 6 U.S.C. § 271(a)(2).  
25 Defendant Johnson is responsible for the administration and enforcement of federal  
26 immigration laws, including implementing and complying with 8 U.S.C. §  
27 1232(c)(2)(B).

28 49. Defendant ICE Enforcement and Removal Operations (“ERO”) is a

1 bureau within ICE and an “agency” within the meaning of the APA. *See* 5 U.S.C. §  
2 551(1); 6 U.S.C. § 271. ERO is responsible for executing removal orders and  
3 transporting UC from CBP custody to ORR custody. ERO oversees the job and  
4 responsibilities of the Field Office Juvenile Coordinator (“FOJC”) who performs  
5 case management duties, completes the appropriate release documents for UC and  
6 their sponsors, and coordinates removal and safe repatriation of UC.

7 50. Defendant Corey A. Price is sued in his official capacity as the Acting  
8 Executive Associate Director of ERO and therefore the “head” of that agency. 6  
9 U.S.C. § 271(a)(2). He is responsible for overseeing more than 7,900 employees  
10 assigned to twenty-four ERO field offices and headquarters.

11 51. Defendant U.S. Citizenship and Immigration Services is a bureau  
12 within DHS and an “agency” within the meaning of the APA. *See* 5 U.S.C. §  
13 551(1); 6 U.S.C. § 271. USCIS is responsible for administering the nation’s  
14 affirmative immigration system. To that end, it has jurisdiction over and processes  
15 all affirmative immigration applications, including I-589 applications for asylum  
16 filed under the TVPRA. *See* 8 U.S.C. § 1158(b)(c)(3).

17 52. Defendant Tracy Renaud is sued in her official capacity as the senior  
18 official performing the duties of Director of USCIS and therefore the “head” of that  
19 agency. *See* 6 U.S.C. § 271(a)(2). She oversees USCIS’s administration of the  
20 immigration system.

21 53. Defendant Department of Health and Human Services (“HHS”) is a  
22 federal cabinet-level department responsible for developing policies for the care and  
23 housing of UC children apprehended by DHS and an “agency” within the meaning  
24 of the APA. *See* 5 U.S.C. § 551(1); 6 U.S.C. § 271; 8 U.S.C. § 1232(c). ORR is an  
25 office within HHS.

26 54. Defendant Norris Cochran is sued in his official capacity as the Acting  
27 Secretary of HHS and is therefore the “head” of the agency. 6 U.S.C. § 271(a)(2).  
28 He also oversees ORR. HHS is responsible for the care and placement of UC in



1 federal custody. *See* 8 U.S.C. § 1232(c); 6 U.S.C. § 279. HHS and ORR enter into  
 2 contracts with public and private entities to house, care for, and provide legal  
 3 assistance to UC apprehended by DHS pursuant to the INA. *See* 6 U.S.C. § 279.

4 55. Defendant Office of Refugee Resettlement is a bureau within the  
 5 Administration for Children and Families, an office within HHS and an “agency”  
 6 within the meaning of the APA. *See* 5 U.S.C. § 551(1); 6 U.S.C. § 271. ORR  
 7 provides rehabilitative, social, and legal services to refugees, asylees, and other  
 8 noncitizens to promote their integration into American society. ORR is responsible  
 9 for the care and placement of all UC.

10 56. Defendant Ken Tota is sued in his official capacity as the Acting  
 11 Director of ORR and therefore the “head” of that agency. *See* 6 U.S.C. § 271(a)(2).  
 12 He is responsible for the care and custody of UC in ORR custody.

### FACTUAL ALLEGATIONS

#### **I. FEDERAL LAW PROVIDES ROBUST AND MANDATORY PROTECTIONS FOR UNACCOMPANIED CHILDREN**

15 57. If an immigrant child appears at the United States border and is  
 16 designated as an unaccompanied child, they are entitled to a panoply of rights and  
 17 procedural safeguards pursuant to the *Flores* Settlement Agreement, the Homeland  
 18 Security Act of 2002 (“HSA”), and the TVPRA. These three sources of law govern  
 19 the treatment and administrative processing of UC. Together, they set forth various  
 20 protections, including access to *pro bono* legal services provided by LSPs, like  
 21 Plaintiffs, to ensure that no UC are subject to removal before having equal access to  
 22 a developmentally-appropriate and child-accommodating immigration process.

##### **A. The Flores Settlement Agreement**

24 58. In 1997, a federal court in the Central District of California in *Flores v.*  
 25 *Reno* approved a consent decree covering “[a]ll minors who are detained in the legal  
 26  
 27  
 28



1 custody of the INS [Immigration and Naturalization Service].”<sup>15</sup> Among other  
 2 requirements, the *Flores* Settlement Agreement directs the INS to “treat all minors  
 3 in its custody with dignity, respect and special concern for their particular  
 4 vulnerability as minors” and to “place each detained minor in the least restrictive  
 5 setting appropriate to the minor’s age and special needs.” *Id.* at ¶ 11. It also  
 6 requires that children “shall” be released “without unnecessary delay” to the custody  
 7 of an adult caregiver, with parents and other family members given priority, and  
 8 requires [the government] to undertake “prompt and continuous efforts” to effect  
 9 family reunification. *Id.* at ¶¶ 11, 14, 18.

10 59. The *Flores* Settlement Agreement established nationwide requirements  
 11 governing the detention, treatment, and release of UC and recognized the unique  
 12 vulnerability of UC while detained without a parent or legal guardian present.<sup>16</sup>

13 **B. Homeland Security Act of 2002**

14 60. In 2002, the HSA divided responsibilities for the processing and  
 15 treatment of UC between HHS’s sub-agency, ORR, and the then-newly created  
 16 DHS. *See* 6 U.S.C. § 279(a). DHS was assigned general apprehension, transfer,  
 17 and repatriation responsibilities. *See* Homeland Security Act, Pub. L. No. 107-296,  
 18 § 462, 116 Stat. 2135 (2002). ORR was assigned certain functions “with respect to  
 19 the care of unaccompanied [] children,” including “coordinating and implementing  
 20 the care and placement” of UC in appropriate custody, reunifying UC with their

21 \_\_\_\_\_  
 22 <sup>15</sup> Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px), ¶  
 10 (C.D. Cal. Jan. 17, 1997), <http://www.aila.org/File/Related/14111359b.pdf>  
 23 [hereinafter the “*Flores* Settlement Agreement”]. After *Flores*, the INS was  
 24 dissolved and subsumed into DHS, whereupon DHS inherited the INS’s obligations  
 under the *Flores* Settlement Agreement.

25 <sup>16</sup> *See* Ruth. E. Wasem, *Asylum Policies for Unaccompanied Children Compared*  
 26 *with Expedited Removal Policies for Unauthorized Adults: In Brief*, Cong. Res.  
 27 Serv. 5 (July 30, 2014), <https://fas.org/sgp/crs/homsec/R43664.pdf>. The Biden  
 28 Administration has stated a commitment to the *Flores* Settlement Agreement and  
 has promised to codify further protections for migrant children. Biden Harris, *The*  
*Biden Plan for Securing our Values as a Nation of Immigrants*,  
<https://joebiden.com/immigration/> (last visited Feb. 11, 2021).

1 parents abroad, if appropriate, maintaining and publishing a list of professionals  
 2 “qualified to provide guardian and attorney representation services” for UC, and  
 3 collecting statistical information on UC. *See* 6 U.S.C. §§ 279(a), (b)(1).<sup>17</sup> Section  
 4 462 of the HSA extended to all UC the key protections of the *Flores* Settlement  
 5 Agreement, including its “least restrictive setting” requirement. Pub. L. No. 107-  
 6 296, § 462, 116 Stat. 2143 (2002).

7 **C. Trafficking Victims Protection Reauthorization Act**

8 61. Congress passed the Trafficking Victims Protection Act of 2000  
 9 (“TVPA”) to “combat trafficking in persons, especially into the sex trade, slavery,  
 10 and involuntary servitude, to reauthorize certain Federal programs to prevent  
 11 violence against women, and for other purposes.” Pub. L. No. 106-368, 114 Stat.  
 12 1464 (2000). In 2008, Congress reauthorized the TVPA with the TVPRA. *See*  
 13 William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L.  
 14 No. 110-457, 122 Stat. 5044 (2008).

15 62. The TVPRA establishes certain rights for UC navigating the  
 16 immigration process, reflecting Congress’s recognition that UC are a “particularly  
 17 vulnerable population” to whom the country “owes a special obligation” to treat  
 18 “humanely and fairly.”<sup>18</sup> The TVPRA imposes an affirmative obligation on DHS  
 19 and HHS to develop policies and procedures to implement its dictates.

20 63. The TVPRA guarantees all UC several discrete procedural and  
 21 substantive rights, including:

22 **1. Proper screening by CBP for signs of human trafficking and**  
 23 **a fear of return**

24 64. Every child must be screened to determine whether they have been a  
 25 victim of child trafficking, have a fear of returning to their country of nationality or

26 <sup>17</sup> *See also* William A. Kandel, Unaccompanied Alien Children: An Overview,  
 27 Cong. Res. Serv. 5 (Oct. 9, 2019), <https://fas.org/sgp/crs/homesec/R43599.pdf>.

28 <sup>18</sup> 154 Cong. Rec. S10866 (daily ed. Dec. 10, 2008) (statement of Sen. Feinstein).

1 of last habitual residence owing to a credible fear of persecution, or are not able to  
 2 make an independent decision to withdraw their application for admission to the  
 3 United States. *See* 8 U.S.C. § 1232(a)(4).<sup>19</sup>

4 **2. Placement “in the least restrictive setting that is in the best  
 5 interest of the child”**

6 65. The TVPRA expressly provides that “an unaccompanied [] child in the  
 7 custody of the Secretary of Health and Human Services shall be promptly placed in  
 8 the least restrictive setting that is in the best interest of the child.” 8 U.S.C. §  
 9 1232(c)(2)(A). It additionally states that “[a] child shall not be placed in a secure  
 10 facility absent a determination that the child poses a danger to self or others or has  
 11 been charged with having committed a criminal offense” and that “[t]he placement  
 12 of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis.”

13 *Id.*

14  
 15  
 16 <sup>19</sup> The TVPRA differentiates between UC arriving from non-contiguous countries  
 17 and those arriving from contiguous countries (i.e., Mexico and Canada). *See* 8  
 18 U.S.C. § 1232(a)(2). The statute requires CBP to screen only Mexican and  
 19 Canadian children, but CBP issued guidance in 2009 requiring officers to screen all  
 20 UC for trafficking and persecution, regardless of nationality. *See* U.S. Gov’t  
 21 Accountability Off., GAO-15-521, *Unaccompanied Alien Children: Actions Needed*  
 22 *to Ensure Children Receive Required Care in DHS Custody* 18 (2015),  
 23 <https://www.gao.gov/assets/680/671393.pdf> (“Further, CBP’s March 2009  
 24 memorandum requires that Border Patrol agents and OFO [Office of Field  
 25 Operations] officers use CBP’s Form 93 to document that they conducted the  
 26 required screening for all [UC] against criteria set forth in TVPRA”) (citing U.S.  
 27 Customs and Border Prot., *Implementation of the William Wilberforce Trafficking*  
 28 *Victims Protection Reauthorization Act of 2008 (TVPRA)* (March 19, 2009),  
<https://www.aila.org/infonet/cbp-issues-interim-guidance-for-processing-uac>  
 (redacted copy)). The information obtained during the screening does not impact  
 the custody of UC from *non-contiguous* countries, who must be transferred to ORR  
 custody. But CBP may return UC to Mexico or Canada, as appropriate, if it  
 determines that a Mexican or Canadian UC: (i) has not been trafficked; (ii) does not  
 credibly fear persecution; and (iii) can make an independent decision to withdraw  
 his application for admission. *See* 8 U.S.C. § 1232(a)(2); *Trafficking Victims*  
*Protection Reauthorization Act: Renewing the Commitment to Victims of Human*  
*Trafficking: Hearing Before S. Comm. On the Judiciary*, 112th Cong. 9-10 (2011)  
 (testimony of Acting Deputy Assistant Sec’y, Off. of Immigr. and Border Sec.,  
 Kelly Ryan). For purpose of this Amended Complaint, “UC” refers to  
 unaccompanied children from non-contiguous countries, unless otherwise noted.

1                   **3. USCIS’s initial jurisdiction over TVPRA-asylum**  
2                   **applications**

3           66. Typically, only the immigration courts—operated by EOIR under the  
4 Department of Justice (“DOJ”)—have jurisdiction over an asylum application filed  
5 by an individual in removal proceedings. *See* 8 U.S.C. § 1229a(a). The TVPRA,  
6 however, gives USCIS initial jurisdiction over asylum applications filed by UC  
7 (“TVPRA-asylum”). *See* 8 U.S.C. § 1158(b)(3)(C) (amending INA § 208 to vest  
8 initial jurisdiction over “any asylum application filed by an unaccompanied [] child”  
9 with an asylum officer). This entitlement to initial adjudication by USCIS applies to  
10 all UC, even those who later reunite with a parent or legal guardian, who originally  
11 filed an asylum application with the immigration court, or who were denied asylum  
12 and are appealing to the BIA or the federal courts. *See* 8 U.S.C. § 1158(b)(3)(c).<sup>20</sup>

13                   **4. Age-appropriate asylum interview**

14           67. The TVPRA further commands that asylum applications for UC “shall  
15 be governed by regulations which take into account the specialized needs of UC and  
16 which address both procedural and substantive aspects of handling UC’s cases.” 8  
17 U.S.C. § 1232(d)(8). In response, USCIS issued guidance and training to officers  
18 regarding the special needs of children and accommodations that should be made for  
19 UC in their interviews and adjudications.

20           68. Thus, instead of facing cross examination in courtrooms by government  
21 attorneys and judges, UC have the right to appear for non-adversarial interviews  
22 with USCIS’s Asylum Officers, who are trained to apply child-sensitive and trauma-  
23 informed interview techniques that take into account the child’s age, language  
24

25 \_\_\_\_\_  
26 <sup>20</sup> *See also* U.S. Citizenship and Immigr. Servs., *Questions and Answers: Updated*  
27 *Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed*  
28 *by Unaccompanied Alien Children* (June 10, 2013),  
<https://www.uscis.gov/sites/default/files/document/questions-and-answers/ra-qanda-determine-jurisdiction-uac.pdf>; Wasem, *supra* note 16, at 6.

1 facility, and background.<sup>21</sup> Moreover, when UC seek asylum as principal applicants  
 2 before USCIS—as opposed to a derivative to a parent’s asylum claim—their claims  
 3 must be adjudicated under a child-centric lens that acknowledges how children  
 4 experience and are impacted by persecution.<sup>22</sup>

5 69. While asylum applicants generally must apply within one year of  
 6 entering the United States, the TVPRA exempts UC from this deadline. *Compare* 8  
 7 U.S.C. §§ 1158(a)(2)(B) *with* 1158(a)(2)(E). Waiving the one-year filing  
 8 requirement is consistent with Congress’s recognition that UC require special  
 9 protections to safeguard their rights and to ensure they are not prematurely or  
 10 unlawfully removed to a country where they face dangerous conditions. By waiving  
 11 the one-year filing requirement, Congress gave UC time to recover from trauma; to  
 12 regain stability in their lives and physical, mental, and emotional development; and  
 13 to mature and age because developing an asylum claim is challenging. It requires  
 14 the applicant to express a fear of return, articulate a legally cognizable basis for  
 15 fearing harm, and provide corroborating evidence in support of their asylum claim.  
 16 Moreover, the TVPRA directs USCIS to help make *pro bono* counsel available to  
 17 UC seeking asylum to ameliorate these age- and trauma-related issues. *See* 8 U.S.C.  
 18 § 1232(c)(5).

19 **5. Placement in TVPRA-proceedings under Section 240, the**  
 20 **right to pursue relief from removal, and the right to counsel**

21 70. The TVPRA expressly forecloses DHS from removing UC without first  
 22 placing them “in removal proceedings under Section 240 of the Immigration and

23 <sup>21</sup> *See* U.S. Citizenship and Immigr. Servs., *Children’s Claims, RAIO Directorate –*  
 24 *Officer Training* (Dec. 20, 2019),  
 25 [https://www.uscis.gov/sites/default/files/document/foia/Childrens\\_Claims\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Childrens_Claims_LP_RAIO.pdf).

26 <sup>22</sup> *See, e.g., Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1068 (9th Cir. 2017)  
 27 (“[W]hen the petitioner is a child, [the adjudicator] must assess the alleged  
 28 persecution from a child’s perspective.”) (quoting *Castro-Martinez v. Holder*, 674  
 F.3d 1073, 1081 (9th Cir. 2011), *overruled on other grounds by Bringas-Rodriguez*,  
 850 F.3d at 1075).



1 Nationality Act” (“TVPRA-proceedings”). 8 U.S.C. § 1232(a)(5)(D). TVPRA-  
2 proceedings are initiated when DHS issues and serves a Notice to Appear (“NTA”)  
3 on the UC and then files the NTA with the immigration court located in the child’s  
4 jurisdiction. *See* 8 U.S.C. § 1229(a)(1). The TVPRA allows each unaccompanied  
5 child to appear before an Immigration Judge in a child-appropriate setting, to seek  
6 asylum and any other form of immigration relief available to him or her, and to be  
7 represented by counsel. *See* 8 U.S.C. § 1229(a); 8 CFR § 239.1(a).<sup>23</sup>

8 71. By requiring DHS to place UC in TVPRA-proceedings, the TVPRA  
9 protects UC from expedited removal, provides a clearly delineated process for  
10 immigration proceedings that can be adopted with the oversight of an Immigration  
11 Judge to address child-centric needs, and affords opportunities to seek all avenues of  
12 relief including TVPRA-asylum, SIJS, protection for victims of human trafficking,  
13 and protection under the Violence Against Women Act (“VAWA”). Moreover,  
14 without placement in TVPRA-proceedings, UC cannot otherwise seek and obtain  
15 voluntary departure free of cost, a benefit Congress exclusively conferred upon UC  
16 seeking safe repatriation. 8 U.S.C. § 1232(a)(5)(D).

17 72. Also recognizing the burden and due process issues in expecting UC to  
18 represent themselves *pro se*, Congress tethered DHS placement of UC in TVPRA-  
19 proceedings to the requirement that UC have access to counsel in those proceedings.  
20 Congress mandated that HHS ensure UC have access to counsel to the “greatest  
21 extent practicable.” 8 U.S.C. § 1232(c)(5). To that end, Congress routinely  
22 appropriates funds to ORR for UC-related legal services. ORR then subcontracts  
23 with LSPs, including Plaintiffs, to represent UC in TVPRA removal proceedings.<sup>24</sup>

24  
25 <sup>23</sup> Under 8 CFR § 239.1 and 8 CFR § 1.2, NTAs must be issued by “immigration  
26 officer[s],” i.e., certain “employees of the Department of Homeland Security” or “of  
27 the United States as designated by the Secretary of Homeland Security.”

28 <sup>24</sup> Off. of Refugee Resettlement, *An Office of the Administration for Children & Families, About the Program* (Sept. 22, 2020), <https://www.acf.hhs.gov/orr/programs/ucs/about>. ORR contracts with the Vera Institute of Justice for the provision of legal services to UC. Vera in turn

1 A child who is not designated UC has no similar right or access to subsidized  
2 counsel. *See C.J.L.G. v. Sessions*, 880 F.3d 1122, 1136 (9th Cir. 2019), *rev'd en*  
3 *banc on other grounds*, 923 F.3d 622, 629 (9th Cir. 2019).

#### 4 **6. No reinstatement of prior removal orders**

5 73. If an adult non-citizen reenters the United States after they were  
6 removed through execution of a prior removal order, they can be subject to  
7 reinstatement of the prior removal order. 8 U.S.C. § 1231(a)(5). Once a removal  
8 order is reinstated, an individual is typically removed without a hearing before a  
9 judge unless the individual can establish a reasonable fear of persecution or torture  
10 in their country of nationality or last habitual residence. These individuals are  
11 placed in “withholding-only” proceedings before the immigration court, in which  
12 the only available relief from removal is withholding of removal under the INA and  
13 protection under the Convention Against Torture. *See* 8 C.F.R. § 241.8.

14 74. The TVPRA, on the other hand, categorically protects UC from  
15 reinstatement of prior removal orders. 8 U.S.C. § 1232(a)(5)(D). UC with  
16 previously effectuated removal orders can neither be removed on prior orders of  
17 removal nor placed in withholding-only proceedings. As defendants-appellants  
18 stated in connection with Ninth Circuit proceedings in *Flores v. Lynch*:

19 The detention requirements of the INA governing expedited removal  
20 and reinstatement of removal apply to all adults, including those who  
21 arrive with children, and to accompanied minors. ***They do not,***  
22 ***however, apply to [UC], since they cannot be subjected to expedited***  
23 ***removal or reinstatement.*** *See* 8 U.S.C. §§ 1232(a)(2)(B), (a)(3),  
24 (a)(5)(D).

25 Respondent’s Motion to Exceed the Type-Volume Limitation by 4,744 Words,  
26 *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016) (No. 15-56434), 2016 WL 330944, at  
27 \*18 (emphasis added). This protection flows from the TVPRA, which requires UC

28 subcontracts with various legal services organizations throughout the country.  
Plaintiffs are thus subcontractors of ORR. *See* Vera Institute of Justice (last visited  
Feb. 11, 2021), <https://www.vera.org/projects/legal-services-for-unaccompanied-children>.



1 be placed in TVPRA-proceedings where they can pursue multiple avenues of relief,  
2 and ensures all UC enjoy their right to seek TVPRA-asylum before USCIS in the  
3 first instance.

4 **7. Safe repatriation**

5 75. The TVPRA mandates safe repatriation for UC who seek voluntary  
6 departure or must be removed. To further protect UC from traffickers and other  
7 persons seeking to victimize children, the TVPRA requires DHS and HHS to work  
8 together to ensure “safe and sustainable repatriation and reintegration” of UC into  
9 their countries of nationality or last habitual residence, “including placement with  
10 their families, legal guardians, or other sponsoring agencies.” 8 U.S.C. §§  
11 1232(a)(2), (c)(1), (a)(5).

12 **8. Categorical protections**

13 76. The TVPRA contains no exceptions to its protections. It does not  
14 distinguish between UC who have or do not have prior immigration histories. More  
15 specifically, it does not exclude from its reach UC who have prior removal orders,  
16 or children who are currently in or have been through MPP proceedings.

17 77. The TVPRA recognizes the need to make otherwise complicated  
18 immigration law and procedure more accommodating to the unique needs of UC.  
19 Indeed, when implemented, the TVPRA protects UC from unlawful or premature  
20 removal to a country where they would face persecution, victimization, and/or  
21 death. Accordingly, the TVPRA guarantees UC two chances to seek asylum: (1) a  
22 non-adversarial interview with a USCIS Asylum Officer; and (2) if USCIS declines  
23 to grant asylum, then through an age-appropriate hearing before an Immigration  
24 Judge in formal TVPRA-proceedings. *See* TVPRA, §§ 232(d)(7)(C), 235 (a)(5)(D).

25 78. These protections reflect the special circumstances of UC, many of  
26 whom have experienced violence and trauma, and thus require special safeguards to  
27 ensure their legitimate opportunity to seek the safety of asylum.

28

1 **II. BEFORE MPP, FEDERAL AGENCIES AND LEGAL SERVICE**  
2 **PROVIDERS COORDINATED TO ENSURE UNACCOMPANIED**  
3 **CHILDREN RECEIVED TVPRA PROTECTIONS**

4 79. The TVPRA guarantees specific protections for UC at every stage of  
5 their proceedings, from their initial apprehension to when they are granted asylum  
6 relief or removed and repatriated safely to their home country. Multiple  
7 governmental agencies interact with and serve UC, and inter-agency coordination is  
8 required to ensure that UC “receive humane and appropriate treatment while in the  
9 custody of the U.S. government.”<sup>25</sup>

10 80. The TVPRA compels DHS and HHS to “enact regulations which take  
11 into account the specialized needs of UC and which address both procedural and  
12 substantive aspects of handling UC’s cases.”<sup>26</sup> Each agency implements its own  
13 policies and guidelines that reflect its obligations under the TVPRA. However, as a  
14 practical matter and as commanded by statute, Defendants coordinate their efforts to  
15 ensure UC are “humanely and fairly” treated as they are processed through the  
16 immigration system and afforded the opportunity to seek asylum and other forms of  
17 immigration relief.<sup>27</sup>

18 81. As detailed below, prior to the Trump Administration’s implementation  
19 of MPP, federal agencies and LSPs, like Plaintiffs, worked together to ensure UC  
20 received TVPRA protections.

21 **A. CBP Typically Apprehends and Is Responsible for Interviewing**  
22 **Immigrant Children and Designating Them as UC**

23 82. Children fleeing persecution who present at or cross the United States  
24 border are ordinarily met by a CBP officer who interviews the child and any  
25

26 <sup>25</sup> 154 Cong. Rec. S10,886 (2008).

27 <sup>26</sup> 8 U.S.C. § 1232(d)(8).

28 <sup>27</sup> 154 Cong. Rec. S10,886.

1 accompanying adults.<sup>28</sup> The apprehending CBP officer is responsible for making a  
 2 threshold determination of the child’s age.<sup>29</sup> CBP must designate as an  
 3 unaccompanied child any non-citizen child for whom the officer has a “reasonable  
 4 claim or suspicion” that the child is: (1) under eighteen years of age; (2) lacks  
 5 immigration status; and (3) does not have a parent or guardian available to “provide  
 6 care and physical custody.”<sup>30</sup>

7 **B. ICE, Through ERO, Is Responsible for Issuing UC Notices to**  
 8 **Appear Before Transferring UC to ORR Custody and Managing**  
 9 **Their Cases**

10 83. ICE, through its sub-agency ERO, is responsible for transporting UC,  
 11 initiating removal proceedings against UC, and safely repatriating UC, if  
 12 appropriate. These duties are governed by federal regulations relating to the  
 13 apprehension and release of minors under 8 C.F.R. § 236.3, as well as its JFRM  
 14 Handbook, “an operational guide” for FOJC who work within ICE’s ERO.<sup>31</sup> The  
 15 JFRM Handbook establishes procedures and best practices for FOJC in the  
 16 “processing, transporting, managing, and removing minors” from the country.<sup>32</sup> It  
 17 also imposes certain affirmative obligations on FOJC, including precise “case  
 18 management” duties.<sup>33</sup>

19 <sup>28</sup> Kandel, *supra* note 17, at 6.

20 <sup>29</sup> See U.S. Immigr. and Customs Enf’t, *Juvenile and Family Residential*  
 21 *Management Unit Field Office Juvenile Coordinator Handbook* 21–23 (2018)  
 22 [hereinafter JFRM Handbook], available at [https://www.aila.org/infonet/ice-](https://www.aila.org/infonet/ice-handbook-handling-minors-encountered-by-dhs)  
 23 [handbook-handling-minors-encountered-by-dhs](https://www.aila.org/infonet/ice-handbook-handling-minors-encountered-by-dhs); 8 U.S.C. § 1232(b)(4).

24 <sup>30</sup> U.S. Customs and Border Prot., *Implementation of the William Wilberforce*  
 25 *Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)* (March 19,  
 26 2009), <https://www.aila.org/infonet/cbp-issues-interim-guidance-for-processing-uac>  
 27 (redacted copy).

28 <sup>31</sup> JFRM Handbook, *supra* note 29, at 2.

<sup>32</sup> *Id.*

<sup>33</sup> To the extent that ERO coordinates its activities with CBP, the JFRM Handbook  
 also describes rules and best practices governing CBP.

1           84. Once ORR confirms housing for UC, ERO takes custody of UC from  
2 CBP and transports them to their designated ORR placements.<sup>34</sup> DHS’s own  
3 policies for implementing the TVPRA require ERO to issue and serve the  
4 unaccompanied child an NTA prior to transferring the child’s custody from CBP to  
5 ORR.<sup>35</sup> ERO’s “TVPRA-NTA” policy and practice further requires FOJC to ensure  
6 that service on the child was legally sufficient, otherwise they must correct the  
7 mistake and re-serve the TVPRA-NTA.<sup>36</sup>

8           85. The JFRM Handbook assigns ERO “case management” responsibility  
9 over all UC in ORR custody.<sup>37</sup> ERO has delegated this responsibility to its FOJC,  
10 who must, among other things, (a) track UC case updates in DHS’s cross-agency  
11 database, ENFORCE, which details a complete case history for each person  
12 apprehended, (b) update the ENFORCE profile, including the “transfer of Docket  
13 Control Office,” to reflect the location of UC upon transfer of custody, (c) maintain  
14 UC Alien-Files (“A-Files”) and convey UC-case information to ORR through the  
15 “UAC-Portal,” and (d) notify OPLA’s Office of the Chief Counsel (“OCC”) of *any*  
16 custody changes for UC with pending cases before EOIR.<sup>38</sup> OCC or its agency  
17 OPLA represents the U.S. government in immigration proceedings and is  
18 responsible for, among other things, “[p]roviding information to the IJ during  
19 immigration court proceedings and to the Board of Immigration Appeals when an  
20

---

21 <sup>34</sup> *Id.* at 33.

22 <sup>35</sup> *Id.*

23 <sup>36</sup> *Id.* at 14.

24 <sup>37</sup> *Id.* at 11.

25 <sup>38</sup> U.S. Immigr. and Customs Enf’t, Memorandum from John P. Torres, Acting  
26 Director, Office of Detention and Removal Operations, to Field Office Directors  
27 160 (March 27, 2006), *available at*  
28 [https://www.ice.gov/doclib/foia/dro\\_policy\\_memos/09684drofieldpolicymanual.pdf](https://www.ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf)  
; JFRM Handbook, *supra* note 29, at 11–14, 31, 38–39, 54, 59.

1 IJ's decision is appealed."<sup>39</sup> FOJC retain custody of a child's TVPRA-NTA,  
 2 manage the child's immigration court hearings, and are responsible for ensuring  
 3 proper service.<sup>40</sup>

4 86. ERO's issuance and service of a TVPRA-NTA on UC serves an  
 5 important function for Plaintiffs and other LSPs, who rely on TVPRA-NTAs to  
 6 obtain and verify a child's name, birthdate, country of origin, and Alien Number  
 7 ("A-Number"). Plaintiffs also must verify if the TVPRA-NTA was properly issued  
 8 and served on the minor because an improperly executed TVPRA-NTA is grounds  
 9 for termination of the child's removal proceedings.

10 87. As part of their representation, Plaintiffs routinely review a minor's  
 11 TVPRA-NTA when screening the child for legal representation. Before MPP,  
 12 Plaintiffs experiences confirm ERO regularly executed new TVPRA-NTAs for UC,  
 13 including those with prior entries or removal orders. Other than the occasional  
 14 lapse, all UC apprehended at the border would arrive at their ORR housing  
 15 placement with a TVPRA-NTA, or have a TVPRA-NTA served upon the shelter's  
 16 custodian shortly thereafter,<sup>41</sup> reflecting the date and place of their most recent entry  
 17 or arrival.

18 **C. ORR Is Responsible for Care and Custody of UC**

19 88. ORR, under HHS, is tasked with implementing the TVPRA's policies  
 20 with respect to the care and custody of UC and ensuring that UC are placed in the  
 21 least restrictive setting. ORR's policy manual—Children Entering the United States  
 22 Unaccompanied—sets its policies and best practices for executing its obligations

23 \_\_\_\_\_  
 24 <sup>39</sup> JFRM Handbook, *supra* note 29, at 59.

25 <sup>40</sup> *Id.* at 13-14, 33.

26 <sup>41</sup> For minors younger than fourteen-years old, ERO must serve the NTA on ORR  
 27 and the minor's parent if the parent is inside the United States and DHS has reason  
 28 to know the parent is here. *See* 8 CFR 103.8(c)(2)(ii); *Matter of Amava*, 21 I.&N.  
 Dec. 583 (BIA 1996); *Matter of Meija-Andino*, 23 I.&N. Dec. 533 (BIA 2002); *see*  
 also JFRM Handbook, *supra* note 29, at 33.

1 under the TVPRA, including: ensuring that each child is placed in the least  
 2 restrictive setting; managing transfers between ORR placements; screening  
 3 sponsors; coordinating safe and timely releases of UC to approved sponsors; and  
 4 maintaining up-to-date case information.<sup>42</sup>

5 89. To house UC who enter ORR custody, ORR sub-contracts with foster  
 6 care programs, shelters, and long-term residential or treatment facilities located  
 7 across the country. Case Managers employed at UC housing-sites are responsible  
 8 for facilitating reunification of UC with their family or approved sponsor. Case  
 9 Managers are also responsible for ensuring that UC in ORR custody appear for any  
 10 scheduled hearing or asylum interview.

11 **D. ORR Must Release UC to Sponsors or Family Without**  
 12 **Unnecessary Delay**

13 90. As required under the *Flores* Settlement Agreement and the TVPRA,  
 14 ORR must make “prompt and continuous efforts” towards placing UC “in the least  
 15 restrictive setting that is in the best interest of the child,” prioritizing placements  
 16 with “parents, guardians, relatives, or individuals designated by the child’s parents,”  
 17 otherwise known as “sponsors.”<sup>43</sup> 8 U.S.C. § 1232(c)(2); *see Flores* Settlement  
 18 Agreement ¶¶ 11, 14, 16. ORR is generally not permitted to delay release of a child  
 19 to a suitable sponsor.<sup>44</sup>

20 91. Case Managers at ORR placements are critical in facilitating the release

21 \_\_\_\_\_  
 22 <sup>42</sup> Off. of Refugee Resettlement, *Children Entering the United States*  
 23 *Unaccompanied* (Dec. 20, 2019), [https://www.acf.hhs.gov/orr/policy-](https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied)  
 24 [guidance/children-entering-united-states-unaccompanied](https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied).

25 <sup>43</sup> *Id.*

26 <sup>44</sup> In fact, increases in the length of stays in ORR custody can lead to “a ballooning”  
 27 of the number of children in ORR custody. In the past, such influxes have led to  
 28 emergency use of facilities with limited access to educational, mental health, or  
 legal services. *See* U.S. Conf. of Catholic Bishops, *The ORR and DHS Information-*  
[Sharing Agreement and its Consequences](https://justiceforimmigrants.org/what-we-are-working-on/unaccompanied-children/orr-and-dhs-information-sharing-agreement-its-consequences/) (Oct. 3, 2019),  
[https://justiceforimmigrants.org/what-we-are-working-on/unaccompanied-](https://justiceforimmigrants.org/what-we-are-working-on/unaccompanied-children/orr-and-dhs-information-sharing-agreement-its-consequences/)  
[children/orr-and-dhs-information-sharing-agreement-its-consequences/](https://justiceforimmigrants.org/what-we-are-working-on/unaccompanied-children/orr-and-dhs-information-sharing-agreement-its-consequences/).



1 of UC to sponsors. They are responsible for assessing potential sponsors, making  
 2 transfer and release recommendations, and coordinating the release of UC from  
 3 ORR custody. They must also coordinate with the local FOJC, who provides a  
 4 recommendation on whether a minor should be released. ORR, however, ultimately  
 5 decides whether to release a child to a sponsor.<sup>45</sup>

6 92. Before MPP, UC who were neither a danger nor a flight risk and who  
 7 had suitable sponsors could expect to be released from ORR custody in between two  
 8 weeks to three months.<sup>46</sup> Aside from occasional compliance issues, ORR would  
 9 promptly release children to parents or other close family members. Plaintiffs rarely  
 10 saw ORR delay reunification because of a child's prior immigration proceedings or  
 11 because of circumstances within a child's immigration proceeding.

12 **E. ORR Contracts with Plaintiffs and Other LSPs to Provide UC a**  
 13 **Right to Counsel as Required by the TVPRA**

14 93. ORR houses UC in facilities and programs located throughout the  
 15 country. ORR typically subcontracts with LSPs, like Plaintiffs, that are nonprofit  
 16 organizations providing *pro bono* assistance and representation to UC. In 2019–20,  
 17 ORR subcontracted with fifty-three LSPs throughout the country to protect UC's  
 18 right to access to counsel, as guaranteed by the TVPRA.<sup>47</sup> Those LSPs located in  
 19 jurisdictions near the U.S.-Mexico border, such as Plaintiffs ImmDef, RAICES, and  
 20 ProBAR serve the highest number of UC. Interior LSPs, such as Plaintiff The Door,  
 21 serve UCs transferred to shelters away from the Southwestern border. In 2019,

22  
 23 <sup>45</sup> *Id.*

24 <sup>46</sup> The average length of care provided by ORR to children who were released in  
 25 September 2020 was 97 days. Prior to the COVID-19 pandemic, in October 2019,  
 26 the average length of care for the same category of children was 69 days. *See* U.S.  
 27 Dep't of Health and Human Servs., *Latest UAC Data – FY2020* (Nov. 30, 2020),  
 28 <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2020/index.html#overall-data>.

<sup>47</sup> *See* 8 U.S.C. § 1232(c)(5).



1 Plaintiffs served upward of 20,000 UC combined.<sup>48</sup>

2 94. LSPs are critical to effectuating Congress’s intent to protect vulnerable  
3 children from trafficking, exploitation, and violence. LSPs conduct their own  
4 screening to identify UC who are victims of trafficking, exploitation, and  
5 persecution, which may dictate the forms of relief available, the types of legal  
6 assistance the child will require, and whether the child qualifies for UC-specific  
7 benefit programs. LSPs assist UC by providing KYR presentations, appearing as  
8 Friend of Court in immigration court, and representing UC in their immigration  
9 proceedings. LSPs may also assist ORR Case Managers and sponsors in facilitating  
10 the reunification process.

11 95. When LSPs perform their duties as contemplated by the TVPRA, they  
12 help safeguard a child’s right to due process in their immigration proceedings. LSPs  
13 are responsible for determining a child’s eligibility for relief, preparing applications  
14 for relief where possible, and advocating for the child in court either as counsel or  
15 Friend of Court. Finally, if warranted, LSPs help safely repatriate UC who do not  
16 require protection under U.S. laws and desire return to their country of nationality or  
17 last habitual residence to be reunited with a parent, relative, or guardian.

18 96. For LSPs to carry out their duties, communication and collaboration  
19 with ORR and ICE stakeholders is critical. For example, as the designated LSP for  
20 ORR-contract facilities throughout Greater Los Angeles, ImmDef relies on ORR to  
21 provide a daily list of UC arriving at LA-area ORR-contract facilities. ORR  
22 typically emails ImmDef a daily roster that includes the name, birth date, and the  
23 unique, nine-digit A-Number for incoming UC. ImmDef then uses this information  
24 to screen UC and provide a KYR presentation within seven to ten days of the child’s  
25

---

26 <sup>48</sup> Plaintiffs do not yet have their numbers for 2020 but believe the numbers will be  
27 lower because of Title 42, which CBP relied on to expel unaccompanied minor  
28 children. *See P.J.E.S.*, 2020 WL 6770508, at \*17 (granting the plaintiff’s request  
for a preliminary injunction).

1 arrival at the local ORR shelter.

2 97. Communication and coordination between the LSPs and ORR and ICE  
3 is also necessary because LSPs cannot reasonably rely on UC to provide complete  
4 information about their past immigration history or identify relevant information in  
5 support of their immigration claim. LSPs often rely on ORR Case Managers and  
6 FOJC to provide case information such as a copy of the child's NTA or medical  
7 intake, information about the child's prior immigration history, or the location of a  
8 separated family member. The relationship between LSPs, ORR, and ICE varies  
9 across the country, but there is a common understanding nationwide that ORR and  
10 ICE hold UC health and immigration case information that is necessary for LSPs to  
11 provide even minimally effective representation, and that LSPs have historically  
12 relied on that information.

13 98. This mutual understanding is also critical for LSPs to provide timely  
14 representation. If an ORR Case Manager or FOJC is unable to provide the  
15 requested information for a child, LSPs must make formal records requests to both  
16 agencies. These records requests can take several months to process, and hamper an  
17 LSP's representation of a child, especially if the child is on an expedited  
18 immigration docket because they are not released to a sponsor and remain in ORR  
19 custody.<sup>49</sup>

20 99. Many LSPs who represent UC on the juvenile detained docket can  
21 generally anticipate having sixty to 120 days to prepare a child's applications for  
22 relief, including a TVPRA-asylum application.<sup>50</sup> When ORR and an FOJC demand

23  
24 <sup>49</sup> See U.S. Dep't of Health and Human Servs., *Requests for UAC Case File*  
25 *Information* (April 14, 2014), [https://www.acf.hhs.gov/orr/policy-guidance/requests-](https://www.acf.hhs.gov/orr/policy-guidance/requests-uac-case-file-information)  
26 [uac-case-file-information](https://www.acf.hhs.gov/orr/policy-guidance/requests-uac-case-file-information); Obtaining Office of Refugee Resettlement Records for  
Clients Who Were Detained as Children, Immigr. Legal Res. Ctr. (Nov. 2019),  
[https://www.ilrc.org/sites/default/files/resources/orr\\_records\\_pa\\_final.pdf](https://www.ilrc.org/sites/default/files/resources/orr_records_pa_final.pdf).

27 <sup>50</sup> This range may vary depending on the jurisdiction. For instance, in The Door's  
28 experience, it ordinarily takes between thirty and sixty days to prepare relief  
applications. In Phoenix, EOIR is running a pilot program in the Phoenix  
Immigration Court where detained juvenile cases are being fast tracked. See

1 a formal records request, they significantly delay an LSP’s access to basic client  
2 information. When LSPs do not receive the responsive records in advance of a  
3 filing deadline, they may be forced to submit filings seeking immigration relief  
4 without a complete understanding of a client’s health and immigration history.

5 100. Importantly, it is infeasible for LSPs to represent all UC who enter  
6 ORR custody given the high numbers of children in custody and the stringent  
7 immigration court docketing deadlines that apply to children in ORR custody. Most  
8 LSPs, such as Plaintiffs, prioritize and agree to represent children who they  
9 reasonably expect will be released and reunified with a parent, guardian, or other  
10 sponsor located within the LSP’s geographic service area. Once UC are released  
11 from ORR custody, their immigration case is transferred from the juvenile detained  
12 docket to the non-detained docket. When a child’s case is transferred to a non-  
13 detained docket, an LSP can reasonably expect significantly more time to meet with  
14 the client and help prepare their applications for relief.<sup>51</sup> Depending on the  
15 immigration court jurisdiction, LSPs can anticipate between six to fifteen months to  
16 help prepare applications for relief for UC.<sup>52</sup> This is at least triple the time they

17  
18 

---

*Florence Immigr. & Refugee Rights Project, Courts in Crisis: The State of Judicial*  
19 *Independence and Due Process in U.S. Immigration Courts* (Jan 28, 2020),  
20 <https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-20200129-SD012.pdf>.

21 <sup>51</sup> Some exceptions may exist depending on jurisdiction.

22 <sup>52</sup> If an LSP finds that a detained child is eligible for asylum and recommends filing  
23 an asylum application with USCIS, best practices dictate prioritizing the child’s  
24 release from custody over preparing the asylum application for three reasons. First,  
25 the process for applying for asylum is intense and the experience of preparing a  
26 child’s claim can be retraumatizing. If asylum is the only relief available, it is better  
27 for the child to not be in custody—and therefore not placed on the expedited  
28 “juvenile detained” docket—while preparing that application. The child will have  
more time to thoroughly prepare their claim with the support of a parent, relative, or  
sponsor. Second, UC who seek TVPRA-asylum while in ORR custody must submit  
to USCIS a change of address if and when they are released to a sponsor. USCIS  
construes this change of address as an “applicant-caused delay,” which may result in  
the loss of immigration benefits such as employment-authorization. Finally, many  
UC who are otherwise eligible for asylum may also become eligible for SIJS relief.  
The SIJS application process is not intense and is less likely to retraumatize the

1 have when representing children on the detained docket.

2 101. Nevertheless, many LSPs, like Plaintiffs, may be compelled to  
 3 represent children in short-term custody who face an imminent threat of deportation,  
 4 want voluntary departure, or are nearing their eighteenth birthday and are at risk of  
 5 aging out of federal foster care under ORR's auspices. However, expedited  
 6 docketing deadlines place enormous pressure on LSPs, requiring them to balance  
 7 representing UC who are in short-term custody and their own organizational  
 8 resources and staffing capacity. Before MPP, Plaintiffs rarely encountered UC with  
 9 orders of removal.

10 102. To that end, Plaintiffs' resources, staffing capacity, and programmatic  
 11 objectives have been designed to serve a high volume of detained UC requiring  
 12 minimal time-sensitive assistance and representation in their TVPRA-proceedings.

13 **F. USCIS Has Jurisdiction over UC Asylum Claims Which the**  
 14 **TVPRA Ensures UC Can Affirmatively Pursue Without Deadline**  
 15 **Given the Challenges Facing UC**

16 103. USCIS is responsible for adjudicating UC applications for asylum and  
 17 does so pursuant to the Affirmative Asylum Procedures Manual ("AAPM"), the  
 18 primary guidance for USCIS asylum officers conducting affirmative asylum  
 19 interviews, with a section specifically dedicated to unaccompanied minors and their  
 20 rights under the TVPRA.<sup>53</sup> The AAPM establishes several principles not otherwise  
 21 reflected in statute. For example, it defines USCIS's jurisdictional scope as  
 22 encompassing all UC, even those currently in removal proceedings or on appeal  
 23 before the BIA or federal courts of appeal.<sup>54</sup>

24 104. Typically, UC first encounter LSPs at KYR presentations, which allow  
 25 child. Most children seek SIJS after release and reunification with a sponsor.

26 <sup>53</sup> See generally U.S. Citizenship and Immigr. Servs, *Affirmative Asylum*  
 27 *Procedures Manual* (May 2016),  
 28 <https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf>.

<sup>54</sup> See *id.* at 32–33.

1 LSP staff to give the children basic information about the immigration process, their  
2 legal situation, and options for legal relief.<sup>55</sup> LSP staff then meet one-on-one with  
3 all newly arriving UC to screen them for relief and ask them questions about their  
4 family, the circumstances that led to their migration, and any ties they have to the  
5 United States. LSPs use this information to evaluate a child's eligibility for release  
6 and for relief. The vast majority of UC have fled violent and dangerous conditions  
7 and fear harm if returned. LSPs work in partnership with UC, their families,  
8 experts, and child advocates to compile evidence and develop strong asylum claims.

9 105. In addition to supporting a child's reunification with a sponsors, LSPs  
10 also begin to prepare the appropriate applications for relief, which can be a slow and  
11 difficult process. Many UC are too young to fully understand the circumstances of  
12 their flight to the United States. For these children, LSPs must rely on information  
13 gleaned from relatives or witnesses in a child's home country, who are often  
14 difficult to contact. Other UC are too traumatized to talk about their experiences or  
15 are socialized to not discuss prior threats and violence by perceived authority  
16 figures, equating disclosure with future harm. LSPs must therefore devote time and  
17 effort to building relationships with UC and ensure they have access to mental  
18 healthcare and emotional support. And even those children who can discuss their  
19 past persecution often lack the vocabulary and sophistication necessary to articulate  
20 their experiences in the form of a perfect asylum claim. LSPs must translate each  
21 child's story into the language of a cognizable claim and support the child's  
22 experience with corroborating evidence. Done appropriately, this process can take  
23 months even under the best circumstances.

24 106. On average, preparation for a TVPRA-asylum filing takes Plaintiffs  
25 between 35 and 60 hours. The time spent includes preparing declarations, obtaining  
26

---

27 <sup>55</sup> Over the course of the pandemic, LSPs have shifted to providing remote KYR  
28 presentations.

1 records, gathering evidence, and preparing the child for testimony. With certain  
2 Plaintiff organizations representing hundreds of UC, Plaintiffs have managed to  
3 build a sustainable practice by predominantly focusing on affirmative relief.

4 107. The LSP files the child’s TVPRA-asylum application with USCIS by  
5 mailing a paper copy of a Form I-589 Application for Asylum and Withholding of  
6 Removal. Typically, Plaintiffs file the application form and will supplement the  
7 application with supporting evidence after the child is given an interview date. The  
8 application is filed with the Nebraska Service Center of USCIS and transferred to  
9 the local office that has jurisdiction over the child at the time of filing. USCIS  
10 usually responds with a receipt notice unless the application is rejected for being  
11 incomplete. USCIS may subsequently reject the application for lack of jurisdiction.

12 108. Assuming the application is not rejected for lack of jurisdiction or other  
13 reasons, USCIS will eventually schedule an asylum interview with the child.  
14 Currently, the wait time for interviews is unpredictable across Plaintiffs’ respective  
15 jurisdictions and varies anywhere from one month to several years.<sup>56</sup> In February  
16 2018, USCIS prioritized the scheduling of recently filed applications, which  
17 Plaintiffs refer to as a “last in first out” policy. Applications filed under USCIS’s  
18 last in first out policy may be scheduled within two months of filing the  
19 application.<sup>57</sup> However, USCIS’s policy has not necessarily meant that the agency  
20 is processing applications quickly. For instance, since the policy’s implementation,  
21 a majority of ImmDef’s UC clients who submitted their TVPRA-asylum  
22 applications are still waiting for an interview date. In the meantime, while they  
23 await an asylum interview, UC may attend school, receive therapy, and recover  
24

25 <sup>56</sup> U.S. Citizenship and Immigr. Servs., *Affirmative Asylum Interview Scheduling*  
26 (last visited Feb. 11, 2021), [https://www.uscis.gov/humanitarian/refugees-and-  
asylum/asylum/affirmative-asylum-interview-scheduling](https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-interview-scheduling).

27 <sup>57</sup> Since 2018, the majority of ImmDef’s cases have not been scheduled for  
28 interviews.



1 from past trauma and grief. Once an interview is calendared, LSPs prepare UC for  
 2 the interview. Depending on a particular child’s needs, an LSP may need to meet  
 3 the child an additional one to three times in advance of the asylum interview to  
 4 prepare them for the interview.

5 **G. ICE May Initiate Removal of UC Only After They Are Denied**  
 6 **Relief by Both USCIS and EOIR Through Full TVPRA-**  
 7 **Proceedings**

8 109. If ICE does not seek to remove an unaccompanied child, the TVPRA  
 9 does not require the child be placed in Section 240 removal proceedings. 8 U.S.C. §  
 10 1232(a)(5)(D). If, however, ICE intends to remove an unaccompanied child, the  
 11 TVPRA requires ICE to initiate removal proceedings against a child by filing the  
 12 charging document—e.g., TVPRA-NTA—with EOIR. 8 C.F.R. § 1003.14(a).  
 13 EOIR is responsible for conducting immigration court proceedings, adjudicating  
 14 immigration relief, and deciding administrative appeals.<sup>58</sup> When an unaccompanied  
 15 child appears, an Immigration Judge must conduct hearings in accordance with  
 16 child-sensitive criteria.<sup>59</sup>

17 110. UC in TVPRA-proceedings are explicitly guaranteed two opportunities  
 18 to seek asylum and other forms of relief before ICE may initiate removal. The first  
 19 opportunity is seeking TVPRA-asylum before USCIS, as described above. If a  
 20 USCIS officer does not grant asylum, the second opportunity is through the  
 21 TVPRA-proceedings before an Immigration Judge. ICE may begin the removal

22 <sup>58</sup> 8 U.S.C. § 1229(a); 8 C.F.R. § 239.1(a). EOIR lacks authority to *sua sponte*  
 23 initiate TVPRA-proceedings against UC. This authority is vested with DHS. 8  
 24 C.F.R. §1003.14.

25 <sup>59</sup> For example, EOIR memoranda direct Immigration Judges to, among other  
 26 things: (i) schedule “juvenile dockets” that occur separate from adult dockets; (ii)  
 27 allow reasonable furniture modifications to the courtroom so that UC are  
 28 comfortable; (iii) employ “child-sensitive” questioning; and (iv) evaluate a child’s  
 testimony and applications for relief in light of their age and ability to understand  
 and convey the incidents underlying their claims for relief. See U.S. Dep’t of Just.,  
 Exec. Off. for Immigr. Rev., *Executive Office for Immigration Review: An Agency  
 Guide* (Dec. 2017),  
[https://www.justice.gov/eoir/page/file/eoir\\_an\\_agency\\_guide/download](https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download).

1 process only after a child is denied all forms of relief from removal by both USCIS  
2 and an Immigration Judge, and exhausts all appellate remedies.<sup>60</sup>

3 111. Prior to the government's imposition of MPP, UC released from ORR  
4 custody were generally not at risk of removal for months or years after their entry  
5 into the United States.<sup>61</sup> Applications for asylum filed by UC may take years to  
6 work their way through the system—first before USCIS, which due to processing  
7 delays typically takes months to adjudicate I-589s;<sup>62</sup> and then for children who are  
8 referred to EOIR for TVPRA-proceedings, which generally takes years to finish the  
9 hearing process.<sup>63</sup> And that timeline does not account for other forms of relief, such  
10 as SIJS or U-Visas. LSPs therefore typically have years to prepare for potential  
11 removals of UC.

12 112. An unaccompanied child may properly become subject to a final  
13 removal order only if USCIS *and* EOIR deny asylum, all other forms of relief are  
14 unavailable or unavailing, and a BIA appeal is unsuccessful. If the BIA denies the  
15 appeal, it will notify the child's attorney, who may then exercise the child's right to  
16 seek federal circuit court judicial review of the final removal order and request a  
17 discretionary stay of removal pending adjudication of the petition for review.

18 \_\_\_\_\_  
19 <sup>60</sup> 8 U.S.C. § 1232(a)(5)(D).

20 <sup>61</sup> In general, most removals of UC traditionally occurred if the child sought  
21 voluntary departure pursuant to the TVPRA—involuntary removals of UC were  
22 rare. UC maintain the right to seek voluntary departure even after having sought  
23 asylum relief before USCIS. 8 U.S.C. § 1232(a)(5)(D)(ii); *see also* Kandel, *supra*  
24 note 17, at 7.

25 <sup>62</sup> Processing times vary, but most of ImmDef's released-UC clients are waiting  
26 anywhere between six months and eighteen months.

27 <sup>63</sup> EOIR begins its 2021 fiscal year with the largest backlog to-date. *See* TRAC  
28 Immigr., *FY 2021 Begins with Largest Immigration Court Backlog on Record*,  
Transactional Records Access Clearinghouse, Syracuse U. (Nov. 24, 2020),  
<https://trac.syr.edu/whatsnew/email.201124.html>. The average wait-time in  
Plaintiffs' immigration court jurisdictions can range between 300 days to three  
years. *See* TRAC Immigr., *Immigration Court Backlog Tool*, Transactional Records  
Access Clearinghouse, Syracuse U. (last visited Feb. 11, 2021),  
[https://trac.syr.edu/phptools/immigration/court\\_backlog/](https://trac.syr.edu/phptools/immigration/court_backlog/).

1           **H. ICE and ERO Must Ensure Safe Repatriation Before Removing a**  
 2           **Child**

3           113. If a child exhausts all forms of review and still does not obtain relief,  
 4 then ICE, through its sub-agency ERO, has authority to safely repatriate the child.<sup>64</sup>  
 5 ERO must ensure “safe and supervised return of [UC],” consistent with the policies  
 6 and procedures set forth in the TVPRA and JFRM Handbook and ERO’s “priority .  
 7 . to preserve family unity during repatriation.”<sup>65</sup> ERO arranges and bears the costs  
 8 of “a safe and supervised return.”<sup>66</sup>

9           114. Before repatriating UC, ICE-ERO must: (1) verify kinship with the  
 10 consulate to safeguard minors from smugglers and other threats;<sup>67</sup> (2) coordinate  
 11 with the child’s legal representatives or consulates to contact family in their home  
 12 country;<sup>68</sup> (3) consult the Department of State’s Country Reports on Human Rights  
 13 Practices and the Trafficking in Persons Report in assessing whether to repatriate an  
 14 unaccompanied child to a particular country;<sup>69</sup> (4) submit a threat assessment of the  
 15 country of origin ten business days prior to repatriation;<sup>70</sup> (5) request escorting  
 16

17  
 18 <sup>64</sup> The Biden Administration issued a moratorium halting deportations for 100 days.  
 19 See Memorandum from the Acting Secretary of U.S. Dep’t of Homeland Security to  
 20 U.S. Customs Border Prot., U.S. Immigr. and Customs Enf’t, and U.S. Citizenship  
 21 and Immigr. Servs. (Jan. 1, 2021),  
 22 [https://www.dhs.gov/sites/default/files/publications/21\\_0120\\_enforcement-  
 memo\\_signed.pdf](https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf). This moratorium applied to some MPP-UC. *Id.* A Texas  
 district court has stayed the moratorium, placing MPP-UC protected under the  
 moratorium at threat of removal once again. See *Texas v. United States*, No. 6:21-  
 CV-00003, 2021 WL 247877, at \*2 (S.D. Tex. Jan. 26, 2021).

23 <sup>65</sup> JFRM Handbook, *supra* note 29, at 45.

24 <sup>66</sup> *Id.* at 45–46.

25 <sup>67</sup> *Id.* at 45.

26 <sup>68</sup> *Id.* at 47.

27 <sup>69</sup> 8 USC 1232 (a)(5)(B).

28 <sup>70</sup> JFRM Handbook, *supra* note 29, at 47.

1 officers to travel with the child;<sup>71</sup> (6) allow the child to communicate with a consular  
 2 official before departure;<sup>72</sup> (7) ensure the appropriate officials, including child  
 3 welfare officials, are confirmed available to accept the child, as mandated by the  
 4 TVPRA;<sup>73</sup> (8) obtain the receiving-official's signature on the Form I-216, indicating  
 5 safe transfer of custody;<sup>74</sup> and (9) ensure the child is returned during daylight hours  
 6 in appropriate outerwear for the current climate conditions.<sup>75</sup>

7 115. Together, these requirements aim to serve the purposes of both family  
 8 unity and protecting the child from trafficking and other threats.

9 **III. DEFENDANTS' MIGRANT PROTECTION PROTOCOLS CREATED**  
 10 **A CRISIS FOR FAMILIES SEEKING ASYLUM AT THE BORDER**  
 11 **AND ENDANGERED CHILDREN'S LIVES**

12 116. On December 20, 2018, then-Secretary Nielsen of DHS announced a  
 13 new policy for processing asylum seekers at the southern border: the Migrant  
 14 Protection Protocols, often referred to as "MPP" or the "Remain in Mexico"  
 15 program.<sup>76</sup> Under MPP, individuals and their families who arrived at the southern  
 16 border and requested asylum—either at a port of entry or after crossing the border  
 17 between ports of entry—received NTAs informing them of when they must appear

18 <sup>71</sup> *Id.* at 47 (specifying that at least one escorting officer must be the same gender).

19 <sup>72</sup> *Id.* at 45, 46.

20 <sup>73</sup> TVPRA § 235(a)(2)(C) (8 U.S.C. § 1232(a)(2)(C)).

21 <sup>74</sup> JFRM Handbook, *supra* note 29, at 46.

22 <sup>75</sup> *Id.* at 46.

23 <sup>76</sup> The MPP program has been the subject of numerous lawsuits. *See* Kate Morrisey,  
 24 *New lawsuit to challenge Trump's 'Remain in Mexico' policy*, San Diego Union  
 25 Trib. (Oct. 28, 2020),  
 26 <https://www.sandiegouniontribune.com/news/immigration/story/2020-10-28/new-lawsuit-to-challenge-remain-in-mexico-policy>; *Innovation Law Lab v. Wolf*, 951  
 27 F.3d 986 (9th Cir. 2020) (temporarily enjoining the operation). On February 1,  
 28 2021, in light of DHS's announcement that it would suspend MPP enrollment, the  
 DOJ moved the United States Supreme Court to hold further briefing in abeyance  
 and remove from the docket oral argument scheduled for February 2021. This  
 motion was granted on February 3, 2021. *See Mayorkas v. Innovation Law Lab*, No.  
 19-1212, 2021 WL 357256, at \*1 (U.S. Feb. 3, 2021).

1 in immigration court and were promptly returned to Mexico, where they remained  
2 for the duration of their immigration proceedings, instead of being permitted to  
3 pursue these proceedings while remaining in the United States. They were  
4 instructed to return to a specific port of entry at a specific date and time for their  
5 next court hearing. While these asylum seekers remained in Mexico, the United  
6 States did and does not provide them with food, shelter, personal protective  
7 equipment, work, funds, transportation to and from the U.S. border, or access to  
8 legal counsel.<sup>77</sup> To date, the vast majority of asylum seekers presenting themselves  
9 at the southern border since the program's implementation were sent back to Mexico  
10 to await their asylum proceedings under MPP.<sup>78</sup>

11 117. As of January 28, 2021, under the leadership of President Biden, DHS  
12 suspended enrollment into MPP and, on February 2, 2021, President Biden ordered  
13 the Secretary of Homeland Security to “promptly review and determine whether to  
14 terminate or modify” the MPP program. President Biden further ordered the  
15 Secretary, in consultation with the Secretary of State, Attorney General, and the  
16 Director of the Centers for Disease Control, to “promptly consider a phased strategy  
17 for the safe and orderly entry into the United States, consistent with public health  
18 and safety and capacity constraints, of those individuals who have been subjected to  
19 MPP for further processing of their asylum claims.” Although the Biden  
20 Administration has announced that it will soon begin allowing migrants forced to  
21 remain in Mexico under MPP into the United States, the administration has warned

22  
23  
24 <sup>77</sup> See Complaint at 33, *Immigr. Defs. Law Ctr v. Wolf*, No. 2:20-cv-9893 (C.D. Cal.  
25 Oct. 28, 2020), available at <https://innovationlawlab.org/media/Complaint-Dkt-1-Immigrant-Defenders-Law-Center-et-al-v.-Wolf-et-al.pdf>.

26 <sup>78</sup> See TRAC Immigr., *Details on MPP (Remain in Mexico) Deportation*  
27 *Proceedings*, Transactional Records Access Clearinghouse, Syracuse U. (Nov.  
28 2020), <https://trac.syr.edu/phptools/immigration/mpp/> (official figure as of Nov.  
2020: 69,333; data based on court records obtained from EOIR using the Freedom  
of Information Act).

1 that “changes will take time,”<sup>79</sup> and MPP hearings remain on the MPP Court docket.

2 **A. MPP Exacerbated the Challenges Facing Immigrant Children**

3 118. MPP has created significant and severe hardships for immigrant  
4 children in three key ways.

5 119. First, MPP proceedings are materially different than TVPRA-  
6 proceedings that occur within the United States. Most notably, before the COVID-  
7 19 outbreak, the Trump Administration created large tent facilities to operate as  
8 “virtual immigration courtrooms” at certain ports of entry. Asylum seekers were  
9 instructed to appear at these tents for immigration hearings that were conducted by  
10 Immigration Judges appearing remotely by videoconference. In these proceedings,  
11 asylum seekers in the tent courts do not receive the usual Legal Orientation Program  
12 (“LOP”) benefits that other migrants who are housed in immigration detention  
13 facilities receive, nor do they have access to *pro bono* legal services. These LOP  
14 benefits include group orientations, one-on-one meetings, workshops, and referrals  
15 to free or low-cost legal services. Indeed, according to an independent analysis of  
16 data obtained from EOIR, fewer than five percent of asylum seekers in MPP have an  
17 attorney. In comparison, thirty-two percent of asylum seekers who remain in the  
18 United States are able to obtain an attorney. Given that asylum seekers also are *five*  
19 *times* more likely to obtain asylum when represented—a figure that increases to  
20 more than *fourteen times* for women and children—the challenges involved in  
21 obtaining representation in MPP are outcome-determinative, leaving meritorious  
22 asylum claims unheard or denied.

23 120. Second, having to remain in Mexico under MPP significantly impairs  
24 asylum seekers’ ability to attend their court hearings. *In absentia* removal orders are

25  
26 <sup>79</sup> See Sabrina Rodriguez, *Biden to Begin Admitting Migrants Forced by Trump to*  
27 *Wait in Mexico*, Politico (Feb. 12, 2021),  
28 <https://www.politico.com/news/2021/02/12/biden-admitting-migrants-trump-mexico-468817>.



1 all too common because asylum seekers in MPP face kidnapping, rape, and other  
2 forms of violence along the border. Moreover, MPP forces asylum seekers into  
3 temporary and unstable housing conditions, which means that there is often no way  
4 for the immigration courts to notify them of the date, time, or location of their  
5 hearings. Notices that do reach asylum seekers may not have accurate or complete  
6 information regarding their hearings, including where and how to cross the border  
7 into the United States to attend those hearings.<sup>80</sup> While nine out of ten immigrants  
8 who are allowed to remain in the United States attend all their court hearings, at  
9 least 50 percent of MPP asylum seekers fail to appear for their hearings. When the  
10 applicant does not appear, the Immigration Judge will typically close the case and  
11 issue a removal order *in absentia*. Children are particularly vulnerable to the harms  
12 of *in absentia* removal orders because they are usually unaware of the substance or  
13 procedure of their immigration proceedings, and their ability to appear for a court  
14 hearing is often beyond their control. In 2018, 42,542 juveniles (including UC)  
15 received *in absentia* removal orders; in 2019, when MPP was implemented, that  
16 number skyrocketed to 55,882.<sup>81</sup>

17 121. Third, after the Trump Administration implemented MPP across all  
18 ports of entry on the southwestern border, conditions in Mexico quickly became dire  
19 for asylum seekers, especially children. Most asylum seekers forced to await  
20 proceedings in Mexico must spend many months waiting to have their asylum cases  
21 decided, living in squalid conditions and without basic necessities like clean

22 \_\_\_\_\_  
23 <sup>80</sup> See Michael G. Bochenek, *Like I'm Drowning: Children and Families Sent to*  
24 *Harm by the US 'Remain in Mexico' Program*, Human Rights Watch (Jan. 6, 2021),  
25 [https://www.hrw.org/report/2021/01/06/im-drowning/children-and-families-sent-](https://www.hrw.org/report/2021/01/06/im-drowning/children-and-families-sent-harm-us-remain-mexico-program)  
26 [harm-us-remain-mexico-program](https://www.hrw.org/report/2021/01/06/im-drowning/children-and-families-sent-harm-us-remain-mexico-program) (reporting that by mid-May 2020, Human Rights  
27 Watch had tracked “more than 1,100 reported cases of murder, rape, kidnapping,  
28 torture, and assault of asylum seekers sent to Mexico under the MPP,” including 265  
kidnappings or attempted kidnappings of children).

<sup>81</sup> TRAC Immigr., *Juveniles – Immigration Court Deportation Proceedings*,  
Transactional Records Access Clearinghouse, Syracuse U. (Dec. 2020),  
<https://trac.syr.edu/phptools/immigration/juvenile/>.

1 drinking water and adequate shelter, sanitation, and nutrition. These conditions  
 2 have worsened with the spread of COVID-19—without clean water, health care, or  
 3 basic cleaning and sanitation equipment, asylum seekers face a heightened risk of  
 4 COVID-19 exposure. Apart from physical hardship and deprivation, migrants  
 5 stranded in MPP must live in or travel through some of the most dangerous areas in  
 6 Mexico, including Mexican states the State Department has designated as “no  
 7 travel” zones, classified at the *same danger level* as Syria, Afghanistan, and  
 8 Yemen—all countries with active combat zones. Human Rights First reports that as  
 9 of December 15, 2020, there have been at least 1,314 publicly reported cases of  
 10 murder, rape, torture, kidnapping, and other violent assaults against asylum seekers  
 11 and migrants forced to return to Mexico since the start of MPP.<sup>82</sup> Of these cases,  
 12 318—nearly 25 percent—are children returned to Mexico, who were kidnapped or  
 13 nearly kidnapped.<sup>83</sup>

14 122. According to HHS data, between October 2019 and May 2020, at least  
 15 500 children crossed the U.S.-Mexico border without their parents or legal  
 16 guardians after spending time in Mexico pursuant to MPP.<sup>84</sup>

17 **B. The Coronavirus and Title 42 Created Further Obstacles for**  
 18 **Children at the Border**

19 123. On March 23, 2020, in response to the COVID-19 pandemic, DHS and

20 <sup>82</sup> Human Rights First, *Delivered to Danger: Trump Administration sending asylum*  
 21 *seekers and migrants to danger* (Dec. 15, 2020),  
 22 <https://www.humanrightsfirst.org/campaign/remain-mexico>.

23 <sup>83</sup> *Id.*

24 <sup>84</sup> See Lomi Kriel, *The Trump Administration Is Rushing Deportations of Migrant*  
 25 *Children During Coronavirus*, ProPublica (May 18, 2020),  
 26 [https://www.propublica.org/article/the-trump-administration-is-rushing-](https://www.propublica.org/article/the-trump-administration-is-rushing-deportations-of-migrant-children-during-coronavirus)  
 27 [deportations-of-migrant-children-during-coronavirus](https://www.propublica.org/article/the-trump-administration-is-rushing-deportations-of-migrant-children-during-coronavirus) (reporting that HHS has  
 28 tracked 571 children who crossed into the U.S. whose parents remained in Mexico  
 through May 18, 2020); see also Priscilla Alvarez, *At least 350 children of migrant*  
*families forced to remain in Mexico have crossed over alone to US*, CNN (Jan. 24,  
 2020), [https://www.cnn.com/2020/01/24/politics/migrant-children-remain-in-](https://www.cnn.com/2020/01/24/politics/migrant-children-remain-in-mexico/index.html)  
[mexico/index.html](https://www.cnn.com/2020/01/24/politics/migrant-children-remain-in-mexico/index.html) (reporting that HHS has tracked 352 children who crossed into  
 the U.S. whose parents remained in Mexico through January 13, 2020). Attorneys  
 and advocates for UC in the United States report that this figure has steadily

1 EOIR suspended all MPP hearings. Implementation of the suspension was chaotic  
2 and confusing, leading some people to travel to ports of entry only to be turned  
3 away. Others missed the opportunity to get their notices of rescheduled hearings.  
4 DHS subsequently suspended MPP hearings indefinitely on July 17, 2020, issuing a  
5 public statement outlining criteria that DHS and DOJ would use to determine when  
6 MPP hearings should resume. To date, DHS and DOJ have not resumed MPP  
7 hearings nor provided information on when those hearings will resume.  
8 Immigration hearings for those in MPP proceedings are postponed indefinitely.

9 124. Further exacerbating the dire circumstances faced by asylum seekers,  
10 the pandemic has also effectuated a near-total shutdown of the country's southern  
11 border. On March 20, 2020, HHS issued an emergency regulation under 42 U.S.C.  
12 § 265 ("Title 42") permitting the Director of the Centers for Disease Control and  
13 Prevention ("CDC") to "prohibit . . . the introduction" of individuals to the country  
14 when the Director believes that "there is serious danger of the introduction of [a  
15 communicable] disease into the United States."<sup>85</sup> The rule allows any customs  
16 officers, including CBP officers, to implement any such order issued by the CDC.

17 125. Relying on this HHS regulation, CDC Director Robert R. Redfield  
18 issued an order suspending the entry of certain individuals who have been in  
19 "Coronavirus Impacted Areas." Citing this new CDC order, on March 20, 2020,  
20 CBP adopted a policy allowing CBP agents to immediately "expel" individuals

21 \_\_\_\_\_  
22 increased in the months since May 2020. The Biden Administration and the First  
23 Lady, Dr. Jill Biden, have repeatedly expressed a commitment to reunifying families  
24 separated from their children under the Trump Administration's immigration  
25 policies. Biden Harris, *The Biden Plan for Securing our Values as a Nation of*  
*Immigrants* (last visited Feb. 11, 2021), <https://joebiden.com/immigration/>; Lexi  
26 Lonas, *Jill Biden to Offer Input on Helping Reunite Separated Immigrant Families:*  
*Report*, The Hill (last visited Feb. 11, 2021),  
[https://thehill.com/homenews/administration/536207-jill-biden-to-personally-help-](https://thehill.com/homenews/administration/536207-jill-biden-to-personally-help-reunite-separated-immigrant-families)  
[reunite-separated-immigrant-families.](https://thehill.com/homenews/administration/536207-jill-biden-to-personally-help-reunite-separated-immigrant-families)

27 <sup>85</sup> Order Suspending Introduction of Certain Persons From Countries Where a  
28 Communicable Disease Exists, 85 Fed. Reg. 17,060, 17,061, 17,067 (Mar. 20,  
2020).

1 arriving at the U.S.-Mexico border.<sup>86</sup> Under the policy, CBP agents do not ask  
 2 individuals whether they face harm or fear persecution if deported and returned to  
 3 Mexico. Instead, CBP relies on individuals to volunteer the information, and an  
 4 agent must seek approval from his or her supervisor before referring an asylum  
 5 seeker for a non-refoulement interview with a USCIS asylum officer.<sup>87</sup>

6 126. According to CBP statistics, CBP has initiated 119,409 enforcement  
 7 actions under Title 42 between the expulsion order's implementation date and  
 8 November 2020.<sup>88</sup> The government, under the apparent authority of Title 42,  
 9 expelled nearly 9,000 children and ejected any who were discovered at the border  
 10 seeking asylum before November 18, 2020, when a federal district court enjoined  
 11 the practice as to UC.<sup>89</sup> These actions were taken in direct conflict with the  
 12 protections the TVPRA guarantees to UC. On January 29, 2021, the D.C. Circuit

13  
 14 <sup>86</sup> See Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately—Ignoring Asylum Law*, ProPublica (April 2, 2020),  
 15 <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law> (revealing internal CBP policy to aggressively return unauthorized migrants to Mexico).  
 16

17 <sup>87</sup> See Nick Mirroff, *Under Trump border rules, U.S. has granted refuge to just two people since late March, records show*, Wash. Post (May 13, 2020),  
 18 [https://www.washingtonpost.com/immigration/border-refuge-trump-records/2020/05/13/93ea9ed6-951c-11ea-8107-acde2f7a8d6e\\_story.html](https://www.washingtonpost.com/immigration/border-refuge-trump-records/2020/05/13/93ea9ed6-951c-11ea-8107-acde2f7a8d6e_story.html) (reporting on a leaked CBP memo detailing its COVID-19 asylum policies).  
 19

20 <sup>88</sup> See U.S. Customs and Border Prot., *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions* (Dec. 14, 2020),  
 21 <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics> (reporting expulsions under Title 42 U.S.C. § 265).  
 22

23 <sup>89</sup> See *P.J.E.S.*, 2020 WL 6770508, at \*17 (granting the plaintiff's request for a preliminary injunction); John Burnett, *Judge Says Coronavirus Can't Be Used as Reason to Quickly Deport Unaccompanied Minors*, NPR (Nov. 18, 2020),  
 24 <https://www.npr.org/2020/11/18/936312918/judge-says-coronavirus-cant-be-used-as-reason-to-deport-unaccompanied-minors> (reporting that, before the injunction, the government had already expelled nearly 9,000 UC). In addition, even after the preliminary injunction against the unlawful expulsions of children, the Trump Administration continued to expel children, in violation of the court's order. Nicole Narea, *The Trump administration expelled unaccompanied migrant children in violation of a court order*, Vox (Dec. 14, 2020),  
 25 <https://www.vox.com/2020/12/14/22174131/trump-unaccompanied-migrant-children-pandemic-expulsion>.  
 26  
 27  
 28

1 vacated the injunction without explanation.<sup>90</sup> On February 11, 2021, the CDC  
2 released a notice stating that UC will now be temporarily exempted from expulsion  
3 under Title 42.<sup>91</sup>

4 **C. MPP and the Pandemic Have Caused Unaccompanied Children**  
5 **with MPP Ties to Present at the Border and Seek Protection**

6 127. The experience of the Doe Family illustrates the crisis that MPP has  
7 caused for children. The Doe Family, which consists of three siblings aged sixteen,  
8 eight, and four, fled their home country after suffering harm and threats from gangs.  
9 Upon entering to the United States, CBP arbitrarily split their family unit in two for  
10 purposes of placing them in MPP proceedings. The mother was placed as the lead  
11 in one case with two of the children as derivatives. The father was designated as the  
12 lead with the third child in another. This resulted in two different Immigration  
13 Judges being assigned to what should have been a single, family unit case, and the  
14 family thus was required to appear at two separate hearings.

15 128. The mother and two of the children were the first to be scheduled for a  
16 merits hearing. Without so much as a KYR presentation, let alone access to counsel,  
17 the family was unable to gather documents and supporting evidence for their case.  
18 Rather than have their case heard as a single family unit, each parent's case was  
19 assigned to a different Immigration Judge.

20 129. Forced to live in unsafe and squalid conditions in a shelter near the  
21 Texas-Mexico border placed further stress on the family unit. The children's father  
22 abandoned them and their mother entered into an abusive relationship with another  
23 man. Soon the Doe Siblings found themselves trapped inside a dangerous home

24 <sup>90</sup> See *P.J.E.S.*, No. 20-cv-22245, available at [https://www.aclu.org/legal-](https://www.aclu.org/legal-document/dc-appeals-court-stay-order)  
25 [document/dc-appeals-court-stay-order](https://www.aclu.org/legal-document/dc-appeals-court-stay-order).

26 <sup>91</sup> Ctrs. for Disease Control and Prevention, *Notice of Temporary Exemption from*  
27 *Expulsion of Unaccompanied Noncitizen Children Encountered in the United States*  
28 *Pending Forthcoming Public Health Determination* (Feb. 12, 2021),  
[https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/CDCPauseNotice-  
ExceptfromExpulsion.pdf](https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/CDCPauseNotice-ExceptfromExpulsion.pdf).



1 within a dangerous country. After witnessing extreme violence, the eldest sibling  
2 took the courageous decision to protect his younger siblings and fled. The Doe  
3 Siblings entered the United States and were apprehended by CBP. After being  
4 designated UC, the children were then transferred to ORR custody.

5 130. While MPP has torn families apart, it has also deprived children of a  
6 meaningful right to seek relief in those proceedings. Eleven-year-old A. Doe and  
7 his mother fled from Honduras to the United States in July of 2019 after a  
8 transnational gang targeted A. Doe with death threats, intimidation, and severe  
9 physical abuse. On their harrowing journey to the southern border they were  
10 kidnapped and held for ransom, imprisoned for several days, and finally escaped  
11 when their captors were too intoxicated to stop them. When A. Doe and his mother  
12 finally thought they were safe—when they made it to the United States border—  
13 they were immediately sent back to the notoriously dangerous MPP camps of  
14 Matamoros, Mexico and placed on the MPP docket.

15 131. The conditions in Matamoros, where 1,000 to 2,600 people live in tents  
16 without access to clean water or proper sanitation, are particularly dire compared to  
17 the other border towns.<sup>92</sup> Matamoros is one of the most dangerous cities in Mexico,  
18 designated as a “Level 4: Do Not Travel” location by the U.S. Department of State.  
19 In just a two-month span from November 2019 to January 2020, 80 migrants, 38 of  
20 whom were children, were kidnapped or victims of attempted kidnappings. Here, A.  
21 Doe and his mother would face dangerous conditions, food and shelter insecurity,  
22 and lack of access to counsel.

23 132. A. Doe and his mother appeared for their first teleconference hearing in  
24 September of 2019, where they were given an application for asylum. During their  
25 second teleconference hearing in October of 2019, A. Doe and his mother filed

26 \_\_\_\_\_  
27 <sup>92</sup> See Human Rights Watch, *US: ‘Remain in Mexico’ Harms Children, Families*,  
28 Human Rights Watch (Jan. 6, 2021), <https://www.hrw.org/news/2021/01/06/us-remain-mexico-harms-children-families>.



1 separate I-589 applications and his mother requested a non-refoulement hearing, in  
2 hopes of escaping their dangerous living conditions. There is no record of the  
3 outcome of that hearing.

4 133. At their third and final hearing, in January of 2020, A. Doe was not  
5 even allowed to testify to the traumatizing abuse he suffered at the hands of gang  
6 members. Instead, the judge treated him as a “rider” to his mother’s application for  
7 relief, ignoring his independent asylum application. They were ordered deported  
8 without any individualized consideration of A. Doe’s claim.

9 134. At eleven, A. Doe had already experienced far more violence than any  
10 child should. Knowing that she would be unable to protect him from the gangs who  
11 had already targeted him in Honduras and from the violence of Matamoros, A.  
12 Doe’s mother made the difficult decision to send her son across the border alone,  
13 where he might be reunited with his grandmother and have an opportunity to live  
14 out a childhood free of further violence.

15 **IV. DEFENDANTS HAVE DENIED MPP-UC THEIR RIGHTS UNDER**  
16 **THE TVPRA, IN VIOLATION OF LAW AND DEFENDANTS’ OWN**  
17 **PUBLISHED POLICIES AND LONG-STANDING PAST PRACTICE**

18 135. The TVPRA does not discriminate against children who, like the Doe  
19 Siblings and eleven-year old A. Doe, were once subject to MPP as part of their  
20 respective family units and thereafter presented at the border, alone, and were  
21 designated UC by CBP and ICE. Once designated UC, the Doe Siblings and A. Doe  
22 were automatically entitled to a panoply of statutory and procedural protections  
23 under the TVPRA and *Flores* Settlement, no matter their prior immigration history.

24 136. DHS seemingly agrees that UC should be exempt from MPP. After  
25 the January 2019 implementation of MPP, DHS and its constituent sub-agencies  
26 have issued memoranda and guidance documents that categorically exempt UC from  
27 MPP. First, on January 24, 2019, DHS issued a press release explicitly excluding  
28 UC from MPP:

With certain exceptions, MPP applies to [non-citizens] arriving in the

1 U.S. on land from Mexico (including those apprehended along the  
 2 border) who are not clearly admissible and who are placed in removal  
 3 proceedings under INA § 240. This includes [non-citizens] who claim  
 4 a fear of return to Mexico at any point during apprehension, processing,  
 or such proceedings, but who have been assessed not to be more likely  
 than not to face persecution or torture in Mexico. Unaccompanied []  
 children . . . will not be subject to MPP.<sup>93</sup>

5 137. In their respective implementation documents, CBP and ICE also  
 6 reiterated the categorical exemption of UC from MPP.<sup>94</sup>

7 138. DHS reiterated this policy as recently as December 7, 2020, stating:

8 Any child who arrives at the border and is determined to be a UAC will  
 9 be processed as such by CBP in accordance with existing UAC  
 10 processing procedures, including transfer to the Department of Health  
 and Human Services (HHS) and generally processed for removal  
 11 proceedings pursuant to Section 240 of the Immigration and National  
 Act (INA). *UACs are not amenable to MPP.*<sup>95</sup>

12 139. Separately and together, the TVPRA, the *Flores* Settlement Agreement,  
 and DHS's written policies leave no question that UC are *not* to be included in or  
 13 processed through MPP.

14 140. Plaintiffs' experiences representing MPP-UC, like the Doe Siblings and  
 15 A. Doe, however, tell a very different story. Contrary to Defendants' public  
 16 statements, DHS, ICE, CBP, and ERO *do* subject UC to MPP. In the case of both  
 17 the Doe Siblings, A. Doe, and numerous other MPP-UC, Defendants continue to  
 18 prosecute children through their prior MPP proceedings despite their subsequent  
 19 classifications as UC. In so doing, Defendants either do not consider or willfully  
 20 ignore that subjecting UC to ongoing MPP proceedings and MPP removal orders  
 21 exposes MPP-UC to summary removal without any opportunity to access their  
 22 rights under the TVPRA. Defendants' treatment of MPP-UC deprives these

23 \_\_\_\_\_  
 24 <sup>93</sup> U.S. Dep't of Homeland Sec., *supra* note 4.

25 <sup>94</sup> *See, e.g.*, U.S. Customs and Border Prot., *supra* note 5 (“[Non-citizens] in the  
 26 following categories are not amenable to MPP . . . [u]naccompanied [] children”);  
 Memorandum from the Deputy Dir. of the U.S. Immigr. and Customs Enf't to Exec.  
 Assoc. Dirs., *supra* note 4 (“DHS will not use the INA section 235(b)(2)(C) process  
 27 in the cases of unaccompanied [] children.”).

28 <sup>95</sup> U.S. Dep't of Homeland Sec., *supra* note 4.

1 children of due process and violates the TVPRA, as well as Defendants’ own  
 2 policies and past practices, which unequivocally extend robust protections to *all*  
 3 UC—even those with prior immigration histories or removal orders.

4 141. Defendants’ actions have created three categories of MPP-UC: (1) UC  
 5 with proceedings pending in immigration courts based on MPP-NTAs; (2) UC with  
 6 non-final MPP removal orders; and (3) UC with final MPP removal orders entered  
 7 either (i) *in absentia*, or (ii) on the merits (collectively, “MPP-UC”).

8 142. Defendants’ actions expose these vulnerable children to a heightened  
 9 risk of removal without due process. MPP-UC, through Plaintiffs, must overcome  
 10 myriad procedural hurdles to access the rights, processes, and procedures guaranteed  
 11 under the TVPRA and *Flores* Settlement Agreement. Each MPP-unaccompanied  
 12 child group faces its own set of barriers based on its unique procedural posture, but  
 13 all three groups rely on Plaintiffs to defend against the same harm: Defendants  
 14 unreasonably delaying, if not entirely preventing, MPP-UC from accessing their  
 15 rights under the TVPRA.

16 **A. ICE and ERO Deny MPP-UC Their Statutory Right to Issuance**  
 17 **and Service of the TVPRA-NTA**

18 **1. ERO Does Not Consistently Issue and Serve MPP-UC with a**  
 19 **TVPRA-NTA**

20 143. It is official ERO policy and historical practice to issue and serve on  
 21 UC a TVPRA-NTA that reflects the child’s name, date of birth, manner and place of  
 22 entry, and the child’s unique, nine-digit A-number. In the fall of 2019, Plaintiffs  
 23 noticed that not all UC were arriving in ORR custody with a TVPRA-NTA  
 24 reflecting their most recent entry. Some children had an MPP-NTA. Other children  
 25 had a TVPRA-NTA.

26 144. After extensive investigation and advocacy to locate missing NTAs,  
 27 Plaintiffs discovered that ERO was not consistently issuing and serving TVPRA-  
 28 NTAs for children previously subject to MPP. This was a departure from ERO’s  
 express policy, which requires issuance and proper service of a TVPRA-NTA

1 reflecting the child's most recent entry before or shortly after transferring the child  
2 from CBP to ORR custody. To date, ERO has not explained or articulated this  
3 change in policy and practice.

4 145. ERO's failure to consistently issue and provide MPP-UC their  
5 TVPRA-NTAs also violates the TVPRA. When MPP-UC do not have a copy of  
6 their TVPRA-NTA, Plaintiffs cannot provide the sound and informed legal counsel  
7 that the TVPRA proscribes. For all UC, Plaintiffs require the NTA and nine-digit  
8 A-number to verify a child's name, date of birth, and method of entry. Without it,  
9 Plaintiffs cannot evaluate and prepare a defense for their clients.

10 146. ERO creates further confusion for Plaintiffs and other LSPs when it  
11 similarly fails to serve MPP-UC with a copy of their MPP-NTAs. This practice  
12 causes MPP-UC to regularly arrive in ORR custody without their MPP-NTA. As a  
13 result, Plaintiffs frequently do not know, and cannot readily discern, whether a child  
14 has any ties to MPP.

15 147. ERO is not generating a TVPRA-NTA for the vast majority of MPP-  
16 UC. Nor is ERO issuing and properly serving all MPP-UC with a TVPRA-NTA.  
17 Moreover, ERO is not issuing and properly serving all MPP-UC with an MPP-NTA.  
18 Based on information and belief, ERO and its FOJCs possess copies of a child's  
19 prior MPP-NTA and TVPRA-NTA, if one exists. Some Plaintiffs and LSPs have  
20 been able to obtain NTA's from ORR through relationships with local  
21 administrators. However, the only assured way of obtaining both the MPP-NTA  
22 and the TVPRA-NTA is by submitting a request to ICE under the Freedom of  
23 Information Act ("FOIA"), which takes months to process.<sup>96</sup>

24 148. For example, ImmDef met siblings sixteen-year-old C.G.G. and  
25 twelve-year-old B.G.G., in an ORR shelter. These siblings presented at the border

26 \_\_\_\_\_  
27 <sup>96</sup> Andrew Craycroft, *Obtaining Office of Refugee Resettlement Records for Clients*  
28 *who were Detained as Children*, Immigr, Legal Res. Ctr. (Nov. 2019),  
[https://www.ilrc.org/sites/default/files/resources/orr\\_records\\_pa\\_final.pdf](https://www.ilrc.org/sites/default/files/resources/orr_records_pa_final.pdf).

1 after being separated from and unable to find their mother in an MPP encampment.  
2 They did not have TVPRA-NTA's, but believed they were scheduled for an MPP  
3 hearing. Based on this information, ImmDef requested that OPLA sever their cases  
4 and change venue to Los Angeles in order to prevent a future *in absentia* order.  
5 When OPLA did not respond, ImmDef followed up, asking OPLA to shed light on  
6 the procedural posture of the case. OPLA then replied that EOIR had not processed  
7 their NTAs and that new ones would need to be issued and filed. Because C.G.G.  
8 and B.G.G. had not been served with a TVPRA-NTA, Plaintiff ImmDef did not  
9 know when and where C.G.G. and B.G.G. entered the United States, whether  
10 C.G.G. and B.G.G. were placed in TVPRA-removal proceedings, and whether  
11 C.G.G. and B.G.G. would even be able to seek voluntary departure if they so  
12 elected. Without the TVPRA-NTA, ERO frustrated ImmDef's abilities to provide  
13 prompt and effective counsel and advice.

14 149. ProBAR has observed that even issuance of a new TVPRA-NTA is not  
15 sufficient to protect UC rights. ProBAR represents two siblings, ages 5 and 10, who  
16 were ordered removed in MPP proceedings in February 2020, and entered the  
17 United States as UC in September 2020, having been separated from their father in  
18 Mexico. The siblings received new TVPRA-NTAs reflecting their status as UC, but  
19 ICE nonetheless sought to enforce their MPP removal orders, moving in October  
20 2020 to dismiss the TVPRA-NTA proceedings before an Immigration Judge.  
21 ProBAR was able to successfully contest the motions and appealed the MPP  
22 removal orders before the BIA. After the children were reunified with family in  
23 Dallas, Texas, ProBAR filed a motion to transfer venue, which was granted.  
24 Although the Immigration Judge denied the motions to dismiss the siblings'  
25 TVPRA-NTAs, the siblings now find themselves subject to competing proceedings,  
26 with ProBAR continuing to represent them in the BIA appeal of their MPP removal  
27 orders, while trying to locate separate counsel to represent them in proceedings  
28 under their new TVPRA-NTAs. The siblings are effectively in limbo, subject to an

1 MPP removal order while at the same time trying to seek affirmative relief.

2 **2. ERO’s Failure to Issue and Properly Serve a TVPRA-NTA**  
3 **Has Forced Plaintiffs to Expend Significant Resources to**  
4 **Identify MPP-UC**

5 150. Because ERO regularly fails to issue and serve MPP-UC their TVPRA-  
6 NTAs, Plaintiffs have had no choice but to completely overhaul their screening  
7 processes for UC. A pending MPP proceeding or outstanding MPP removal order  
8 exposes UC to drastic consequences that create obstacles to UC ever being afforded  
9 their rights under the TVPRA, including prompt release and seeking asylum. As a  
10 result, Plaintiffs must now spend significant time and staff resources conducting in-  
11 depth initial and follow-up interviews of every child just to determine if he or she  
12 has MPP ties.

13 151. Plaintiffs have revised and/or updated their UC screening processes to  
14 include new interview questions and follow-up procedures to aid in determining  
15 whether a child has been in MPP. To begin, Plaintiffs’ routine screening interviews  
16 are now significantly longer, as Plaintiffs’ staff must ask additional questions  
17 designed to elicit useful information from children who are young, traumatized, and  
18 often do not have a full understanding of their immigration history. Because MPP-  
19 UC often cannot articulate the procedural posture of their case, or even that they  
20 were in prior MPP proceedings, certain Plaintiffs have also adopted supplemental  
21 investigatory procedures intended to reconstruct a child’s immigration history. For  
22 example, some Plaintiffs will now screen the child’s A-number to discover a  
23 scheduled or missed immigration court hearing; screen adjacent A-numbers to verify  
24 whether the child was initially processed with family members; obtain contact  
25 information for parents to determine their immigration history as well as the child’s;  
26 and if necessary, request records from ORR or EOIR. These new or updated intake  
27 questions and investigatory processes often add at minimum ten minutes to every  
28 screening, which in the aggregate adds a significant burden, given the total number  
of screenings that Plaintiffs conduct, and the additional time required to train staff in



1 these new procedures.

2 152. Conversations and collaboration with other LSPs across the country  
3 have confirmed that they, like Plaintiffs, have had to adopt similar supplemental  
4 screening procedures to identify MPP-UC and promptly initiate defensive  
5 representation to preserve their rights under the TVPRA. These new screening  
6 procedures, however, are not foolproof, and LSPs are often alerted to a child's ties  
7 to MPP with little to no time to prepare the requisite defense.

8 153. In one case, Plaintiffs' sister LSP, the Florence Immigrant and Refugee  
9 Rights Project ("FIRRP"), learned through the EOIR hotline that its client was  
10 subject to an MPP-removal order. Later that same day, the client's potential sponsor  
11 informed FIRRP that an ICE officer gave notice of its intent to remove the child that  
12 very day. The ORR Case Manager knew that FIRRP represented the client, yet  
13 neither ORR nor ICE made any effort to notify FIRRP that its client was scheduled  
14 for removal that day. Even when LSPs discover an otherwise hidden MPP status  
15 through their additional procedures, there is no guarantee that the information will  
16 come soon enough to engage in the litigation that Defendants' require to delay  
17 removal.

18 **B. ORR and ERO Conditioning Release and Reunification on**  
19 **Evidence of Plaintiffs' Advocacy and Representation**

20 **1. ORR and ERO Condition the Release of MPP-UC on**  
21 **Appellate and Other Legal Action in Violation of the FSA**  
22 **and TVPRA**

23 154. Consistent with the *Flores* Settlement Agreement, the TVPRA requires  
24 that "an unaccompanied . . . child in the custody of [ORR] shall be promptly placed  
25 in the least restrictive setting that is the best interest in the child." 8 U.S.C. §  
26 1232(c)(2)(A). Per these requirements, ORR, ERO, and ICE coordinate to release  
27 UC to sponsors between sixty and ninety days after the child is placed in ORR  
28

1 custody.<sup>97</sup> For MPP-UC, however, ORR, ERO, and ICE have departed significantly  
2 from their normal course, in violation of the *Flores* Settlement Agreement, the  
3 TVPRA, and their own policies and historical practice.

4 155. In an April 24, 2020, order, Judge Gee of the Central District of  
5 California held that unless enforcement of an MPP-removal order is “imminent,”  
6 ORR cannot unreasonably delay release of MPP-UC. *Jenny L. Flores, et al. v.*  
7 *William P. Barr, et al.*, No. CV-85-4544 DMG (AGRx), 2020 WL 2758792, at \*12–  
8 13 (C.D. Cal. April 24, 2020). The evidentiary record reflected “that numerous . . .  
9 minors with a pending MPP case or removal order . . . have remained in ORR care  
10 for months despite pending appeals of their initial removal orders under the MPP.”  
11 *Id.* at \*9. At that time, ORR admitted to denying release and reunification for MPP-  
12 UC whose removal were “imminent,” without defining the term. *See id.* at \*9.  
13 ORR clarified it would not delay or deny release of UC whose MPP removal order  
14 had been “reopened, appealed, or otherwise delayed for any other reason”—  
15 confirming that ORR’s policy was to prioritize removal over release of MPP-UC in  
16 ORR custody absent evidence that the child was challenging the MPP removal  
17 order. *Id.* at \*9.

18 156. ORR’s response to Judge Gee’s April 24 order has been inconsistent.  
19 Plaintiffs ImmDef, RAICES, and The Door, and other LSPs, have observed  
20 continued delays in release of MPP-UC clients served by their organizations, while  
21 ORR has generally been releasing ProBAR’s MPP-UC clients, with a few notable  
22 exceptions. In a November 18, 2020 email to RAICES, ORR reiterated its pre-April  
23 24 position, stating, “MPP cases with final removal orders will be processed for  
24 removal as per guidance from OPLA and JFRM, that is our standing order and will  
25

26  
27 <sup>97</sup> This number reflects nation-wide ORR statistics. However, average release time  
28 may vary depending on jurisdiction.

1 be enforced on this and all future MPP cases with final orders.”

2 157. Two sibling clients of the Michigan Immigrant Resource Center  
 3 (“MIRC”) demonstrate Defendants’ refusal to release a child promptly, as required  
 4 by the TVPRA, if that child has an MPP removal order. Both siblings came into an  
 5 ORR shelter in MIRC’s geographic service area at the same time, but only one  
 6 sibling had a prior MPP removal. ORR identified a suitable sponsor for both  
 7 siblings but was willing to release only the sibling without an MPP removal order.  
 8 After four months of advocacy by MIRC, ORR, at the direction of ICE, finally  
 9 relented and reunified the children with their aunt as a sponsor.

10 158. Neither the *Flores* Settlement Agreement nor the TVPRA allow ORR  
 11 to condition a child’s release on future actions or advocacy. Nor do those  
 12 authorities permit ORR to pressure Plaintiffs into litigating matters for clients they  
 13 would not otherwise serve. ORR and ERO’s conduct have violated the relevant law,  
 14 caused unjust and harmful results for children, unreasonably interfered with  
 15 Plaintiffs’ duties to UC, and commandeered Plaintiffs into initiating representation  
 16 even where they otherwise would not.

17 **2. Defendant-ORR’s Conditioning of Release on Appellate and**  
 18 **Other Legal Action Further Burdens Plaintiffs’ Resource**  
 19 **Capacity**

20 159. Before MPP, Plaintiffs ImmDef, RAICES, and ProBAR<sup>98</sup> rarely  
 21 engaged in advocacy around the release of UC to sponsors, let alone represented UC  
 22 who were likely to be released to sponsors outside of Plaintiffs’ geographic service  
 23 areas. After MPP, however, ORR’s conditioning reunification of MPP-UC on  
 24 appellate and other legal action has added a significant burden to LSPs across the  
 25 country, including ImmDef, RAICES, and The Door, who have been forced to  
 26 engage in time and resource-intensive advocacy to protect MPP-UC’s right to be

27 <sup>98</sup> MPP was implemented prior to The Door becoming an LSP, so it has no pre-  
 28 MPP practice.

1 released to a sponsor without “unnecessary delay.” *Flores Settlement* ¶ 14; *see also*  
2 8 U.S.C. § 1232(c)(2)(B) (“[A]n unaccompanied minor in the custody of the  
3 Secretary of Health and Human Services shall be promptly placed in the least  
4 restrictive setting that is in the best interest of the of the child.”). In a few cases,  
5 ProBAR has also had to prove that MPP-UC were contesting MPP orders to prevent  
6 stalled reunifications.

7 160. DHS has made clear to ImmDef, RAICES, The Door, and LSPs in  
8 other jurisdictions that UC with MPP removal orders will not be released because  
9 the execution of their removal order is prioritized over their rights under the  
10 TVPRA. ORR and ICE in these jurisdictions will allow release of MPP-UC with  
11 removal orders only if LSPs provide some evidence that they are representing MPP-  
12 UC in the underlying MPP proceedings and are challenging the removal order. This  
13 strains and diverts organizational resources by adding to their dockets UC clients  
14 who require immediate defensive representation in MPP proceedings.

15 161. In early 2020, ImmDef staff identified five MPP-UC who were at risk  
16 of removal. Two of those children had *in absentia* orders in their MPP-proceedings  
17 for failing to appear while the other three had orders of removal not yet final.  
18 Because of the exigent circumstances that ORR imposed, none met ImmDef’s  
19 standard criteria for representation of detained UC because they were awaiting  
20 release to sponsors. For four of the five children, FOJC and ORR did not agree to  
21 release the kids until ImmDef showed proof of representation or legal challenge in  
22 the child’s MPP proceedings. Once ImmDef initiated representation, ImmDef’s  
23 staff spent hours investigating and preparing the filing and incurred nearly 100 more  
24 hours in their continued litigation of some of those children’s cases. In two of the  
25 cases on appeal, ImmDef attorneys and support staff logged over ninety hours  
26 preparing appellate briefing and motions challenging each client’s MPP removal  
27 order to prevent their removal and ensure their right to seek TVPRA-asylum in the  
28 United States.

1           162. Even still, evidence of appellate action or legal advocacy is sometimes  
2 not enough to persuade DHS and ORR to resume their normal release processes for  
3 MPP-UC. For example, in email correspondence with DHS, RAICES sought  
4 confirmation that DHS filed with EOIR the NTAs for three sibling MPP-UC whose  
5 reunification processes suddenly and without explanation stopped. DHS responded  
6 that “per JFRMU guidance, these [UC]s will be removed using the existing orders.”  
7 This exchange took place while the three siblings had TVPRA-asylum applications  
8 pending before their local asylum office as well as applications for SIJS pending  
9 before USCIS. The need for this constant communication with Defendants is itself  
10 burdensome but also often leads to more scrambling in a desperate effort to protect  
11 children from being deported and deprived of all their TVPRA rights, including the  
12 right to TVPRA-asylum. This also strains Plaintiffs’ already limited resources and  
13 burdens their ability to represent UC not encumbered by MPP.

14           163. The work necessary to protect the TVPRA rights of MPP-UC is so  
15 burdensome that attorneys must clear out a significant period of time to devote to  
16 MPP-UC’s representation. To do so, the MPP-unaccompanied child’s attorney must  
17 often find coverage for any hearings, client meetings, and other deadlines. For  
18 example, one ProBAR attorney was required to clear her calendar for three weeks in  
19 order to engage in emergency motion practice for an MPP-unaccompanied child  
20 facing removal, requiring her typical caseload to be managed by others. This  
21 practice is unsustainable for Plaintiffs.

22           **C. ICE Jeopardizes MPP-UC’s Right to TVPRA Protections by**  
23           **Failing to Affirmatively Notify EOIR of the Child’s ORR Custody**  
24           **Status**

25           **1. ICE Allows MPP-UC to Be Ordered Removed *in Absentia***

26           164. Plaintiffs and other LSPs routinely encounter MPP-UC who were  
27 ordered removed *in absentia* at an MPP Court hearing that occurred *while the*  
28 *children were in ORR custody*. To avoid this result, ICE need only follow its own  
policies and federal regulations, which require it to provide notice of a child’s

1 change in custody status to OPLA’s local attorney, who then must notify EOIR.

2 165. By their own policies, DHS, CBP, and ICE each have several discrete  
3 investigatory and reporting obligations wherein they screen individuals upon  
4 apprehension or during enforcement. CBP, for example, must query immigration  
5 and criminal databases to identify whether UC have previously been in removal  
6 proceedings, such as MPP, and log its findings into databases shared with ICE and  
7 ERO.<sup>99</sup> When UC are then transferred to ORR custody, ERO-FOJC must inform  
8 the OPLA, the attorneys who appear on behalf of ICE in immigration removal  
9 proceedings. This triggers OPLA’s duty to notify EOIR of the change and to  
10 separately move to change venue upon any changes to a respondent’s custody  
11 status—for example, MPP respondents becoming UC in ORR custody.<sup>100</sup>

12 166. Based on information and belief, ICE, through its FOJC, does not  
13 timely notify OPLA when MPP-UC are placed in ORR custody, in violation of its  
14 case management responsibilities. If ICE did provide this information, Plaintiffs  
15 would never encounter MPP-UC with *in absentia* removal orders that were entered  
16 while the child was in ORR custody. In Plaintiffs’ general experience, when OPLA  
17 informs EOIR that a *pro se* child-respondent is in ORR custody, EOIR will not  
18 order the child removed *in absentia* and will instead require OPLA to file a change  
19 of venue.

20 167. ICE’s and ERO’s failures to follow their policy and notify OPLA when  
21 a child previously in MPP is transferred to ORR custody means, for example, that a

22 \_\_\_\_\_  
23 <sup>99</sup> JFRM Handbook, *supra* note 29, at 6 & n.28; *see also* U.S. Dep’t of Homeland  
24 Sec., *supra* note 4 at 3 (contemplating CBP discovering an unaccompanied child’s  
25 prior involvement in MPP).

26 <sup>100</sup> *See* 8 C.F.R. § 1003.19(g) (requiring DHS to “immediately advise . . . of a  
27 change in respondent/applicant’s custody location or of release from Service  
28 custody, or subsequent taking into Service custody, of a respondent/applicant.”);  
Off. of the Chief Immigr. J., Immigration Court *Practice Manual*, ¶ 2.2(d)(i) & (ii)  
 (“DHS is obligated to notify the Immigration Court when an [individual] is moved  
between detention facilities. . . . [DHS] is responsible for notifying the Immigration  
Court when an [individual] is released from custody.”).



1 child detained in California is still expected to appear at a hearing scheduled in  
2 Texas. A child’s failure to appear results in a removal order *in absentia*, which then  
3 makes the child a “removal priority,” subject to imminent summary removal.  
4 Ultimately, an unaccompanied child’s unknowing failure to appear in MPP Court  
5 has the domino effect of ultimately preventing the child from accessing his or her  
6 rights under the TVPRA, including the rights to prompt release, reunification, and  
7 TVPRA-asylum.

8 168. The breakdown in Defendants’ normal reporting requirements means  
9 that, in the context of MPP, one hand (i.e., the immigration courts presiding over  
10 MPP proceedings and possibly the OPLA attorneys representing ICE in those  
11 proceedings) does not know what the other (i.e., CBP, ERO, and ORR) is doing. As  
12 a result, when the child invariably fails to appear, these agencies deploy a variety of  
13 legal sanctions without giving the child notice or an opportunity to defend against  
14 the outcome. ICE, ERO, and FOJC then compound this injury when designating the  
15 child a “removal priority,” subject to imminent removal again without an  
16 opportunity to exercise his or her rights under the TVPRA to seek TVPRA-asylum  
17 and prompt release from custody.

## 18 **2. Plaintiffs Engage in Time-Consuming Litigation Against *in*** 19 ***absentia* Removal Orders**

20 169. Plaintiffs have encountered MPP-UC with *in absentia* removal orders  
21 either because ICE failed to notify EOIR about the child’s designation and ORR  
22 custody status, or because the child’s family missed their hearing before the MPP  
23 Court. In both scenarios, MPP-UC are at risk of imminent removal unless and until  
24 the child, through counsel, moves to reopen the MPP proceedings.

25 170. A motion to reopen an *in absentia* removal order is not a *pro forma*  
26 filing—it is a substantive one that often requires resource-intensive briefing and  
27 evidence. Because children cannot be expected to prepare such filings on their own,  
28 Plaintiffs must prepare the motion or risk ERO deporting the child.

1           171. After discovering an *in absentia* order—which can be nearly  
2 impossible because by definition the client was not in court when it was entered—  
3 Plaintiffs must immediately assemble evidence that explains the child’s absence.

4           172. For *in absentia* orders entered against children while they are in ORR  
5 custody, Plaintiffs must provide evidence proving the child was in custody at the  
6 time of the hearing. This could include an NTA issued after the child’s entry and  
7 designation as an unaccompanied child or an I-213 reflecting the child’s  
8 unaccompanied child entry. These records, however, are not always at Plaintiffs’  
9 disposal, as neither ERO nor ORR make these documents readily available.  
10 Plaintiffs must consequently devote substantial staff time searching for these  
11 documents or rely on the good-will of individual OPLA attorneys or court  
12 personnel. Plaintiffs then must prepare the legal and factual arguments for the  
13 motion, compile and attach this and any other corroborating evidence, and file it  
14 with the MPP Court that entered the removal order.

15           173. For children ordered removed *in absentia* after their family was unable  
16 to attend their MPP hearing due to circumstances beyond the child’s control,  
17 Plaintiffs must show either exceptional circumstances or lack of notice.<sup>101</sup>  
18 Exceptional circumstances include “battery or extreme cruelty to the [non-citizen] or  
19 any child or parent of the [non-citizen], serious illness of the [non-citizen], or  
20 serious illness or death of the spouse, child, or parent of the [non-citizen], but not [ ]  
21 less compelling circumstances.”<sup>102</sup> Lack of notice requires that the government  
22 failed to effect notice “reasonably calculated to reach and inform” MPP-UC or  
23 counsel.<sup>103</sup>

24  
25 <sup>101</sup> 8 U.S.C. § 1229a(b)(5)(C).

26 <sup>102</sup> *Id.* § 1229a(e)(1); *see also Reyes v. Ashcroft*, 358 F.3d 592, 596–97 (9th Cir.  
27 2004) (finding ineffective assistance of counsel an exceptional circumstance).

28 <sup>103</sup> *Khan v. Ashcroft*, 374 F.3d 825, 829 (9th Cir. 2004).

1           174. Plaintiffs must gather evidence related to DHS’s efforts to give the  
2 child and her family notice of the MPP hearing and the circumstances surrounding  
3 the child’s inability to attend her MPP hearing. Especially with tender-age children,  
4 Plaintiffs’ ability to meet the child’s burden often turns on evidence available only  
5 from difficult-to-reach family members stuck in MPP encampments. Plaintiffs must  
6 additionally compile compelling documentation or corroborating evidence to show  
7 that the child’s circumstances meet the standards for reopening.

8           175. For example, ImmDef has filed three motions to reopen *in absentia*  
9 removal orders for MPP-UC. In most cases, staff attorneys learned of their clients’  
10 *in absentia* orders through calling the EOIR hotline—a measure ImmDef  
11 implemented to detect MPP removal orders. After discovering these orders,  
12 ImmDef attorneys drafted motions to reopen based on changed circumstances,  
13 insufficient notice, extraordinary circumstances, and the court’s *sua sponte*  
14 authority. All three motions were granted.

15           176. RAICES has filed seven motions to reopen *in absentia* removal orders  
16 for MPP-UC. In each of these cases, staff attorneys learned of their clients’ *in*  
17 *absentia* orders through their expanded intake process. Because children often do  
18 not know whether they have been placed in MPP proceedings, RAICES staff are  
19 required to corroborate the child’s version of events with an adult relative if they can  
20 be located. Then, attorneys draft motions to reopen arguing insufficient notice,  
21 exceptional circumstances, and that DHS failed to meet its burden of removability,  
22 among other arguments. In total, each of these motions represented forty or more  
23 hours of work.

24           177. ProBAR has filed twenty-three motions to reopen *in absentia* removal  
25 orders to date and is currently preparing two more for immediate filing. To gather  
26 information about the MPP cases, ProBAR filed multiple FOIA requests with  
27 Defendants, reviewed court files, and listened to court recordings, as the children  
28 and their families often did not have necessary legal information. In two *in absentia*

1 cases, ProBAR was unable to confirm any information with the parents. One father  
 2 who possessed documents on his phone and on his person disappeared on the  
 3 dangerous streets of Matamoros, which compelled his son to enter the U.S. alone. A  
 4 parent in a second *in absentia* case similarly disappeared. To this day, neither of the  
 5 two parents has been located.

6 178. The Door has filed three motions to reopen removal orders for MPP-  
 7 UC. In each of these cases, staff attorneys learned of the MPP removal order from  
 8 ORR shelter staff. The Door staff then worked with their clients and their clients'  
 9 families outside the United States to file motions to reopen and emergency stay  
 10 motions. All three motions to reopen and associated stay motions were denied,  
 11 requiring The Door to appeal the denials to the BIA as a matter of great urgency.  
 12 The Door also filed I-246 stay applications with ICE-ERO New York Field Office  
 13 in each of these cases—none of which the ICE ERO New York Field Office  
 14 ultimately adjudicated. Each motion to reopen adds at least 20-30 hours of work  
 15 required by The Door staff, as well as emergency resources to be diverted from  
 16 other matters and at the expense of other cases. This results in closing fewer cases  
 17 in the same amount of time and more difficulty meeting grant deliverables and  
 18 jeopardizing funding.

19 **D. DHS's and ICE's Continued Prosecution of MPP Against UC**  
 20 **Compels Plaintiffs to Represent the Child in the MPP Proceedings**  
 21 **and Diverts Resources Away from Representation on the Child's**  
 22 **TVPRA Protection**

23 **1. DHS Treats MPP-UC as Removal Priorities**

24 179. DHS and ICE have expressly stated that they consider UC with MPP  
 25 removal orders to be “removal priorities,” and thus subject to immediate and  
 26 summary removal, without the full TVPRA-proceedings guaranteed by the  
 27 TVPRA.<sup>104</sup> This position not only subjects UC to MPP proceedings, in violation of  
 28 Defendants' own express policies, but it also allows enforcement of a removal order

<sup>104</sup> See 8 U.S.C. § 1232(5)(D)(i).

1 issued in proceedings not contemplated by the TVPRA. Children in MPP  
2 proceedings have no benefit of counsel, cannot seek TVPRA-asylum relief, and  
3 have no guarantee that their applications for relief will be reviewed under child-  
4 specific standards.

5 180. Moreover, an unaccompanied child is the principal applicant on their  
6 asylum claim under the TVPRA, so their claim must be adjudicated through a child-  
7 centric lens. Children do not receive this benefit in MPP proceedings. In MPP,  
8 children are almost always treated as derivatives of their parents' asylum  
9 applications, even when they have their own independent asylum claims and file  
10 their own asylum applications. Even in the rare cases where an MPP Court purports  
11 to consider a child's claim separate and apart from their parents' claim, that process  
12 is void of the safeguards guaranteed to children under the TVPRA and EOIR's own  
13 policies.

14 181. RAICES, in the same Doe Family case, encountered a sibling group  
15 who described having been ordered removed with their family by an MPP Court.  
16 RAICES obtained the removal order but was unable to obtain a copy of the record  
17 of proceedings before filing its motion to reopen. Knowing only that the child did  
18 not recall having testified in MPP Court, RAICES moved to reopen proceedings,  
19 arguing, among other issues, that the MPP Court violated its regulatory duty to  
20 develop the record for the children's asylum claim when it failed to take the  
21 children's testimony. The MPP Court rejected the motion, holding, among other  
22 things, that it did develop the record, as evidenced by (a) one of the children signing  
23 his own application, and (b) the transcript of proceedings showing that one of the  
24 children had an opportunity to develop his claim when he answered "no" to the  
25 Immigration Judge's question, "because you are fifteen years old, is there something  
26 you would like to say that your mother has not said?"

27 182. Defendants' summary enforcement of MPP removal orders against UC  
28 without any process directly violates the TVPRA and contravenes Congress's intent

1 to guarantee UC multiple opportunities to seek immigration relief under a fair and  
2 child-appropriate process.

3 183. When ICE enforces MPP removal orders against UC, the government is  
4 effectively “removing very young children to no one.”<sup>105</sup> The parent or caregiver  
5 responsible for the child’s best interests is stuck in Mexico, caught in the morass of  
6 MPP. As a result, MPP children are often returned to a home country where they  
7 have no parent or caregiver. Thus, Defendants’ prioritization of MPP-UC for  
8 removal further reflects—at best—a disregard for the TVPRA’s demand for the  
9 “safe repatriation” of UC.<sup>106</sup>

10 184. The Door’s client, P.M.B.R., provides another example. While  
11 P.M.B.R. and his mother were in Mexico awaiting their second MPP hearing set for  
12 January 2020, gunmen attacked the shelter where they were staying and kidnapped  
13 P.M.B.R.’s mother. Knowing it was unsafe to remain in Mexico as a sixteen-year-  
14 old without his mother to care for him, P.M.B.R. presented himself at the U.S.  
15 border again, and was admitted as an unaccompanied child. In the meantime,  
16 P.M.B.R. received an *in absentia* removal order for missing his MPP Court date.  
17 CBP transferred him to ORR custody in New York, where an LSP began  
18 representation and moved to reopen the MPP proceedings. On or about April 27,  
19 2020, after the motion to reopen was denied, ICE removed P.M.B.R. to Honduras,  
20 but never told P.M.B.R. where he was going. P.M.B.R. was not met by anyone  
21 upon disembarking in Honduras. He had to borrow a Honduran officer’s phone to  
22 call his sister, who was unaware of his return, to come pick him up. On June 16,  
23 2020, The Door entered representation and filed a second, now post-departure,

24  
25 <sup>105</sup> Lomi Kriel, *The Trump administration is rushing deportations of migrant*  
26 *children during coronavirus*, Tex. Trib. (May 18, 2020),  
<https://www.texastribune.org/2020/05/18/trump-deportations-migrant-children-texas-coronavirus/>.

27  
28 <sup>106</sup> 8 U.S.C. § 1232(a)(5).



1 motion to reopen, which was granted on July 29, 2020.

2 185. P.M.B.R. remains in Honduras to date. The Door has spent over 100  
3 hours working to have P.M.B.R. returned to the United States so that he can access  
4 his rights under the TVPRA. ERO's practices have exacerbated this already  
5 challenging process, requiring The Door to coordinate with the U.S. Embassy in  
6 Tegucigalpa, Honduras and Honduran authorities directly for his return because  
7 ERO will not do so. Meanwhile, P.M.B.R. remains in Honduras where his life is  
8 endangered. Because ERO will not itself return P.M.B.R. to the United States,  
9 P.M.B.R. does not know if he will be able to attend his removal proceedings in New  
10 York Immigration Court.

11 **2. Plaintiffs Engage in Time-Consuming Litigation to Protect**  
12 **MPP-UC from Removal**

13 186. Because the threat of imminent and summary removal hangs over UC  
14 with MPP removal orders, Plaintiffs, and most other LSPs, must shift their  
15 representation priorities to preventing that unlawful removal before pursuing asylum  
16 and other forms of immigration relief available under the TVPRA. Because DHS  
17 continues to enforce MPP removal orders against UC, Plaintiffs must do whatever  
18 they can to protect these MPP-UC. Plaintiffs and their sister organizations must  
19 strenuously defend against MPP removal orders and represent UC in matters beyond  
20 the scope of Plaintiffs' expertise, often on an emergency and expedited basis.  
21 Depending on an MPP-unaccompanied child's circumstances, the representation  
22 necessary to prevent the child's unlawful removal can involve moving to reopen the  
23 child's MPP proceedings; moving to sever the child's proceedings from the parent's  
24 MPP proceedings; and moving to change venue from the MPP Court to the  
25 immigration court in the jurisdiction to which ORR has transferred the child. These  
26 are all motions that Plaintiffs had no occasion to file before MPP, and had limited  
27 expertise in preparing or filing. Plaintiffs may also need to defend the child's MPP  
28 proceedings and represent MPP-UC on appeal even though Plaintiffs did not

1 represent the child before the MPP Court and do not have access to the  
2 administrative record. Defendants' threats of summary deportation have even  
3 forced Plaintiffs and other LSPs to seek emergency federal habeas relief as the only  
4 recourse in the face of Defendants' expedited enforcement timelines.

5 187. These filings impose a significant briefing and evidentiary burden on  
6 LSPs and strain their staffing and resource capacities. Moreover, Defendants'  
7 actions and inactions have compounded the obstacles impairing Plaintiffs' ability to  
8 provide effective representation of these children, including:

- 9 • a substantially accelerated timeframe for the child's defense, based on  
10 the threat of summary removal without notice;
- 11 • Defendants' failure or refusal to share timely information about an  
12 MPP –unaccompanied child's immigration history, the hearing  
13 transcripts from the MPP Court proceeding, and/or the administrative  
14 record, thereby forcing Plaintiffs to litigate their clients' cases without  
15 any reasonable understanding of the merits;
- 16 • ICE-OPLA's refusal to affirmatively file motions to change venue and  
17 to sever an MPP-unaccompanied child's case from her parent's MPP  
18 proceedings at the time MPP-UC enter ORR;
- 19 • the need for Plaintiffs to contact family members to explore extra-  
20 record facts that may be relevant to grounds of relief, which is time-  
21 and resource-consuming;
- 22 • the need to file such motions and briefs and, in some instances, to  
23 appear in immigration courts outside of Plaintiffs' own jurisdictions,  
24 which requires Plaintiffs to expend time and resources reviewing the  
25 rules of a foreign jurisdiction and/or consulting sister LSPs located in  
26 that jurisdiction because local and judge-specific rules are not publicly  
27 available; and
- 28 • the pandemic and the restrictions on in-person meetings with MPP-UC

1 in custody increase the time to prepare declarations.

2 188. Thus, whenever Plaintiffs encounter an MPP-unaccompanied child  
3 with a removal order, they must engage in time-consuming defensive litigation and  
4 brief complex and often novel legal issues, often with little to no advanced notice  
5 and limited staffing capacity. If they do not, UC could be removed before they can  
6 exercise their rights under the TVPRA.

7 189. For example, ImmDef dedicated more than eighty hours over eleven  
8 days to filing an appeal and motion to remand on behalf of J. Doe. Because J. Doe  
9 was treated as a derivate to his mother's application for relief, ImmDef had to both  
10 appeal the MPP Court's decision denying relief to his mother, and separately file a  
11 motion to remand requesting J. Doe be given an opportunity to present his own case.  
12 ImmDef had to reconstruct the administrative record below through interviews with  
13 the child and his parents because the BIA did not timely send the administrative  
14 record or transcript from the MPP Court.

15 190. Thus, Defendants have left Plaintiffs with no choice but to engage in  
16 emergency representation of MPP-UC to prevent their summary removal and ensure  
17 that they may access their TVPRA rights including the right to seek affirmative  
18 asylum from USCIS. For instance, Plaintiff ProBAR represents an MPP-  
19 unaccompanied child who was subject to MPP when she and her mother fled  
20 Honduras after receiving threats of retribution for reporting a sexual assault by a  
21 family member. The MPP-unaccompanied child later entered the United States after  
22 facing violence in the Matamoros, Mexico refugee camp, and was designated as an  
23 unaccompanied child. After taking on representation, ProBAR learned that ICE  
24 intended to imminently remove the child. ProBAR had to immediately file a motion  
25 to reopen the unaccompanied child's MPP proceeding and a motion to stay  
26 execution of removal with the MPP Immigration Judge to stay the child's removal.  
27 DHS opposed the motion to reopen and the MPP Immigration Judge refused to grant  
28 a stay of removal. ProBAR then immediately pivoted and filed an I-246 Application

1 for a Stay of Deportation or Removal with ICE and an Emergency Motion to Stay  
2 Execution of Removal Order with the Board of Immigration Appeals to stay the  
3 execution of the MPP removal order. ICE denied the stay application for unknown  
4 reasons and the BIA denied the stay request. ProBAR thereafter secured *pro bono*  
5 counsel to file a federal lawsuit and a Motion for a Preliminary Injunction to prevent  
6 DHS from removing her without giving her the opportunity to seek relief from  
7 removal as an unaccompanied child, independent from her mother's MPP claims.  
8 ICE did not await a ruling on the Preliminary Injunction, and instead sought to  
9 remove the child before a hearing could be held, forcing ProBAR to file a  
10 Temporary Restraining Order (TRO). The TRO was unsuccessful, and ICE  
11 removed the unaccompanied child within hours.<sup>107</sup>

12 191. Similarly, in May 2020, The Door was forced to seek a TRO to enjoin  
13 ICE's attempted middle-of-the-night removal of its client, A.D.R.S., and petition for  
14 a writ of habeas corpus. This litigation remains ongoing, having already required  
15 hundreds of hours of The Door's work.

16 192. Defendants' actions prevent Plaintiffs from fulfilling their contractual  
17 duty to represent UC in their applications for TVPRA-asylum and other forms of  
18 immigration relief pursuant to the TVPRA, and they divert Plaintiffs' time and  
19 resources toward time-sensitive litigation and away from building trust with  
20 traumatized clients and developing the necessary facts. Plaintiffs must divert their  
21 resources and attention to filing multiple, resource-intensive, and often emergency  
22 motions to prevent the imminent and unlawful removal of MPP-UC.

### 23 3. Defendants Unsafely Repatriate MPP-UC

24 193. MPP-UC face uniquely dangerous consequences if deported by ICE-

25  
26 <sup>107</sup> The BIA subsequently *sua sponte* granted the unaccompanied child's appeal of  
27 denial of her motion to reopen, months after ICE had removed the child. ProBAR is  
28 now working on having her returned to the United States so that she can access her  
rights under the TVPRA.

1 ERO. When children are initially subject to MPP and later designated UC, their  
2 families are often still subject to MPP and remain in Mexico while their children are  
3 deported to their home countries. DHS is purportedly committed to ensuring family  
4 unity during repatriation. Yet Plaintiffs are informed and believe that ICE-ERO  
5 neglects to make basic safe repatriation efforts such as consulting with a child's  
6 attorney or using Department of State's Country Reports and Trafficking Reports to  
7 assess whether to repatriate an unaccompanied child to a particular country.

8 194. When ICE-ERO fails to undertake basic precautionary measures, it  
9 exposes MPP-UC to dangerous conditions upon return to their countries of origin.  
10 LSPs have had no option but to assume Defendants' safe-repatriation  
11 responsibilities to mitigate the child's risk of harm upon return and promote  
12 successful reintegration.

13 195. ProBAR has represented at least two children who were unsafely  
14 repatriated. For example, ProBAR also represented a boy from Honduras who  
15 entered the U.S. as an unaccompanied child while subject to an MPP removal order.  
16 Upon learning of the MPP removal order, ProBAR immediately filed a Form I-246  
17 with ICE and a motion to reopen. ICE denied the I-246. On April 1, 2020, the MPP  
18 Immigration Judge denied the motion to reopen, but ProBAR was not informed of  
19 this decision (ICE was informed). On April 23, 2020, believing that the motion to  
20 reopen was still pending, ProBAR submitted additional evidence that it had been  
21 working furiously to collect. Based on this additional evidence, the Immigration  
22 Judge granted the motion to reopen. However, less than two hours before the  
23 Immigration Judge granted the motion to reopen, ICE had already removed the boy  
24 to Honduras based upon the Immigration Judge's earlier denial. ProBAR was  
25 blindsided by this abrupt and unexpected removal. On April 28, 2020, in response  
26 to the MPP Immigration Judge's grant to reopen the case, ICE filed a Motion to  
27 Dismiss. The MPP Immigration Judge granted the motion, which ProBAR has  
28

1 appealed to the BIA. The appeal is pending.

2 196. RAICES's seven-year-old client, J.J.M.F., was similarly unsafely and  
3 abruptly repatriated. RAICES met J.J.M.F. in a shelter on or around September 15,  
4 2020, after he fled from an unsafe MPP encampment where he and his mother were  
5 forced to stay. Soon after intake and contacting J.J.M.F.'s mother, RAICES  
6 determined that J.J.M.F. was eligible for SIJS and asylum. The minor, however, had  
7 a MPP final order of removal even though ICE had issued the child a TVPRA-NTA,  
8 which ICE refused to file with the immigration court. ICE-ERO had separately  
9 informed RAICES that they intended to execute J.J.M.F.'s removal instead.  
10 Working as quickly as possible, RAICES sought and obtained an emergency  
11 declaratory judgement from a state court, which was a prerequisite for J.J.M.F.'s  
12 SIJS application that RAICES filed the same day. At the same time, attorneys for  
13 RAICES interdepartmental team—which was created to serve this specific client—  
14 sought a temporary restraining order from a federal district court to stop J.J.M.F.'s  
15 imminent deportation. RAICES kept ICE-ERO abreast of all their efforts, but on  
16 September 22, 2020, ICE deported J.J.M.F. to Honduras—the same day a federal  
17 judge granted the TRO prohibiting J.J.M.F.'s deportation. Shortly thereafter,  
18 RAICES learned from J.J.M.F.'s mother that ICE deported J.J.M.F. without  
19 coordinating with his family, including his mother, whose whereabouts were known  
20 by ICE. No one in J.J.M.F.'s family knew when he arrived in Honduras or where he  
21 was being housed. RAICES sought answers from the FOJC but received no  
22 response. Desperately trying to locate the child, RAICES spent hours calling  
23 random youth shelters in Honduras. Eventually, RAICES learned that J.J.M.F. had  
24 been left at a shelter. J.J.M.F. remains in Honduras to date without parental  
25 protection.

26 197. ICE-ERO's unsafe repatriation practices mean LSPs must step in to  
27 ensure MPP-UC's safety, including by attempting to provide services  
28 internationally. ProBAR, for example, makes international calls to clients' home



1 countries looking for safe housing and social services, and has contracted services  
 2 with an organization abroad. This type of advocacy is outside Plaintiffs' normal  
 3 scope of representation for UC clients.

4 **E. ICE, ERO, and USCIS'S Failure to Guarantee MPP-UC's Rights**  
 5 **to Seek TVPRA-Asylum Creates Instability and Uncertainty for**  
 6 **MPP-UC and Plaintiffs Tasked to Serve Them**

7 **1. USCIS Rejects Jurisdiction Over Asylum Applications Filed**  
 8 **by MPP-UC With Removal Orders, and Is Silent as to How it**  
 9 **Treats All Other MPP-UC**

10 198. Defendants' designation of MPP-UC as "removal priorities" means  
 11 MPP-UC with removal orders have no recourse to the TVPRA's explicit guarantee  
 12 of TVPRA-asylum relief.

13 199. First, because MPP-UC are designated as "removal priorities,"  
 14 Plaintiffs must quickly initiate representation to defend against an MPP-  
 15 unaccompanied child's summary removal. If the LSPs' defense of these MPP-UC  
 16 fails, these children will likely be removed without ever having the opportunity to  
 17 seek TVPRA-asylum in the United States, despite the TVPRA's plain language and  
 18 congressional intent.

19 200. Second, since MPP was implemented, USCIS has arbitrarily and  
 20 capriciously rejected some MPP-UC asylum applications for lack of jurisdiction  
 21 while seemingly accepting others. In fact, when an ALIA Liaison asked USCIS if it  
 22 would accept jurisdiction over a TVPRA-asylum application filed by MPP-UC,  
 23 USCIS in October 2020 answered that "it would depend on the circumstances of the  
 24 case and whether USCIS is presented with an application that it determines to have  
 25 been filed by a UAC."

26 201. ImmDef, for example, has had at least one asylum application for an  
 27 MPP-unaccompanied child client with a final removal order denied for lack of  
 28 jurisdiction, while other MPP-UC's asylum applications who do not have a MPP  
 final order of removal remain pending with no apparent rejection. USCIS's  
 inconsistent adjudication of MPP-UC asylum applications has sown confusion and

1 uncertainty about MPP-UC's right to seek TVPRA-asylum. And when coupled with  
2 ICE and ERO's demonstrated willingness to remove MPP-UC on short notice and  
3 without first placing them in full TVPRA-proceedings, Defendants effectively deny  
4 MPP-UC their statutory right to multiple opportunities to seek asylum.

5 202. Defendants have provided no explanation for USCIS's uneven  
6 treatment of MPP-UC asylum applications. RAICES, for example, has filed  
7 TVPRA-asylum applications for some of its MPP-UC clients with final MPP  
8 removal orders. The asylum office accepted some applications, which remain  
9 pending. It rejected others, including that of one sibling group, whose application  
10 was abruptly rejected in October 2020 for lack of jurisdiction, citing the children's  
11 final removal order.

12 203. When USCIS rejects initial jurisdiction over a child's asylum  
13 application expressly because an MPP removal order controls, it violates DHS's  
14 policies by "subjecting" the child to MPP. It also construes MPP as stripping  
15 USCIS of its initial jurisdiction obligations under the TVPRA. This exception is  
16 directly at odds not only with the TVPRA's plain text and judicial interpretation of  
17 the same, but also USCIS's own practice of previously accepting jurisdiction over  
18 TVPRA-asylum applications even where a child has a prior order of removal.

19 204. Compounding the lack of process, USCIS's actions in denying asylum  
20 applications are final. When USCIS rejects jurisdiction over TVPRA-asylum  
21 applications filed by MPP-UC, those children have no appellate recourse or other  
22 administrative remedies to challenge USCIS's error.

23 **2. USCIS's Actions and ERO's Silence Interfere with Plaintiffs'**  
24 **Abilities to Provide MPP-UC with Effective Counsel**

25 205. USCIS's arbitrary and capricious treatment of MPP-UC's asylum  
26 applications, coupled with the ever-present threat of removal from ICE, leaves  
27 Plaintiffs in the dark on how best to advocate for MPP-UC. Because of the finality  
28 of removal, Plaintiffs have been compelled to adopt a defense-first model; the

1 TVPRA is of no use to an unaccompanied child if she has been removed before she  
2 can benefit from its protections. With their limited resources, however, it is nearly  
3 impossible for Plaintiffs to mount an effective defense for MPP-UC with removal  
4 orders and invest the necessary staff time and resources to prepare legitimate asylum  
5 applications for these children.

6 206. ICE's and USCIS's unlawful refusal to afford MPP-UC with the right  
7 to pursue TVPRA-asylum prevents Plaintiffs from meaningfully developing an  
8 attorney-client relationship and fully investigating and developing a child's  
9 applications for affirmative relief. By organizational design and as contemplated by  
10 the TVPRA, Plaintiffs' primary role is to help children access their affirmative  
11 benefits under a child-sensitive timeframe. The TVPRA, for example, requires  
12 USCIS to accept initial jurisdiction over a TVPRA application filed by UC before  
13 their eighteenth birthday, and exempts UC from the usual one-year deadline for  
14 applying for asylum. 8 U.S.C. §§ 1158(a)(2)(B), (a)(2)(E). This gives Plaintiffs  
15 flexibility to decide when to prepare and file applications for UC. *See M-A-C-O-*,  
16 27 I.&N. Dec. 477 (BIA 2018). Plaintiffs ordinarily use this delayed timeline to the  
17 child's benefit by waiting until a child is released to begin the fact investigation and  
18 application preparation.

19 207. On average, Plaintiffs may require anywhere between 35 to 60 hours to  
20 prepare a child's TVPRA-asylum application. However, this time is spread over  
21 weeks, if not months or years, depending on how long it takes USCIS to grant an  
22 interview after an application is filed. Plaintiffs prepare declarations, obtain records,  
23 gather evidence, and prepare the child for the asylum office interview, among other  
24 things. Because of the flexible timeframe that UC have historically had to assert  
25 their TVPRA-asylum claims, each Plaintiff is able to represent hundreds of UC  
26 annually. In contrast, if USCIS does not accept a child as a TVPRA-unaccompanied  
27 child, then the child must file her asylum application within one year of her MPP-  
28

1 NTA. 8 U.S.C. § 1158(a)(2)(B).

2 208. For MPP-UC, Plaintiffs must dedicate sometimes hundreds of hours  
3 defending against the lingering effects of the MPP proceedings before they can even  
4 consider preparing the robust asylum claim they ordinarily would for other UC. In  
5 some instances, Plaintiffs may even have to forestall preparation of the asylum  
6 claim until they can thwart the possibility of MPP-UC's imminent removal.

7 209. Defendants' departure from their published policies and long-standing  
8 practices have caused divergent strategies among LSPs, including Plaintiffs, as they  
9 seek to secure for their MPP-UC clients the statutory protections to which they are  
10 entitled.

11 210. When ImmDef began encountering MPP-UC in ORR custody, ImmDef  
12 quickly realized that it would not be sustainable or practical to initiate representation  
13 for all children, especially those who might be released outside of ImmDef's  
14 geographic service area. To offset the burden, ImmDef reached out to its local  
15 OPLA-attorney to ascertain whether OPLA could take affirmative action. OPLA  
16 agreed and has since successfully filed motions to sever and change venue in the  
17 child's MPP proceedings, which in turn has helped ImmDef.

18 211. As a result, ImmDef modified its policy to automatically initiate  
19 representation only for MPP-UC with removal orders, given their imminent risk of  
20 removal. Within a short period of meeting a child facing this predicament, ImmDef  
21 enters its appearances and begins preparing a child's motion to reopen or remand  
22 and any BIA briefing. To that end, ImmDef must obtain statements from family and  
23 monitor the child's release status and status of proceedings on a daily basis. To  
24 complete this labor-intensive work within Defendants' strict timeline, ImmDef  
25 attorneys and support staff must drop everything and focus on the MPP-  
26 unaccompanied child's case, which harms all other UC clients, whose cases need  
27 attention but are put on the backburner. It also harms MPP-UC because ImmDef  
28 cannot devote time to the child's affirmative applications for relief. A full caseload

1 for a CRP attorney is fifty-to-seventy cases. They and the program at large do not  
2 have the time, resources, or personal capacity to devote long stretches of time to one  
3 single client.

4 212. RAICES, for its part, has been forced to compromise its commitment to  
5 trauma-sensitive practices because of the twin pressures created by USCIS and  
6 ICE/ERO policies. Before MPP, RAICES waited until UC were released to  
7 sponsors to begin building their asylum claims over several meetings. Released  
8 children are surrounded by support systems and can better handle the difficult,  
9 sometimes painful discussions that attorneys must have with clients to develop their  
10 asylum claims. For MPP-UC, however, RAICES attorneys do not have the benefit  
11 of waiting to complete a child's TVPRA-asylum application under their normal  
12 timeline.

13 213. ProBAR, for its part, has had to undertake extreme procedural steps to  
14 represent its UC clients and protect them from imminent removal. These efforts  
15 have distracted from the usual efforts ProBAR's team would undertake to help  
16 prepare their clients to make affirmative asylum applications. For example,  
17 ProBAR attorneys have had to drop their day-to-day responsibilities to prioritize  
18 representation for every MPP-UC with a removal order.

19 214. USCIS's inconsistent adjudication of MPP-UC asylum applications—  
20 as well as ICE's and ERO's unpredictable enforcement of MPP removal orders—  
21 means that Plaintiffs are always on the back foot. Unable to predict what will  
22 happen to their clients, Plaintiffs struggle to effectively represent MPP-UC and seek  
23 for them the full panoply of immigration relief that the TVPRA provides.

24 **V. PLAINTIFFS WILL CONTINUE TO DIVERT RESOURCES AND**  
25 **TAKE DRASTIC MEASURES TO ENSURE DEFENDANTS DO NOT**  
26 **THWART TVPRA RIGHTS FOR MPP-UC**

27 215. Defendants' failure to comply with the TVPRA and their own policies  
28 and past practice has forced Plaintiffs to undertake extraordinary efforts to  
effectively represent MPP-UC in a manner that allows the children to access their

1 TVPRA rights. Defendants’ acts and omissions deprive MPP-UC of the opportunity  
2 to seek asylum, obtain prompt release from federal custody and placement with  
3 sponsors, and receive due process prior to removal to countries where they may face  
4 danger and trauma.

5 216. Although DHS announced that UC are not “amenable to MPP” and  
6 would not be “subject to MPP,” DHS’s ongoing prosecution of MPP proceedings  
7 against UC makes clear that neither this policy nor the TVPRA is being enforced.  
8 Defendants have shown that they can and will enforce MPP proceedings against  
9 MPP-UC without providing the child any TVPRA protections. As such, Plaintiffs  
10 must go to extraordinary lengths to defend a child’s MPP proceedings while  
11 simultaneously exploring all avenues to preserve a child’s rights under the TVPRA.

12 217. Defendants’ actions are unprecedented. Prior to MPP, Plaintiffs never  
13 bore responsibility as part of their LSP obligations to represent children in  
14 immigration proceedings initiated before the child was apprehended and designated  
15 as an unaccompanied child. Defendants’ actions have therefore driven Plaintiffs to  
16 engage in litigation outside of their normal areas of expertise and significantly  
17 burdened their already-stretched staff capacity and resources.

18 218. To grapple with the needs of MPP-UC, Plaintiffs must divert critical  
19 resources away from other cases and clients because representation of an MPP-  
20 unaccompanied child requires far more time and resources to litigate. The addition  
21 of even one new MPP-unaccompanied child case can require an exorbitant amount  
22 of time and resources depending on the case’s procedural posture and the  
23 complexity of the issues involved.

24 219. ImmDef may devote anywhere between twenty and eighty hours  
25 representing MPP-UC in just one action to satisfy Defendants’ demands. For  
26 example, ImmDef spent more than sixty-two hours researching Fifth Circuit  
27 authority to prepare twelve-year-old A. Doe’s brief on appeal from an MPP removal  
28 order. This was ImmDef’s first time preparing appellate briefing under Fifth Circuit



1 authority. Because ImmDef did not represent A. Doe in his MPP-immigration court  
2 proceedings, ImmDef was not familiar with the administrative record below.

3 ImmDef attorneys working on the appeal had no option but to set aside other cases  
4 to spend time familiarizing themselves with Fifth Circuit law, learning the facts of  
5 the case and the proceedings, and exploring all avenues of relief. In addition to  
6 submitting the appeal brief, ImmDef attorneys also prepared a 133-page motion to  
7 remand separately seeking the Board of Immigration Appeals to remand A. Doe's  
8 case back to the immigration court and allow him an opportunity to exercise his  
9 rights under the TVPRA. ImmDef is still awaiting a decision on A. Doe's case.

10 220. To represent MPP-UC, ImmDef has had to divert resources away from  
11 filing TVPRA-asylum applications and other forms of immigration relief for its  
12 other UC clients. ImmDef has also had to abandon advocacy on other UC's related  
13 matters because of the time and resources required to serve MPP-UC clients.

14 221. RAICES, likewise, has suffered increased burdens because of the  
15 dilemmas and uncertainties created from Defendants' disparate and inconsistent  
16 treatment of MPP-UC. One case required a total of four attorneys and four legal  
17 assistants to prevent the removal of two MPP-UC. In less than two days, the team  
18 prepared declarations and state court documents for the two children while also  
19 preparing I-360 packets. The Litigation Department then filed a mandamus petition  
20 and a request for a temporary restraining order in federal court to prevent removal of  
21 the children.

22 222. Similar to ImmDef, RAICES has also had to reallocate existing staff  
23 and pull them from their previous roles so they could work on MPP-UC cases. In  
24 most instances, because of the emergency nature of the work, RAICES cannot  
25 complete the work required on an MPP-unaccompanied child's case without  
26 requiring its staff to work longer hours.

27 223. ProBAR has similarly dedicated significant staff resources to meet the  
28 unique needs of MPP-UC. These responsibilities have largely fallen on ProBAR's

1 legal team, which has had to engage in emergency motion and appellate practice to  
2 reverse MPP-removal orders. As a result, ProBAR personnel are pulled away from  
3 their day-to-day responsibilities and the legal team's normal practices have been  
4 significantly disrupted. When ProBAR identifies an MPP-unaccompanied child, the  
5 ProBAR legal team immediately undertakes representation and starts dedicating  
6 resources, where other clients would typically be addressed in the ordinary course.  
7 This additional need for representation has created a new group of clients who need  
8 extensive and urgent representation, redirecting ProBAR's staff and resources from  
9 their other UC clients.

10 224. The Door must also dedicate significant time and resources to meet the  
11 needs of MPP-UC, particularly those with removal orders. To even discover which  
12 UC are MPP-UC, The Door has had to extend its initial screenings of all UC. Given  
13 the time-sensitive nature of MPP-UC cases, when The Door suspects an  
14 unaccompanied child may have MPP ties, The Door must often take the additional  
15 steps of contacting the ORR facility director, ORR federal field specialist, and  
16 OPLA. These measures compound the time, urgency, and process required for  
17 initial intakes. In addition, when The Door encounters an MPP-UC, it must conduct  
18 significant and time-sensitive extra outreach to identify the parents' status and  
19 location, if possible. These efforts are further complicated when a child's parent is  
20 still subject to MPP in Mexico—where it is difficult to locate and communicate with  
21 MPP individuals—or when the parent's whereabouts are unknown, circumstances  
22 that arise in almost all of The Door's MPP-UC cases. Additionally, MPP-UC with  
23 removal orders often require emergency motion practice to prevent removal and  
24 ensure UC access to their TVPRA rights—such as motions to reopen, appeals to the  
25 Board of Immigration Appeals, and federal litigation. These cases can require  
26 hundreds of hours that attorneys would typically spend serving other UC. When a  
27 UC has an MPP removal order, The Door estimates it must undertake approximately  
28 ten times more work than required of a non-removal order case. In the case where

1 ICE sought to execute an MPP-UC’s removal order, The Door’s work at least  
2 doubled.

3 225. Plaintiffs’ breakneck efforts to protect MPP-UC clients frustrates their  
4 representation of other vulnerable children. Every time a Plaintiff organization has  
5 no option but to drop everything to assemble a motion to reopen or investigate a  
6 client’s MPP ties, dozens of other UC’s TVPRA-asylum applications or SIJS filings  
7 must be put on hold. And the impact has stretched far beyond individual cases.  
8 Plaintiffs’ need to retool their practices to represent MPP-UC prevents them from  
9 focusing the same type of energy on other initiatives to benefit UC, such as strategic  
10 litigation. If Defendants did not disregard MPP-UC rights under the Due Process  
11 Clause of the Fifth Amendment, the INA, and the TVPRA, then Plaintiffs would not  
12 be forced to turn their backs on their other non-MPP UC clients in order to devote  
13 hundreds of hours to secure MPP-UC the bare minimum of protections.

14 **FIRST CLAIM FOR RELIEF**

15 **Violation of Procedural Due Process Clause of the**  
16 **Fifth Amendment to the U.S. Constitution**

17 **(All Plaintiffs Against All Defendants)**

18 226. Plaintiffs reallege and incorporate the allegations of all the preceding  
19 paragraphs.

20 227. This claim is brought by Plaintiffs ImmDef, RAICES, ProBar, and The  
21 Door, on behalf of themselves.

22 228. The Procedural Due Process clause of the Fifth Amendment provides  
23 that the government shall not “deprive any person of life, liberty, or property  
24 without due process of law.” U.S. Const. amend V.

25 229. By virtue of their placement in ORR custody, MPP-UC are UC entitled  
26 to the protections of the TVPRA. MPP-UC therefore have a protected property  
27 interest in their statutory entitlements under the TVPRA. The TVPRA expressly  
28

1 grants robust rights to UC and directs both DHS and HHS to establish procedures to  
2 provide and protect those rights.

3 230. The TVPRA expressly provides UC *inter alia*, (1) the right to prompt  
4 placement in the least restrictive setting; (2) the right to seek TVPRA-asylum  
5 through a non-adversarial process before a USCIS asylum officer; (3) the right to  
6 have USCIS exercise initial jurisdiction over the child's TVPRA-asylum  
7 applications rather than the immigration court; (4) waiver of the one-year filing  
8 requirement; and (5) the right to safe repatriation if all forms of relief from removal  
9 are eventually denied. *See* 8 U.S.C. §§ 1158(a)(2)(E), (b)(3)(C), 1232(a)(5)(A)–(D),  
10 (c)(2), (d)(8).

11 231. MPP-UC also have a separate and distinct fundamental liberty interest  
12 in their continued presence in the United States and in not being removed without  
13 due process.

14 232. Defendants have failed to provide any safeguards to protect MPP-UC's  
15 ability to access their rights under the TVPRA. Defendants' failure to afford MPP-  
16 UC due process exposes MPP-UC to summary and unsafe removal. ICE's failure to  
17 affirmatively notify EOIR that a child, who was previously an MPP-respondent, is  
18 now designated as an unaccompanied child and in the custody of ORR, subjects that  
19 child to imminent risk of removal and deprivation of the child's TVPRA rights.  
20 ERO withholds from both MPP-UC and Plaintiffs, who are tasked to serve them,  
21 basic, critical information about an MPP-unaccompanied child's prior MPP  
22 proceedings. DHS subjects MPP-UC to the forthcoming or continued effects of  
23 their MPP proceedings by aggressively opposing Plaintiffs' efforts to defend their  
24 MPP-UC clients in their immigration proceedings. These include but are not limited  
25 to moving to sever MPP-UC from their MPP proceedings, moving to change venue  
26 from MPP Court to the appropriate immigration court, seeking reversal and remand  
27 from the BIA, and moving for the MPP Court to reopen MPP proceedings so MPP-  
28

1 UC may seek the full array of benefits available to them under the TVPRA.

2 233. Plaintiffs and their sister organizations are the first and only line of  
3 defense for UC subject to MPP. As a result, Plaintiffs have had to develop policies  
4 and procedures to safeguard MPP-UC from often imminent risk of summary  
5 removal and unsafe repatriation based on their MPP proceedings and to prevent  
6 DHS, ICE, ERO, USCIS, and ORR from denying MPP-UC their rights under the  
7 TVPRA. Defendants have therefore caused and continue to cause Plaintiffs to  
8 divert organizational resources to protect MPP-UC from Defendants’ unlawful  
9 policies and have frustrated and continue to frustrate Plaintiffs’ organizational  
10 missions.

11 **SECOND CLAIM FOR RELIEF**

12 **Violation of Administrative Procedure Act, 5 U.S.C. § 706(1)**

13 **Failure to Act as Required Under TVPRA**

14 **8 U.S.C. §§ 1158(a)(2)(E), (b)(3)(C),**  
15 **1232(a)(5)(D), (c)(2)(A), (d)(8).**

16 **(All Plaintiffs Against All Defendants)**

17 234. Plaintiffs reallege and incorporate the allegations of all the preceding  
18 paragraphs.

19 235. The Court shall “compel agency action unlawfully withheld or  
20 unreasonably delayed . . . .” 5 U.S.C. § 706(1). Agency action is unlawfully  
21 withheld or unreasonably delayed if “an agency failed to take a discrete agency  
22 action that it is required to take.” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64  
23 (2004) (emphasis omitted).

24 236. Defendants continually fail to take three discrete, nondiscretionary  
25 actions mandated by the TVPRA upon a child’s UC designation.

26 237. *First*, ICE and ERO fail to issue and serve a legally sufficient TVPRA-  
27 NTA on MPP-UC after a child is designated as an unaccompanied child but before  
28

1 she is transferred to ORR custody. The failure to issue and serve an NTA deprives  
2 the child, Plaintiffs, and all other LSPs serving UC with crucial information  
3 necessary to pursue immigration relief and exercise the child’s rights under the  
4 TVPRA.

5 238. *Second*, USCIS has failed to exercise jurisdiction over affirmative  
6 asylum applications filed by UC. Under the TVPRA, UC are entitled to seek  
7 asylum affirmatively before the USCIS asylum office. 8 U.S.C. § 1158(b)(3)(C)  
8 (“[a]n asylum officer . . . **shall** have initial jurisdiction over any asylum application  
9 filed by an unaccompanied [child]”) (emphasis added). The TVPRA further  
10 provides that the USCIS asylum process “**shall** be governed by regulations which  
11 take into account the specialized needs” of UC. 8 U.S.C. § 1232(d)(8) (emphasis  
12 added). UC are entitled to seek TVPRA-asylum any time before their eighteenth  
13 birthday. *See* 8 U.S.C. § 1158(a)(2)(E). By subjecting UC to MPP, Defendants are  
14 violating their own express policies and preventing MPP-UC from exercising their  
15 statutory right to seek TVPRA-asylum under USCIS’s jurisdiction, in violation of  
16 the TVPRA.

17 239. *Third*, ERO and ORR have failed to promptly place UC in the least  
18 restrictive settings that are in the best interest of the child. The TVPRA provides  
19 that UC “**shall** be promptly placed in the least restrictive setting that is in the best  
20 interest of the child.” 8 U.S.C. § 1232(c)(2)(A) (emphasis added). The *Flores*  
21 Settlement Agreement also requires defendants to release UC from ORR custody  
22 “without unnecessary delay” and undertake “prompt and continuous efforts . . .  
23 toward family reunification.” *Flores* Settlement Agreement ¶¶ 11, 14, 16.  
24 Defendants have disregarded these requirements and instead conditioned the release  
25 of UC on advocacy and representation by counsel in the child’s MPP proceedings—  
26  
27  
28



1 which proceedings have nothing to do with the TVPRA.

2 240. Rather than taking these statutorily required action, Defendants  
3 continue to deny UC their TVPRA rights.

4 241. Defendants' failure to act is final agency action that is reviewable under  
5 5 U.S.C. §§ 702 and 706. Defendants' violation of the APA causes ongoing harm to  
6 Plaintiffs who must divert organizational resources to protect UC clients' rights  
7 under the TVPRA and the *Flores* Settlement Agreement.

8 242. Plaintiffs have no adequate alternative remedy at law and accordingly  
9 seek a court order under 5 U.S.C. § 706(1) compelling Defendants to take actions  
10 required by the TVPRA.

11 **THIRD CLAIM FOR RELIEF**

12 **Violation of Administrative Procedure Act, 5 U.S.C. § 706(2)**

13 **Failure to Implement Policies in Violation of TVPRA**

14 **8 U.S.C. §§ 1158(a)(2)(E), (b)(3)(C),**  
15 **1232(a)(5)(D), 1232(c)(2)(A), 1232(d)(8)**

16 **(All Plaintiffs Against All Defendants)**

17 243. Plaintiffs reallege and incorporate the allegations of all the preceding  
18 paragraphs.

19 244. Defendants' actions are arbitrary and capricious or otherwise not in  
20 accordance with law when they disregard the requirements of the TVPRA by failing  
21 to enact or enforce policies assuring access to TVPRA rights for MPP-UC. 5 U.S.C.  
22 §§ 706(2)(A).

23 245. The TVPRA directs Defendants to effectuate the rights of UC through  
24 UC-specific policies and procedures. *See generally* 8 U.S.C. § 1232. Accordingly,  
25 Defendants developed policies that govern their treatment of UC. CBP, for  
26 example, implemented special screening and processing protocols for children who  
27 enter the United States unaccompanied; ICE accepted case management  
28 responsibility over UC's immigration cases; ORR established processes to ensure

1 UC are promptly released to suitable sponsors; and USCIS adopted child-sensitive  
 2 standards and implemented trauma-informed interviewing techniques for UC’s  
 3 TVPRA-asylum applications.<sup>108</sup>

4 246. But where UC have prior ties to MPP, Defendants abandon their  
 5 policies and longstanding practices that ensure a child’s access to TVPRA  
 6 protections. Defendants subject UC to their MPP proceedings and have no cohesive  
 7 approach toward Plaintiffs’ attempts to defend MPP-UC from the effects of their  
 8 MPP proceedings, seek TVPRA-asylum on behalf of MPP-UC, and secure the  
 9 prompt release of MPP-UC from ORR custody. Nor do Defendants take appropriate  
 10 steps to ensure safe repatriation of MPP-UC. *See Motor Vehicle Mfrs. Ass’n of U.S.,*  
 11 *Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (action is arbitrary  
 12 and capricious where the agency “entirely failed to consider an important aspect of  
 13 the problem”).

14 247. Defendants’ actions disregard the requirements of the TVPRA and are  
 15 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with  
 16 law” in violation of the APA. 5 U.S.C. § 706(2)(A).

17 248. Defendants’ failure to implement any policy or procedure to afford UC  
 18 access to TVPRA rights is final agency action that is reviewable under 5 U.S.C.  
 19 §§ 702 and 706.

20 249. Defendants’ violation of the APA causes ongoing harm to Plaintiffs  
 21 who must divert organizational resources to protect UC clients’ rights under the  
 22 TVPRA and the *Flores* Settlement Agreement.

23 250. Plaintiffs have no adequate alternative remedy at law and accordingly  
 24 seek review and injunctive relief under 5 U.S.C. § 706(2).

#### **FOURTH CLAIM FOR RELIEF**

25  
 26  
 27 <sup>108</sup> *See generally* JFRM Handbook, *supra* note 29; Off. of Refugee Resettlement,  
 28 *supra* note 42.

1 **Violation of MPP Policies; *Accardi* Doctrine and Administrative Procedure**  
2 **Act—5 U.S.C. § 706(2) By Relying On MPP Proceeding to Deny UC TVPRA**  
3 **Protections**

4 **(All Plaintiffs Against All Defendants)**

5 251. Plaintiffs reallege and incorporate the allegations of all the preceding  
6 paragraphs.

7 252. Defendants’ use of UC’s prior involvement in MPP proceedings to  
8 deny them their rights under the TVPRA contravenes their own policies in violation  
9 of the *Accardi* principal and the APA. *United States ex rel. Accardi v. Shaughnessy*,  
10 347 U.S. 260 (1954) (ruling that administrative agencies are obliged to follow their  
11 own regulations); 5 U.S.C. § 706(2)(A).

12 253. Defendants continue to subject UC to the processes and outcomes of  
13 MPP hearings that began before their entry and designation as UC. This treatment  
14 violates agency policy and procedures, including but not limited to DHS’s January  
15 24, 2019, Migrant Protection Protocols Policy, which unequivocally states that  
16 “[u]naccompanied [] children . . . will not be subject to MPP”;<sup>109</sup> CBP’s January 28,  
17 2019 MPP Guiding Principles, which unequivocally states that “[u]naccompanied []  
18 children” are included in the categories of individuals “not amenable to MPP”;<sup>110</sup>  
19 and ICE’s February 12, 2019 Memorandum, which unequivocally states “DHS will  
20 not use the INA section 235(b)(2)(C) process in the cases of unaccompanied []  
21 children.”<sup>111</sup> Indeed, as recently as December 7, 2020, DHS repeated its

22 \_\_\_\_\_  
23 <sup>109</sup> U.S. Dep’t of Homeland Sec., *Migrant Protection Protocols* (Jan. 24, 2019),  
<https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> (emphasis  
24 added).

25 <sup>110</sup> U.S. Customs and Border Prot., *MPP Guiding Principles 1* (Jan. 28, 2019),  
[https://www.cbp.gov/sites/default/files/assets/documents/2019-  
26 Jan/MPP%20Guiding%20Principles%201-28-19.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf).

27 <sup>111</sup> U.S. Immigr. and Customs Enf’t, *Implementation of the Migrant Protection*  
*Protocols*, Memorandum from the Deputy Director of the U.S. Immigr. and  
28 Customs Enf’t to Exec. Assoc. Dir. 1 (February 12, 2019),  
<https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy->

1 unequivocal exclusion of UC from MPP in its Supplemental Policy Guidance:  
2 “UACs are not amendable to MPP.”<sup>112</sup>

3 254. Defendants have provided no reasoned explanation for violating the  
4 TVPRA, or their own policies. *See FCC v. Fox Television Stations, Inc.*, 556 U.S.  
5 502, 515 (2009) (affirming that agencies must provide “reasoned explanation” for  
6 action and may not “depart from a prior policy *sub silentio* or simply disregard rules  
7 that are still on the books”). Their actions therefore violate *Accardi* and are  
8 arbitrary and capricious under 5 U.S.C. § 706(2).

9 255. Defendants’ failure to comply with their own policies and procedures is  
10 final agency action that is reviewable under 5 U.S.C. §§ 702 and 706.

11 256. Defendants’ actions cause ongoing harm to Plaintiffs who must divert  
12 organizational resources to protect UC clients’ rights under the TVPRA.

13 257. Plaintiffs have no adequate alternative remedy at law and accordingly  
14 seek review and injunctive relief under 5 U.S.C. § 706(2).

15 **FIFTH CLAIM FOR RELIEF**

16 **Administrative Procedure Act, 5 U.S.C. § 706(2)(A)**

17 **Conditioning Access to the TVPRA in Violation of TVPRA, 8 U.S.C. §§ 1158,**  
18 **1229a(b)(4), 1362**

19 **(All Plaintiffs Against All Defendants)**

20 258. Plaintiffs reallege and incorporate the allegations of all the preceding  
21

22 \_\_\_\_\_  
23 [Memorandum-11088-1.pdf](#) (“DHS will not use the INA section 235(b)(2)(C)  
process in the cases of unaccompanied [] children”).

24 <sup>112</sup> U.S. Dep’t of Homeland Sec., *Supplemental Policy Guidance for Additional*  
25 *Improvement of the Migrant Protection Protocols* (Dec. 7, 2020),  
[https://www.dhs.gov/sites/default/files/publications/supplemental\\_policy\\_guidance.pdf](https://www.dhs.gov/sites/default/files/publications/supplemental_policy_guidance.pdf)  
26 [pdf](#) (emphasis added); *see also* U.S. Dep’t of Homeland Sec., *Migrant Protection*  
27 *Protocols* (last published December 15, 2020), [https://www.dhs.gov/migrant-](https://www.dhs.gov/migrant-protection-protocols)  
[protection-protocols](https://www.dhs.gov/migrant-protection-protocols) (noting that UC are not amendable to MPP); U.S. Customs and  
28 Border Prot., *Migrant Protection Protocols FY2021*,  
<https://www.cbp.gov/newsroom/stats/migrant-protection-protocols>.

1 paragraphs.

2 259. The APA provides that courts “shall . . . hold unlawful and set aside  
3 agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not  
4 in accordance with law . . . ; [or] in excess of statutory jurisdiction, authority, or  
5 limitations, or short of statutory right.” 5 U.S.C. §§ 706(2)(A), (C).

6 260. Defendants’ practice of requiring MPP-UC to provide proof of legal  
7 challenge or representation of their MPP removal orders interferes with Plaintiffs’  
8 ability to deliver access to counsel on TVPRA-related benefits as contemplated by  
9 the TVPRA. 8 U.S.C. §§ 1158, 1229a(b)(4), 1362. Defendants’ actions are  
10 therefore not in accordance with law and in excess of their statutorily prescribed  
11 authority in violation of § 706(2) of the APA.

12 261. Defendants’ actions are arbitrary and capricious because, in adopting  
13 its policies of conditioning a MPP-unaccompanied child’s release from ORR  
14 custody on proof of legal representation or challenge of their MPP removal order,  
15 Defendants failed to consider the obstacles that Plaintiffs would face.

16 262. Defendants’ practice constitutes final agency actions that are  
17 reviewable under 5 U.S.C §§702 and 706.

18 263. Defendants’ violation of the APA causes ongoing and imminent harm  
19 to Plaintiffs who must divert organizational resources to litigate a child’s MPP  
20 proceeding in order to protect MPP-UC clients’ rights under the TVPRA. By  
21 forcing Plaintiffs to enter into representation of clients they otherwise would not  
22 service and file emergency appeals and motions to protect MPP-UC from  
23 deportation, Defendants have frustrated Plaintiffs’ core missions, impaired their  
24 efforts, and forced them to divert substantial resources away from existing  
25 programs.

26 264. Plaintiffs have no adequate remedy at law and therefore seek  
27  
28

1 immediate review under the APA and injunctive relief.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiffs ImmDef, RAICES, ProBAR, and The Door respectfully  
4 request that this Court:

- 5 a. Assume jurisdiction of this matter;
- 6 b. Issue a judgement declaring that Defendants are in violation of the  
7 following:
- 8 i. The Due Process Clause of the Fifth Amendment;
- 9 ii. The William Wilberforce Trafficking Victims Protection  
10 Reauthorization Act of 2008, 8 U.S.C. § 1232;
- 11 iii. The Immigration and Nationality Act, based on Defendants’ violations  
12 of 8 U.S.C. §§ 1129a, 1158 and 1362;
- 13 iv. The *Flores* Settlement Agreement;
- 14 v. Section 706(1) of the Administrative Procedure Act, based on  
15 Defendants’ unlawful withholding of actions required by the TVPRA,  
16 including 8 U.S.C. §§ 1232(c)(2)(A) and 1158(b)(3)(C), and by the  
17 *Flores* Settlement Agreement; and
- 18 vi. Section 706(2) of the Administrative Procedure Act;
- 19 c. Issue injunctive relief requiring Defendants to comply with the laws  
20 and regulations cited above;
- 21 d. Issue injunctive relief prohibiting Defendants and any of their officers,  
22 agents, successors, employees, representatives, and any and all persons acting in  
23 concert with them or on their behalf, from engaging in the unlawful policies,  
24 practices, acts, and omissions described herein;
- 25 e. Issue injunctive relief requiring Defendant to prospectively implement  
26 procedures to ensure all UC have access to the full protections of the TVPRA,  
27 regardless of prior placement in MPP proceedings;
- 28 f. Issue injunctive relief requiring Defendants to provide new avenues to



1 access TVPRA protections for MPP-UC previously denied those rights, including  
2 repatriated MPP-UC;

3 g. Award Plaintiffs their reasonable attorneys’ fees, costs, and other  
4 expenses pursuant to 28 U.S.C. § 2412 and other applicable law; and

5 h. Grant any and all such other relief as the Court deems just and  
6 equitable.

7 Dated: February 12, 2021

8

9 SIMPSON THACHER & BARTLETT LLP JUSTICE ACTION CENTER

10 By /s/ Stephen P. Blake  
11 STEPHEN P. BLAKE (260069)  
sblake@stblaw.com

12 HARRISON J. FRAHN, IV (206822)  
13 hfrahn@stblaw.com  
2475 Hanover Street  
14 Palo Alto, California 94304  
Telephone: (650) 251-5000  
15 Facsimile: (650) 251-5002

16 BROOKE E. CUCINELLA (*pro hac vice*  
17 forthcoming)  
brooke.cucinella@stblaw.com  
18 425 Lexington Avenue  
New York, NY 10017  
Telephone: (212) 455-3070  
19 Facsimile: (212) 455-2502

20 *Attorneys for Plaintiffs Immigrant*  
*Defenders Law Center; Refugee and*  
*Immigrant Center for Education and Legal*  
*Services; South Texas Pro Bono Asylum*  
*Representation Project, a project of the*  
22 *American Bar Association; and The Door*

23 IMMIGRANT DEFENDERS LAW  
24 CENTER

25 By /s/ Munmeeth Kaur Soni

26 MUNMEETH KAUR SONI (254854)  
meeth@immdef.org  
27 HANNAH K. COMSTOCK (311680)  
hcomstock@immdef.org  
28 CAITLIN E. ANDERSON (324843)  
caitlin@immdef.org

By /s/ Karen C. Tumlin  
KAREN C. TUMLIN (234691)  
karen.tumlin@justiceactioncenter.org  
ESTHER H. SUNG (255962)  
esther.sung@justiceactioncenter.org  
JANE P. BENTROTT (323562)  
jane.bentrott@justiceactioncenter.org  
DANIEL J. TULLY (309240)  
daniel.tully@justiceactioncenter.org  
P.O. Box 27280  
Los Angeles, California 90027  
Telephone: (323) 316-0944

*Attorneys for Plaintiffs Immigrant*  
*Defenders Law Center; Refugee and*  
*Immigrant Center for Education and*  
*Legal Services; and The Door*

1 634 S. Spring Street, 10th Floor  
2 Los Angeles, California 90014  
3 Telephone: (213) 634-0999  
4 Facsimile: (213) 282-3133

5 *Attorneys for Plaintiffs Immigrant*  
6 *Defenders Law Center; Refugee and*  
7 *Immigrant Center for Education and Legal*  
8 *Services; and The Door*

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

