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

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

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

[Additional counsel listed below]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

IMMIGRANT DEFENDERS LAW CENTER; *et al.*,

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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

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

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

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

Congress expressly guaranteed to all unaccompanied children a suite of rights under the Trafficking Victims Protection Reauthorization Act ("TVPRA"). Nonetheless, Defendants ask this Court to create an exception to that universal mandate for kids subjected to the Migrant Protection Protocols ("MPP"), a prior administration's sub-regulatory program that Defendants boast of having shut down. What Defendants demand is the right to deport children—children who are alone, fleeing danger—based on orders issued through a program that President Biden has called "dangerous" and "inhumane," and that Secretary Mayorkas recently noted may have "resulted in the abandonment of potentially meritorious protection claims." Ex. 1; Ex. 2.[1] Defendants cannot have it both ways.

Defendants' Opposition underscores the need for judicial intervention. Defendants argue that Section 240 proceedings under MPP and the TVPRA are "identical." This unsupported assertion is demonstrably untrue and would render the TVPRA a dead letter. Defendants also assert that children who enter the United States first as part of a family unit, and later alone and vulnerable, are simply not entitled to rights as "unaccompanied children." This is not only cruel, but clearly contrary to law. Congress made no such exception to the TVPRA.

Ultimately, the Opposition offers nothing to rebut the weight of law and evidence presented in the Motion. Defendants do not point to a single fact showing that MPP-unaccompanied children are able to avail themselves of the TVPRA's protections for asylum and removal proceedings. All unaccompanied children, including those subjected to MPP, are entitled to these rights under the TVPRA. Defendants' denial of these rights is arbitrary, capricious, contrary to law, and in violation of due process. The Court should enjoin Defendants' unlawful Practice.

[1] Exhibits ("Ex.") 1 and 2 are attached to the Supplemental Declaration of Stephen Blake, filed concurrently herewith. All other Exhibits are attached to the Declaration of Stephen Blake accompanying the Motion. *See* Dkt. No. 29-2.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

The Motion details how Defendants' Practice defies the TVPRA and denies MPP-unaccompanied children their rights to: "(i) access [ ] the adjudication process set forth in the TVPRA," including affirmative asylum adjudication by U.S. Customs and Immigration Services ("USCIS") free of any filing deadline, relief from reinstatement of prior removal orders, and the right to Section 240 proceedings that "address the unique needs of unaccompanied children"; "(ii) placement in the least restrictive setting"; "(iii) access [ ] informed counsel throughout their proceedings"; and "(iv) when necessary, safe repatriation to their country of origin." Mot. at 14; *see id.* at 5-12. Plaintiffs also detailed how Defendants' conduct violates the APA and Fifth Amendment due process rights. *See id.* at 12-20. Defendants' Opposition all but ignores Plaintiffs' arguments, evidence, and authority, relying instead on conclusory assertions in attempting to rebut Plaintiffs' showing of success on the merits. *See generally* Defs.' Opp to Pls.' Mot. for Prelim. Injunct., Dkt. 32 (hereinafter "Opp.") at 5-14.[2] Although to receive injunctive relief Plaintiffs need only show likely success or serious questions on the merits of one of their claims, *see Finance Express LLC v. Nowcom Corp.*, 564 F. Supp. 2d 1160, 1168 (C.D. Cal. 2008), Plaintiffs have satisfied their burden as to each claim.

A. Defendants' Practice Is Arbitrary, Capricious, and Not in Accordance with Law, in Violation of APA Section 706(2)

Plaintiffs present voluminous evidence demonstrating that Defendants' Practice is arbitrary, capricious, and contrary to the TVPRA in violation of the APA. *See* Mot. at 13-15. Defendants ignore this factual and legal support, focusing on a

[2] Defendants purport to "incorporate by reference" each argument raised in their 25-page motion to dismiss. Opp. at 2. This attempt to circumvent the Court's page limitations is improper, *cf.* J. Olguin Initial Standing Order at 5, and the Court should disregard such arguments. *See Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 345 (9th Cir. 1996) (FRCP do not sanction "the incorporation of substantive materials by reference"). If the Court wishes to consider such arguments, Plaintiffs refer the Court to their opposition to that motion. *See* Dkt. No. 30.

handful of narrow arguments and attacking strawman claims not raised by Plaintiffs.

1. Plaintiffs Have Shown that Defendants Have Denied MPP-Unaccompanied Children TVPRA Rights, Contrary to Law

Defendants' Practice denies MPP-unaccompanied children a variety TVPRA-guaranteed rights in violation of Section 706(2), including timely placement with a sponsor, affirmative asylum adjudication by USCIS, relief from prior removal orders, meaningful access to counsel, and, if necessary, safe repatriation. *See* Mot. at 13-14. Rather than respond substantively, Defendants attack strawmen.

The TVPRA affords unaccompanied children special protections in their Section 240 removal proceedings. Defendants belabor the contention that the TVPRA does not guarantee an unaccompanied child the right to "*new* Section 240 proceedings when there is a prior unexecuted removal order or before the conclusion of their uncompleted proceedings"—even when those prior proceedings occurred when the child was accompanied. Opp. at 6. Defendants, however, offer no authority in support of their conclusion, which conflicts with the TVPRA.

The statute is clear: "Any unaccompanied [] child sought to be removed by the Department of Homeland Security . . . shall be—(i) *placed* in removal proceedings under section 240 of the [Immigration and Nationality Act ("INA")]." 8 U.S.C. § 1232(a)(5)(D) (emphasis added). But these Section 240 proceedings are not the same as those commenced in other contexts, including MPP. The TVPRA requires that Section 240 removal proceedings for unaccompanied children reflect the TVPRA safeguards that guarantee: (i) access to the TVPRA's adjudication of children's applications for relief in ways that account for their "specialized needs"; (ii) placement in the least restrictive setting; (iii) access to informed counsel throughout their proceedings; and (iv) when necessary, safe repatriation. *See* Mot. at 14; *see also* 8 U.S.C. §§ 1158(a)(2)(E), (b)(3)(C); 1232(a)(2), (a)(5)(D), (c)(1), (c)(2)(A), (c)(5), (d)(8).

These requirements are unambiguous. *D.B. v. Cardall*, 826 F.3d 721, 738

(4th Cir. 2016) ("Section 1232 . . . addresses the treatment of [unaccompanied children] throughout the immigration process, *from arrest to either legal status or repatriation*.").[3] Though Defendants quibble over the propriety of "new" proceedings, this is purely semantic. Whether the proceedings are "new" or "old," unaccompanied children must be conferred the full protection required by the TVPRA when they are designated "unaccompanied," regardless of their immigration history. Defendants concede they have failed to do so. *See* Opp. at 5-6. Nothing in the TVPRA exempts Defendants from complying with this statutory mandate once a child has been designated unaccompanied.

A single example illustrates the extreme nature of Defendants' position. A ProBAR client was placed in MPP as a derivative to his father's application and both were issued *in absentia* MPP removal orders. ProBAR Decl. ¶ 22. The pair then returned to their home country, where the child was abandoned. *Id.* The child then journeyed *from his home country* to the United States—alone. *Id.* Although the child had thus returned to his home country (which normally constitutes execution of a removal order, *see* 8 U.S.C. § 1231; 8 C.F.R. § 241.7) and thereafter reentered the United States and was designated "unaccompanied," ProBAR attorneys must still advocate on his behalf because in their experience, if the motion they filed to reopen his removal order is denied, the government will take steps to summarily enforce his "unexecuted" MPP removal order. *Id.* This child's experience also underscores the moral bankruptcy of Defendants' position: an orphan whom Defendants designated unaccompanied can be denied TVPRA process

[3] Defendants stress that an MPP-unaccompanied child's MPP removal order is "unexecuted," such that when Defendants seek to enforce the order they are purportedly not seeking reinstatement of a prior removal order in contravention of the TVPRA. *E.g.*, Opp. at 5-6, 8-13. This counterintuitive position is a product of the unusual situation created by MPP whereby the government considers nearly all MPP removal orders to be *unexecuted*, even though the respondents leave the United States and are "returned" to Mexico *after being ordered removed*. Under other circumstances, leaving the United States after being ordered removed would be considered an execution of the removal order. *See* 8 C.F.R. § 241.7.

`1 because of the taint of prior, unrelated MPP proceedings. This is legally and morally unsupportable. *See* Mot. at 2-3.

Plaintiffs do not challenge Defendants' Notice To Appear ("NTA") practices. Defendants seek to excuse their refusal to serve new NTAs on MPP-unaccompanied children under Section 706(2). *See* Opp. at 5-6, 10. Plaintiffs, however, do not challenge Defendants' NTA practices as arbitrary, capricious, or contrary to law. Indeed, "NTA" appears nowhere in Plaintiffs' Section 706(2) argument. *See* Mot. at 13-15. Defendants' argument related to NTAs is thus irrelevant and need not factor into the Court's determination as to this claim. *See California v. Bernhardt*, 472 F. Supp. 3d 573, 607 n.19 (N.D. Cal. 2020).

Defendants unnecessarily delay release of MPP-unaccompanied children. Plaintiffs have offered considerable authority and evidence showing that Defendants delay release of MPP-unaccompanied children to approved sponsors, in violation of the TVPRA. *See* Mot. at 7, 13-15. Defendants are wrong that Plaintiffs are "precluded" from raising this claim here rather than the *Flores* court. Opp. at 8. Judge Gee expressly refuted this claim when she declined a related-case transfer of this matter. *See* Dkt. 12; Dkt. 30 at 19 n.14. The evidence Defendants purportedly offer to rebut this claim, Sualog Decl. ¶¶ 7-8, is unavailing. It merely provides reports from the *Flores* Juvenile Coordinator, but does not address Plaintiffs' evidence of delayed releases during the periods covered by those reports, including when Immigration and Customs Enforcement ("ICE") instructed the Office of Refugee Resettlement ("ORR") not to reunify an MPP-unaccompanied child as recently as March 2021. *See* NIJC Decl. ¶ 19.

Defendants concede that the Practice violates various TVPRA requirements. Critically, Defendants offer nothing to rebut Plaintiffs' evidence and arguments showing that, contrary to the TVPRA, MPP-unaccompanied children are: removed *in absentia* while in ORR custody, *see* Mot. at 7-8; deprived of affirmative asylum adjudication by USCIS, *see id*. at 8-10, 11; denied meaningful access to

counsel, *see id*. at 8-10; and not safely repatriated, *see id*. at 10. Mot. at 13-15. Defendants thus have waived these arguments. *See Jenkins v. Cnty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005) (finding a party abandoned claims when failing to raise them in opposition); *Martinez v. City of West Sacramento*, No. 2:16-cv-02566-TLN-JDP, 2021 WL 1216532, at *8, 9, 11 (E.D. Cal. Mar. 31, 2021) (a party that did not respond to an argument in opposition "conceded the argument"). This, too, bolsters Plaintiffs' likelihood of success on their claim that Defendants have violated Section 706(2).

2. Plaintiffs Have Shown that Defendants Arbitrarily and Capriciously Subject MPP-Unaccompanied Children to Their Prior MPP Proceedings

Plaintiffs independently show entitlement to Section 706(2) relief because Defendants' Practice is an arbitrary and capricious unexplained departure from their policy that unaccompanied children shall not be subject to MPP. *See* Mot. at 14-15. In an extraordinary effort to distinguish their own unambiguous policy pronouncement, Defendants argue that "subject to MPP" should be defined narrowly as referring only to the act of returning asylum-seekers to Mexico. Opp. at 8. This circumscribed interpretation of MPP is belied by Secretary Mayorkas's recent recognition of MPP as a broader procedural tool for moving MPP enrollees through their immigration proceedings. Ex. 2 at 4 (stating that MPP's procedural "focus on speed" raised questions as to "whether *the process* provided enrollees an adequate opportunity to appear for proceedings to present their claims for relief" (emphasis added)). Ultimately, semantics cannot obscure Defendants' concession that they subject unaccompanied kids to the ongoing immigration processes initiated when they were enrolled in MPP without providing them TVPRA rights. This is without question *subjecting* unaccompanied children *to MPP*. *See* Mot. at 16-17.

Defendants also make the extraordinary claim that MPP proceedings and TVPRA proceedings are "identical." Opp. at 8-9, 10. This assertion is erroneous for several reasons. *First*, it ignores that the TVPRA demands additional process

and protections for unaccompanied children *in addition to* Section 240 proceedings. *See* Mot. at 3. The TVPRA guarantees unaccompanied children an affirmative asylum application adjudicated by USCIS through a non-adversarial process. *Id.*; 8 U.S.C. § 1158(a)(2)(E). USCIS must adjudicate these applications under standards that "take into account" unaccompanied kids' "specialized needs," and unaccompanied children are exempt from the one-year filing deadline that constrains other applicants. Mot. at 3; 8 U.S.C. §§ 1158(a)(2)(E), (b)(3)(C); 1232(c)(5), (d)(8). These protections were not available to children in MPP Section 240 removal proceedings—and it is false to suggest otherwise. *See* Mot. at 8. Defendants do not, and cannot, plausibly claim that MPP-unaccompanied children have unimpaired access to affirmative asylum proceedings. *See id*. at 8-11.[4]

Second, Defendants ignore that the TVPRA also demands additional process and protections for unaccompanied children *within* Section 240 proceedings, supplementing procedures in the INA. *See* Mot. at 8. The TVPRA requires Section 240 proceedings to account for the "specialized needs" of unaccompanied children and "address both procedural and substantive aspects of handling" these cases. 8 U.S.C. § 1232(d)(8). The TVPRA further requires that unaccompanied children be afforded access to counsel in Section 240 proceedings to the greatest extent practicable. *Id*. § 1232(c)(5). And children are entitled to seek voluntary departure at any point before proceedings are complete. *Id.* § 1232(a)(5)(D)(ii). But children in MPP were not afforded these safeguards in their Section 240 proceedings—and DHS's recent memo confirms the "cause for concern." Ex. 2 at 4. Defendants are wrong to assert that Section 240 proceedings commenced in MPP—where kids lacked access to counsel and child-appropriate adjudication—are "identical" to the

[4] In response to this litigation, USCIS has confirmed that all unaccompanied children, including MPP-unaccompanied children with unexecuted MPP removal orders, may access affirmative asylum under the TVPRA. Mot. Ex. N. Defendants, however, have expressly reserved the right to remove MPP-unaccompanied children *before USCIS can adjudicate their asylum applications*. Opp. at 6.

Section 240 proceedings owed unaccompanied children under the TVPRA.

Finally, Defendants' argument renders the TVPRA duplicative of the INA. This is refuted by the TVPRA's text, which mandates several additional procedural and substantive rights not conferred by the INA. *Compare* 8 U.S.C. § 1225(b)(2)(C) *with* 8 U.S.C. §§ 1158, 1232; *see also Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (holding that "a statute should be interpreted so as not to render one part inoperative"). It is further refuted by the legislative history, which confirms that "without [the TVPRA], *there would be no procedure* to make sure" "that these children are treated humanely and fairly." 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008) (emphasis added). To the extent there is any conflict between the INA and the TVPRA, the specific TVPRA requirements govern over the general INA procedures. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *D.B.*, 826 F.3d at 735-36 (specific TVPRA requirement of release to a suitable custodian governs over the INA's general detention authority). Thus, the specific TVPRA protections are owed to all unaccompanied children, irrespective of the status of their immigration proceedings. *See D.B.*, 826 F.3d at 738.

For these factual and legal reasons, it is baseless for Defendants to claim that pursuing, prosecuting, and enforcing the Section 240 removal proceedings available through MPP is identical to affording an unaccompanied child the opportunity to have informed legal counsel; to seek asylum under USCIS's initial jurisdiction; and to be placed in Section 240 removal proceedings with the full range of TVPRA-guaranteed protections before removal. Defendants' concessions underscore that Plaintiffs are likely to show that Defendants' Practice is arbitrary and capricious.

3. Defendants Ignore Plaintiffs' Reliance on Consistent, Universal Application of the TVPRA

Defendants do not dispute Plaintiffs' reliance interests on predictable and lawful treatment of all unaccompanied children under the TVPRA and Defendants'

implementing policies. *See* Mot. at 15.[5] Defendants' concessions and waivers reinforce Plaintiffs' likelihood of success on the merits of their claim that Defendants' conduct is arbitrary and capricious. *See Jenkins v. Cnty. of Riverside*, 398 F.3d at 1095 n.4; *Ramirez v. Ghilotti Bros. Inc.*, 941 F. Supp. 2d 1197, 1211 n.7 (N.D. Cal. 2013) (collecting cases where a party's failure to address in opposition brief claims raised in a motion as an "abandonment of those claims").

4. Plaintiffs Have Established Final Agency Action

Defendants state—without authority or analysis—that the "only arguably 'final' agency action" Plaintiffs have identified is removal itself. Opp. at 5 n.6. Defendants' *ipse dixit* is wrong; the challenged conduct is final agency action.

The Supreme Court in *Bennett v. Spear* set forth two conditions required for final agency action: (1) "the action must mark the 'consummation' of the agency's decision-making process"; and (2) "the action must be one by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" 520 U.S. 154, 177 (1997). Courts evaluate "the 'finality' element in a pragmatic way," *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), with the goal of not "meddl[ing] in the agency's ongoing deliberations," *San Francisco Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 578 (9th Cir. 2019).

With respect to the first element, Defendants do not argue 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." *Id.* Rather, as Plaintiffs have documented—and Defendants concede—Defendants have already implemented their practices that deny MPP-unaccompanied children TVPRA rights. *See* Mot. at 6-11. This satisfies the first requirement for final agency action. *Lucas R. v. Azar*, No. 18-cv-5741, 2018 WL 7200716, at *8 (C.D. Cal. Dec. 27, 2018).

[5] Defendants only seek to refute Plaintiffs' purported reliance on DHS issuing new NTAs to all unaccompanied children; but Plaintiffs do not identify this as a reliance interest, and so this argument is irrelevant. Mot. at 15.

Plaintiffs also satisfy the second prong of the *Bennett* inquiry, because the denial of statutory and procedural rights is a decision from which "legal consequences will flow." *Bennett*, 520 U.S. at 177-78. Plaintiffs have established that Defendants keep these kids in ORR custody longer than non-MPP unaccompanied children, require those kids to appear in MPP proceedings, and remove them to their home countries without processes afforded to other unaccompanied children, including the opportunity to seek asylum or voluntary departure. *See* Mot. at 6-11. These are the same types of denials of rights that courts regularly find constitute final agency action. *See, e.g.*, *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 612, n.7 (S.D.N.Y. 2018) (finding final agency action where challenged conduct caused an extension in the process by which ORR released unaccompanied children); *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 139 (D.D.C. 2018) (finding DHS's rejection of parole requests constituted final agency action).

5. Plaintiffs Are Entitled to Relief Regarding Unaccompanied Children Who Have Been Unlawfully Removed

Defendants argue that Plaintiffs have not established that unaccompanied children who have already been unlawfully removed under MPP orders of removal are entitled to relief. Opp. at 10. Yet Defendants offer no authority for this argument, and ignore the authority cited by Plaintiffs, including the TVPRA itself, as well as the Court's inherent equitable authority. *See* Mot. at 10, 12, 23-25; *see also Hutto v. Finney*, 437 U.S. 678, 683 (1978) (approving the equitable power of federal district courts to order structural changes to remedy constitutional violations); *Saravia for A.H. v. Sessions*, 905 F.3d 1137, 1143 (9th Cir. 2018) (affirming preliminary injunction consistent with statutory mandate under the TVPRA requiring unaccompanied children procedural protections).

B. Defendants' Practice Violates the *Accardi* Doctrine

Plaintiffs have shown that Defendants violate several of their own policies, and thus the *Accardi* doctrine, as to MPP-unaccompanied children. Plaintiffs'

Motion delineates several discrete policies that Defendants violate, including policies that require: (i) ERO to issue and serve unaccompanied children with an NTA prior to transferring custody of the child to ORR;[6] (ii) ORR to promptly release a child to a suitable sponsor; (iii) ICE, ERO, and CBP to log unaccompanied children's status and location in shared databases; (iv) DHS to provide unaccompanied children access to a child-centric affirmative asylum interview and subsequent 240 immigration court hearing; and (v) ERO to ensure safe repatriation. *See* Mot. at 6-11, 17. Defendants' unsupported claim that they do not violate "any" such policies falls woefully short of a substantive response to Plaintiffs' claims and should be treated as a waiver of any arguments in opposition. Opp. at 12. Nor do Defendants rebut the evidence showing their failure to comply with these policies. *Compare* Mot. at 6-11 *with* Opp. at 11-12. Defendants also fail to distinguish Plaintiffs' authority or cite a single case of their own applying *Accardi* except to quote the legal standard. Opp. at 11-12; *see Said v. Cnty. of San Diego*, No. 12CV2437-GPC RBB, 2013 WL 5878119, at *3 (S.D. Cal. Oct. 30, 2013) (where a party does "not address[] the merits of" the others' arguments and has "only restated the applicable law, the Court assumes that [party] concedes this point"). Offering nothing to dispute their failure to follow those policies, Defendants waive this argument. *Ramirez*, 941 F. Supp. 2d at 1211 n.7.

Instead, the Opposition rises and falls with Defendants' claim that unaccompanied children previously processed into MPP as part of a family unit are not entitled to any of the benefits of their changed status as "unaccompanied children." This is contrary to law. *Supra* at 3-8. If the Court resolves this threshold question in Plaintiffs' favor, Defendants have conceded that they do not follow their own TVPRA policies for MPP-unaccompanied children. Mot. at 6-11, 16-18. Plaintiffs therefore have shown a strong likelihood of success of their *Accardi* claim.

[6] Indeed, Defendants confirm they do not consistently issue new NTAs to MPP-unaccompanied children. Opp. at 10.

C. Plaintiffs Are Likely to Succeed on Their Due Process Claim

Plaintiffs' Motion explained how Defendants' Practice interferes with MPP-unaccompanied children's constitutionally protected interests in avoiding wrongful removal and accessing their statutory entitlements under the TVPRA. *See* Mot. at 18-20. Defendants' Opposition contends that (i) Plaintiffs present these kids' due process interests too broadly by invoking the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); and (ii) Plaintiffs have not demonstrated cognizable prejudice to support a claim. *See* Opp. at 12-14. Defendants' attempts to restrict these children's due process rights come up short.

***Plaintiffs' due process claim is governed by* Mathews.** There is no dispute that Plaintiffs' clients have constitutionally protected due process rights. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (Due Process Clause applies to "all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent"); *Plyler v. Doe*, 457 U.S. 202, 210 (1982). Defendants part ways from Plaintiffs as to the scope of those rights. Plaintiffs have explained that an MPP-unaccompanied child's due process interests must be considered under *Mathews*, *see* Mot. at 19-20, but Defendants argue *Mathews* is irrelevant, and the child's interests are co-extensive with the INA and TVPRA, *see* Opp. at 12-13. To support this narrow interpretation, Defendants cite the Supreme Court's decision in *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020), *see* Opp. at 12, which is inapposite.

There, the Court held that the processes and procedures in the INA establish the only process due to noncitizens in expedited removal proceedings. *See Thuraissigiam*, 140 S. Ct. at 1982-83. In reaching that conclusion, the Court explained that its analysis was limited to a noncitizen "in respondent's position." *Id.* at 1983. While Defendants invite this Court to disregard this limitation and restrict the procedural due process rights of unaccompanied children (who are expressly *exempt* from expedited removal, *see* 8 U.S.C. § 1232(a)(5)(D)), they offer

no authority that applies *Thuraissigiam*'s holding so expansively. Indeed, no court in the Ninth Circuit has construed *Thuraissigiam* to limit a due process claim outside the narrow context of expedited removal. *E.g.*, *United States v. Guzman-Hernandez*, 487 F. Supp. 3d 985, 989-93 (E.D. Wash. 2020) (declining to extend *Thuraissigiam* and approving due process challenge to expedited removal order based on regulatory violations); *United States v. Gonzales-Lopez*, No. CR-18-00213, 2020 WL 5210923, *6, n.1 (N.D. Cal. Sep. 1, 2020) (same).

The Ninth Circuit's decision in *Angov v. Lynch*, 788 F.3d 893 (9th Cir. 2015), which relies on *Thuraissigiam*'s predecessors, does not change matters. *See* Opp. at 12-13. Nowhere in the opinion did the panel hold that its decision applied to unaccompanied children, and following *Angov*, the Ninth Circuit expressly held that *Mathews* governs in a child's removal proceedings. *See C.J.L.G. v. Barr*, 923 F.3d 622, 632 (9th Cir. 2019) (en banc) (Paez, J., concurring) ("Where due process interests are at stake in a child's removal proceedings, this court looks to the familiar test formulated in *Mathews*[.]"). Because the *Mathews* framework applies, *see Mathews*, 424 U.S. at 334-35, and Defendants have offered no substantive response to Plaintiffs' arguments, *see* Mot. at 19-20, Plaintiffs have demonstrated a likelihood of success on their due process claims under *Mathews*.

In any event, even if Defendants are correct that *Thuraissigiam* applies and limits MPP-unaccompanied children's "procedural rights . . . to those provided by Congress," Opp. at 12, Plaintiffs are still likely to prevail on their claim. Contrary to Defendants' assertion, Plaintiffs have shown that Defendants are denying these children access to the processes set forth in the TVPRA. *See supra* at 3-8.

Plaintiffs need not demonstrate prejudice to succeed on their due process claim. Defendants also argue that Plaintiffs are unlikely to succeed on their constitutional claim because they have not shown sufficient prejudice from Defendants' unlawful Practice. *See* Opp. at 13-14. But prejudice is only relevant for claims challenging the fairness of a specific underlying proceeding. *See*

Grigoryan v. Barr, 959 F.3d 1233, 1240 (9th Cir. 2020) (prejudice depends on the impact of alleged violation on the outcome of a particular individual proceeding); *Ching v. Mayorkas*, 725 F.3d 1149, 1156-57 (9th Cir. 2013) (same). Plaintiffs do not challenge any child's specific underlying proceedings. They are not asking the Court to examine whether a child's affirmative asylum proceedings were prejudiced by Defendants' Practice, or to assess how Defendants' deprivation of statutorily conferred benefits such as release to a sponsor and safe repatriation impacted a child's immigration proceedings. *Cf.* Mot. at 7-8, 10. Indeed, at the heart of this case is Defendants' prevention of some children in accessing asylum proceedings at all. Plaintiffs are challenging a systemic denial of rights that has impacted dozens of LSPs and hundreds of unaccompanied kids. *See id.* In this context, prejudice is simply not relevant. *See Hernandez v. Sessions*, 872 F.3d 976, 993-95 (9th Cir. 2017) (applying *Mathews* and not analyzing prejudice in class action challenge to the processes used by immigration officials to set bond amounts); *see also Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1195 (N.D. Cal. 2017).

Fundamentally, "[w]hen a child may be deported, the [constitutional] interest is especially great." *C.J.L.G.*, 923 F.3d at 633 (Paez, J., concurring). The Opposition does not refute that Defendants have failed to adequately safeguard against erroneously depriving MPP-unaccompanied children of their substantial liberty and property interests. *Cf.* Opp. at 13. Plaintiffs have thus established a likelihood that Defendants' Practice violates due process. *See* Mot. at 18-20.

II. PLAINTIFFS HAVE ESTABLISHED IRREPARABLE HARM

The Motion details how Defendants' unlawful Practice has upended Plaintiffs' service models, forcing them to divert substantial resources from existing programs to help MPP-unaccompanied children, and has deprived these children of their due process and TVPRA rights. *See* Mot. at 21-23. Defendants' only response is to fault Plaintiffs for "delay" and attempt to minimize the significance of their statutory and constitutional violations. *See* Opp. at 17-21. Both arguments fail.

A. Plaintiffs Did Not Delay In Filing This Suit

In an attempt to sidestep the harm caused by their Practice, Defendants argue that Plaintiffs needlessly delayed "over two years" after MPP was implemented to sue Defendants over their unlawful conduct. Opp. at 17.[7] But as Defendants recognize, Plaintiffs could not have sued when MPP was rolled out because Plaintiffs did not even begin encountering unaccompanied children impacted by the Practice until the end of 2019. *See* Opp. at 17. Even then, Plaintiffs could not file suit immediately because they required time to gather facts and investigate potential claims. Plaintiffs' ability to understand the full breadth of Defendants' Practice was frustrated for much of 2020, while Defendants were expelling individuals under Title 42 including, at times, unaccompanied children, which obscured their treatment of MPP-unaccompanied children. *See* Compl. ¶ 93, n.48, ProBAR Decl. ¶ 4. It was only after representing children in complex cases over time—through which individual MPP-unaccompanied children sought, without success, to address Defendants' illegal conduct through the administrative and judicial process—that Plaintiffs discerned the systemic Practice of denying MPP-unaccompanied children their TVPRA rights and modified their representation processes accordingly. *See, e.g.*, ProBAR Decl. ¶¶ 12-14; ImmDef Decl. II ¶¶ 24-26; Door Decl. ¶ 13.

As the Ninth Circuit has observed, delay is justified "when it is 'used to evaluate and prepare a complicated claim.'" *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 954 (9th Cir. 2001). As it was here. *See, e.g., Lazor v. Univ. of Conn.*, No. 3:21-CV-583 (SRU), 2021 WL 2138832, at *7 (D. Conn. May 26, 2021) (excusing ten-month delay caused by "logistical complications compounded by the pandemic, and counsel's extensive investigation and research into the legal and factual

[7] Defendants do not, and cannot, assert that Plaintiffs were dilatory in filing this Motion given the parties' good-faith efforts since March to resolve this suit without Court intervention. *See Ocean Garden, Inc. v. Marktrade Co.*, 953 F.2d 500, 508 (9th Cir. 1991) (six-month delay in moving for preliminary injunction excusable where parties were engaged in settlement negotiations); *Guess?, Inc. v. Tres Hermanos*, 993 F. Supp. 1277, 1286 (C.D. Cal. 1997) (same for nine-month delay).

issues"); *Marks Org., Inc. v. Joles*, 784 F. Supp. 2d 322, 333-34 (S.D.N.Y. 2011) (excusing delay "caused by good faith efforts to investigate the facts and law"). Because the scope of Defendants' unlawful practice and "the magnitude of the potential harm bec[ame] apparent gradually," Plaintiffs' decision to wait to file the suit was a "prudent delay." *Arc of California v. Douglas*, 757 F.3d 975, 990-91 (9th Cir. 2014); *accord Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019). Courts are "loath to withhold relief solely on th[e] ground [of delay]," *Arc of Cal.*, 757 F.3d at 990, and the "delay" here should not weigh against irreparable harm.

B. Plaintiffs and MPP-Unaccompanied Children Will Suffer Irreparable Harm Absent an Injunction

Defendants do not dispute that Plaintiffs may establish irreparable harm by showing that Defendants' unlawful conduct forced Plaintiffs to divert organizational resources and frustrated their institutional missions. *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013). Nor do Defendants dispute that Plaintiffs have supplied evidence that they have overhauled screening procedures, restructured staffing, engaged in representation outside of their expertise and service models, and declined clients in response to the Practice. *See* Mot. at 21-22. Defendants downplay these harms, suggesting their unlawful treatment of vulnerable children could not have impaired Plaintiffs' resources and missions, *see* Opp. at 18-20, and that the continuing harms from the Practice "will alleviate over time," *id.* at 21. Defendants' attempts to distract from Plaintiffs' evidence fail.

First, Defendants suggest that the Practice could not have "perceptibly impaired" Plaintiffs' missions because Defendants purportedly have not violated enough unaccompanied children's statutory and constitutional rights. *See* Opp. at 18 (claiming Plaintiffs did not "identify a substantial number" of MPP-unaccompanied children affected by the Practice). But Defendants' focus on the "small handful of cases per organization," *id.* at 19, is not only irrelevant to the question of irreparable harm, *cf. Arizona Dream Act Coal. v. Brewer*, 757 F.3d

1053, 1068 (9th Cir. 2014) ("*ADAC*") (district court erred in evaluating severity of harm to Plaintiffs), but ignores the extent of the harm caused by the Practice.

Each case Defendants minimize reflects a vulnerable child who has been denied their rights. The "deprivation of [these] constitutional rights 'unquestionably constitutes irreparable injury,'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012), and favors an injunction here. *See* Mot. at 22-23. Defendants, however, entirely ignore Plaintiffs' arguments and thus concede their merit. Moreover, each MPP-unaccompanied child's case is extremely burdensome to Plaintiffs, requiring disproportionate staff resources and attention that diminish Plaintiffs' organizational resources. *E.g.*, RAICES Decl. ¶ 14 (60 to 100 hours per child); The Door Decl. ¶ 24 (over 200 hours on a single case), ¶ 66 (requiring the time of 10-20 non-MPP unaccompanied child cases); ProBAR Decl. ¶ 31 (100 hours pursuing a motion to reopen for one child); ImmDef Decl. II ¶ 64 (up to 80 hours for each substantive merits motion). The Practice has also forced Plaintiffs to change their screening procedures, restructure staffing, revise the delivery of their legal services, and forgo other projects that would further their missions. *See* Mot. at 21-22.

Defendants suggest that this "small percentage" of cases could not cause irreparable harm. Opp. at 20. Defendants' speculation is no substitute for the nearly 200 pages of evidence Plaintiffs submitted with this Motion detailing the diversion of resources and institutional changes that were caused by Defendants' Practice. *E.g.*, *S.A. v. Trump*, No. 18-CV-03539-LB, 2019 WL 990680, at *9 (N.D. Cal. Mar. 1, 2019) (irreparable harm to organization where organization "had to divert more resources to assist its members affected" by new DHS policy); *cf. Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (organizational standing where organization alleged "diver[sion] [of] scarce resources from other efforts").[8]

[8] Defendants fault Plaintiffs for "*voluntarily undertaking*" MPP-unaccompanied children's particularly burdensome cases. Opp. at 20. But they ignore that Plaintiffs' missions and contractual obligations are to ensure that *all* unaccompanied children can access their TVPRA rights. ImmDef Decl. I ¶ 13; Door Decl. ¶ 49;

Second, Defendants argue that the winding down of MPP prevents any showing of irreparable harm because there will be "fewer cases" of MPP-unaccompanied children impacted by the Practice in the future and Plaintiffs' harms "will alleviate over time." Opp. at 21. But DHS's June 1, 2021 memo confirms that the "termination of MPP does not impact" MPP-unaccompanied children. Ex. 2 at 7. In fact, the memo reinforces that Plaintiffs will continue suffering irreparable harm in the immediate term—exactly what a preliminary injunction is intended to address. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008).

Moreover, despite Defendants' speculation to the contrary, Plaintiffs' experiences and evidence show that Defendants continue to deprive MPP-unaccompanied children of their rights under the TVPRA. As recently as April 2021, ProBAR had to defend against removal of an MPP-unaccompanied child under an MPP removal order. ProBAR Decl. ¶ 35. And even in the three weeks since Plaintiffs filed their Motion, LSPs have continued to encounter MPP-unaccompanied children subject to MPP removal orders entering the shelters they serve. RAICES Decl. II ¶¶ 2-7; ImmDef Decl. III ¶¶ 2-6.[9] As long as MPP-unaccompanied children continue to arrive at the shelters Plaintiffs are sub-contracted to serve, Plaintiffs must maintain their overhauled screening procedures, continue to engage in representation outside their established expertise, and divert organizational resources. ImmDef Decl. III ¶¶ 7-8. Defendants offer nothing to refute the evidence showing that Plaintiffs suffer irreparable harm each day Defendants violate MPP-unaccompanied children's TVPRA rights.

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH IN FAVOR OF AN INJUNCTION

The balance of the equities and public interest strongly favor a preliminary

---

RAICES Decl. ¶ 11; ProBAR Decl. ¶ 7.

[9] "RAICES Decl. II" refers to the Declaration of Natalia Trotter; "ImmDef Decl. III" refers to the Supplemental Declaration of Marion Donovan-Kaloust.

injunction. Defendants conclude that these factors "favor[] the Government" because: (i) the public's interest in compliance with the APA is "abstract"; (ii) Defendants have purportedly taken "substantial and prompt action"; and (iii) an injunction would create unexplained "chaos." Opp. at 21-22. Each argument fails.

First, there is nothing "abstract" about the public's interest in ensuring MPP-unaccompanied kids can fully enjoy their rights and protections under the TVPRA. As the Ninth Circuit has recognized, the public interest "is served by compliance with the APA" and the Constitution. *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018); *see Melendres*, 695 F.3d at 1002 (public interest served by "prevent[ing] the violation of a party's constitutional rights").

Second, the only action Defendants have taken to address Plaintiffs' claims has been USCIS's new guidance. *See* Mot. at 11; Ex. N[10]. While Defendants point to the wind-down of MPP, they concede that it "does not impact" MPP-unaccompanied children in the United States. Ex. 2 at 7. Until Defendants agree to stop subjecting these kids to MPP proceedings, a Court order is required to ensure "substantial and prompt action" is taken to protect MPP-unaccompanied children.

Finally, Defendants aver that a preliminary injunction would "cause chaos." Opp. at 22. But no chaos ensued when USCIS issued new guidance last month. Defendants also warn of the "risk of duplicative, competing removal proceedings," *id.*—ignoring that the parties are already burdened with duplicative and competing removal proceedings because of Defendants' Practice, *see* ProBAR Decl. ¶ 25; Door Decl. ¶¶ 28-46. Since an injunction would only require Defendants to "end an unlawful practice," they can claim no "harm" when balancing the equities. *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013).

In short, Defendants have identified no public interest in their continued unlawful conduct. Given Plaintiffs' evidence and authority, *see* Mot. at 23, the

[10] All references to exhibits with letters are from the exhibits attached to Dkt. 29-2, Blake Decl. in support of Plaintiffs' motion for preliminary injunction.

public interest "tips sharply towards" Plaintiffs and the unaccompanied kids they serve. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

IV. PLAINTIFFS' REQUESTED INJUNCTION IS APPROPRIATE

A preliminary injunction is necessary to maintain the *status quo* as this case progresses. Plaintiffs seek to enjoin Defendants from continuing to engage in an unlawful Practice that denies MPP-unaccompanied children their rights under the TVPRA and Constitution. The Proposed Order made that clear: Paragraph One enjoins Defendants from "continuing to subject" MPP-unaccompanied children "to MPP proceedings," and Paragraph Two enjoins Defendants from "continuing to deny MPP-unaccompanied children rights and benefits" under the TVPRA and Fifth Amendment and orders Defendants to "restore the *status quo*," specifically listing four steps required to do so. Dkt. No. 29-26 ("Proposed Order") at 3-4.

Defendants argue that (i) the requested injunction is purportedly too "vague and indefinite" for Defendants to comply, *see* Opp. at 14-17, and (ii) a nationwide injunction is too broad, *see id.* at 22-23. Neither argument has merit.

A. Plaintiffs Seek a Prohibitory Injunction to Preserve the *Status Quo*

At the outset, Defendants mischaracterize the relief sought by Plaintiffs as a "mandatory" injunction, subject to more exacting requirements, while offering no analysis or argument to support that assertion. *See* Opp. at 15, 17, 22. This argument is not only waived, *see Concialdi v. Jacobs Engineering Grp.*, No. CV 17-1068 FMO (GJSx), 2019 WL 3084282, at *10 n.9 (C.D. Cal. Apr. 29, 2019) (Olguin, J.) (one-sentence argument waived where it was "insufficiently developed for the court to consider it"), but is also wrong. Plaintiffs seek a *prohibitory* injunction to enjoin the Practice so that Defendants once again treat all unaccompanied kids consistently regardless of their immigration history. *See* Mot. at 2, 25; Proposed Order at 3-4. Relief that "prohibit[s] enforcement of a new law or policy" in order to "preserve[] the *status quo*" preceding Defendants' unlawful conduct is classically prohibitory. *ADAC*, 757 F.3d at 1061; *see GoTo.com, Inc. v.*

Walt Disney Co., 202 F.3d 1199, 1210 (9th Cir. 2000) (*status quo* refers to the parties' status before the challenged conduct).

The fact that Defendants must take "[a]ctions to reinstate the *status quo* [do] not convert [a] prohibitive order[] into mandatory relief." *Al Otro Lado v. Wolf*, 497 F. Supp. 3d 914, 926-27 (S.D. Cal. 2020) (collecting cases). In other words, the requested injunction is not mandatory simply because Defendants may take discrete actions as to unaccompanied children to restore the *status quo*. *See* Proposed Order at 3-4; *Hernandez*, 872 F.3d at 998 (injunction was prohibitory where *status quo* required future initial bond hearings); *ADAC*, 757 F.3d at 1061 (same where *status quo* was a legal regime under which all holders of employments documents were eligible for drivers licenses).

Plaintiffs seek a simple solution: Defendants must stop their unlawful conduct and treat MPP-unaccompanied kids as they would have treated any unaccompanied kid before adopting the Practice. This relief is prohibitory, not mandatory.[11]

B. The Requested Injunction Is Sufficiently Specific

Defendants contend that the Proposed Order violates Rule 65(d) because its provisions are too vague or simply require Defendants to "follow the law." Opp. at 15-17. Each argument, however, relies on an unduly cabined reading of the Proposed Order and ignores this Circuit's pragmatic approach to fair notice.

First, Defendants argue that Paragraph Two is not sufficiently detailed. *Id.* at 15-17. Defendants claim they do not understand what a "legally sufficient NTA" is. *Id.* at 16. But the baseline statutory requirements for an NTA are clear. *See* 8 U.S.C. § 1229(a). If Defendants remain confused what else the term means "in this

[11] Even if Defendants were correct that Plaintiffs seek a mandatory injunction, they offer no argument or authority why Plaintiffs do not satisfy their burden for mandatory relief. *See Ms. L. v. U.S. Imm. & Customs Enf't*, 310 F. Supp. 3d 1133, 1141 n.8 (S.D. Cal. 2018) (refusing to reach whether plaintiffs sought prohibitory or mandatory relief because "Plaintiffs have met their burden" as to either). Plaintiffs meet this burden: they have established a strong likelihood of success on the merits of their claims and that the equities clearly favor an injunction. Mot. at 12-23.

context," Opp. at 16, they should look to the "circumstances surrounding [the order's] entry," rather than focus on the term in isolation, *Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1133-34 (9th Cir. 2006). Plaintiffs have explained how Defendants have refused to issue NTAs to MPP-unaccompanied children reflecting all information required by the statute and their policies when the kids are first screened and before transfer to ORR. *E.g.*, Mot. at 6-7. This runs afoul of the INA and Defendants' own handbook, which requires all unaccompanied kids to have NTAs "reviewed for legal sufficiency" before transfer to ORR. *See* Ex. B at 33. In this context, Defendants cannot credibly claim that they lack sufficient notice of what is meant by a "legally sufficient NTA." *See Toyo Tire & Rubber Co. v. Hong Kong Tri-Ace Tire Co.*, 281 F. Supp. 3d 967, 977 (C.D. Cal. 2017) (considering context of injunction to conclude that Rule 65(d) was satisfied).[12]

Defendants' complaint that the Proposed Order does not list all steps they must take to restore the *status quo*, Opp. at 16-17, is undermined by Plaintiffs' detailed briefing and evidence of Defendants' unlawful actions. *See* Mot. at 6-11. Defendants are certainly aware of the actions they took before implementing the Practice to, for example, ensure unaccompanied kids were timely released to sponsors, were not improperly removed, and when appropriate, were returned to the United States.[13] The requested injunction simply requires Defendants to take the actions they would have taken but for the unlawful Practice. The failure to specify every "necessary" or "procedural step" for Defendants to comply with the

[12] Defendants' conclusory attacks on the language in Paragraph 1 track these objections, *see* Opp. at 15 (arguing that the language is "inherently vague and difficult to understand, and compliance would be impossible"), fail for the same reasons, especially because the central dispute in this litigation relates to how Defendants "subject[] MPP-unaccompanied children to MPP," *see* Mot. at 2, 16, 19.

[13] Indeed, Defendants have detailed policies addressing these very situations, further belying their assertion that they are unaware what steps would need to be taken to comply with the Proposed Order. *See, e.g.*, Ex. B; U.S. Dep't of Homeland Sec., U.S. Immigration & Customs Enf't, *FAQs: Facilitating Return for Lawfully Removed Aliens* (last updated Nov. 3, 2020), https://www.ice.gov/remove/facilitating-return.

prohibitory injunction does not violate Rule 65(d). *See, e.g., Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1086-87 (9th Cir. 2004) (injunction complies with Rule 65(d) even if it "declines to provide [the defendant] with explicit instructions on the appropriate means to accomplish this directive."); *Ms. L*, 310 F. Supp. 3d at 1149-50 (entering injunction ordering defendants to take "all steps necessary); *cf. Indep. Living Res. v. Or. Arena Corp.*, 1 F. Supp. 2d 1159, 1173 n.16 (D. Or. 1998) (leaving "logistical matters" concerning the implementation of an injunction "in the capable hands of the [defendants]").[14]

Second, Defendants contend that Paragraph Two amounts to little more than "a bare injunction to follow the law." Opp. at 15-16. Not so. The result of the Court enjoining the Practice will be that Defendants return to the *status quo* where all unaccompanied children are afforded their TVPRA rights. But Plaintiffs do not simply ask the Court to order Defendants to "comply with the TVPRA." *Cf. United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1137-38 (D.C. Cir. 2009) (injunction was "sufficiently specific" where "[t]he district court did not abstractly enjoin Defendants from violating RICO"). The Proposed Order details what the *status quo* requires, and thus is not vague. *See United States v. Miller*, 588 F.2d 1256, 1261 (9th Cir. 1978) (injunction is not vague merely because it "is framed in language almost identical to the statutory mandate").

When read in context, the requested injunction is not "so vague that [it has] no reasonably specific meaning." *Fortyune*, 364 F.3d at 1087. Instead, it provides Defendants sufficient notice of the actions that must be taken to stop the unlawful Practice and restore the *status quo*.[15]

---

[14] Defendants' effort to read ambiguity into Paragraph Two by latching onto the word "including," Opp. at 15-16, fails. *E.g., NAC Found., LLC v. Jodoin*, No. 2:16-cv-01039-GMN-VCF, 2016 WL 4059648, at *3 (D. Nev. July 26, 2016) (injunction enjoining defendant from certain acts, "including, but not limited to" disparaging plaintiff, satisfied Rule 65).

[15] In any event, any lack of specificity provides no basis for denying Plaintiffs relief because the Court retains discretion to amend any language before or after issuance

C. A Nationwide Injunction Is Necessary to Protect Plaintiffs and Their Clients and No Stay Should Be Granted

A nationwide injunction is needed to restore the *status quo* for Plaintiffs and all MPP-unaccompanied children affected by the Practice. Defendants do not dispute that the Court has "'considerable' discretion in crafting suitable equitable relief." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 680 (9th Cir. 2021). And they entirely ignore, and thus concede, *see Jenkins*, 398 F.3d at 1095 n.4, Plaintiffs' arguments showing that a nationwide injunction is appropriate where: (i) the plaintiffs "do not operate in a fashion that permits neat geographic boundaries"; (ii) unlawful agency action is challenged under the APA; and (iii) an injunction would promote "uniformity in immigration policy." Mot. at 24-25.

In their Opposition, Defendants insist that an injunction would require "a nationwide programmatic overhaul" that would "place an unnecessary strain on Government and Court resources." Opp. at 23. But Defendants do not explain why a prohibitory order that they abandon the Practice and return to their prior practices would force them to "overhaul" anything or would "strain" their resources (or this Court's). Defendants' own conduct in this litigation shows that the requested relief is not a heavy lift. Defendant USCIS recently agreed to stop unlawfully denying jurisdiction for MPP-unaccompanied child asylum applications and issued guidance confirming its initial jurisdiction of affirmative asylum applications for *all* unaccompanied kids, including those with MPP removal orders. Mot. at 11; Ex. N.

Defendants' remaining attempts to avoid a nationwide injunction also fail. Defendants again tout their efforts to wind down MPP and claim that there would be "no reason to expect" additional MPP-unaccompanied children presenting at the border in the future, Opp. at 23. But Plaintiffs have encountered new MPP-

---

of an injunction. *E.g., Hub Int'l of Cal. Ins. Servs., Inc. v. Kilzer*, No. C-06-5227 MMC, 2007 WL 1521535, at *1 (N.D. Cal. May 24, 2007) (amending injunction to clarify language); *Cupolo v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078, 1086 (N.D. Cal. 1997) (granting injunction, but ordering plaintiff to propose amended language).

unaccompanied children even in the three weeks since filing their Motion. *See* RAICES Decl. II ¶¶ 2-6; ImmDef Decl. III ¶¶ 2-8. And while Defendants cast their denial of unaccompanied children's TVPRA and constitutional rights as "inconveniences [ ] experienced in the past," Opp. at 23, Plaintiffs continue to encounter, and to be required to expend substantial resources defending, unaccompanied children subject to existing MPP removal orders that Defendants have attempted to execute, *see* Mot. at 21-22. Defendants also suggest that an injunction is inappropriate because this case presents "discrete problems" for individual children. Opp. at 22-23. The fact that Defendants' unlawful conduct manifests itself in individual cases provides no basis for refusing to enjoin the Practice wherever it is in operation. *Cf. Hernandez*, 872 F.3d at 998 (affirming injunction setting aside unlawful practice that denied individual detainees bond hearings).[16] And, moreover, Defendants' Practice causes *systemic* problems for Plaintiffs, which have had to radically restructure how they serve all of their clients.

Finally, Defendants' request for a stay of any injunction is unsubstantiated, ill-timed, and inappropriately directed to this Court. *See* Opp. at 24; *Nken v. Holder*, 556 U.S. 418, 433–34 (2009) (party seeking a stay pending appeal "bears the burden of showing that the circumstances justify" it). This request should be denied.[17]

CONCLUSION

For the reasons set forth herein, and in Plaintiffs' Memorandum of Points and Authorities and supporting declarations, Plaintiffs' Motion should be granted.

[16] Defendants also appear to suggest, without authority, that they have harmed too few children have to warrant injunctive relief. *See* Opp. at 22-23. But even if Defendants have only unlawfully denied rights to "a few dozen" kids—which Plaintiffs dispute, *e.g.*, Mot. at 6 (noting that at least 700 children have been denied TVPRA rights); Ex. L (same)—the burden on Defendants would therefore be "a mild one," even if the injunction were mandatory. *Hernandez*, 872 F.3d at 999-1000 (affirming injunction requirement to "conduct a relatively small number of new hearings" for those detained due to defendants' unlawful procedures).

[17] To the extent the Court considers this request, Plaintiffs respectfully request the opportunity to fully brief these issues, consistent with Defendants' burden.

SIMPSON THACHER & BARTLETT LLP

By */s/ Stephen Blake*
STEPHEN P. BLAKE (260069)
sblake@stblaw.com
HARRISON J. FRAHN, IV (206822)
hfrahn@stblaw.com
2475 Hanover Street
Palo Alto, California 94304
Telephone: (650) 251-5000
Facsimile: (650) 251-5002

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

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

IMMIGRANT DEFENDERS LAW CENTER

By */s/ Meeth Soni*

MUNMEETH KAUR SONI (254854)
meeth@immdef.org
HANNAH K. COMSTOCK (311680)
hcomstock@immdef.org
CAITLIN E. ANDERSON (324843)
caitlin@immdef.org
634 S. Spring Street, 10th Floor
Los Angeles, California 90014
Telephone: (213) 634-0999
Facsimile: (213) 282-3133

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

JUSTICE ACTION CENTER

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

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

ECF Certification

Pursuant to L.R. 5-4.3.4(a)(2)(i), the filer attests that all other signatories listed, and on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

Dated: June 3, 2021

SIMPSON THACHER & BARTLETT LLP

By */s/ Stephen Blake*

Stephen P. Blake (260069)
sblake@stblaw.com
2475 Hanover Street
Palo Alto, CA 94304
Telephone: (650) 251-5153
Facsimile: (650) 251-5002

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