

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

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

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

18 [Additional counsel listed below]

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

22 IMMIGRANT DEFENDERS LAW
23 CENTER; *et al.*,
24
25 Plaintiffs,
26
27 v.
28 U.S. DEPARTMENT OF HOMELAND
SECURITY; *et al.*,
Defendants.

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

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS PLAINTIFFS' FIRST
AMENDED COMPLAINT**

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

1 KAREN C. TUMLIN (234691)
 karen.tumlin@justiceactioncenter.org
 2 ESTHER H. SUNG (255962)
 esther.sung@justiceactioncenter.org
 3 JANE BENTROTT (323562)
 jane.bentrott@justiceactioncenter.org
 4 DANIEL J. TULLY (309240)
 daniel.tully@justiceactioncenter.org
 5 JUSTICE ACTION CENTER
 P.O. Box 27280
 6 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

7
 8 *Attorneys for Plaintiffs Immigrant*
 9 *Defenders Law Center; Refugee and*
 10 *Immigrant Center for Education and*
 11 *Legal Services; and The Door*

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TABLE OF AUTHORITIES

CASES

A Cmty. Voice v. EPA,
No. 19-71930, 2021 WL 1940690 (9th Cir. May 14, 2021) 19

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967) 21

Abramowitz v. EPA,
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Al Otro Lado, Inc. v. McAleenan,
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Al Otro Lado, Inc. v. McAleenan,
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Ali v. Ashcroft,
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Aracely, R. v. Nielsen,
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Bell Atlantic Corp. v. Twombly,
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Bennett v. Spear,
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Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.,
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1 *Ciba-Geigy Corp. v. EPA*,
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 19 *East Bay Sanctuary Covenant v. Biden*,
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 21
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 25 *El Rescate Legal Servs., Inc. v. Exec. Off. of Immigr. Rev.*,
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 27
 28 *Fair Hous. of Marin v. Combs*,
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Flores v. Johnson,
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Flores v. Reno,
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Havens Realty Corp. v. Coleman,
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1 *Hearns v. San Bernardino Police Dep’t*,
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 11 *NWDC Resistance v. Immigr. & Customs Enf’t*,
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1 *Spencer Enterprises, Inc. v. U.S.*,
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OTHER AUTHORITIES

11 154 Cong. Rec. S10887 8

12 H.R. Rep. No. 110-430 (2007) 8

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1 **INTRODUCTION**

2 Defendants concede that the Trafficking Victims Protection Reauthorization
3 Act (“TVPRA”) guarantees specific statutory rights to unaccompanied children.
4 Yet, Defendants move to dismiss Plaintiffs’ claims that would protect the TVPRA
5 rights of unaccompanied children who had previously been placed in the Trump
6 Administration’s Migrant Protection Protocols (referred to as “MPP-
7 unaccompanied children”). Plaintiffs’ First Amended Complaint (“Complaint”)
8 alleges numerous ways that Defendants have subjected—and continue to subject—
9 unaccompanied children to MPP, exposing them to the instability, uncertainty, and
10 danger of removal to countries where they have no one to care for them.
11 Defendants’ actions have irreparably harmed Plaintiffs, legal service providers
12 (“LSPs”) whose mission is to serve unaccompanied children.

13 Defendants seek dismissal through a series of convoluted justiciability and
14 jurisdictional arguments, which, if accepted, would leave Plaintiffs and their MPP-
15 unaccompanied child clients with no recourse before this, or any other, Court. At
16 bottom, Defendants’ position is that MPP-unaccompanied children are first and
17 foremost MPP respondents whose entitlements under the TVPRA are secondary
18 and, thus, disposable. But Congress, the courts, and Defendants’ own regulations
19 and policies require otherwise. MPP-unaccompanied children are unaccompanied
20 children who are entitled to the full benefit of the TVPRA. Defendants have no
21 discretion to dilute, let alone deny, these rights. Plaintiffs have sufficiently pled
22 facts showing they continue to divert organizational resources and take drastic
23 measures to preserve their clients’ rights under the TVPRA. There is no
24 jurisdictional bar prohibiting Plaintiffs’ claims. This Court should therefore deny
25 Defendants’ motion.

26 **BACKGROUND**

27 In January 2019, the Trump Administration began implementing MPP.
28 Under that policy, asylum seekers were forced to return to Mexico to await their

1 immigration proceedings, often in dangerous and unsanitary encampments where
2 they were vulnerable to kidnapping, rape, assault, and illness. First Amended
3 Complaint (“FAC”) ¶ 120. As a result of this policy, some children who were
4 previously processed through MPP with their parents were later separated and
5 entered the United States alone. *Id.* ¶ 5.¹

6 Given their inherent vulnerability, children who enter the United States alone
7 are designated “unaccompanied” and automatically entitled to a panoply of rights
8 and protections under the TVPRA. *See* Motion to Dismiss (“MTD”) at 2-3; FAC
9 ¶¶ 57-78. These rights include guaranteed access to non-adversarial asylum
10 proceedings; the right to be placed in the least restrictive setting that is in the best
11 interest of the child; access to counsel to the “greatest extent practicable”;
12 protection from the reinstatement of prior removal orders; and, if necessary, the
13 right to “safe and sustainable repatriation” to the child’s home country. 8 U.S.C.
14 §§ 1158(a)(2)(E), (b)(3)(C); 1232(a)(2), (a)(5)(D), (c)(1), (c)(2)(A), (c)(5), (d)(8);
15 *see also* FAC ¶¶ 57-78. Congress guaranteed these rights to all unaccompanied
16 children, regardless of any prior immigration proceedings. *Id.* ¶¶ 9, 62, 69. These
17 children are also connected to LSPs, like Plaintiffs, that are sub-contracted by the
18 Office of Refugee Resettlement (“ORR”) to ensure these children receive the full
19 benefit of their TVPRA protections. FAC ¶ 72.

20 Defendants deny MPP-unaccompanied children their guaranteed rights under
21 the TVPRA. *Id.* ¶¶ 140-214. Despite Defendants’ stated policy that
22 “[u]naccompanied [] children . . . will not be subject to MPP,” Defendants use
23 MPP-unaccompanied children’s prior MPP proceedings to bar access to their
24 TVPRA rights by, among other things: (i) failing to issue legally sufficient Notices
25

26 ¹ Thus, for example, some children who were initially “riders” to their parents’
27 asylum applications in MPP—without the opportunity to advance claims of their
28 own—later found themselves in U.S. custody, compelled to navigate any
immigration claims alone. *Id.* ¶¶ 127, 133, 180.

1 To Appear (“NTA”) reflecting each child’s most recent entry; (ii) unreasonably
 2 delaying children’s release to sponsors; (iii) enforcing MPP removal orders; (v)
 3 failing to ensure safe repatriation; and (vi) failing to guarantee children’s access to
 4 affirmative asylum (collectively referred to as the “Practice”). *Id.* ¶¶ 150-53, 159-
 5 63, 169-78, 186-92, 197, 205-25.

6 Defendants’ unlawful Practice harms Plaintiffs and their unaccompanied
 7 child clients, forcing Plaintiffs to divert resources and take extraordinary measures
 8 to ensure MPP-unaccompanied children receive their TVPRA rights and protections
 9 as Congress intended. *Id.* ¶¶ 150-53, 159-63, 169-78, 186-92, 197, 205-25, 241,
 10 249, 256, 263.

11 ARGUMENT

12 Courts may not dismiss a complaint for failure to state a claim where a
 13 plaintiff has alleged “enough facts to state a claim to relief that is plausible on its
 14 face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A court must
 15 accept all well-pled factual allegations in a complaint as true; construe those
 16 allegations “in the light most favorable” to plaintiffs, *Silvas v. E*Trade Mortg.*
 17 *Corp.*, 514 F.3d 1001, 1003 (9th Cir. 2008) (citation omitted); and “then determine
 18 whether they plausibly give rise to an entitlement to relief,” *Ashcroft v. Iqbal*, 556
 19 U.S. 662, 679 (2009); *see also Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir.
 20 2010) (same). Although “*Iqbal* demands more of plaintiffs than bare notice
 21 pleading,” “it does not require [the court] to flyspeck complaints looking for any
 22 gap in the facts.” *Lacey v. Maricopa Cty.*, 693 F.3d 896, 924 (9th Cir. 2012).²

23
 24 ² Defendants make the extraordinary argument that the Complaint violates Rule 8 of
 25 the Federal Rules of Civil Procedure because it is “prolix.” MTD at 24. The Ninth
 26 Circuit has recognized that even a complaint with “excessively detailed factual
 27 allegations” should not be dismissed where it sets forth “coherent, well-organized,
 28 and [] legally viable claims.” *Hearns v. San Bernardino Police Dep’t*, 530 F.3d
 1124, 1127 (9th Cir. 2008) (vacating dismissal of plaintiff’s 81-page complaint); *see*
 also *Dichter-Mad Fam. Partners, LLP v. United States*, 707 F. Supp. 2d 1016, 1019
 (C.D. Cal. 2010) (denying dismissal, over defendant’s Rule 8 arguments, of
 plaintiff’s “unusually long” complaint), *aff’d*, 709 F.3d 749 (9th Cir. 2013). To the
 extent Defendants seek to be “relieve[d]” of their own obligations under Rule 8, *see*

1 **I. PLAINTIFFS HAVE STANDING**

2 **A. Plaintiffs Have Adequately Pled Article III Standing**

3 The Supreme Court has long held that, where a defendant’s “practices have
4 perceptibly impaired” an organizational plaintiff’s service of their clients, “there
5 can be no question that the organization has suffered injury in fact.” *Havens Realty*
6 *Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *see also El Rescate Legal Servs., Inc.*
7 *v. Exec. Off. of Immigr. Rev.*, 959 F.2d 742, 748 (9th Cir. 1992). In other words, an
8 organization has Article III standing where “the defendant’s behavior has frustrated
9 [the organization’s] mission and caused it to divert resources in response to that
10 frustration of purpose.” *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663
11 (9th Cir. 2021) (“*EBSC III*”) (citing *Fair Hous. of Marin v. Combs*, 285 F.3d 899,
12 905 (9th Cir. 2002)). The Complaint satisfies this standard.

13 Rather than engage with the relevant legal standard and Plaintiffs’ factual
14 allegations demonstrating organizational standing, Defendants argue that Plaintiffs
15 lack standing because they allegedly have not been “forced to divert resources” or
16 shown “that any Government actions have jeopardized their client base or funding.”
17 MTD at 4. The Ninth Circuit, however, has never *required* such a showing. *Cf.*
18 *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 766-67 (9th Cir. 2018)
19 (“*EBSC I*”) (explaining that “los[s of] a substantial amount of funding” is an
20 alternative way to show standing).

21 In any event, Plaintiffs have adequately pled facts showing they have
22 “expended additional resources that they would not otherwise have expended, and
23 in ways that they would not have expended them.” *Nat’l Council of La Raza v.*
24 *Cegavske*, 800 F.3d 1032, 1039–41 (9th Cir. 2015); FAC ¶¶ 150-53, 159-63, 169-
25 78, 186-92, 194-97, 205-25. Plaintiffs’ shared core mission is to provide legal
26 services to unaccompanied children. FAC ¶¶ 17, 24, 31, 37. The Complaint details

27 _____
28 MTD at 24, they fail to cite a single example from the Complaint of purportedly
“irrelevant” material.

1 the ways in which Plaintiffs have built their legal services models in reliance on the
2 TVPRA’s guarantees. *Id.* ¶¶ 93-102. However, Plaintiffs’ systems of serving
3 unaccompanied clients have had to undergo drastic changes since the United States
4 Department of Homeland Security (“DHS”) started violating its policy of
5 exempting unaccompanied children from MPP. *Id.* ¶¶ 143-225, 246. Plaintiffs had
6 to change their screening procedures, re-organize staffing, and create new trainings
7 and procedures to address the unique needs of their new MPP-unaccompanied child
8 client base. *See* FAC ¶¶ 150-63, 169-78, 186-192. Because Defendants abandoned
9 their TVPRA obligations to MPP-unaccompanied children, Plaintiffs must
10 represent MPP-unaccompanied children in MPP courts outside of Plaintiffs’
11 jurisdictions and in proceedings that are beyond the scope of Plaintiffs’ operations
12 and legal expertise. *EBSC I*, 932 F.3d at 766; *Nat’l Council of La Raza*, 800 F.3d
13 1032 at 1039-41; *see* FAC ¶¶ 143-225, 246.

14 These allegations show how Defendants’ unlawful Practice has “perceptibly
15 impaired” Plaintiffs’ ability to provide services as contemplated by their missions
16 and the TVPRA, which is sufficient to show a diversion of resources for Article III
17 standing at this stage. *El Rescate Legal Services*, 959 F.2d at 748 (holding that an
18 organization established to provide specific services suffers injuries where
19 defendants’ practice impairs its ability to provide those services); *cf. Nat’l Council*
20 *of La Raza v.*, 800 F.3d 1032 at 1040 (“The Court has also made clear that a
21 diversion-of-resources injury is sufficient to establish organizational standing at the
22 pleading stage, even when it is ‘broadly alleged.’” (citation omitted)).

23 Defendants also argue that Plaintiffs lack standing because their injuries are
24 “not out of necessity to prevent harm to their organizations or their missions.”
25 MTD at 5. Defendants are wrong. This is not a situation where Plaintiffs
26 “manufacture[d] the injury by incurring litigation costs or simply choosing to spend
27 money fixing a problem that otherwise would not affect the organization at all.” *La*
28 *Asociación de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083,

1 1088 (9th Cir. 2010); *see* MTD at 5. Plaintiffs are ORR-subcontracted LSPs
 2 responsible for serving all unaccompanied children detained in their respective
 3 geographic service areas. FAC ¶¶ 93-95, 100, 192. Plaintiffs are tasked with
 4 ensuring their unaccompanied child clients can effectuate their TVPRA rights.
 5 When Defendants deny or prevent an MPP-unaccompanied child from accessing his
 6 or her TVPRA rights, Plaintiffs must defend that child. Plaintiffs’ injuries are thus
 7 not “self-inflicted”; they are caused by Defendants withholding TVPRA protections
 8 from Plaintiffs’ clients.

9 Ultimately, Defendants cannot escape that Plaintiffs’ injuries are materially
 10 identical to the frustration of mission and diversion of resources that have long
 11 sufficed to show organizational standing in the Ninth Circuit.³ *See Nat’l Council of*
 12 *La Raza*, 800 F.3d at 1039-41 (finding organizational standing where Plaintiffs
 13 “changed their behavior” and “expended additional resources that they would not
 14 otherwise have expended” as a result of the state’s violation); *EBSC III*, 933 F.3d at
 15 663(same, where organization had to represent clients outside their core client
 16 base); *El Rescate Legal Services*, 959 F.2d at 748 (holding that plaintiffs established
 17 standing by pleading that their collective missions to represent migrants in
 18 immigration proceedings were “perceptibly impaired” by EOIR’s practice and
 19 policy of using incompetent translators and its failure to translate portions of the
 20 proceedings).

21 **B. Plaintiffs Are Within the Immigration and Nationality Act’s**
 22 **(“INA’s”) Zone of Interests**

23 Courts apply the zone of interests test to “determine, using traditional tools of
 24 statutory interpretation, whether a legislatively conferred cause of action

25 ³ Defendants also argue that Plaintiffs lack standing because their injuries arise from
 26 a “change in the law.” MTD at 5. Notwithstanding that Plaintiffs do not challenge a
 27 *change* but a *violation* of the law, Defendants’ out-of-circuit authority is inapposite.
 28 *See Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015)
 (rejecting organizational standing based on hypothetical injuries); *Nat’l Taxpayers*
Union, Inc. v. United States, 68 F.3d 1428, 1434 (D.C. Cir. 1995) (same).

1 encompasses a particular plaintiff’s claim.” *Lexmark Int’l, Inc. v. Static Control*
2 *Components, Inc.*, 572 U.S. 118, 127 (2014). Defendants concede that the zone of
3 interests test under the Administrative Procedure Act (“APA”) is “not ‘especially
4 demanding’” and that it “forecloses suit ‘only when a plaintiff’s interests are so
5 marginally related to or inconsistent with the purposes implicit in the statute that it
6 cannot reasonably be assumed that Congress authorized that plaintiff to sue.’” MTD
7 at 6 (quoting *Static Control Components*, 572 U.S. at 130; *see also Clarke v. Sec.*
8 *Indus. Ass’n*, 479 U.S. 388, 396 (1987); *Legal Assistance for Vietnamese Asylum*
9 *Seekers v. Dep’t of State*, 45 F.3d 469, 471-72 (D.C. Cir. 1995) (finding American
10 citizen sponsors were within zone of interests protected by the INA because the INA
11 authorized the immigration of their family members, and “the zone of interest test
12 does not necessarily require a specific congressional purpose to benefit the would-be
13 plaintiff”), *vacated on other grounds*, 519 U.S. 1 (1996). Plaintiffs clear this low
14 bar.

15 Defendants do not argue that Plaintiffs’ interests are “inconsistent with” the
16 purpose of the TVPRA or that they are “so marginally related to” the purposes
17 implicit in the statute. *Clarke*, 479 U.S. at 396; *see* MTD at 6-7. Instead,
18 Defendants sidestep this standard entirely and rest their argument on Justice
19 O’Connor’s in-chambers opinion in *INS v. Legalization Assistance Project*, 510 U.S.
20 1301 (1993), which the Ninth Circuit has expressly rejected as “non-binding” and
21 “concededly ‘speculative.’” MTD at 6-7 (citing *Legalization Assistance Project*,
22 510 U.S. at 1305 (O’Connor, J., on application for a stay)); *EBSC I*, 932 F.3d at 769
23 n.10 (“We reject the Government’s invitation to rely on *INS v. Legalization*
24 *Assistance Project*[.]”).

25 Defendants’ attempt to distinguish *EBSC I* also falls flat. *See* MTD at 7 n.4.
26 Just as those plaintiff “[o]rganizations’ interest in aiding immigrants seeking
27 asylum is consistent with the INA’s purpose to ‘establish[] . . . [the] statutory
28 procedure for granting asylum to refugees,” *EBSC I*, 932 F.3d at 768, Plaintiffs’

1 interest in ensuring that unaccompanied children are afforded the protections
 2 guaranteed by the TVPRA is consistent with the TVPRA’s purpose of “[p]reventing
 3 the trafficking of unaccompanied alien children found in the United States by
 4 ensuring that they are not repatriated into the hands of traffickers or abusive
 5 families, and are well cared for.” H.R. Rep. No. 110-430, at 35 (2007). Indeed,
 6 Plaintiffs here are subcontracted by ORR specifically to fulfill the TVPRA’s
 7 Congressional mandate to “provide[] for pro bono legal representation for
 8 unaccompanied alien children in their immigration matters, where possible[.]” 154
 9 Cong. Rec. S10887 (daily ed. Dec. 10, 2008); *see also* 8 U.S.C. § 1232(c)(5)
 10 (requiring that unaccompanied children be given access to counsel to the greatest
 11 extent practicable). Defendants’ actions adversely affect Plaintiffs because they
 12 cannot perform their duties as contemplated by Congress.⁴

13 **II. THE INA DOES NOT BAR REVIEW OR RELIEF**

14 **A. Section 1252(b)(9) Does Not Foreclose Jurisdiction**

15 Defendants contend that Section 1252(b)(9) strips this Court of jurisdiction to
 16 review any actions “linked to removal proceedings and orders of removal.” MTD
 17 at 10. But that is not the standard. The operative inquiry is instead whether
 18 Plaintiffs’ claims raise *legal questions* that “arise from” actions taken to remove an
 19 immigrant. *See Jennings v. Rodriguez*, 138 S.Ct. 830, 841, 841 n.3 (2018)
 20 (plurality opinion recognized as controlling in *Dep’t of Homeland Sec. v. Regents of*
 21 *the Univ. of Cal.*, 140 S.Ct. 1891, 1907 (2020)); *Al Otro Lado, Inc. v. McAleenan*,
 22 423 F. Supp. 3d 848, 863 (S.D. Cal. 2019). Legal questions that do *not* arise from
 23 such actions are collateral to removal proceedings, unreviewable on a petition for
 24 review (“PFR”), and not barred. *Las Americas Immigrant Advoc. Ctr. v. Trump*,

25 _____
 26 ⁴ Defendants’ contention that Plaintiffs assert “‘no judicially cognizable interest’ in
 27 the ‘enforcement of the immigration laws’” is also misplaced. MTD at 8 (citing
 28 *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984)). *Sure-Tan* describes “limitations
 on third-party, not organizational, standing,” and third-party standing is not at issue
 here. *EBSC III*, 993 F.3d at 664 n.6.

1 475 F. Supp. 3d 1194, 1208 (D. Or. 2020) (explaining that § 1252(b)(9) does not
2 bar “claims that [are] unreviewable through the PFR process,” which are
3 “necessarily independent and collateral”). Because Plaintiffs’ claims do not arise
4 from removal proceedings and are unreviewable in the PFR process, they are not
5 barred.

6 Before *Jennings*, the Ninth Circuit treated Section 1252(b)(9) and its
7 counterpart Section 1252(a)(5) as channeling through the PFR process “any issue—
8 whether legal or factual—arising from any removal-related activity.” *J.E.F.M. v.*
9 *Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016). But the Supreme Court rejected this
10 “expansive interpretation of § 1252(b)(9) [because it] would lead to staggering
11 results,” *Jennings*, 128 S.Ct. at 840, and the Ninth Circuit has since corrected
12 course. See *Gonzalez v. U.S. Immigr. & Customs Enf’t*, 975 F.3d 788, 810 (9th Cir.
13 2020) (discussing effect of *Jennings*). Defendants nevertheless rely on outdated
14 authority, describing Section 1252(b)(9) as “broad” and “capacious,” see MTD at 9-
15 10, despite this Circuit now construing the provision as “targeted and narrow,”
16 *Gonzalez*, 975 F.3d at 810 (quoting *Dep’t of Homeland Sec. v. Regents of the Univ.*
17 *of Cal.*, 140 S.Ct. at 1907).

18 The legal questions raised in Plaintiffs’ claims do not “arise from” removal
19 actions because Plaintiffs do not ask this Court to directly “review . . . an order of
20 removal; . . . the decision . . . to seek removal; . . . [or] any part of the process by
21 which . . . removability will be determined.”⁵ *Jennings*, 138 S.Ct. at 841, 841 n.3;
22 see also *Al Otro Lado*, 423 F. Supp. 3d at 863. Rather, Plaintiffs ask this Court to
23 hold Defendants to their obligations under the TVPRA and their own regulations
24

25 ⁵ Full vindication of Plaintiffs’ clients’ rights may “have an impact on some
26 removals.” *NWDC Resistance v. Immigr. & Customs Enf’t*, 493 F. Supp. 3d 1003,
27 1013 (W.D. Wash. 2020). But that does not condemn Plaintiffs’ claims. Even
28 where a litigant’s “ultimate goal” is to “overturn [a] final order of removal,” this
Court retains jurisdiction over the type of collateral issues raised by the Complaint.
See *Singh v. Gonzales*, 499 F.3d 969, 979 (9th Cir. 2007).

1 and policies, which together ensure that unaccompanied children receive due
2 process. FAC ¶¶ 64-72. Courts within this Circuit have previously found
3 challenges requesting identical relief to survive Section 1252(b)(9). *See Al Otro*
4 *Lado*, 423 F. Supp. 3d at 863 (exercising jurisdiction where the “very relief
5 Plaintiffs seek is to commence [removal] proceedings and have their asylum claims
6 adjudicated”).

7 Jurisdiction is especially appropriate because Plaintiffs have no other means
8 of challenging Defendants’ Practice.

9 Plaintiffs are not individual [noncitizens] and they are not bringing
10 claims on behalf of any [noncitizen]. They therefore do not have
11 access to the PFR process for their asserted claims. Allowing
12 organizational plaintiffs to bring claims alleging systemic problems,
independent of any removal orders, that allegedly cause harms
specific to those organizations does not thwart the purpose of
§ 1252(b)(9)).

13 *Las Americas Immigrant Advoc. Ctr*, 475 F. Supp. 3d at 1208-09. Release from
14 ORR custody—like detention—cannot be challenged via PFR. *See Jennings*, 138
15 S.Ct. at 840-41 (observing that prolonged detention claims are effectively
16 unreviewable on PFR and holding § 1252(b)(9) does not strip jurisdiction);
17 *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018) (affirming district court
18 jurisdiction over detention claim). Access to asylum before USCIS is likewise
19 “collateral to” removal proceedings and unreviewable on PFR. *EBSC III*, 993 F.3d
20 at 667 (describing affirmative asylum as “collateral to the process of removal” and
21 exercising jurisdiction over plaintiffs’ claims). In sum, Plaintiffs’ claims cannot be
22 remedied by a circuit court’s “determination that the BIA or IJ acted contrary to
23 law,” so they are not jurisdictionally barred under Section 1252(b)(9). *Torres v.*
24 *Dep’t of Homeland Sec.*, 411 F. Supp. 3d 1036, 1049 (C.D. Cal. 2019); *see also*
25 *E.O.H.C. v. Sec’y U.S. Dep’t of Homeland Sec.*, 950 F.3d 177, 186 (3d Cir. 2020)
26 (holding § 1252(b)(9) “does not strip jurisdiction when [noncitizens] seek relief that
27 courts cannot meaningfully provide alongside review of a final order of removal”).
28

1 **B. Section 1252(f) Does Not Foreclose Injunctive Relief**

2 Defendants also overlook the exceptions to Section 1252(f)'s limits on
3 "enjoin[ing] or restrain[ing] the operation of" Sections 1221 through 1232. 8
4 U.S.C. § 1252(f). The Ninth Circuit has held that "Section 1252(f) prohibits only
5 injunction of 'the operation of' the detention statutes, not injunction of a *violation of*
6 *the statutes.*" *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) (emphasis
7 added); *see also Ali v. Ashcroft*, 346 F.3d 873, 886 (9th Cir. 2003) (same), *vacated*
8 *on unrelated grounds sub nom. Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005).
9 Because Plaintiffs seek only to enjoin statutory *violations*, this Court may remedy
10 their injuries by ordering Defendants to meet their TVPRA obligations without
11 constraining the proper operation of Sections 1221 through 1232. *See* FAC ¶¶ 232-
12 33, 236-40, 246-47, 253-54, 260, 264. Section 1252(f) therefore does not prohibit
13 injunctive relief. *See Ali*, 346 F.3d at 886.⁶

14 Additionally, Plaintiffs' claims arise under the TVPRA and its implementing
15 regulations, which are codified outside the statutory sections subject to Section
16 1252(f). *See* FAC ¶ 15 (citing 8 U.S.C. § 1158 and agency regulations as bases for
17 claims). The INA does not restrict the type of relief available for these challenges.
18 *Gonzalez*, 975 F.3d at 813 ("[T]he statute's plain text makes clear that its
19 limitations on injunctive relief do *not* apply to *other* provisions of the INA" or
20 administrative regulations or policies) (emphasis in original).

21 **C. Section 1252(g) Does Not Foreclose Jurisdiction**

22 Nor is this Court's jurisdiction foreclosed under Section 1252(g), which bars
23 review of the Attorney General's discretionary decision to "commence proceedings,
24 adjudicate cases, or execute removal orders." 8 U.S.C. § 1252(g); *see* MTD at 13-
25

26 ⁶ Should the Court grant declaratory relief, Defendants' Section 1252(f) arguments
27 are further inapposite. *See Rodriguez*, 591 F.3d at 1119 ("It is simply not the case
28 that Section 1252(f) bars . . . declaratory relief . . ."); *Las Americas Immigrant*
Advoc. Ctr., 475 F. Supp. 3d at 1211.

1 16. Defendants’ attempt to stretch Section 1252(g) fails for two independent
 2 reasons. First, Defendants ignore that Section 1252(g) exempts constitutional
 3 challenges to agency policies and practices (Plaintiffs’ First Claim) as well as
 4 purely legal questions concerning non-discretionary acts (Plaintiffs’ remaining APA
 5 claims). *See Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998); *Arce v. United*
 6 *States*, 899 F.3d 796, 800-01 (9th Cir. 2018). Second, even if these exemptions do
 7 not apply, Defendants’ arguments fare no better because Plaintiffs’ claims do not
 8 fall within the scope of Section 1252(g) as they do not challenge the Attorney
 9 General’s decision to “commence . . . , adjudicate . . . , or execute removal” 8
 10 U.S.C. § 1252(g); *see also M.M.M. v. Sessions*, 347 F. Supp. 3d 526, 532 (S.D. Cal.
 11 2018). For either of these independent reasons, Section 1252(g) does not apply.

12 **1. Section 1252(g) Does Not Bar Plaintiffs’ Constitutional**
 13 **Claims**

14 Plaintiffs’ procedural due process claim is a “‘general collateral challenge[]
 15 to unconstitutional practices and policies used by the agency.’” *Walters v. Reno*,
 16 145 F.3d 1032, 1052 (9th Cir. 1998) (quoting *McNary v. Haitian Refugee Ctr., Inc.*,
 17 498 U.S. 479, 492 (1991)). It is brought by organizational plaintiffs and it does not
 18 challenge the validity of any underlying MPP removal orders or proceedings. *See*
 19 *FAC* ¶¶ 226-33; *NWDC Resistance*, 493 F. Supp. 3d at 1011 (“A narrow reading of
 20 Section 1252(g) does not apply to constitutional challenges brought by one who is
 21 not the [noncitizen] subject to the three discrete decisions articulated in that statute,
 22 or one who is not bringing a challenge to such actions on the [noncitizen’s]
 23 behalf.”). It seeks only a meaningful opportunity to restore “the administrative
 24 system that exists to litigate meritorious” claims for relief under the TVPRA’s
 25 child-centric standards. *Chhoeun v. Marin*, 306 F. Supp. 3d 1147, 1159 (C.D. Cal.
 26 2018) (rejecting government’s § 1252(g) argument where “[t]he relief Petitioners
 27 request . . . is limited to ‘a day in court’ to comport with due process.”); *see FAC* ¶¶
 28 226-33. This constitutional challenge therefore is beyond Section 1252(g)’s

1 purview. *See id.*; *Walters*, 145 F.3d at 1052 (exercising jurisdiction where plaintiff
2 sought to enforce due process rights in removal proceedings, rather than review of
3 removal proceedings on the merits).

4 **2. Section 1252(g) Does Not Bar Plaintiffs' APA Claims**

5 Plaintiffs' APA claims are also exempt from Section 1252(g)'s jurisdictional
6 bar because they involve "purely legal question[s] that [do] not challenge the
7 Attorney General's discretionary authority." *United States v. Hovsepian*, 359 F.3d
8 1144, 1155 (9th Cir. 2004) (en banc). TVPRA rights are universal and mandatory,
9 and Defendants have no discretion to deny unaccompanied children those rights.
10 *See* FAC ¶ 62; 8 U.S.C. § 1232. Defendants do not dispute this fact but instead try
11 to insulate themselves from judicial review by recasting their decision to
12 circumvent the TVPRA as "prosecutorial discretion." *See* MTD at 15. Where, as
13 here, the statutory mandates are clear, "the Attorney General totally lacks the
14 discretion . . . , [and] § 1252(g) is simply not implicated."⁷ *Arce*, 899 F.3d at 801.

15 **3. Even if Section 1252(g) Applies, None of Plaintiffs' Claims** 16 **"Arise From" the Three Prerequisite Categories**

17 Notwithstanding the above exemptions that apply to Plaintiffs' claims,
18 Section 1252(g) still does not foreclose review here. Defendants' arguments rest on
19 an erroneously broad interpretation of the statute's key terms that is contrary to
20 "instructions of the Supreme Court, [Ninth Circuit] precedent, and common sense,
21 all of which require [the Court] to read the statute narrowly." *Arce*, 899 F.3d at 800
22 (alterations added). Plaintiffs' claims do not "arise from" the Attorney General's
23 discretion to "'commence proceedings, adjudicate cases, or execute removal
24 orders.'" *Wong v. United States*, 373 F.3d 952, 963-64 (9th Cir. 2004) (quoting
25

26
27 ⁷ This is true even if the legal questions underlying Plaintiffs' claims form "the
28 backdrop against which the Attorney General later will exercise discretionary
authority." *Hovsepian*, 359 F.3d at 1155.

1 *Reno v. American–Arab Anti–Discrimination Committee*, 525 U.S. 471, 482 (1999))
2 (emphasis in original).

3 **First**, Defendants’ “commencement-based” arguments ignore that
4 “commence” in Section 1252(g) only reaches DHS’s discretionary decision to
5 *initiate* proceedings. Indeed, Defendants broadly construe “commence” to
6 encompass: (1) the failure of United States Immigration and Customs Enforcement
7 (“ICE”) component Enforcement and Removal Operations (“ERO”) to issue and
8 serve a new NTA on an MPP-unaccompanied child before transfer to ORR custody;
9 and (2) DHS’s and ICE’s “intent to continue to subject [unaccompanied children] to
10 Section 1229(a) removal proceedings” that were initiated before the child was
11 designated unaccompanied. *See* MTD at 14-16. The first argument fails by way of
12 8 C.F.R. § 1003.14, which provides that “[j]urisdiction vests, *and proceedings*
13 *before an Immigration Judge commence*, when a charging document is *filed* with
14 the Immigration Court by [DHS].” *Id.* (emphasis added). Plaintiffs’ claims
15 concern “issuing” and “serving” a charging document, which are temporally
16 distinct from “filing” and thus “commencing” proceedings.⁸ *See Wong*, 373 F.3d at
17 965; *Balgun v. Sessions*, 330 F. Supp. 3d 1211, 1217-18 (C.D. Cal. 2018)
18 (collecting cases illustrating the “temporal disconnect” of what occurs before
19 proceedings commence). Defendants’ second argument fails on its own terms
20 because the decision “to *continue* to subject [unaccompanied children] to section
21 1229(a) proceedings” cannot also be the decision to “commence” those same
22 proceedings. MTD at 15 (emphasis and alteration added).

23 **Second**, Defendants’ “execution”-based arguments fail for similar reasons.
24 Defendants recast Plaintiffs’ First, Third, and Fourth claims as challenges to the
25

26 ⁸ U.S. Immigr. and Customs Enf’t, *Juvenile and Family Residential Management*
27 *Unit Field Office Juvenile Coordinator Handbook* 14, 21, 33–34 (2018) [hereinafter
28 JFRM Handbook], available at <https://www.aila.org/infonet/ice-handbook-handling-minors-encountered-by-dhs>.

1 underlying MPP removal orders themselves to bring those claims under the
 2 statute’s “execution” bar.⁹ See MTD at 16. Plaintiffs, however, do not ask this
 3 Court to invalidate MPP removal orders issued against their clients. They only ask
 4 this Court to require Defendants to discharge their non-discretionary obligations
 5 under the TVPRA and ensure due process. FAC ¶¶ 230-33, 245-50, 253-57, p. 91.
 6 These duties include ensuring that every MPP-unaccompanied child is promptly
 7 placed in the least restrictive setting, may pursue asylum before USCIS and, if
 8 necessary and appropriate, is safely repatriated. FAC ¶¶ 58, 65-75. Plaintiffs’
 9 claims therefore do not arise from Defendants’ decision to execute removal orders;
 10 they arise from Defendants’ mandatory obligations under the TVPRA and the
 11 Constitution.

12 **Third**, and lastly, Defendants’ “adjudication”-based argument fails as a
 13 matter of law. DHS and ICE claim to make an “adjudicatory” decision when they
 14 continue to subject MPP-unaccompanied children to MPP proceedings. MTD at
 15 15. This argument fails under *Barahona-Gomez v. Reno*, where the Ninth Circuit
 16 articulated the rule “that after the case has been initiated before an IJ, there is no
 17 longer any discretion as to whether a matter should be adjudicated or not.” 236
 18 F.3d 1115, 1120 (9th Cir. 2001). *Barahona-Gomez* squarely dispenses with
 19 Defendants’ arguments.

20
 21
 22 ⁹ Defendants also argue that ORR’s failure to promptly release MPP-unaccompanied
 23 children is tied to a decision to execute a removal order and is thus barred from
 24 review. See MTD at 14–15. As the Supreme Court has described it, “Section
 25 1252(g) was directed against a particular evil: attempts to impose judicial
 26 constraints upon prosecutorial discretion.” *Hovsepian*, 359 F.3d at 1155 (quoting
 27 *Reno*, 525 U.S. at 485 n.9 (1999)). The United States Department of Health and
 28 Human Services (“HHS”) and ORR are not prosecuting agencies and thus do not
 exercise prosecutorial discretion, notwithstanding the legally and factually
 inapposite authority Defendants cite. See MTD at 15 (citing *Flores v. Johnson*,
 2015 WL 12656240, at *2 (C.D. Cal., Sept. 30, 2015) (addressing stays of removal);
Sissoko v. Rocha, 509 F.3d 947, 949 (9th Cir. 2007) (addressing § 1252(g) and
 commencement of proceedings)).

1 **III. PLAINTIFFS HAVE STATED CLAIMS UPON WHICH RELIEF MAY**
2 **BE GRANTED**

3 **A. Plaintiffs Sufficiently Allege a Procedural Due Process Claim**

4 Defendants' sole substantive qualm with Plaintiffs' procedural due process
5 claim rests on the legally inapposite principle that Plaintiffs failed to demonstrate
6 prejudice. *See* MTD at 18. Prejudice, however, is only an element in collateral
7 attacks to deportation proceedings. *Compare id.* (citing *Gomez-Velazco v. Sessions*,
8 879 F.3d 989, 993–94 (9th Cir. 2018), and *Luna-Arenas v. Garland*, 842 Fed.
9 App'x 144, 145 (9th Cir. 2021)), with *Zerezghi v. USCIS*, 955 F.3d 802, 807, 808-
10 13 (9th Cir. 2020) (applying *Mathews* framework, which lacks a prejudice element,
11 to due process challenge to USCIS and BIA's denial of affirmative application for
12 lawful permanent residency); *see also Medina v. California*, 505 U.S. 437, 442-46
13 (1992) (departing from the *Mathews* framework to evaluate due process challenge
14 to criminal proceedings); *Montes-Lopez v. Holder*, 694 F.3d 1085, 1090-94 (9th
15 Cir. 2012) (detailing Ninth and sister Circuits' jurisprudence concerning whether to
16 require prejudice as an element of due process claim concerning the denial of
17 counsel in immigration proceedings). In that context, the additional prejudice
18 element "rests on the view that the results of a proceeding should not be overturned
19 if the outcome would have been the same even without the violation." *Gomez-*
20 *Velazco*, 879 F.3d at 993. This principle does not apply to Plaintiffs' affirmative
21 procedural due process claim, which does not challenge or seek to invalidate the
22 outcome of the underlying MPP proceedings. *See Zerezghi*, 955 F.3d at 807, 808-
23 13; *Hernandez v. Sessions*, 872 F.3d 976, 993-94 (9th Cir. 2017) (reviewing due
24 process challenge to immigration judge bond determination process under *Mathews*
25 and not requiring separate showing of prejudice). Defendants' only argument in
26 support of dismissing Plaintiffs' due process claim thus fails as a matter of law.
27
28

1 **B. Plaintiffs Sufficiently Allege that Defendants Fail to Take Discrete**
 2 **Action in Violation of APA Section 706(1)**

3 Plaintiffs’ Second Claim alleges that Defendants fail to perform three
 4 discrete, non-discretionary duties that Defendants owe to all unaccompanied
 5 children under the TVPRA and their own regulations. *See* 5 U.S.C. § 706(1); *see*
 6 *also Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64-66 (2004). Defendants only
 7 challenge two of Plaintiffs’ claims: (1) that ICE and ERO fail to issue and serve
 8 legally sufficient NTAs on MPP-unaccompanied children before their transfer to
 9 ORR custody in violation of the TVPRA; and (2) that ERO and ORR fail to
 10 promptly place MPP-unaccompanied children in the least restrictive setting that is
 11 in their best interest. *See* FAC ¶¶ 237, 239; MTD at 19.¹⁰ Defendants’ arguments
 12 are without merit.

13 *First*, Defendants argue that Plaintiffs “have not identified—and cannot
 14 identify—any ‘unequivocal command’ concerning the issuance of a ‘TVPRA-
 15 NTA[.]’” MTD at 19. But that is exactly what Plaintiffs have identified. *See* FAC
 16 ¶¶ 70-72, 83-87, 109-12. As set forth in the Complaint, the TVPRA imposes on
 17 ICE the non-discretionary and discrete duty to issue and serve a legally sufficient
 18 TVPRA-NTA¹¹ on all unaccompanied children before it may seek to remove any
 19 such child. *See* 8 U.S.C. §§ 1232(a)(5)(D)(i), (d)(8) (providing that any
 20 unaccompanied child sought to be removed “shall” be placed in section 240

21 ¹⁰ Defendants do not argue that Plaintiffs have failed to sufficiently plead USCIS’s
 22 failure to perform a discrete duty owed to MPP-unaccompanied children.
 23 Defendants merely note USCIS’s May 7, 2021 policy memorandum clarifying that
 24 USCIS will accept jurisdiction of an I-589 application filed by an MPP-
 25 unaccompanied child. *See* MTD at 19-20, 19 n.7. This policy was issued several
 26 months after Plaintiffs filed the Complaint and after negotiations between the
 27 parties.

28 ¹¹ Defendants claim there is no such thing as a TVPRA-NTA, but this semantic
 quibble misses the mark. As explained in the Complaint, Plaintiffs use the term to
 distinguish the NTA issued in MPP proceedings (referred to as “MPP-NTA”) from
 the NTA issued to a child upon entry to the United States and designation as
 unaccompanied (i.e., TVPRA-NTA).

1 proceedings tailored to their “specialized needs” as required by the TVPRA),
 2 1229(a) (stating that NTAs “shall” be given to all individuals in section 240
 3 removal proceedings); 8 C.F.R. § 1003.14(a) (stating that Section 240 jurisdiction
 4 does not vest until a legally sufficient NTA has been filed and served);¹² *SAS*
 5 *Institute, Inc. v. Iancu*, 138 S.Ct. 1348, 1351 (2018) (“The word ‘shall’ generally
 6 imposes a nondiscretionary duty[.]”); *see also Spencer Enterprises, Inc. v. United*
 7 *States*, 345 F.3d 683, 690-91 (9th Cir. 2003) (same); FAC ¶¶ 70-72, 109-12.¹³

8 **Second**, ORR’s implementing regulations impose a discrete,
 9 nondiscretionary legal duty to “release[] [an unaccompanied child] to an approved
 10 sponsor without unnecessary delay.” 45 C.F.R. § 410.301(a); *see also* 8 U.S.C. §
 11 1232(c)(2)(A) (same). In *Flores v. Rosen*, ORR conceded that this obligation is
 12 “not . . . optional . . . [but] *mandatory*.” 984 F.3d 720, 731 (9th Cir. 2020)
 13 (emphasis added). Defendants do not dispute this legal requirement or Plaintiffs’
 14 allegations. Instead, they stake their defense on a factual quarrel that goes to the
 15 merits of the claim, which has no place in a motion to dismiss. *See* MTD at 19-20
 16 (discussing imminent removal); *Iqbal*, 556 U.S. at 679. Plaintiffs’ factual
 17 allegations sufficiently establish that ORR delays release of MPP-unaccompanied
 18 children to approved sponsors in violation of its mandatory duty. FAC ¶¶ 154-58.

19
 20 _____
 21 ¹² Because the TVPRA categorically protects unaccompanied children from
 22 reinstatement of prior removal orders, 8 U.S.C. § 1232(a)(5)(D), it is unlawful for
 23 ICE to remove any unaccompanied child based on a prior-issued charging document
 24 (NTA) or removal order. FAC ¶¶ 71, 73-74. To the extent that Defendants do
 25 pursue such removals based on prior MPP removal orders, not only does this violate
 26 the TVPRA, but it also confirms that Defendants wrongly subject unaccompanied
 27 children to MPP. *See infra* Section III.C.

28 ¹³ Further, ICE’s and ERO’s internal policies unequivocally mandate: “ERO will
 accept custody of the [unaccompanied children] from CBP *only after* the following
 conditions have been satisfied: [the unaccompanied child] has been processed,
 charging documents have been issued and served;”¹³ FAC ¶¶ 83-84. *See*
Vietnam Veterans of Am. v. Cent. Intel. Agency, 811 F.3d 1068, 1071 (9th Cir. 2016)
 (finding internal Army regulations to confer judicially enforceable duties under
 706(1)).

1 For instance, Plaintiffs offer the example of a child whom Defendants held in
 2 custody for *four months* before finally releasing him to an approved sponsor in the
 3 United States. FAC ¶ 157. The Complaint satisfies Plaintiffs’ burden to overcome
 4 a motion to dismiss, and Defendants offer no cognizable argument as to why
 5 Plaintiffs fail to state a claim for relief.¹⁴ MTD at 19-20.

6 ***Finally***, Plaintiffs do not launch a “programmatic attack” of the kind
 7 addressed by *Lujan*. See MTD at 19, 21-22 (quoting *Norton*, 542 U.S. at 64
 8 (referencing *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990)).
 9 Defendants “confuse aggregation of similar, discrete purported injuries—claims
 10 that many people were injured in similar ways by the same type of agency action—
 11 for a broad programmatic attack.” See *Ramirez v. U.S. Immigr. & Customs Enf’t*,
 12 310 F. Supp. 3d 7, 21 (D.D.C. 2018).

13 C. **Plaintiffs Sufficiently Allege that Defendants Fail to Enact or**
 14 **Enforce Policies Required by the TVPRA in Violation of APA**
Section 706(2)

15 Plaintiffs allege that Defendants act arbitrarily, capriciously, and contrary to
 16 the law when they: (1) fail to enforce or adopt policies ensuring MPP-
 17 unaccompanied children receive their TVPRA protections; and (2) deprive MPP-
 18 unaccompanied children their rights under the TVPRA. FAC ¶¶ 243-50.
 19 Defendants offer no persuasive reason to dismiss Plaintiffs’ Third Claim for Relief
 20 under Section 706(2)(A).

21 ***First***, the plain text of the APA refutes Defendants’ argument that their
 22 “purported inaction is not a cognizable claim under Section 706(2) of the APA.”

23 _____
 24 ¹⁴ This Court should reject Defendants’ passing argument that only Judge Gee has
 25 authority to remedy this claim because it is related to *Flores* settlement. MTD at 17;
 26 see also *Flores v. Reno*, No. CV 85-4544 RJK (Px) (C.D. Cal. 1997). Judge Gee
 27 denied Plaintiffs’ notice of related case on this precise ground, holding that this case
 28 and *Flores* “do not arise from a closely related transaction, happening, or event;”
 “do not call for a determination of the same, substantially related, or similar
 questions of law and fact;” and that “declining to transfer this case would not entail
 substantial duplication of labor.” See Dkt. 12 (Judge Gee’s order declining to
 transfer this case to her calendar).

1 MTD at 20. The APA expressly defines “agency action” to include the “failure to
 2 act,” and thus authorizes challenges to “inaction by an agency if an agency
 3 arbitrarily and capriciously withholds action or if such inaction constitutes an abuse
 4 of discretion or is not in accordance with law under Section 706(2)(A).” 5 U.S.C. §
 5 551(13); *Raymond Proffitt Found. v. U.S. Army Corps of Eng’rs*, 128 F. Supp. 2d
 6 762, 771 (E.D. Pa. 2000).¹⁵

7 **Second**, Defendants seek to recast Plaintiffs’ claim as only alleging inaction,
 8 when Plaintiffs also allege that “Defendants subject UC to their MPP proceedings,”
 9 in violation of the TVPRA. FAC ¶ 246. As set forth throughout the Complaint,
 10 Plaintiffs challenge as arbitrary, capricious, and unlawful Defendants’ Practice that
 11 prioritizes enforcement of MPP over the provision of non-discretionary statutory
 12 duties to MPP-unaccompanied children. *See, e.g.*, FAC ¶ 5 (“Defendants thereafter
 13 have failed to implement policies necessary to ensure that these UC receive the
 14 protections guaranteed them by law and, instead, have taken affirmative steps to
 15 restrict access to these protections.”), 160, 179, 216, 232, 246, 252. Similar claims
 16 routinely fall within the ambit of 706(2). *See, e.g.*, *Al Otro Lado, Inc. v. McAleenan*,
 17 394 F. Supp. 3d 1168, 1180 (S.D. Cal. 2019) (finding a section 706(2) claim based
 18 on an allegation that United States Customs and Border Protection (“CBP”)
 19 “denied” asylum seekers access to the asylum process); *Aracely, R. v. Nielsen*, 319
 20 F. Supp. 3d 110, 149-55 (D.D.C. 2018) (finding DHS’s failure to comply with
 21 internal guidance in denying parole requests was likely arbitrary and capricious).¹⁶

22
 23 ¹⁵ *See also A Cmty. Voice v. EPA*, No. 19-71930, 2021 WL 1940690, at *8-9 (9th
 24 Cir. May 14, 2021) (finding EPA “inaction” to be arbitrary and capricious where the
 25 agency abandoned an ongoing statutory duty to update soil-lead hazard standards);
 26 *Ramirez*, 310 F. Supp. 3d at 25-30 (holding that ICE’s consistent failure to apply
 27 certain factors in making custody decisions under the TVPRA was reviewable under
 28 APA § 706(2)); *Friends of Yosemite Valley v. Scarlett*, 439 F. Supp. 2d 1074, 1089
 (E.D. Cal. 2006) (“[W]hether Plaintiffs rely on Section 706(1) or 706(2) is
 immaterial, because, as explained in *SUWA*, an agency action includes both action
 and inaction.”), *aff’d sub nom. Friends of Yosemite Valley v. Kempthorne*, 520 F.3d
 1024 (9th Cir. 2008).

¹⁶ Nor do Plaintiffs launch a “programmatically attack” of the kind challenged in *Lujan*.

1 **Third**, and finally, Plaintiffs have adequately alleged final agency action.
 2 The Supreme Court in *Bennett v. Spear* set forth two conditions required for final
 3 agency action: (1) “the action must mark the ‘consummation’ of the agency’s
 4 decision-making process”; and (2) “the action must be one by which ‘rights or
 5 obligations have been determined’ or from which ‘legal consequences will flow.’”
 6 520 U.S. 154, 177 (1997) (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S.*
 7 *Corp.*, 333 U.S. 103, 113 (1948) and *Port of Bos. Marine Terminal Ass’n v.*
 8 *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Courts evaluate “the
 9 ‘finality’ element in a pragmatic way,” with the goal of not “meddl[ing] in the
 10 agency’s ongoing deliberations[.]” *Abbott Laboratories v. Gardner*, 387 U.S. 136,
 11 149 (1967); *San Francisco Herring Ass’n v. Dep’t of the Interior*, 946 F.3d 564,
 12 578 (9th Cir. 2019).

13 Defendants do not claim—or even suggest—that they are “in the middle of
 14 trying to figure out [their] position . . . and that this action somehow prematurely
 15 inserts the courts into the mix.” *San Francisco Herring Ass’n*, 946 F.3d at 578
 16 (citing *CSI Aviation Servs., Inc. v. U.S. Dep’t of Transp.*, 637 F.3d 408, 411, 414
 17 (D.C. Cir. 2011); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir.
 18 1986); *see also Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990)).
 19 And as Plaintiffs have alleged, nothing about Defendants’ Practice was “merely
 20 tentative.” *Bennett*, 520 U.S. at 178. Defendants have issued *in absentia* removal
 21 orders to MPP-unaccompanied children for failing to appear before MPP judges,
 22 delayed family reunification based on MPP ties, and deported children “to no one”
 23 on MPP removal orders—and in the process have denied these children various
 24 rights guaranteed by the TVPRA. *See* FAC ¶¶ 156, 164, 195, 243-47. The first
 25 prong is therefore met because “[t]he FAC includes specific factual allegations
 26 demonstrating that these policies and/or practices are not tentative or interlocutory

27
 28 _____ *See supra* Section III.B.

1 in nature, as [Defendants have] already implemented them.”¹⁷ *Lucas R. v. Azar*,
 2 No. 18-cv-5741, 2018 WL 7200716, at *8 (C.D. Cal. Dec. 27, 2018) (emphasis
 3 added) (denying defendants’ motion to dismiss).

4 Plaintiffs also satisfy the second prong of the *Bennett* inquiry. There can be
 5 no dispute that the denial of statutory and procedural rights is a decision from which
 6 “legal consequences will flow.” *Bennett*, 520 U.S. at 177-78. And Defendants do
 7 not dispute that, based on the policies and actions challenged here, children have
 8 been kept in ORR custody longer, made to appear in their MPP proceedings, and
 9 removed to their home countries without processes afforded to other
 10 unaccompanied children, including the opportunity to seek asylum or voluntary
 11 departure. FAC ¶¶ 111, 148-156, 164, 195; 8 U.S.C. § 1232; Pub. L. No. 110-457,
 12 122 Stat. 5076-77; *see also L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 612, n.7
 13 (S.D.N.Y. 2018) (finding final agency action where challenged conduct caused an
 14 extension in the process by which ORR released unaccompanied children); *Aracely*,
 15 *R. v. Nielsen*, 319 F. Supp. 3d 110, 139 (D.D.C. 2018) (finding DHS’s rejection of
 16 parole requests constituted final agency action). In fact, Defendants admit that
 17 MPP-unaccompanied children are subject to MPP removal proceedings and
 18 removal orders. *See* MTD at 23. Ultimately, Defendants’ arguments in support of
 19 dismissing this claim fail.

20 **D. Plaintiffs Sufficiently Allege an *Accardi* Claim**

21 Defendants fail to cite a single case in support of their argument that
 22 Plaintiffs’ *Accardi* claim should be dismissed. Instead, Defendants base their
 23 request for dismissal entirely on a linguistic sleight of hand, arguing that Plaintiffs
 24 have alleged that Defendants have violated their own policy that unaccompanied
 25

26 ¹⁷ Defendants’ position taken for the purpose of this litigation does not bear on the
 27 Court’s analysis. *See Abramowitz v. EPA*, 832 F.2d 1071, 1075 (9th Cir.
 28 1987) (“We do not believe the Agency’s own designation of its action determines
 the jurisdictional issue.”), *superseded by statute on other grounds*.

1 minors will “not be subject to MPP,” but “the FAC does not allege that any
2 unaccompanied minors are being placed in MPP[.]” MTD at 22. Apparently, it
3 must be said: being unlawfully subject to a program and being unlawfully placed in
4 that program are different and distinct actions—Plaintiffs here challenge the former,
5 not the latter. This semantic clarification alone should dispose of Defendants’
6 dubious argument.

7 Rather than address Plaintiffs’ claims as pled, Defendants describe the
8 dispute as one turning on geography, protesting that they are not returning these
9 children to Mexico a second time under MPP. *See* MTD at 22. This is
10 misdirection. As the FAC details, “MPP” refers not only to Defendants’ policy of
11 returning asylum seekers to Mexico, but also to Defendants’ adjudication of those
12 individuals’ cases through truncated removal proceedings that are woefully short of
13 the affirmative asylum and child-centric section 240 proceedings guaranteed to
14 unaccompanied children in the United States. *See* FAC ¶¶ 118–20, 140–42, 179–92.
15 The Complaint is clear: Plaintiffs’ challenge Defendants’ Practice of subjecting
16 unaccompanied children to MPP proceedings in violation of Defendants’ own
17 policy. *Id.*

18 Indeed, “Defendants’ briefing leaves the distinct impression that Defendants
19 concede the existence of a policy from which Plaintiffs’ alleged injuries flow.” *Al*
20 *Otro Lado*, 394 F. Supp. 3d at 1208. By their own words, Defendants subject MPP-
21 unaccompanied children to MPP. *See* MTD at 12 (admitting that MPP-
22 unaccompanied children “proceed” in “the removal proceedings that previously
23 commenced” in MPP), 15 (arguing that Defendants’ custody determinations as to
24 MPP-unaccompanied children “directly arise from a ‘decision’ to ‘execute removal
25 orders’” from MPP). Defendants thus fail to offer legal grounds to dismiss this
26 claim or an explanation as to how their treatment of MPP-unaccompanied children
27
28

1 does not violate their own express policy that unaccompanied children “will not be
2 subject to MPP.”¹⁸

3 **E. Plaintiffs Sufficiently Allege that Defendants Condition Access to**
4 **the TVPRA in Violation of APA Section 706(2)(A)**

5 Plaintiffs final claim for relief shows that Defendants place unlawful
6 conditions on MPP-unaccompanied children’s access to their TVPRA rights. *See*
7 FAC ¶¶ 258-64. Defendants, however, misconstrue Plaintiffs’ claim as alleging
8 “interfer[ence] with access to counsel” and insist the claim should be dismissed
9 because it “lacks plausible factual support.” MTD at 23. Defendants’ argument
10 lacks merit and ignores the factual allegations supporting Plaintiffs’ claim.

11 The TVPRA requires unaccompanied children be placed in the “least
12 restrictive setting that is in the best interest of the child” without undue delay. *See* 8
13 U.S.C. § 1232(c)(2)(A); *see also* FAC ¶¶ 65, 90-92. As set forth in the Complaint,
14 however, Defendants condition release of MPP-unaccompanied children to
15 approved sponsors, or placement in the “least restrictive setting,” on evidence that
16 Plaintiffs are representing the child in the MPP proceeding. *See* FAC ¶¶ 154-58.
17 Plaintiffs, in turn, must enter representation on an MPP case outside their area of
18 expertise and engage in time-consuming emergency motion practice and advocacy
19 just to secure the MPP-unaccompanied child’s release. *See* FAC ¶¶ 159-63.

20 The TVPRA’s command, however, is absolute: all unaccompanied children
21 “shall be promptly placed in the least restrictive setting that is in the best interest of
22 the child.” 8 U.S.C. § 1232(c)(2)(A) (emphasis added); *see SAS Inst., Inc.*, 138

23 ¹⁸ Plaintiffs have sufficiently alleged an *Accardi* claim against Defendant CBP.
24 FAC ¶¶ 165-68, 251-57. Plaintiffs have detailed CBP’s “discrete investigatory and
25 reporting obligations.” FAC ¶ 165. Plaintiffs further allege that the “breakdown in
26 Defendants’ normal reporting requirements” causes immigration courts to not know
27 what “CBP, ERO, and ORR” are doing, which has directly led to immigration
28 consequences for Plaintiffs’ clients. FAC ¶ 168. This satisfies Plaintiffs’ obligation
“that each claim in a pleading be supported by ‘a short and plain statement of the
claim showing that the pleader is entitled to relief.’” MTD at 24 (quoting *Landers v.*
Quality Commc’ns, Inc., 771 F.3d 638, 640 (9th Cir. 2014)).

1 S.Ct. at 1351 (explaining “shall . . . imposes a nondiscretionary duty”). It does not
2 condition a child’s release on any ground, let alone proof of existing legal
3 representation. The Complaint thus plausibly alleges that Defendants’
4 “conditioning an MPP-unaccompanied child’s release from ORR custody on proof
5 of . . . challenge of their MPP removal order,” FAC ¶ 261, violates Defendants’
6 duties under the TVPRA and thus is “contrary to law.” 5 U.S.C. § 706(2)(A);
7 *EBSC III*, 993 F.3d at 669-71 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def.*
8 *Council, Inc.*, 467 U.S. 837, 842 (1984)).

9 **CONCLUSION**

10 Defendants’ motion to dismiss should be denied. To the extent Defendants’
11 motion is not denied outright, Plaintiffs respectfully request leave to amend the
12 Complaint. *See Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th
13 Cir. 2001) (holding that leave to amend shall be granted with “extreme liberality”).
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SIMPSON THACHER & BARTLETT LLP JUSTICE ACTION CENTER

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

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

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; and The Door*

*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/ Munmeeth 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*

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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.

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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*