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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

IMMIGRANT DEFENDERS LAW CENTER, et al.,

Plaintiffs,

v.

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

Defendants.

No. 2:21-cv-00395-FMO-RAOx

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Hearing Date: June 17, 2021
Hearing Time: 10:00 a.m.
Ctrm: 6D
Hon. Fernando M. Olguin

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I. INTRODUCTION

On June 1, 2021, the Secretary of Homeland Security issued a memorandum entitled, "Termination of the Migrant Protection Protocols Program." ("June 1, 2021 Memo.")[1] The memorandum rescinds the January 25, 2019 memorandum entitled "Policy Guidance for Implementation of the Migrant Protection Protocols," "effective immediately." (June 1, 2021 Memo at 7.) The memorandum also directs "DHS personnel, effective immediately, to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives issued to carry out MPP" and to "continue to participate in the ongoing phased strategy for the safe and orderly entry into the United States of individuals enrolled in MPP." (*Id.* at 7.)

Plaintiffs' First Amended Complaint ("FAC") does not directly challenge MPP, but it does challenge agency actions related to the implementation of MPP. (*See, e.g.*, FAC at ¶ 44, 45, 47.) The announcement of the termination of MPP supports Defendants' motion to dismiss Plaintiffs' FAC. Plaintiffs' claims are largely based on what they perceive to be inconsistent treatment for unaccompanied children who were previously subject to MPP returns due to: (a) alleged delays in release from custody; (b) alleged failures to issue new Notices to Appear ("NTAs") where removal proceedings were already initiated; (c) prosecution of pending removal proceedings; and (d) and execution of removal orders. To the extent that any of Plaintiffs' claims are dependent on the existence of MPP, those claims are now or will be moot as the relevant agencies take the necessary steps to terminate MPP and rescind any implementing guidance and directives. For example, USCIS has announced that it will accept new asylum applications from people in MPP, which dispositively addresses one significant aspect of Plaintiffs' complaint.

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[1] U.S. Dep't of Homeland Sec., Alejandro Mayorkas, "Termination of the Migrant Protection Protocols Program" (June 1, 2021) at p. 7, available at: https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf (last accessed June 2, 2021).

For this new reason, the reasons set forth in the Motion, and the reasons set forth herein, Plaintiffs' FAC is subject to dismissal.

II. ARGUMENT

A. Plaintiffs Lack Standing to Pursue Their Claims

1. Plaintiffs Lack Article III Standing

As set forth in Defendants' motion to dismiss, the key questions as to the issue of Article III standing are whether any actions of Defendants have (1) "frustrated" Plaintiffs' missions and (2) "caused" them to "divert resources in response to that frustration of purpose." *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021) ("*EBSC III*"). As the Ninth Circuit stated in *EBSC III*, to prevail, an organizational plaintiff must show that it has been "perceptibly impaired" in its ability to perform its services. *Id.*

Plaintiffs have failed to adequately allege facts to support that standard. In their Opposition, Plaintiffs argue that they have adequately alleged organizational standing because they have "had to undergo drastic changes" since the implementation of MPP, including "chang[ing] their screening procedures, re-organiz[ing] staffing, and creat[ing] new trainings and procedures to address the unique needs of their *new* MPP-unaccompanied child client base." (Dkt. 30 at 15.) However, allegations that include the need to "include new interview questions" and additional "supplemental investigatory procedures" that add at minimum "ten minutes to every screening" do not demonstrate that the organizations have been perceptibly impaired in their abilities to perform their services. (*See* FAC at ¶ 151.) Any change in the law would impose this kind of a minimal burden.

Plaintiffs also argue that they "must represent MPP-unaccompanied children in MPP courts outside of Plaintiffs' jurisdictions and in proceedings that are beyond the scope of Plaintiffs' operations and legal expertise." (Dkt. 30 at 15.) However, the FAC does not adequately allege that actions of Defendants have forced them to do so in order to avoid the "frustration" of their missions. Indeed, based on the allegations of the FAC,

1 the number of MPP-related cases Plaintiffs' attorneys handle appears to be relatively
2 small compared to their overall caseload. *See* FAC at ¶ 211 ("A full caseload for a CRP
3 attorney is fifty-to-seventy cases. They and the program at large do not have the time,
4 resources, or personal capacity to devote long stretches of time to one single client.");
5 FAC at ¶ 18 ("With a diverse staff of over 100 employees, ImmDef has over seventy
6 full-time attorneys, law clerks, and support staff members . . . ."); FAC at ¶ 175
7 ("ImmDef has filed three motions to reopen *in absentia* removal orders for MPP-UC. In
8 most cases, staff attorneys learned of their clients' *in absentia* orders through calling the
9 EOIR hotline . . . ."); FAC at ¶ 25 ("In 2019, RAICES managed 28,257 legal cases.");
10 FAC at ¶ 176 ("RAICES has filed seven motions to reopen *in absentia* removal orders
11 for MPP-UC."); FAC at ¶ 33 ("[ProBAR's] Legal Department has over eighty
12 employees, with a dedicated team of over twenty attorneys, twelve paralegals, and
13 twenty legal assistants working with the UC population."); FAC at ¶ 177 ("ProBAR has
14 filed twenty-three motions to reopen *in absentia* removal orders to date and is currently
15 preparing two more for immediate filing."); FAC at ¶ 42 ("Together with their *pro bono*
16 partners, The Door's attorneys handle upwards of 1,500 immigration cases per year.");
17 FAC at ¶ 178 ("The Door has filed three motions to reopen removal orders for MPP-
18 UC.")

19 Plaintiffs' allegations are insufficient to demonstrate that any Government actions
20 impaired their ability to provide services by frustrating their missions, and therefore the
21 FAC should be dismissed.

22 **2. Plaintiffs' APA Claims Fail Because They Are Outside the Zone**
23 **of Interests for the Asserted Statutory Provisions**

24 In their Opposition, Plaintiffs argue that Justice O'Connor's in-chambers opinion
25 in *INS v. Legalization Assistance Project of L.A. Cty.*, 510 U.S. 1301 (1993) (O'Connor,
26 J., in chambers) is "non-binding," but they fail to adequately rebut the points she raised
27 in that opinion. Justice O'Connor explained that the Immigration Reform and Control
28 Act "was clearly meant to protect the interests of undocumented aliens, not the interests

of [legal service provider] organizations," and the fact that a "regulation may affect the way an organization allocates its resources . . . does not give standing to an entity which is not within the zone of interests the statute meant to protect." *Id.* at 1305.

Here, among other claims, Plaintiffs argue that new NTAs should be issued to unaccompanied children who were previously in removal proceedings while in MPP. Yet Plaintiffs point to no statutory or legal authority establishing that their organizational interests in litigating on behalf of their clients are of the nature that Congress intended for them to be able to bring as a legal action under the Administrative Procedure Act ("APA") to directly assert the alleged rights of their clients. All attorneys have an interest in the outcome of their clients' actions. For the APA claims Plaintiffs are attempting to advance in this action, this Court should find that Plaintiffs do not fall within the zone of interests that would allow them to pursue their claims.

B. This Court Lacks Jurisdiction Pursuant to 8 U.S.C. § 1252(b)(9)

In their Opposition, Plaintiffs argue that their claims can proceed because they do not "arise from removal proceedings." However, for example, in the Second Claim for Relief of the FAC, Plaintiffs argue that in circumstances in which an unaccompanied child has pending removal proceedings, ICE is in violation of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA") by failing to "serve a legally sufficient" NTA on the child. (FAC at ¶ 237.) In essence, Plaintiffs seek an order from this Court compelling ICE to initiate a second instance of removal proceedings when a first instance is already pending. In seeking that order, Plaintiffs raise "questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from" an existing removal proceeding. *See* 8 U.S.C. § 1252(b)(9). Such a request falls squarely within the prohibition of judicial review set forth in section 1252(b)(9).

Plaintiffs argue that they "have no other means of challenging Defendants' Practice" because they "do not have access to the [petition for review ("PFR")] process for their asserted claims." (Dkt. 30 at 20 (citation omitted).) This fact only underscores

the reality that Plaintiffs' counsel do not actually represent UACs in the PFR proceedings they claim are insufficient. This Court should not permit Plaintiffs to assert claims that are more properly brought by individuals through the PFR process. The circumstances of each individual case of an unaccompanied child who was previously in MPP is unique. Plaintiffs' general assertions of the extra effort they expend in representing these clients supports Defendants' contention that individualized review of cases through the PFR process is what Congress intended in enacting Section 1252(b)(9). *See Reno v. Am.-Arab Anti Discrim. Comm.*, 525 U.S. 471, 482-83 (1999); *Martinez v. Napolitano*, 704 F.3d 620, 622 (9th Cir. 2012) (citing to 8 U.S.C. § 1252(b)(9)). Therefore, Plaintiffs' claims should be barred by this Court.

C. The Court Lacks Jurisdiction Pursuant to 8 U.S.C. § 1252(f)

In their Opposition, Plaintiffs argue that Section 1252(f) prohibits injunction of "the operation of" the removal statutes, but not the "violation" of those statutes. (Dkt. 30 at 21.) But the exception Plaintiffs advocate for is not as broad as they claim. If it were, the exception would swallow the rule: Virtually all requested injunctions to restrain operation of the removal statutes are premised on some sort of alleged violation of those statutes or other law. As noted in *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010), which Plaintiffs cite in their Opposition, the exception to Section 1252(f) lies in cases where the Plaintiff seeks "to enjoin conduct it asserts is not authorized by the statutes." *Id.* at 1120. Here, Plaintiffs do not contend—and cannot demonstrate—the removal statutes themselves or any constitutional authority prohibit Defendants from either (a) keeping children who re-enter the United States unaccompanied in their prior removal proceedings or (b) executing a prior unexecuted order of removal. Any injunction prohibiting Defendants from (1) keeping children who return to the border unaccompanied in their prior removal proceedings or (2) executing previously unexecuted orders of removal against them would restrain the operation of Section 1229a, which provides no such prohibitions. An injunction requiring Defendants to issue a second NTA to children who return to the United States unaccompanied would

1 likewise restrain the operation of Section 1229a. *See Vazquez Perez v. Decker*, 2019 WL
2 4784950, at *8 (S.D.N.Y. 2019) (an injunction requiring "initial master calendar
3 hearings to be held within a prescribed time period—*would* restrain the operation of at
4 least Section 1229(b), which provides no such time period").
5 Plaintiffs also argue that their claims arise under the TVPRA, not the Immigration
6 and Nationality Act ("INA") provisions that are subject to Section 1252(f). That is
7 incorrect. Irrespective of when the provisions were enacted, the claims arise from the
8 "provisions of part IV of this subchapter," namely 8 U.S.C. §§ 1221 to 1232. 8 U.S.C.
9 § 1252(f). Thus, Plaintiffs specifically premise each of their claims on provisions
10 subject to Section 1252(f):
11 • Plaintiffs' First Claim arises under Section 1232(a)(5)(A)-(D), (c)(2), and
12 (d)(8) (Dkt. No. 14 at ¶¶ 230-32);
13 • Plaintiff's Second and Third Claims arise under Section 1232(a)(5)(D),
14 (c)(2)(A), and (d)(8) (Dkt. No. 14 at ¶¶ 89-92);
15 • Plaintiffs' Fourth Claim arises under Section 1225 (Dkt. No. 14 at ¶ 253
16 ("DHS will not use the INA section 235(b)(2)(C) [8 U.S.C.
17 § 1225(b)(2)(C)] process in the cases of unaccompanied [] children.")); and
18 • Plaintiff's Fifth Claim arises under Section 1229a(b)(4) (Dkt. No. 14 at
19 ¶¶ 94-96).
20 *See* 8 U.S.C. § 1252(f) ("no court (other than the Supreme Court) shall have jurisdiction
21 or authority to enjoin or restrain the operation of the provisions of part IV of this
22 subchapter"). This is true even if the removal proceeding is enjoined based upon some
23 other violation of law. *See, e.g.*, *J.E.F.M. v. Holder*, 107 F. Supp. 3d 1119, 1143 (W.D.
24 Wash. 2015), *reversed on other grounds*, 837 F.3d 1026 (9th Cir. 2016) (injunctive relief
25 premised on alleged due process violation for failing to appoint counsel for juvenile
26 respondents in removal proceedings). The key question for Section 1252(f) is not how
27 Plaintiffs frame their claims, but whether an injunction would restrain operation of
28 "enjoin or restrain the operation of [Sections 1221-1232]." 8 U.S.C. § 1252(f).

Compare Catholic Social Services, Inc. v. I.N.S., 232 F.3d 1139, 1150 (9th Cir. 2000) (1252(f) did not apply to injunction issued pursuant to 8 U.S.C. Section 1255a).

In this case, any injunction enjoining removal proceedings or enforcement of unexecuted removal orders or requiring issuance of a second NTA would enjoin the operation of at least Section 1229a and Section 1231, and Plaintiffs have not otherwise identified any violations of Sections 1221-1232.

D. The Court Lacks Jurisdiction Pursuant to 8 U.S.C. § 1252(g)

In their Opposition, Plaintiffs argue that their claims are not subject to Section 1252(g) because they bring "constitutional challenges to agency policies and practices" and otherwise raise "purely legal questions concerning non-discretionary acts" for purposes of their APA claims. (Dkt. 30 at 22.) That is not correct – Plaintiffs seek to enjoin the government from continuing pending Section 1229a immigration proceedings or the execution of removal orders, which is precisely what Section 1252(g) precludes courts to do outside of the specialized review system set up by Congress.

With respect to Plaintiffs' Due Process claim, constitutional challenges are not exempt from the Section 1252(g) bar, as Plaintiffs contend. The United States Supreme Court has held otherwise. In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) ("*AADC*"), the Supreme Court held that "selective enforcement" claims brought under the First and Fifth Amendments were challenges to the "Attorney General's decision to 'commence proceedings'" and thus "fall[] squarely within § 1252(g)." *Id.* at 474-75, 488.

The cases Plaintiffs cite do not suggest otherwise and are otherwise inapposite because none involved challenges to decisions to commence proceedings, adjudicate cases, or execute removal orders. In *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998), there was no dispute that the court had jurisdiction to hear the asserted constitutional challenge, which did not "arise from a 'decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien.'" *Id.* at 1051-52. Instead, the Ninth Circuit was asked to decide whether the district court

had jurisdiction to prevent execution of deportation orders that would further the alleged constitutional violations, and the Ninth Circuit concluded that the district court "had jurisdiction to order adequate remedial measures." *Id.* at 1053. In *NWDC Resistance v. Immigration & Customs Enforcement*, 493 F. Supp. 3d 1003 (W.D. Wash. 2020), the organizational plaintiffs sought a "permanent injunction prohibiting ICE from selectively enforcing the immigration laws against any individual in retaliation for protected political speech," including by "opening an investigation or surveilling a suspected violator"—actions that do not fall within the three categories enumerated in Section 1252(g) *Id.* at 1007, 1010.[2] In *Chhoeun v. Marin*, 306 F. Supp. 3d 1147 (C.D. Cal. 2018), the plaintiffs made clear they were not challenging their removal orders, but instead merely requested "that their deportations be delayed until they can file motions to reopen and until they can avail themselves of the administrative system that exists to litigate meritorious motions to reopen." *Id.* at 1159. The facts of that case, however, have been described as "unique." *See Probodanu v. Sessions*, 387 F. Supp. 3d 1031, 1042 (C.D. Cal. 2019) ("Petitioners cannot create jurisdiction by merely 'cloaking' [] allegations in 'constitutional garb.'") (citing *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001)); *see also Em v. Whitaker*, 2018 WL 6663437, at *5 n.5 (D. Ariz. 2018) (declining to follow *Chhoeun)*; *Hamama v. Adducci*, 912 F.3d 869, 874-75 (6th Cir. 2018) ("Attorney General's enforcement of long-standing removal orders . . . is not subject to judicial review.").

Here, by contrast, Plaintiffs' Due Process challenge does "arise from a 'decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien,'" *Walters*, 145 F.3d at 1051-52, namely, the

[2] The holding in *NWDC* is inconsistent with the Supreme Court's decision in *AADC*, which squarely held that challenges to allegedly discriminatory decisions to commence removal proceedings were barred by Section 1252(g). To the extent *NWDC* suggests that programmatic challenges that are not tied to "any specific alien or any particular proceeding" are not subject to Section 1252(g), Defendants respectfully submit that it should not be followed. Section 1252(g) would be rendered meaningless if organizational plaintiffs could challenge in the aggregate what individual noncitizens could not challenge individually.

1 decision to execute prior removal orders against MPP-UC and to continue pending
2 removal proceedings. *See* FAC at ¶ 232.
3 With respect to Plaintiffs' APA claims, Plaintiffs' assertion that they challenge
4 only "non-discretionary acts" is not accurate. None of the four challenged acts that
5 Defendants specifically identified in their Motion (Dkt. 27 at 24-26) are "non-
6 discretionary acts," and Plaintiffs do not contend otherwise. Indeed, Plaintiffs' own
7 pleading presumes discretion on the part of Defendants. (*See* Dkt. 14, ¶ 87 ("Before
8 MPP, Plaintiffs experiences confirm ERO regularly executed new TVPRA-NTAs for
9 UC, including those with prior entries or removal orders."), ¶ 92 ("Before MPP, UC who
10 were neither a danger nor a flight risk and who had suitable sponsors could expect to be
11 released from ORR custody in between two weeks to three months.").
12 Finally, and contrary to Plaintiffs' arguments in opposition, Plaintiffs do challenge
13 several decisions "to commence proceedings, adjudicate cases, or execute removal
14 orders against any alien":
15 **Failure to Serve a Second NTA:** Plaintiffs attempt to draw a distinction between
16 serving a new NTA (which they seek to require) and filing a new NTA with the
17 Immigration Court. (Dkt. No. 30 at 24.) But this distinction makes no sense. The
18 service of an NTA is the first step in the removal process and reflects the Government's
19 decision "to commence proceedings." 8 U.S.C. § 1252(g); 8 U.S.C. § 1229(a)(1) ("In
20 removal proceedings under section 1229a of this title, written notice (in this section
21 referred to as a 'notice to appear') shall be given in person to the alien . . . ."); *Niz-*
22 *Chavez v. Garland*, 141 S. Ct. 1474, 1482 (2021) (describing the NTA as "the basis for
23 commencing" removal proceedings). It is of no moment that proceedings do not
24 commence until the Government takes the additional step of filing the NTA. As the
25 court reasoned in *Martinez v. United States*, 2014 WL 12607787 (C.D. Cal. 2014) in
26 rejecting this same argument:
27 Drafting and issuing a notice to appear signifies DHS' decision to
28 commence proceedings even if proceedings do not commence until DHS

> files that notice to appear with the Immigration Court . . . . If the Court were to adopt Plaintiff's interpretation, then claims arising from the issuance of a notice to appear would be shielded from review only if the Government later filed that same notice to appear with the Immigration Court. Such a limitation on § 1252(g) would discourage Government agents from issuing notices to appear or, more perversely, from cancelling improvidently issued notices to appear before proceedings commence because these decisions would open the door to legal action.

Id. at *3; *see also Wallace v. Napolitano*, 2014 WL 11429309, at *2 (S.D. Fla. 2014) (suit seeking to compel issuance of NTA barred by Section 1252(g)).[3]

Prosecuting Prior Removal Proceedings: Next, Plaintiffs claim that continued prosecution of previously-initiated removal proceedings does not fall under Section 1252(g) because such a decision to continue the previous action does not constitute "commencement." (Dkt. 30 at 24.) But even if such a decision is not one to "commence" proceedings, it is certainly a decision to "adjudicate cases." *See Martinez*, 2014 WL 12607787, at *3 (malicious prosecution claim required plaintiff to prove that DHS "adjudicated removal proceedings against him" and was thus barred by Section 1252(g)); *see also AADC*, 525 U.S. at 483-85 (explaining that the three actions and decisions covered by Section 1252(g) "represent the initiation or prosecution of various stages in the deportation process," the Executive has "discretion to abandon the endeavor" at each stage, and "Section 1252(g) seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations, providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed") (internal citations and quotations omitted); *Hanggi v. Holder*,

[3] Plaintiffs' argument also underscores the questionable nature of their NTA-based claim. Since they seek a new NTA for some purpose other than for "Initiation of Removal Proceedings," 8 U.S.C. § 1229, their request finds no support under the INA.

563 F.3d 378, 383 (8th Cir. 2009) (challenge to decision not to terminate proceedings barred by Section 1252(g) because "[a] decision to terminate proceedings, like a decision to forgo proceedings, implicates the Attorney General's enforcement discretion"); *see also Alvidres-Reyes v. Reno*, 180 F.3d 199, 201 (5th Cir. 1999) ("The Congressional aim of § 1252(g) is to protect from judicial intervention the Attorney General's long-established discretion to decide whether and when to *prosecute or adjudicate* removal proceedings or to execute removal orders." (emphasis added)).

Plaintiffs alternatively argue that, once removal proceedings commence, there is no longer any discretion to adjudicate them, citing *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1120 (9th Cir. 2001). (Dkt 30 at 25.) *Barahona-Gomez* simply held that an *immigration judge* lacks discretion not to adjudicate the cases before it. It did not hold that *DHS* lacks discretion whether or not to continue prosecuting a removal action. Nor could its reasoning extend to DHS, which has broad discretion to halt (or continue) its prosecution of a removal, including to: (1) cancel an NTA, 8 C.F.R. § 239.2(a), and (2) move to dismiss, 8 C.F.R. § 239.2(c).[4]

E. Plaintiffs' First Claim for Relief for Violation of the Fifth Amendment Due Process Clause Must Be Dismissed

Plaintiffs have failed to adequately allege prejudice to UC because of Defendants' actions, and therefore their due process claim fails. In their Opposition, Plaintiffs contend that the prejudice requirement applies only to "collateral attacks to deportation proceedings." (Dkt. 30 at 26.) But Plaintiffs' Due Process claim *is* a collateral attack to multiple removal proceedings, specifically those proceedings where Plaintiffs seek to prevent the execution of removal orders or the continuation of already pending proceedings. *See, e.g.*, FAC at ¶ 232 ("DHS subjects MPP-UC to the forthcoming or

[4] Plaintiffs now clarify that they "do not ask this Court to invalidate MPP removal orders issued against their clients." (Dkt. 30 at 25.) In light of this representation, the Court should deny Plaintiff's request in their preliminary injunction motion that Defendants be ordered to "ensure 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.)

continued effects of their MPP proceedings by aggressively opposing Plaintiffs' efforts to defend their MPP-UC clients in their immigration proceedings."). These individual unaccompanied children could only challenge the procedures applied to them on due process grounds through the PFR process after proceedings concluded and would be required to show prejudice in those proceedings. Plaintiffs here should not be permitted to circumvent these procedural and substantive requirements and do on an aggregate level what individuals could not do themselves.

Plaintiffs cite two immigration cases — *Zerezghi v. USCIS*, 955 F.3d 802 (9th Cir. 2020) and *Hernandez v. Sessions*, 872 F.3d 976, 993-94 (9th Cir. 2017) — where the *Mathews* test was applied, but the courts did not require a showing of prejudice. *Zerezghi* is inapplicable for two reasons. First, it was decided in the immigration benefit context, not the removal context, and second, the question before the court was whether "additional process was due," such that it had occasion to consider the *Mathews* factors. *Id.* at 810. *Hernandez* likewise involved consideration of a new procedure, namely, considering financial circumstances for bond determinations for individuals detained under 8 U.S.C. Section 1226(a). 872 F.3d at 986, 990.

Here, by contrast, the question raised by Plaintiffs' Due Process claims is whether already-existing statutorily proscribed procedures were followed in particular cases—precisely the type of claim for which the prejudice requirement was created.[5] *Grigoryan v. Barr*, 959 F.3d 1233, 1240 (9th Cir. 2020) ("To prevail on a due process challenge to deportation proceedings, [the Grigoryans] must show error and substantial prejudice."); *see also, e.g.*, *United States v. Ramos*, 623 F.3d 672, 684 (9th Cir. 2010) (while noncitizen's stipulated removal with DHS violated due process and the agency's own regulation concerning stipulated removals, noncitizen failed to show necessary resulting prejudice).

[5] As Plaintiffs' clients are noncitizens who have not established domicile in the United States, they cannot seek additional, judicially created procedures from the Court. (*See* Dkt. 32 at 18-20.)

F. Plaintiffs' Second Claim for Relief for Violation of the APA for Failure to Act as Required Under the TVPRA Must Be Dismissed

Like their FAC, Plaintiffs' Opposition fails to identify any "specific, unequivocal command" to take the discrete actions Plaintiffs seek to require in their Second Claim. With respect to the issuance of a "TVPRA-NTA," Plaintiffs again cite to 8 U.S.C. Section 1232(a)(5)(D)(i), which requires unaccompanied children to be "placed in removal proceedings under section 240." But as Plaintiffs allege in the FAC, MPP-UC have all *already* been placed in removal proceedings under Section 240. *See* FAC at ¶ 140. Section 1232(a)(5)(D)(i) is therefore satisfied, and no second removal proceeding or NTA is required.

As to the alleged delay in release from custody, Plaintiffs decline to "cite [any] authority prohibiting custody of noncitizens whose removal is imminent." (Dkt. 27 at 30.) Given this, Plaintiffs have failed to identify any "specific, unequivocal command" to release unaccompanied children whose removal is imminent, much less within a statutorily prescribed period of time.

Moreover, and setting aside the lack of a statutorily prescribed period of time, Plaintiffs do not even allege facts plausibly suggesting any delays in releasing UC from custody as a result of MPP. Plaintiffs allege that "[b]efore MPP, UC who were neither a danger nor a flight risk and who had suitable sponsors could expect to be released from ORR custody in between two weeks to three months." FAC at ¶ 92. Yet, the only example Plaintiffs cite of a purported delayed release was in custody for four months—just outside of the weeks to three-month range Plaintiffs expected traditionally. (Dkt. 30 at 28-29.)

Finally, it appears Plaintiffs still intend to press their claim concerning USCIS's alleged past failure to consistently accept jurisdiction over asylum applications filed by MPP-UC. But, given that USCIS has issued a memorandum confirming it has jurisdiction over such applications, Plaintiffs' claim is moot and should be dismissed.

G. Plaintiffs' Third Claim for Relief for Violation of the APA for Failure to Implement Policies in Violation of the TVPRA Must Be Dismissed

In their Opposition, Plaintiffs argue that they may challenge agency inaction pursuant to Section 706(2). Plaintiffs are incorrect. Causes of action pursuant to Section 706(1) and 706(2) are distinct causes of action. "A challenge to an agency's alleged failure to act is more appropriately channeled through Section 706(1)." *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1309 (S.D. Cal. 2018). On the other hand, "Section 706(2) is typically reserved for completed agency actions whose validity can be assessed according to the bases for setting aside agency action set forth in that provision." *Id.* Accordingly, Plaintiffs' Third Claim for "Failure to Implement Policies in Violation of TVPRA" should be dismissed as improperly brought under Section 706(2). *See, e.g.*, *Northwest Environmental Defense Center v. Bonneville Power Admin.*, 477 F.3d 668, 681 n.10 (9th Cir. 2007) (distinguishing *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004) on the ground that "the petitioners here do not seek redress for agency inaction under § 706(1), but rather challenge final agency action under the § 706(2) and the Northwest Power act"); *Leigh v. Salazar*, 2014 WL 4700016, at *4 (D. Nev. 2014) (construing a Section 706(2) claim regarding an agency's alleged failure to act as in fact a Section 706(1) claim).

Next, Plaintiffs argue that their Third Claim does, in fact, challenge agency action based on the allegation buried in Paragraph 246 of the FAC that "Defendants subject UC to their MPP proceedings." (Dkt. 30 at 30.) But first, to the extent Plaintiffs seek to challenge both agency action and an agency failure to act, they should be required to replead those claims as two separate and distinct claims, for the reasons given above. *See, e.g.*, *Butchee v. Scilia*, 2011 WL 90106, at *3 (D. Nev. Jan. 10, 2011) ("[P]etitioner needs to plead the ineffective-assistance claim and the underlying claim in separate grounds, because they are distinct claims with different governing law."); *Karnazes v. Am. Airlines, Inc.*, 2021 WL 179591, at *3 (N.D. Cal. 2021) (dismissing complaint that listed out various statutory violations, but failed to "separate out these causes of action or

even attempt to plead the elements of each distinct cause of action"). Second, the FAC is devoid of any *factual* allegations demonstrating that keeping certain unaccompanied children in their prior removal proceedings does, in fact, constitute a final agency action and one that is subject to judicial review. And third, for the reasons stated in the Motion, elsewhere in this brief, and in Defendants' opposition to Plaintiffs' preliminary injunction motion, Plaintiffs have no basis to challenge Defendants' prosecution of existing removal proceedings against the unaccompanied children at issue, and the Court lacks jurisdiction to hear such a challenge.

Moreover, and contrary to Plaintiffs' contentions, Plaintiffs have failed to allege any discrete final agency action for purposes of a Section 706(2) claim. *Norton*, 542 U.S. at 64. The FAC identifies a handful of *inconsistent practices* for treatment of unaccompanied children already subject to prior removal proceedings—all of which stem from the alleged "Failure to Implement Policies in Violation of TVPRA." FAC at 91; *see* Dkt. 27 at 30-31. That is precisely the opposite of final agency action required under Section 706(2). *See, e.g.*, *Al Otro Lado*, 327 F. Supp. 3d at 1320-21 (dismissing Section 706(2) claim because the complaint did not even plausibly allege a connection between challenged "tactics employed by various [U.S. Customs and Border Protection "CBP"] officials" and "an unwritten policy created by the Defendants," particularly where the complaint itself showed inconsistencies in practice); *Bark v. United States Forest Serv.*, 37 F. Supp. 3d 41, 50 (D.D.C. 2014) ("Plaintiffs appear to have attached a 'policy' label to their own amorphous description of Forest Service's practices. But a final agency action requires more."). As in *Al Otro Lado*, Plaintiffs own allegations disclaim the existence of even any unwritten policy, much less a final agency action.[6]

[6] Plaintiffs improperly attempt to shift their pleading burden when they argue that "Defendants do not claim—or even suggest—that they are 'in the middle of trying to figure out [their] position . . . and that this action somehow prematurely inserts the courts into the mix.'" (Dkt. 30 at 31.) Plaintiffs are required to—but have not—sufficiently alleged any final agency action. *See S.F. Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 575, 576 (9th Cir. 2019) (to survive dismissal, a plaintiff must sufficiently allege facts demonstrating "final agency action" meeting the two *Bennett* factors).

Finally, Plaintiffs appear to concede that they have failed to allege that Defendants failed to take "a *discrete* agency action that [they are] *required to take*" for purposes of a Section 706(1) claim. *Norton*, 542 U.S. at 64; *see* Dkt. 27 at 31. And, while they disclaim they have launched a "programmatic attack," Plaintiffs have done just that, and they provide no authority suggesting otherwise. *See, e.g.*, *Californians for Renewable Energy v. United States EPA*, 2018 WL 1586211, at *19 (N.D. Cal. 2018) (dismissing APA claim that EPA "engaged in a 'pattern and practice' of failing to issue preliminary findings and recommendations for voluntary compliance" within 180 days of accepting a Title VI complaint for investigation because it was "in effect, making a programmatic attack, which is impermissible under *Norton* and *Lujan*"); *Del Monte Fresh Produce N.A., Inc. v. United States*, 706 F. Supp. 2d 116, 119–20 (D.D.C. 2010) (dismissing claim that FDA engaged in a pattern and practice of delaying sampling and inspecting imported produce because, "[w]ere the Court to review Del Monte's claim, it would . . . consider the procedures by which the FDA inspects samples and makes decisions as to their suitability for import"—"just the sort of 'entanglement' in daily management of the agency's business that the Supreme Court has instructed is inappropriate").

H. Plaintiffs' Fourth Claim for Relief for Violation of MPP Policies, the *Accardi* Doctrine, and the APA Must Be Dismissed

In their Opposition, Plaintiffs contend that Defendants' argument for dismissal is based "entirely on a linguistic sleight of hand." (Dkt. 30 at 32.) Not so. Defendants' argument for dismissal is based on Plaintiffs' own allegations and the policies incorporated by reference. Plaintiffs' own allegations demonstrate that the unaccompanied children at issue are subject to previously-initiated Section 1229a removal proceedings, and nothing in the policies Plaintiffs incorporate by reference support their claim that Defendants are violating any MPP policy or any other policy. Plaintiffs attempt to create confusion by suggesting that there is some sort of distinct "truncated removal proceedings" that are part of MPP. (Dkt. 30 at 33.) But there is no such thing and never was such a thing. All relevant proceedings were conducted under

the statutory and regulatory requirements for full removal proceedings under INA § 240.

The FAC does not include any *factual* allegations demonstrating otherwise, and the documents Plaintiffs incorporate by reference plainly contradict their contentions. MPP was a program in which certain amenable noncitizen applicants for admission are returned to Mexico for the duration of removal proceedings; it was not a program creating any new type of removal proceedings: "The Migrant Protection Protocols (MPP) are a U.S. Government action whereby certain foreign individuals entering or seeking admission to the U.S. from Mexico – illegally or without proper documentation – may be returned to Mexico and wait outside of the U.S. for the duration of their immigration proceedings."[7] The documents also confirm that the individuals subject to MPP were placed in the same removal proceedings as noncitizen placed in removal proceedings and who was not in MPP: "MPP applies to aliens arriving in the U.S. on land from Mexico (including those apprehended along the border) who are not clearly admissible and who are placed in removal proceedings *under INA § 240*." *Id.* (emphasis added). Nothing in the documents states that the Government must nullify or cancel any pending INA § 240 proceedings when a child who was previously in MPP returns to the United States unaccompanied.

Moreover, as noted above, the policies Plaintiffs rely on for this claim have been rescinded (or will be immediately rescinded).[8] Since the FAC seeks only prospective injunctive and declaratory relief on this claim, it must be dismissed as moot. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 111 (1983).

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[7] U.S. Dep't of Homeland Sec., Migrant Protection Protocols (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols.

[8] *See* U.S. Dep't of Homeland Sec., Alejandro Mayorkas, "Termination of the Migrant Protection Protocols Program" (June 1, 2021) at p. 7, available at: https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf (last accessed June 2, 2021) (rescinding "Policy Guidance for Implementation of the Migrant Protection Protocols" effective immediately and instructing DHS to "rescind implementing guidance and other directives issued to carry out MPP).

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I. Plaintiffs' Fifth Claim for Relief for Violation of the APA for Conditioning Access to the TVPRA Must Be Dismissed

In their Opposition, Plaintiffs argue that their fifth claim is not subject to dismissal because they have adequately alleged that "Defendants condition release of MPP-unaccompanied children to approved sponsors, or placement in the 'least restrictive setting,' on evidence that Plaintiffs are representing the child in the MPP proceeding." (Dkt. 30 at 34.) In support of this argument, Plaintiffs cite to the FAC at ¶¶ 154-158. (*Id*.) However, the factual allegations in those paragraphs do not support Plaintiffs' argument that Defendants condition release of MPP-UC on evidence that they are represented by legal counsel. Instead, they merely argue that ORR allegedly "clarified it would not delay or deny release of UC whose MPP removal order had been 'reopened, appealed, or otherwise delayed for any other reason'" and that ORR has explained that "MPP cases with final removal orders will be processed for removal." (FAC at ¶¶ 155-156.) Because Plaintiffs have failed to support their conclusory allegations in this claim with plausible factual support, it should be dismissed.

J. Plaintiffs Have Failed to State a Claim Against CBP

In their Opposition, Plaintiffs argue in a footnote that they have "sufficiently alleged an *Accardi* claim against Defendant CBP." (Dkt. 30 at 34 n.18.) However, Plaintiffs do not identify what policy CBP is allegedly failing to follow. None of the referenced paragraphs of the FAC in note 18 of their Opposition identifies any policy CBP is failing to follow. (*See id*. (citing FAC at ¶¶ 165-168).) Plaintiffs allege that DHS, CBP, and ICE have discrete investigatory and reporting obligations (FAC at ¶ 165), but the FAC only alleges that ICE has failed to follow their policies. (FAC at ¶ 166-167.) Therefore, Defendants CBP and Troy Miller should be dismissed from this action.

K. The FAC Violates Rule 8 of the Federal Rules of Civil Procedure

In their Opposition, Plaintiffs argue in a footnote that their complaint satisfies Rule 8(a)(2) of the Federal Rules of Civil Procedure because it is "coherent, well-

organized," and has "legally viable claims." (Dkt. 30 at 3 n.2 (citing *Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1127 (9th Cir. 2008))). In *Hearns*, the Ninth Circuit held that the district court abused its discretion in dismissing the 68-page complaint in that case with prejudice instead of imposing a less drastic alternative. *Hearns*, 530 F.3d at 1132-33. The Ninth Circuit noted that the district court "also has ample remedial authority to relieve a defendant of the burden of responding to a complaint with excessive factual detail." *Id.* at 1132. In *Hearns*, the Ninth Circuit noted, "Many or all of the paragraphs from 33 through 207 of the FAC, covering 38 pages, could have been stricken. Alternatively, the judge could have excused Defendants from answering those paragraphs." *Id.*

Here, Defendants did not ask the Court to dismiss the FAC for violating Rule 8(a)(2). Instead, they merely requested that the Court "relieve Defendants from answering the irrelevant introductory allegations, irrelevant statutory background allegations, unnecessary factual detail, and irrelevant allegations." (Dkt. 27 at 24.) This request is consistent with what the Ninth Circuit in *Hearns* suggested could be done by a district court confronted with a complaint that contains "excessive factual detail." *See Hearns*, 530 F.3d at 1132.

Plaintiffs' factual allegations begin at paragraph 57 on page 17 and continue through paragraph 225 on page 82. The entire complaint spans 264 paragraphs and 92 pages. "Length may make a complaint unintelligible, by scattering and concealing in a morass of irrelevancies the few allegations that matter." *United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 378 (7th Cir. 2003). "Rule 8(a) requires parties to make their pleadings straightforward, so that judges and adverse parties need not try to fish a gold coin from a bucket of mud." *Id.* The FAC does not comply with Rule 8(a)(2), and therefore, as requested in the motion to dismiss, if the Court does not dismiss the FAC in full, Defendants should be relieved from responding to the unnecessary factual details set forth in the FAC.

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III. CONCLUSION

For these reasons, the Court should grant Defendants' motion to dismiss.

Dated: June 3, 2021

Respectfully submitted,

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