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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

IMMIGRANT DEFENDERS LAW CENTER, et al,

Plaintiff,

v.

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

Defendants.

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Hearing Date: June 17, 2021
Hearing Time: 10:00 a.m.
Ctrm: First Street Courthouse
350 W. 1st Street
Los Angeles, CA. 90012
Ctrm. 6D, 5th Floor

Hon. Fernando M. Olguin

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In their First Amended Complaint ("FAC"), Plaintiffs have asserted the following causes of action that they cite as the bases for their motion for a preliminary injunction ("PI Motion"):

- failure to implement policies in violation of the Trafficking Victims Protection Reauthorization Act ("TVPRA") and 5 U.S.C. § 706(2)(A) (third cause of action);
- violation of the *Accardi* Doctrine and 5 U.S.C. § 706(2)(A) (fourth cause of action); and
- violation of the Procedural Due Process Clause of the Fifth Amendment (first cause of action).

(Dkt. 29 at 1 (citing FAC ¶¶ 226-33, 243-57).)

Notably, Plaintiffs are not challenging the Migrant Protection Protocols ("MPP") in this action or in their PI Motion. (*See* Dkt. 14, 29.) Instead, Plaintiffs' PI Motion seeks an order only as to Defendants U.S. Department of Homeland Security ("DHS") and U.S. Department of Health and Human Services ("HHS") as follows:

(1) enjoining DHS from continuing to subject unaccompanied noncitizen children previously processed through the MPP (referred to herein as "UC") to immigration proceedings instituted prior to their most recent entry; and

(2) requiring DHS and HHS to:

(a) issue a new Notice to Appear ("NTA") to all UC, based on their most recent entries;

(b) ensure the prompt placement of UC in the "least restrictive setting" without regard to the procedural posture of the child's previous MPP case;

(c) ensure that UC will not be subject to MPP, and that no UC are removed on orders of removal issued prior to their most recent entry; and

(d) ensure the safe return to the United States of UC removed to their home countries after a subsequent re-entry to the United States.

(Dkt. 29-26 at 3-4.)

In the PI Motion, Plaintiffs explain that they are not seeking an order against USCIS. Plaintiffs' FAC alleges that USCIS rejects jurisdiction over asylum applications filed by UC with removal orders, interfering with Plaintiffs' ability to provide UC with effective counsel. (Dkt. 14 at 79-83, 90.) However, on May 7, 2021, USCIS issued updated service center operations guidance on accepting applications for asylum filed by applicants who may be unaccompanied noncitizen children.[1] Based on the issuance of that guidance, Plaintiffs elected not to seek preliminary relief against USCIS. (Dkt. 29-1 at 10 n.1.)

On March 13, 2021, Defendants filed a motion to dismiss the FAC, arguing that it should be dismissed on the grounds that (1) Plaintiffs lack standing to pursue their claims, (2) this Court lacks jurisdiction over Plaintiffs' claims, and (3) Plaintiffs have failed to state claims for relief against any of the Defendants. (See Dkt. 27.) In the interest of brevity and to promote judicial economy, Defendants will not repeat those arguments in this opposition. Instead, Defendants hereby incorporate those arguments by reference because they support their contention that Plaintiffs cannot demonstrate a likelihood of success on the merits.[2]

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[1] USCIS Service Center Operations Memo: Updated Service Center Operations Guidance for Accepting Forms I-589 Filed by Applicants Who May Be Unaccompanied Alien Children, May 7, 2021, available under "Related Links," at https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/minor-children-applying-for-asylum-by-themselves (last accessed May 27, 2021) ("Forms I-589 filed by applicants who were enrolled in the Migrant Protection Protocols (MPP) should be processed in the same way as Forms I-589 filed by potential UACs who are in removal proceedings not being held pursuant to MPP. Applicants who were enrolled in MPP and who have final removal orders entered in absentia or on the merits should also be processed in the same way as potential UACs who were not enrolled in MPP.")

[2] Defendants also reiterate their argument from their motion to dismiss that Defendants CBP and Troy Miller should be dismissed from this action, as Plaintiffs have failed to state any claim against CBP and have failed to even allege any facts with regards to CBP. At a minimum, there is no basis to support injunctive relief against CBP, as even taking the facts in the FAC, Mtn for PI, and supporting exhibits as true, Plaintiffs have failed to identify any CBP practices that would warrant injunctive relief.

Therefore, for the reasons set forth in Defendants' motion to dismiss (Dkt. 27) and the additional reasons set forth herein, Plaintiffs' motion should be denied.

II. FACTUAL BACKGROUND

In December 2018, the Secretary of Homeland Security announced the implementation of MPP, which applied the Secretary's contiguous territory return authority in 8 U.S.C. § 1225(b)(2)(C). MPP directed that certain noncitizens who were arriving in or entering the United States on land from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their section 1229a (8 U.S.C. § 1229a) removal proceedings (referred to herein as Section 240 removal proceedings). *See, e.g.*, *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1078 (9th Cir.), *cert. granted,* 141 S. Ct. 617 (2020).

On January 20, 2021, DHS announced the suspension of new enrollments in MPP, effective January 21, 2021.[3] On February 11, 2021, DHS announced that, beginning on February 19, 2021, it would begin "phase one of a program to restore safe and orderly processing at the southwest border. DHS will begin processing people who had been forced to 'remain in Mexico' under the Migrant Protection Protocols (MPP)."[4] The announcement explained that "[t]his new process applies to individuals who were returned to Mexico under the MPP program and have cases pending before the Executive Office for Immigration Review (EOIR)," but does not apply to (a) individuals outside the United States "who were not returned to Mexico under MPP," (b) individuals outside the United States "who do not have active immigration court cases," and (c) individuals "in the United States with active MPP cases." *Id.* "To date, DHS—in coordination with interagency and international organization partners as well as the Government of

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[3] Press Release, U.S. Dep't of Homeland Security, DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), available at https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program (last accessed May 27, 2021).

[4] Press Release, U.S. Dep't of Homeland Security, DHS Announces Process to Address Individuals in Mexico with Active MPP Cases (Feb. 11, 2021), available at https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases (last accessed May 27, 2021).

Mexico—has processed over 10,000 migrants subject to MPP into the United States at six ports of entry along the Southwest Border while comporting with public health guidance regarding COVID-19."[5]

III. LEGAL STANDARD

Preliminary injunctive relief "is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The moving party has the burden of persuasion. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). To obtain preliminary injunctive relief, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that the balance of equities tips in favor of the moving party; and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20.

Under the Ninth Circuit's "sliding scale" approach to preliminary injunctions, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). "In all cases, a preliminary injunction can issue only if the plaintiff "establish[es] that irreparable harm is likely, not just possible." *Id.* (citing *Winter*, 555 U.S. at 22).

A plaintiff who seeks a mandatory injunction ordering the defendant to take action "must establish that the law and facts clearly favor [its] position, not simply that [it] is likely to succeed." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc); *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014). A mandatory injunction goes beyond simply maintaining the status quo and is particularly disfavored. *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979). Mandatory preliminary injunctive relief should not be issued unless the facts and law clearly favor the moving party. *Id.*; *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150,

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[5] Testimony of Alejandro N. Mayorkas, Secretary of Homeland Security, May 13, 2021, available at https://www.hsgac.senate.gov/imo/media/doc/Testimony-Mayorkas-2021-05-13.pdf (last accessed May 27, 2021).

1160 (9th Cir. 2011) (mandatory injunctions should not issue in "doubtful cases").

IV. ARGUMENT

A. Plaintiffs Have Not Established a Likelihood of Success on the Merits

1. Plaintiffs Have Failed to Establish a Likelihood of Success Under the APA[6]

a. Plaintiffs Cannot Establish that DHS's Decision Not to Issue New NTAs to UC Previously Processed with Their Families Under MPP Violates the APA

Under MPP, certain inadmissible applicants for admission who arrived on land from Mexico, including families with children, were placed into removal proceedings and "returned" to Mexico where they awaited the resolution of their immigration proceedings before an immigration judge. *Innovation Law Lab. v. McAleenan*, 924 F.3d 503, 506 (9th Cir. 2019). For the UC at issue in Plaintiffs' complaint who subsequently re-entered the United States without their parents, they did so either with (1) an *unexecuted* removal order (because an order of removal was entered against them or became final after they had been returned to Mexico)[7] or (2) ongoing removal proceedings.

In their PI Motion, Plaintiffs seek an order from this Court requiring DHS to issue new NTAs to UC who were previously processed under MPP and who re-entered the

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[6] In addition to the reasons set forth herein, Defendants note that as set forth in their motion to dismiss, this cause of action is subject to dismissal and therefore not likely to succeed on the merits because Plaintiffs have not identified any "final agency action" under 5 U.S.C. § 706(2), upon which they base this claim. (Dkt. 27 at 30-32.) Indeed, Plaintiffs' Motion is based on their complaints of five or six practices (referred to as "The Practice"), each of which is allegedly not uniform, but rather carried out inconsistently unevenly. The only arguably "final" agency action Plaintiffs identify is in footnote 6 of the Motion—the removal of some unaccompanied children pursuant to orders issued while the child was in MPP. (Dkt. 29-1 at 21 n. 6.) But Plaintiffs do not directly challenge those discrete actions. Nor could they, as any such challenge would be clearly barred by 8 U.S.C. § 1252. *See* 8 U.S.C. §§ 1252(a)(1), (a)(2), (a)(5), (b), (e), (f), (g).

[7] DHS can only execute a final removal order. *See* 8 U.S.C. 1231(a)(1)(A)-(B); 8 C.F.R. § 241.2(a)(1) (authorizing the issuance of a warrant of removal on the basis of "the final administrative removal order").

United States either with unexecuted removal orders or with ongoing removal proceedings pending. (Dkt. 29-1 at 22 ("right to new Section 240 proceedings"), 29-26 at 3.) Plaintiffs argue that DHS's failure to do so is "arbitrary, capricious, and otherwise not in accordance with law." (Dkt. 29-1 at 21.)

In support of this argument, Plaintiffs cite to 8 U.S.C. §§ 1158(a)(2)(E), (b)(3)(C); 1232(a)(5)(D), (d)(8). (Dkt. 29-1 at 22.) However, none of those sections provide UC with the right to be placed in *new* Section 240 proceedings when there is a prior unexecuted removal order or before the conclusion of their uncompleted proceedings:

- 8 U.S.C. § 1158(a)(2)(E) provides that the "safe-third-country provision" and the "one-year filing deadline" do not apply to UC. *See East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 758 (9th Cir. 2018);
- 8 U.S.C. § 1158(b)(3)(C) provides that asylum officers have initial jurisdiction over any asylum applications filed by UC. *See Mazariegos-Diaz v. Lynch*, 605 Fed. Appx 675 (9th Cir. 2015);
- 8 U.S.C. § 1232(a)(5)(D) provides that UC sought to be removed by DHS must be placed in Section 240 removal proceedings. *See O.A. v. Trump*, 404 F. Supp. 3d 109, 121–22 (D.D.C. 2019); and
- 8 U.S.C. § 1232(d)(8) delegates authority to federal agencies to enact regulations governing the asylum applications of UC that "take into account their specialized needs." *See J.O.P. v. U.S. Dep't of Homeland Security*, 2020 WL 2932922, at *4 (D. Md. 2020).

Critically, nothing in the TVPRA requires that already pending Section 240 proceedings be started over, or unexecuted removal orders disregarded, if UC are re-encountered by DHS. Indeed, once immigration proceedings commence and jurisdiction vests with an immigration judge, neither the noncitizen nor DHS can compel the termination of proceedings without a proper reason for the immigration judge to do so. *See, e.g.*, *Matter of Sanchez-Herbert*, 26 I. & N. Dec. 43, 45 (BIA 2012); *see also* 8 C.F.R. §§ 239.2(a), 1239.2(c). Therefore, Plaintiffs have failed to demonstrate that

Defendants have acted arbitrarily, capriciously, or not in accordance with law by declining to enact policies requiring the issuance of new NTAs to UC.[8]

b. **Plaintiffs Cannot Establish that HHS has Failed to Place UC in the Least Restrictive Setting, in Violation of the APA**

In their motion, Plaintiffs argue that the Office of Refugee Resettlement ("ORR"), which is a component of HHS, has "delayed or outright refused to reunify some children with sponsors, especially if a child has an MPP removal order." (Dkt. 29-1 at 15.) Plaintiffs' "evidence" includes the following:

- ProBar Decl. ¶ 29 (Dkt. 29-23 at 14-15) (stating that alleged issues related to "ICE officers instruct[ing] ORR shelters to prohibit reunification" for UC with removal orders were resolved in May 2020, in accordance with the *Flores* Settlement Agreement);
- ImmDef Decl. II ¶¶ 61-66 (Dkt. 29-20 at 21-23) (identifying examples from November 2019, early 2020, and April 2020);
- Door Decl. ¶ 69 (Dkt. 29-18 at 19-20) (not identifying any examples);
- RAICES Decl. ¶¶ 51-53 (Dkt. 29-22 at 26-27) (identifying several undated examples and an example from January 2021, in which the children were going to be removed, but were not when the Board of Immigration Appeals ("BIA") "award[ed] relief, preventing the children's removal");
- KIND Decl. ¶ 17 (Dkt. 29-17 at 8) (identifying examples from March and April 2020); and
- NIJC Decl. ¶ 19 (Dkt. 29-21 at 8) (identifying an example from March 2021 in

[8] In their motion, Plaintiffs argue that Defendants have improperly "reinstated" prior removal orders, under the authority of 8 U.S.C. § 1231(a)(5). (*See, e.g.*, Dkt. 29-1 at 11, 22,) To reinstate a prior removal order, an immigration officer must find that the individual in question: (1) is not a citizen; (2) was removed or voluntarily departed while subject to a prior removal order; and (3) reentered the United States illegally. *Alvarado-Herrera v. Garland*, 993 F.3d 1187, 1190 (9th Cir. 2021) (citing 8 C.F.R. § 241.8(a)). Here, because the UC at issue do not have *executed* removal orders, by definition, there could not be a "reinstatement" of a prior removal order, even if UC were subject to reinstatement, which they are not. *See* 8 U.S.C. § 1232(a)(5)(D) (requiring that all UC who DHS seeks to remove be placed in Section 240 removal proceedings).

which ERO was preparing to execute a removal order and *asked* ORR not to make further efforts at reunification).

The issue of purported delayed reunification is one that has been raised before the court in *Flores v. Garland*, 85-cv-04544 DMG (C.D. Cal.). (*See generally* Sualog Decl.) Because the court in that case oversees a settlement that applies to a class of minors and provides requirements regarding the length of custody, litigating those issues before this Court is duplicative and precluded. Moreover, that court is closely monitoring issues relating to the length of detention. On April 24, 2020, the *Flores* court ruled that unless enforcement of an MPP-removal order is "imminent," ORR could not unreasonably delay release of UC. (Sualog Decl. ¶ 6.) On December 4, 2020, the *Flores* court ordered the filing of interim compliance reports by, among others, ORR. (Sualog Decl. ¶ 7.) Since the filing of those reports began, there have not been any documented cases where ORR delayed release of an unaccompanied noncitizen child due to an imminent or unexecuted removal order. (Sualog Decl. ¶ 8 (citing docketed entries with reports, including ECF 1060-1 at 21 [1/12/21 Report], 1084-1 at 33 [2/22/21 Report]).) Therefore, Plaintiffs cannot establish a violation of the APA by HHS.

c. **Plaintiffs Cannot Establish that UC Are Being Subjected to MPP in Violation of the APA**

In their motion, Plaintiffs argue that Defendants violate the APA when they "subject unaccompanied children to prior MPP proceedings." (Dkt. 29-1 at 23.) Defendants do not dispute that UC are not amenable to MPP. Where they differ from Plaintiffs is in the definition of what is included in the term MPP. MPP is an implementation of 8 U.S.C. § 1225(b)(2)(C), which provides that DHS may return certain applicants for admission to the foreign contiguous territory from which they are arriving on land pending Section 240 removal proceedings in lieu of placing them in detention. As the Ninth Circuit has defined it:

The MPP provides that non-Mexican asylum seekers arriving at our southern border be returned to Mexico for the duration of their immigration

> proceedings, rather than either being detained for expedited or regular removal proceedings or issued notices to appear for regular removal proceedings.

Innovation Law Lab, 951 F.3d at 1077 (citation omitted). In short, MPP is a process under which certain applicants for admission are returned to Mexico for the duration of their removal proceedings. It does not alter the fact that individuals who are subjected to MPP are provided full removal proceedings under Section 1229a, which is the same type of proceeding that UC receive if they arrive at the border. *See* 8 U.S.C. § 1232(b). It *does* alter whether they will be in the United States or in Mexico while those proceedings are conducted.

As the Ninth Circuit noted in *Innovation Law Lab*, MPP does not apply to "unaccompanied alien children." *Id.* MPP also does not apply to "'aliens processed for expedited removal,' 'aliens with known physical [or] mental health issues,' 'returning [Legal Permanent Residents] seeking admission,' and 'aliens with an advance parole document or in parole status.'" *Id.* These exemptions created by DHS guidance mean that noncitizens in these categories will not be processed under MPP and returned to Mexico for the duration of their Section 240 removal proceedings upon their encounter by DHS. The exemptions do not confer a right on any noncitizens in these categories to have *new* NTAs issued if they are encountered (a) with an unexecuted removal order issued in Section 240 removal proceedings or (b) while in pending Section 240 removal proceedings.

When Plaintiffs use the term "MPP proceedings," they are referring to Section 240 proceedings. Plaintiffs have failed to identify any basis for asserting that it violates the APA to (a) execute a previously-issued removal for UC who were previously processed for MPP and then re-entered the United States, or (b) maintain the pending Section 240 proceedings of UC. Therefore, Plaintiffs' argument fails.

d. **Plaintiffs' Alleged "Reliance Interests" Do Not Establish a Violation of the APA**

In their motion, Plaintiffs argue that Defendants violated the APA when they failed to consider Plaintiffs' reliance interests because their actions have forced Plaintiffs into a "time-consuming, emergency posture." (Dkt. 29-1 at 23.) Plaintiffs' argument fails because it is based on an incorrect assertion that DHS has reversed a prior policy. DHS does not as a matter of policy issue new NTAs every time it encounters an inadmissible or removable noncitizen, and Plaintiffs have not pointed to any policy stating to the contrary. When UC who were returned to Mexico under MPP elect to re-enter the United States, they have done so either with unexecuted orders of removal or pending removal proceedings. Plaintiffs are not challenging MPP in this action. Therefore, their argument concerning "reliance interests" is solely based on their unsubstantiated expectation that DHS would issue new NTAs to UC with unexecuted orders of removal or pending removal proceedings. Because DHS's actions do not constitute a reversal of prior policy, Plaintiffs' argument fails.

e. **Plaintiffs Cannot Establish Their Entitlement to an Order Requiring the Return of UC Who Have Been Removed to Their Home Countries Pursuant to Valid Orders of Removal**

In Plaintiffs' proposed order, they seek an order from this Court "ensur[ing] safe return of MPP-unaccompanied children removed to their home countries pursuant to MPP removal orders who elect to return to the United States to access their TVPRA rights." (Dkt. 29-26 at 4.) However, their motion does not contain any argument demonstrating their entitlement to such an order.[9] Therefore, this argument fails.[10]

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[9] In their proposed order, Plaintiffs also request an order ensuring that "no unaccompanied child is removed on an MPP order of removal." (Dkt. 29-26 at 4.) However, in the motion, Plaintiffs present no authority prohibiting the execution of previously unexecuted removal orders against UC who return to the United States.

[10] Plaintiffs' motion also contains a section entitled, "MPP-Unaccompanied Children Are Not Safely Repatriated" (Dkt. 29-1 at 18), but their proposed order does not contain any requested relief related to this contention. (Dkt. 29-26.)

2. Plaintiffs Have Failed to Establish a Likelihood of Success Under the *Accardi* Doctrine

a. **DHS Is Not Violating any of its Policies Related to the Issuance of NTAs**

The *Accardi* Doctrine provides that agencies are required to abide by their own internal policies. *See Church of Scientology of California v. United States*, 920 F.2d 1481, 1487 (9th Cir. 1990) (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). One such policy, cited by Plaintiffs, is that UC are not amenable to MPP. (Dkt. 29-1 at 24.) As noted above, Defendants do not dispute that UC are not amenable to MPP. However, just as noncitizen children in the United States who were once encountered with their parents but are later encountered as unaccompanied children are still subject to pending Section 240 removal proceedings, UC encountered at the border are subject to any pending Section 240 proceedings that were initiated during a prior entry to the United States. There is no requirement that the proceedings be duplicated with the initiation of a second, identical proceeding.

Plaintiffs do not contend or present any evidence that any unaccompanied noncitizen children are being placed in MPP. To the contrary, Plaintiffs allege that children who were already issued an NTA as part of MPP (or issued removal orders *while* accompanied), and then return to the United States unaccompanied, are improperly still subject to the pending removal proceedings or existing, previously-issued removal orders. That is not a violation of any policy, but a proper application of the INA, which does not contain any vehicle to pursue duplicate proceedings. *See, e.g.*, *In Re W-C-B-*, 24 I. & N. Dec. 118, 122 (BIA 2007) (once jurisdiction has vested, an NTA cannot be cancelled by unilateral DHS action, such as the issuance of another NTA).

In their motion, Plaintiffs also contend that the prosecution of pending removal proceedings and enforcement of unexecuted removal orders subverts Plaintiffs' clients' TVPRA rights. However, Plaintiffs offer no authority to show that anything in the TVPRA restricts or prohibits the Government from continuing already pending removal

proceedings or enforcing unexecuted removal orders against the uniquely situated noncitizens at issue in this case (UC subject to pending removal proceedings or unexecuted removal orders who return to the United States unaccompanied).

Therefore, Plaintiffs cannot succeed on their claim that Defendants are violating any of their own internal policies with respect to the issuance of NTAs.

b. **ORR Is Not Violating any of its Policies Related to Releasing Children to Eligible Sponsors**

As noted above, there is no evidence to support Plaintiffs' claims that Defendant ORR is currently unreasonably delaying or denying any release to UC on the grounds that they have pending or prior Section 240 proceedings while in MPP. *See* Sualog Decl. at ¶¶ 6-8 (since April 24, 2020, no cases where ORR delayed release of an MPP-UAC due to an imminent or unexecuted removal order). Therefore, Plaintiffs are not entitled to injunctive relief related to their claim that Defendants are violating any of the own internal policies with respect to the release of UC to eligible sponsors.

3. Plaintiffs Have Failed to Establish a Likelihood of Success Under the Fifth Amendment

In their motion, Plaintiffs assert a liberty interest in "avoiding wrongful deportation" and a property interest in "their statutory entitlements under the TVPRA." (Dkt. 29-1 at 26-27.) Plaintiffs further assert generally that the *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) factors weigh in favor of the requested preliminary injunctive relief without any specific analysis of the procedures that already exist pursuant to the INA. (Dkt. 29-1 at 26-28.) But first, as noncitizens encountered at the border when they reappear unaccompanied, the procedural rights of UC are limited to those provided by Congress. *See Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (where a noncitizen has neither established domicile or residence in the United States before apprehension, "'[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953))); *see also Angov v. Lynch*, 788 F.3d 893,

898 (9th Cir. 2015) (noncitizen who presented at border seeking asylum not entitled to procedural due process beyond that provided by Congress).

Accordingly, the Court need not engage in any analysis regarding abstract due process interests of the UC because the procedures they are due are limited to those prescribed by statute. And for the same reason, the Court need not engage in any *Mathews* analysis, which "requires courts to look at structural procedures that exist and those that are sought by a category of claimants." *C.J.L.G. v. Barr*, 923 F.3d 622, 631 (9th Cir. 2019) (Paez, J., concurring). Instead, the Court need only determine whether UC are provided with the procedures required by statute.

For largely the reasons stated above, Plaintiffs have not established any procedural violations of the INA or TVPRA: (a) there is no requirement to issue a second NTA when one already exists; (b) Plaintiffs have not shown that UC are being unreasonably delayed in their release to sponsors on the basis that they have ties to MPP; (c) Plaintiffs have not shown and cannot show that UC are being ordered removed *in absentia* for failing to appear at removal hearings associated with MPP;[11] (d) Plaintiffs have not identified any authority prohibiting enforcement of unexecuted removal orders against UC who return to the United States unaccompanied; and (e) Plaintiffs have not presented any evidence that UC with MPP ties are treated any differently from other unaccompanied noncitizen children in being assured safe repatriation to their home countries.

Furthermore, Plaintiffs make no attempt to show constitutionally significant, resultant prejudice, as required for a due process claim. *Gomez-Velazco v. Sessions*, 879 F.3d 989, 993 (9th Cir. 2018) (the prejudice requirement "rests on the view that the

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[11] Removal proceedings involving individuals returned to Mexico pursuant to MPP have been put on hold since the outset of the COVID-19 pandemic, in March of 2020. See https://www.dhs.gov/news/2020/03/23/joint-statement-mpp-rescheduling; https://www.dhs.gov/news/2020/07/17/department-homeland-security-and-department-justice-announce-plan-restart-mpp. Accordingly, there is no imminent risk of any UCs with MPP ties being ordered removed in absentia in proceedings involving families in MPP, and Plaintiffs have not provided evidence of any recent in absentia removal orders in removal proceedings associated with MPP. (*See, e.g.*, KIND Decl. [Dkt. 29-17] at ¶¶ 15, 21; ImmDef Decl. I [Dkt. 29-19] at ¶¶ 31, 38.)

results of a proceeding should not be overturned if the outcome would have been the same even without the violation," and is applicable to alleged irregularities where "counsel can act . . . after issuance of the removal order and remedy any damage done"). Here, Plaintiffs cannot show resultant prejudice because, as they acknowledge, the UC have not yet been prejudiced in any way, and in fact have avenues for relief available to them, including, as Plaintiffs acknowledge, seeking the reopening of the existing Section 240 removal proceedings. *See* 8 U.S.C. § 1229a(b)(5)(C), (c)(7).

Plaintiffs provide an anecdotal account of one child who mistakenly believed her hearing was in New York instead of Texas and was ordered removed *in absentia*, as a result of not being issued a second NTA. (KIND Decl. [Dkt. 29-17] at ¶ 21.) But even in that case, it remains to be seen (via the petition for review process) whether any resultant prejudice occurred. A motion to reopen could be, and in fact was filed in that particular instance, to cure any defect. *See id.* This is how Congress designed the INA: to correct errors in removal proceedings through a petition for review addressing the flaws in individual cases rather than litigation like this. *See J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (any issue arising from any removal-related activity can be reviewed only through the petition for review process created by statute).

In the PI Motion, Plaintiffs also allege that Defendants have ordered UC "removed in absentia in MPP proceedings while the child is in ORR custody." (Dkt. 29-1 at 14.) But Plaintiffs have set forth no evidence that this is currently happening. Removal proceedings for individuals in MPP have been paused since the outset of the pandemic, *in March of 2020*. Even assuming it were happening, Plaintiffs have not established any constitutionally significant resulting prejudice for these UC. In these instances, Plaintiffs can—and have—filed motions to reopen, sever, and change venue on their clients' behalf. *See* KIND Decl. (Dkt. 29-17), ¶¶ 15, 21; ImmDef Decl. I, ¶¶ 31, 38.

B. Plaintiffs Request for a Preliminary Injunction Is Impermissibly Vague and Indefinite

Under Fed. R. Civ. P. 65(d)(1)(C), every injunction must "describe in reasonable

detail—and not by referring to the complaint or other document—the act or acts restrained or required." The purpose of Rule 65(d) is to prevent confusion on the part of those faced with injunctive orders, and to avoid a decree too vague to be understood. *See Fed. Election Comm'n v. Furgatch*, 869 F.2d 1256, 1263 (9th Cir. 1989) (holding that an injunction that enjoins "future violations" of a statute fails to specify the precise conduct prohibited); *see also Parsons v. Ryan*, 754 F.3d 657, 689 n.35 (9th Cir. 2014) (requiring that an injunction be "more specific than a bare injunction to follow the law"). This specificity requirement is especially important for a mandatory injunction, which Plaintiffs seek in the second portion of their proposed preliminary injunction. Such injunctions "require the defendant to take *specific* action," *L.A. Unified Sch. Dist. v. S&W Atlas Iron & Metal Co., Inc.*, 2020 WL 8816534, at *9 (C.D. Cal. 2020), and are "particularly disfavored" because they go well beyond simply maintaining the status quo. *Anderson*, 612 F.2d at 1114.

Here, the first portion of the proposed injunction contains a mandatory component: "to take all steps necessary to cease subjecting MPP-unaccompanied children to MPP." But such an injunction is inherently vague and difficult to understand, and compliance would be impossible. Plaintiffs do not specify what any of the "steps necessary" would be, and do not specify what it means to "subject[] MPP-unaccompanied children to MPP." These omissions are critical, given that (a) the Biden Administration has suspended new enrollments into MPP and no individuals are currently being placed in MPP and (b) MPP enrollees were placed in Section 240 removal proceedings as with all other individuals subject to removal proceedings.

The mandatory second portion of Plaintiffs' proposed preliminary injunction seeks an order requiring DHS and HHS "to restore the status quo and immediately take all steps necessary to ensure the full panoply of rights and protections under the TVPRA are made available and accessible to all MPP-unaccompanied children, including . . . ." (Dkt. 29-26 at 3-4.) The proposed injunction does not specify what "all steps necessary" are. It identifies four such steps, but is not limited to those four such steps and includes

the word "including." Defendants would have no way to interpret an injunction purporting to require certain steps be taken that are not even identified.

Moreover, the four steps that are enumerated are either still too vague to be understood or are nothing more than a "bare injunction to follow" what Plaintiffs perceive to be the law. *Parsons*, 754 F.3d at 689 n.35. First, Plaintiffs seek an injunction requiring the issuance of a new, "legally sufficient" NTA to all "MPP-unaccompanied children" that "reflects their most recent entry and status as 'unaccompanied.'" (Dkt. 29-26 at 3.) But Plaintiffs do not specify what "legally sufficient" means in this context, other than demanding that it reflect the date of their most recent entry and status as unaccompanied, neither of which is required by 8 U.S.C. § 1229a(a).[12] Second, Plaintiffs seek an injunction requiring DHS and HHS to take affirmative steps to ensure the prompt placement of unaccompanied children in the "least restrictive setting without regard to the procedural posture of the child's previous MPP case." (*Id.*) But DHS and HHS are already subject to the least restrictive setting requirement, and this amounts to nothing more than a "bare injunction to follow the law." This relief is also duplicative of the *Flores* decree, which is administered by another Court. Moreover, Plaintiffs do not specify what, exactly, Defendants must do to "ensure prompt placement." Third, Plaintiffs seek an injunction requiring DHS and HHS to "take all procedural steps necessary to ensure compliance with DHS's own policy that unaccompanied children will not be subject to MPP and ensure no unaccompanied child is removed on an MPP order of removal." (Dkt. 29-26 at 4.) But Plaintiffs do not specify what *any* of those "procedural steps" are that they seek to require Defendants to undertake. And finally, Plaintiffs seek an injunction requiring DHS and HHS to "ensure" the safe return of removed "MPP-unaccompanied children" to the United States to access their TVPRA rights. (*Id.*) But once again, the proposed injunction nowhere specifies what specific affirmative actions any defendant must take

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[12] Plaintiffs also do not explain why their clients require what they characterize as "legally sufficient NTAs based on the child's most recent entry," when they are able to apply for asylum and are already subject to prior NTAs. (Dkt. 29-1 at 14.)

to achieve the desired purpose.

In short, the Court should not enter the requested mandatory injunction relief, which consists of nothing more than dictates to follow what Plaintiffs perceive to be the law and provides no specific actions Defendants must take to comply with it.

C. Plaintiffs Have Not Established Irreparable Harm

1. Plaintiffs' Delay in Filing This Motion Does Not Support Their Contention of Irreparable Harm

"A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff's rights." *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213–14 (9th Cir. 1984) (citations omitted). However, a delay by a plaintiff in acting demonstrates the lack of need for speedy action by the courts. *See id.*; *see also Li v. Home Depot USA Inc.*, 2013 WL 12120065, at *3 (C.D. Cal. 2013) (delay of three months in seeking preliminary injunction implies a lack of urgency and irreparable harm); *First Franklin Fin. Corp. v. Franklin First Fin., Ltd.*, 356 F. Supp. 2d 1048, 1055 (N.D. Cal. 2005) (three month delay "undercuts . . . claims of urgency and irreparable harm").

Here, Plaintiffs did not file this case until January 2021—two years after "DHS began implementing the Migrant Protection Protocols" and well over a year after Plaintiffs began encountering the alleged representation difficulties that form the basis for their claims. (Dkt. 29-1 at 13; *see also* ImmDef Decl. II [Dkt. 29-20] at ¶¶ 29 (three ImmDef clients were ordered removed *in absentia*, two in October 2019 and one in February 2020), 62 (advised in November 2019 that UAC "could not be reunified with her sponsor until her MPP proceedings were resolved"), 66 ("In one early case, the ICE FOJC advised he would not allow for the reunification of children with MPP removal orders, and instead intended to remove them unless their removal orders were quickly reopened.").) This delay of over two years "undercuts . . . claims of urgency and irreparable harm." *First Franklin Financial Corp.*, 356 F. Supp. 2d at 1055.

2. Plaintiffs' Motion Fails to Demonstrate That the Complained-of Acts Have Perceptibly Impaired Their Ability to Perform Their Services or Frustrated Their Missions

The declarations Plaintiffs have submitted are focused on limited, anecdotal examples of alleged difficult representation that occurred in the past. They provide little to no information on their UC caseloads and alleged representation difficulties they are *currently* facing, and even less information on the alleged difficulties they expect to be presented with in the future. These omissions are critical. Injunctive relief is designed to remedy current and future harm, not past harm. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 111 (1983) (in order to establish standing to pursue injunctive relief, a plaintiff must show a "threat of injury that must be both 'real and immediate,' not 'conjectural' or 'hypothetical,'" and past injury does not suffice to show a threat of future injury, "[a]bsent a sufficient likelihood that [the plaintiff] will be again wronged in a similar way").

Importantly, nowhere in their submissions do Plaintiffs identify a substantial number of recent instances of UC who were previously in MPP with their families presenting at the border. ProBAR and RAICES each identified *one* child that they represented who entered the United States unaccompanied in January 2021, RAICES Decl. (Dkt. 29-22), ¶ 67; ProBAR Decl. (Dkt. 29-23), ¶ 35, and the other Plaintiffs have not identified any such recent UC entries. *See* The Door Decl. (Dkt. 29-18); ImmDef Decl. I (Dkt. 29-19); ImmDef. Decl. II. (Dkt. 29-20). These few recent UC entries related to MPP only suggest that Plaintiffs' current UC caseloads will decrease over time.

Plaintiffs assert in their Motion that actions taken by DHS and ORR (what they refer to as the "Practice")[13] have led to more than 700 children being denied "TVPRA

[13] "(i) [F]ailing to issue legally sufficient NTAs based on the child's most recent entry; (ii) unreasonably delaying a child's release to a sponsor; (iii) ordering a child removed in absentia in MPP proceedings while the child is in ORR custody; (iv) enforcing MPP removal orders while the child is in ORR custody; (v) failing to safely

(footnote cont'd on next page)

rights." (Dkt. 29-1 at 14.) But Plaintiffs have not substantiated this number. The article Plaintiffs cite in support of this figure—a CBS News Article that references this lawsuit—is insufficient grounds on which to issue injunctive relief and, in any event, makes no such claim. Instead, it states:

> According to government data obtained by CBS News, the Office of Refugee Resettlement, the federal agency responsible for housing unaccompanied children, has housed 701 minors whose parents were in Mexico under the MPP program. Most – 643 of them – have been released to family members in the U.S.

(Dkt. 28-14 at 2.) In other words, Plaintiffs are complaining about difficult representation of UC who remain in custody in a mere *few dozen* cases allocated among multiple organizations[14]—in other words, a small handful of cases per organization. For example:

- The Door—which has a Legal Services Center team of "over forty attorneys, social workers, paralegals and other support staff" and handles "upwards of 1,500 immigration matters per year"—has served a mere "10 MPP-unaccompanied children" since 2019, and only four of those UC were subject to final orders of removal. (The Door Decl. [Dkt. 29-18] at ¶¶ 4, 10, 15.) The Door does not state how many UC it is currently serving.
- ImmDef—which represented "more than 1,600 noncitizens in removal proceedings in 2019 alone" and "currently provides representation for close to 1,000 unaccompanied children"—is currently "providing ongoing full-scale representation services to thirty-two identified MPP-unaccompanied children."

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repatriate children removed from the U.S.; and (vi) failing to ensure a child's access to an asylum interview before an asylum officer (collectively referred to as the "Practice"). (Dkt. 29-1 at 14.)

[14] Plaintiffs ImmDef, RAICES, ProBar, and The Door have also attached to their PI Motion declarations from the following immigrant advocacy organizations who perform the same or similar work: (1) Kids in Need of Defense ("KIND"), (2) the National Immigrant Justice Center ("NIJC"), (3) the Young Center for Immigrant Children's Rights, and (4) the Galveston-Houston Immigrant Representation Project ("GHIRP"). (Dkt. 29-17, 29-21, 29-24, 29-25,)

(ImmDef Decl. I [Dkt. 29-19] at ¶¶ 10, 13, 18.) ImmDef does not specify how many of these thirty-two representations involve the "huge hurdles" complained of and what those hurdles are in each representation, but states that it has "had three unaccompanied child clients who were ordered removed *in absentia* by MPP judges" during the course of MPP. (*Id.* at ¶ 19; ImmDef Decl. II [Dkt. 29-20] at ¶ 29.)

- RAICES is "[a] diverse staff of 283 attorneys, legal assistants, social workers, advocates, and support staff" that "managed 29,257 legal cases" in 2019 alone. (RAICES Decl. [Dkt. 29-22] at ¶ 4.) RAICES does not specify how many of the tens of thousands of cases it manages annually have involved UC, and it provides just one example of representation it considered difficult. (*Id.* at ¶¶ 15-22.)
- ProBAR—which expects to serve "over 32,000 unaccompanied children this year"—"has served and tracked at least 174 MPP-unaccompanied children" since MPP's inception. (ProBAR Decl. [Dkt. 29-23] at ¶¶ 4, 30.)

Plaintiffs have not established that the "Practice" has "perceptibly impaired" their missions. Their respective UC caseloads make up just a small percentage of their overall unaccompanied children caseloads (*e.g.*, ProBAR – no greater than, and likely less than, 0.54%; ImmDef – 3.2%), and an even smaller percentage of their overall caseloads (*e.g.*, The Door – no greater than, and likely less than, 0.67%; ImmDef – 2%).

Additionally, Plaintiffs do not state that all, or even a substantial portion of, their UC cases present the same "extraordinary" efforts they detail in the few examples they provide. And in light of the declarations Plaintiffs have provided from non-party organizations who perform the same services, Plaintiffs do not and cannot explain why they must take on each of the UC cases they have so chosen to take, as opposed to referring them to other organizations. If Plaintiffs' complaints were deemed sufficient to satisfy Article III's standing requirements, any legal organization or law firm could sue after *voluntarily undertaking* a case where Government policies or practices make representation in a particular, specialized area more time-intensive than an average case.

Moreover, the Government's recent announcements and actions taken to wind down MPP make it highly unlikely that Plaintiffs will encounter the same alleged difficulties they have experienced previously. As of May 13, 2021, the Government had processed over 10,000 individuals returned to Mexico pursuant to MPP into the United States at six United States ports of entry.[15] As more families previously placed in MPP are processed into the United States on a daily basis,[16] there will be fewer and fewer cases of UC with pending removal proceedings presenting at the border who had been previously returned to Mexico with their families pursuant to MPP (since they have been or are eligible for processing into the United States with their families pursuant to phase one).

In short, Plaintiffs complain of an alleged diversion of resources resulting from a program that is currently being wound down in a safe and efficient manner, including by suspending the enrollment of any new individuals or families in the program and processing program enrollees into the United States on a daily basis. Plaintiffs have not shown that their past alleged difficulties are likely to persist—much less worsen—and in fact, the alleged problems they complain of will alleviate over time. As such, Plaintiffs have not established irreparable harm.

D. The Balance of Equities and the Public Interest Weigh Against a Preliminary Injunction

The public interest favors the Government. Plaintiffs contend that the public interest favors them because there is a public interest in compliance with the APA, to prevent constitutional violations, and to ensure legal service providers can "effectively

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[15] Testimony of Alejandro N. Mayorkas, Secretary of Homeland Security, Before U.S. Senate Committee on Homeland Security & Governmental Affairs, On "DHS Actions to Address Unaccompanied Minors at the Southern Border" (May 13, 2021), available at: https://www.hsgac.senate.gov/imo/media/doc/Testimony-Mayorkas-2021-05-13.pdf.

[16] *See generally* U.S. Dep't of Homeland Security, Migrant Protection Protocols, DHS Begins to Process Individuals in MPP Into the United States to Complete their Immigration Proceedings (Feb. 20, 2021; last published April 13, 2021), available at https://www.dhs.gov/migrant-protection-protocols (last accessed May 27, 2021).

perform" their services. Whatever public interest there is in those things in the abstract, they do not tip the scales in Plaintiffs' favor here. As explained above, the Government has been taking substantial and prompt action to address the concerns Plaintiffs have raised about the treatment of UC who re-entered the United States alone after being subject to MPP with their family, and those actions should be permitted to move forward without court supervision. Further, as set forth in Defendants' motion to dismiss, Plaintiffs have not shown any APA violations. They identify no "final agency action" that the public would have any interest in setting aside or any systematic practices that violate any immigration laws. Nor do they identify a single due process violation. And Plaintiffs have not presented any evidence showing that their attorney-client relationships with any of their clients have been impaired. Rather, they complain they have been presented with a handful of difficult UC cases among the thousands of unaccompanied children's cases they handle each year.

On the other hand, if an injunction were granted, ordering, among other things, the issuance of a new NTA each time a child already subject to removal proceedings re-enters the country, the implementation and operational burden on the Government would be significant. The injunction as drafted would cause chaos. The risk of duplicative, competing removal proceedings would arise, and multi-agency coordination and promulgation of policies and procedures would be required to address this risk. Therefore, the balance of equities and the public interest weigh against a preliminary injunction.

E. Plaintiffs Are Not Entitled to the Nationwide Injunction They Request

The extraordinary remedy of a nationwide, mandatory preliminary injunction is not warranted here on any of Plaintiffs' claims. *Anderson*, 612 F.2d at 1114 (mandatory injunctions "particularly disfavored" and should not be issued unless the facts and law clearly favor the moving party). First, as the numbers submitted by Plaintiffs demonstrate, and as discussed above with respect to irreparable harm, Plaintiffs' complaints boil down to a few dozen representations shared collectively between them

and many other legal service providers. Such discrete problems are best resolved through the avenues of relief already available for these represented UC, including the actions being taken by DHS, motions to reopen, motions to transfer venue, appeals to the BIA, and petitions for review—not a nationwide programmatic overhaul. Second, many of Plaintiffs' complaints are not attuned to present realities, but rather are focused on inconveniences they experienced in the past. For example, Plaintiffs complain about representation of UC who were ordered removed *in absentia* by immigration judges who were presiding over their respective families' MPP cases. Yet, removal proceedings in cases of individuals in MPP have been on hold since the onset of the COVID-19 pandemic. A nationwide programmatic overhaul to address issues that may have occurred in the past would place an unnecessary strain on Government and Court resources. And third, as explained above, the UC are a unique and unusual class of individuals who are or were previously subject to removal proceedings with their families, were returned to Mexico, and then returned to the United States unaccompanied. Plaintiffs have presented no evidence to suggest that any additional self-separated UC whose families were in MPP, much less a significant number of such UC, will arrive at the border in the future.

Indeed, the Government has already processed over 10,000 individuals into the United States as part of its phase one efforts to wind down MPP. With more and more prior MPP families being processed into the United States (including the parents of the UC who came to the United States on their own), there would be no reason to expect a significant number of additional children with pending removal proceedings to present at the border unaccompanied in the future.

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V. CONCLUSION

For these reasons, the Court should deny Plaintiffs' motion for a preliminary injunction. In the event the Court determines any injunctive relief is warranted, it should stay its injunction for at least two weeks to give Defendants an opportunity to consider whether to appeal the injunction.

Dated: May 27, 2021

Respectfully submitted,

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