

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

A.C.H.C., a minor, by and through her next friend and stepfather, JOSE C.; B.B.H.C., a minor by and through her next friend and stepfather, JOSE C.; J.S.C.C., a minor, by and through his next friend and father, JOSE C.,

*Plaintiffs,*

v.

WILLIAM P. BARR, in his official capacity as United States Attorney General; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; JAMES McHENRY, in his official capacity as Director of Executive Office for Immigration Review; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, in his official capacity as Acting Secretary of the U.S. Department of Homeland Security; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; FRANCISCO MADRIGAL, in his official capacity as Acting Field Office Director for the U.S. Immigration and Customs Enforcement; MATTHEW T. ALBENCE, in his official capacity as Deputy Director and Senior Official Performing the Duties of the Director of the Immigration and Customs Enforcement; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; KENNETH T. CUCCINELLI, in his official capacity as Senior Official Performing the Duties of the Director of U.S. Citizenship and Immigration Services.

*Defendants.*

Case No. 1:20-cv-00770-RDM

**FIRST AMENDED COMPLAINT  
FOR DECLARATORY AND  
INJUNCTIVE RELIEF AND  
PETITION FOR WRIT OF  
MANDAMUS**

**INTRODUCTION**

1. Plaintiffs A.C.H.C., B.B.H.C., and J.S.C.C. are minor siblings from El Salvador who, after filing a habeas petition and motion for Temporary Restraining Order with this Court, have finally been released to their father, Jose C., from the custody of the Office of Refugee

Resettlement (“ORR”) as required by the William Wilberforce Trafficking Victims Protection Reauthorization Act (“TVPRA”) and a binding consent decree known as the *Flores* Settlement Agreement. They have suffered physical and sexual assault; endured illness, extreme temperatures, and malnutrition; were separated from their father, mother, and siblings due to Defendants’ policies and practices; were forced to enter the United States alone and without their parents; and currently are at risk of being deported to a country where they have faced death threats and where they have no parent or other relative or guardian to receive them and protect them from persecution.

2. The TVPRA and the Due Process Clause of the Fifth Amendment of the United States Constitution require the Department of Homeland Security (“DHS”) to place unaccompanied immigrant children such as Plaintiffs in removal proceedings under section 240 of the Immigration and Nationality Act (“INA”) (8 U.S.C. § 1229a) before removing them from the United States. *See* 8 U.S.C. § 1232(a)(5)(D). Placement in such removal proceedings is initiated by the issuance and filing of a Notice to Appear (“NTA”). Once issued and filed, an NTA unlocks multiple legal protections that Congress expressly provided to unaccompanied immigrant children seeking asylum in the United States, to protect them from errors in process or judgment that could improperly result in their removal back to the dangers they fled.

3. Children are a particularly vulnerable population, as they lack the capability and resources to navigate a byzantine immigration system and asylum process that confuses even adults. The protections afforded by full INA § 240 proceedings are even more important for unaccompanied immigrant children like Plaintiffs, who enter the United States without a parent or guardian and, in the case of Plaintiffs, have survived violence and trauma in both their home country and in Mexico under the federal government’s recently adopted Migrant Protection

Protocols (“MPP”), which force asylum seekers to remain in Mexico while pursuing their asylum claims in immigration court. Even if an unaccompanied immigrant child is eventually reunited with a parent, relative, or other legal guardian; has pending claims in immigration court or the Board of Immigration Appeals; and/or is in INA § 240 removal proceedings, the TVPRA’s protections still apply.

4. Plaintiffs have endured unspeakable hardships and have been denied a meaningful opportunity to present their claims for asylum. The U.S. government refuses to honor its legal commitment to protect unaccompanied immigrant children such as Plaintiffs, instead seeking to remove them to El Salvador, where they have no parent or caregiver available to care for them or protect them from harm. Plaintiffs respectfully request that this Court order Defendants to comply with their obligations under the TVPRA and the Constitution and place Plaintiffs in INA § 240 removal proceedings, as required by 8 U.S.C. § 1232(a)(5)(D), before attempting to remove them to El Salvador.

### **JURISDICTION**

5. This Court has subject matter jurisdiction over the claims alleged in this Complaint pursuant to 28 U.S.C. §§ 1331 and 1343, as they arise under the U.S. Constitution and under federal statutes.

6. This Court has personal jurisdiction over Defendants. Defendants Department of Homeland Security, U.S. Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services, and Executive Office of Immigration Review are headquartered in the District of Columbia. Defendants Barr, Wolf, McHenry, Albence, and Cuccinelli have their business addresses in the District of Columbia.

7. The Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2), waives the U.S. government’s sovereign immunity where, as here, federal agencies have acted in violation of the law.

8. The Court has authority to issue a declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and Rule 57 of the Federal Rules of Civil Procedure.

9. The Court has authority to grant injunctive relief pursuant to 5 U.S.C. §§ 702 and 706, and Rule 65 of the Federal Rules of Civil Procedure.

10. The Court has authority to order mandamus relief pursuant to The Mandamus Act, 28 U.S.C. § 1361.

11. This Court has jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a).

#### **VENUE**

12. Venue properly lies in the District of Columbia because a majority of Defendants reside in the District of Columbia and a substantial part of the events and omissions giving rise to this action occurred in the District of Columbia. 28 U.S.C. § 1391(e)(1).

13. Defendants Department of Homeland Security, U.S. Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services, and Executive Office of Immigration Review are headquartered in the District of Columbia. Defendants Barr, Wolf, McHenry, Albence, and Cuccinelli have their business addresses in the District of Columbia.

14. Plaintiffs are informed and believe, and based thereon allege, that Defendants’ decisions regarding the policies and procedures relating to the detention and processing of unaccompanied immigrant children, including those previously subject to MPP, also known as the “Remain in Mexico” program, have been and are being made in the District of Columbia.

## PARTIES

15. Plaintiff A.C.H.C. is a 16-year-old girl from El Salvador who is filing this petition by and through her next friend and stepfather, Jose C. After MS-13 members murdered A.C.H.C.'s biological father when she was a young child, A.C.H.C. was raised by Jose. C. and considers him her father. This Complaint refers to Jose C. as A.C.H.C.'s father.

16. Plaintiff B.B.H.C. is a 14-year-old girl from El Salvador who is filing this petition by and through her next friend and stepfather, Jose C. After MS-13 members murdered B.B.H.C.'s biological father when she was a young child, B.B.H.C. was raised by Jose. C. and considers him her father. This Complaint refers to Jose C. as B.B.H.C.'s father.

17. Plaintiff J.S.C.C. is a nine-year-old boy from El Salvador who is filing this petition by and through his next friend and father, Jose C.

18. Defendant William P. Barr is the Attorney General of the United States and has responsibility for the administration of the immigration laws pursuant to 8 U.S.C. § 1103, oversees the Executive Office of Immigration Review, and is empowered to grant relief from removal. He is sued in his official capacity.

19. Defendant Executive Office for Immigration Review ("EOIR") is responsible for adjudicating immigration cases and, under delegated authority from the Attorney General, conducting immigration court proceedings, appellate reviews, and administrative hearings.

20. Defendant James McHenry is the Director of EOIR and oversees the nation's immigration court system. He is sued in his official capacity.

21. Defendant U.S. Department of Homeland Security ("DHS") has responsibility for enforcing the immigration laws of the United States.

22. Defendant Chad F. Wolf is the Secretary of DHS and directs each of the component agencies within DHS, including Immigration and Customs Enforcement. Defendant Wolf is

responsible for implementing and enforcing U.S. immigration laws and policies, including orders of removal. He is sued in his official capacity.

23. Defendant Immigration and Customs Enforcement (“ICE”) is the sub-agency of DHS that is responsible for the detention and removal operations of DHS.

24. Defendant Francisco Madrigal is the Acting Field Office Director for the ICE Baltimore Office of Enforcement and Removal Operations and is responsible for and has authority over the removal of noncitizens within his jurisdiction, including Plaintiffs.

25. Defendant Matthew T. Albence is the Deputy Director and Senior Official Performing the Duties of the Director of ICE, and he oversees the removal of noncitizens in the United States. He is sued in his official capacity.

26. Defendant U.S. Citizenship and Immigration Services (“USCIS”) is the sub-agency of DHS that, through its Asylum Officers, conducts interviews of unaccompanied children to determine whether they have a credible fear of persecution and must be permitted to apply for asylum.

27. Defendant Kenneth T. Cuccinelli is the Senior Official Performing the Duties of the Director of USCIS.

## **STATEMENT OF FACTS**

### ***OVERVIEW***

28. After enduring persecution, death threats, and violence in El Salvador; separation from their father and siblings; hardship and deprivation during the journey from El Salvador to Mexico; assault, illness, and malnutrition in Matamoros, Mexico, where they remained for months subject to MPP; and finally, separation from their mother, Plaintiffs—three siblings from El Salvador who are 16, 14, and 9 years old—are in the United States with a removal order still hanging over their heads.

29. In El Salvador, Plaintiffs witnessed their mother being beaten at the behest of MS-13 gang members, and their relatives were murdered for refusing to provide information to MS-13 gang members about their family's whereabouts. When Plaintiffs sought asylum in the United States, MPP forced them into Mexico, where Plaintiffs A.C.H.C. and J.S.C.C. were physically and sexually assaulted, and where they all suffered malnutrition, illness, and the harsh elements of nature while living in a donated tent.

30. On January 7, 2020, an Immigration Judge presiding over their MPP proceedings issued a removal order against Plaintiffs and their mother. During the family's hearing, the Immigration Judge did not ask Plaintiffs any questions and did not allow any Plaintiff to speak about their fears of being returned to Mexico, or their fears of being removed to their home country of El Salvador, which they had fled because of threats of death and violence against themselves, their parents, and their extended family members based on their kinship ties and religion. The Immigration Judge told Ms. C. that she would need a good attorney to appeal his ruling, a remark Ms. C. interpreted to mean that she could not appeal without securing an attorney, which she could not afford to do.

31. Facing constant dangers in Mexico, Plaintiffs' mother, Ms. C., had an unimaginable decision: continue to risk her children being kidnapped, killed or raped in Mexico or be separated from them. Focused on her children's safety, Ms. C. allowed them to cross the border on their own. Plaintiffs crossed the border and presented themselves to U.S. border officials. Federal law requires Defendants to place Plaintiffs in "the least restrictive setting appropriate to their age and special needs," including release "without unnecessary delay" to a parent, such as their father. After Defendants moved Plaintiffs to an ORR-affiliated shelter in Maryland, however, Defendants

initially refused to reunite Plaintiffs with their father—even though he lived nearby in Maryland—because of the MPP removal order against Plaintiffs.

32. On March 4, 2020, Plaintiffs’ immigration attorneys learned that DHS intended to execute the MPP removal order against Plaintiffs on March 16, 2020. On March 9, 2020, Plaintiffs filed motions to reopen their immigration case and to change venue to an Immigration Court in Maryland so that the required INA § 240 proceedings for Plaintiffs could proceed. On March 12, 2020, the Immigration Court in Harlingen, Texas stayed the MPP removal order against Plaintiffs pending its adjudication of Plaintiffs’ motions to reopen and change venue, and allowed DHS “adequate time to file a response” to the motions.<sup>1</sup>

33. On March 25, 2020, after more than nine weeks of separation from their parents, Plaintiffs were reunited with their father.

34. The respite afforded by the Harlingen Immigration Court’s stay has been temporarily extended through negotiations between the parties after this litigation was filed. While the removal order has been stayed for the moment, it can be executed against Plaintiffs 30 days after any denial of Plaintiffs’ requests to reopen their immigration proceedings—or as early as April 30, 2020. There continues to be a threat that Defendants intend to remove Plaintiffs as soon as possible, as evinced by Defendants’ opposition to Plaintiffs’ motion to reopen the removal orders against them.

35. This threat of removal, with no opportunity for Plaintiffs to explain why they should not be sent back to their home country with no parent or guardian to receive them, directly violates the TVPRA, which states that whenever DHS seeks to remove any unaccompanied immigrant

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<sup>1</sup> Although Plaintiffs and their mother went through their MPP proceedings in Brownsville, Texas, the Immigration Court in Harlingen, Texas has administrative control over cases proceeding under MPP in Brownsville.

child, that child “*shall* be placed in removal proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C. 1229a)” before the child can be removed. 8 U.S.C. § 1232(a)(5)(D) (emphasis added). Such proceedings will provide Plaintiffs the opportunity to assert their own asylum claims. To date, no such proceedings have commenced against these three children.

36. If executed, the removal order would return Plaintiffs to a country where there is no parent or caretaker to take custody of them, and where their family has been threatened with death and physical violence—or murdered—by the MS-13 gang because of their family’s kinship ties and their religious beliefs and activities. MS-13 brutally murdered A.C.H.C.’s and B.B.H.C.’s biological father when they were young children, and given the assaults and threats the family has endured since then, the family has no doubt that the gang would not hesitate to do the same to Plaintiffs if they returned to El Salvador.

37. As unaccompanied immigrant children, Plaintiffs are entitled to full, formal removal proceedings under section 240 of the INA. As part of that process, they are entitled to present their asylum claims to a USCIS Asylum Officer in a non-adversarial setting. If the Asylum Officer does not approve their asylum claims then, they are entitled to a second opportunity to present their asylum claims to an Immigration Judge, who will review the Asylum Officer’s findings and consider additional evidence and arguments showing why they are entitled to asylum. Yet, to date, these three children have received none of these required protections.

38. The threat of deportation hanging over Plaintiffs is the most recent in a series of actions demonstrating how Defendants’ treatment of unaccompanied immigrant children continues to violate the law and Plaintiffs’ statutory and constitutional rights. Multiple organizations representing unaccompanied immigrant children report that it is now DHS policy that children who enter the country unaccompanied after being ordered removed under MPP

should not be issued NTAs reflecting their entry as unaccompanied minors, and should not be placed in INA § 240 proceedings. Because of this, these organizations have been told by ICE attorneys, or have otherwise been forced by the exigencies of an imminent threat of removal, to file emergency motions to reopen and/or appeals to the Board of Immigration Appeals to prevent children from being removed without the protections of the TVPRA. Defendants' practice attempts to erase the TVPRA's statutory command for INA § 240 proceedings for unaccompanied immigrant children and cultivates an immigration system that turns a deaf ear to the very credible fears of the most vulnerable immigrants: young, unaccompanied immigrant children. This is the case for Plaintiffs, who were subjected to violence and fear in Mexico, and now face potential removal to El Salvador without the processes owed to them under U.S. law.

### ***LEGAL BACKGROUND***

#### **Asylum Procedures at the U.S.-Mexico Border Before MPP**

39. Until recently, individuals applying for asylum at the U.S.-Mexico border were placed either in expedited removal proceedings under INA § 235(b)(1), 8 U.S.C. § 1225(b)(1), or in full removal proceedings under INA § 240, 8 U.S.C. § 1229a.

40. Expedited removal allows the immediate removal, without a hearing before an Immigration Judge, of noncitizens who lack valid entry documents or attempt to enter the United States through fraud—*unless* they express a fear of persecution. *See* 8 U.S.C. § 1225(b)(1)(A)(i). Asylum seekers who were placed in expedited removal would receive a credible fear interview with an Asylum Officer. If they passed that interview—by showing a significant possibility that they would be able to establish eligibility for asylum, 8 U.S.C. § 1225(b)(1)(B)(v), a low threshold—they were required to be placed in regular removal proceedings under INA § 240, which begin when DHS issues and files with the immigration court a charging document called a Notice to Appear (“NTA”). 8 C.F.R. § 1239.1(a).

41. Until significant recent procedural changes, asylum seekers could pursue their asylum claims during the removal process while remaining in the United States, regardless of whether they were placed in regular removal proceedings after passing a credible fear interview, or placed directly in regular removal proceedings. Asylum seekers would either be held in detention or released pursuant to parole or bond pending completion of their asylum and removal proceedings.

42. Whether detained or released, however, no asylum seeker could be physically removed from the United States without an order of removal duly issued by an Immigration Judge either in full removal proceedings or, for those who failed to pass a credible fear screening, in expedited removal proceedings.

### **The Migrant Protection Protocols**

43. On December 20, 2018, then-DHS Secretary Nielsen announced a new policy for processing asylum seekers at the southern border: the Migrant Protection Protocols (“MPP”), often referred to as the “Remain in Mexico” program. Under MPP, individuals who arrive at the southern border and request asylum—either at a port of entry or after crossing the border between ports of entry—receive NTAs in immigration court and are promptly returned to Mexico, where they must remain for the duration of their immigration proceedings, instead of pursuing these proceedings in the United States. They are instructed to return to a specific port of entry at a specific date and time for their next court hearing. While these asylum seekers remain in Mexico, the U.S. does not provide them with food, shelter, work, funds, transportation to and from their U.S. court hearings, or access to legal counsel.

44. The Trump administration later issued several memoranda and guidance documents in January 2019 to implement MPP. These directives included a January 25, 2019 memo from then-DHS Secretary Nielsen, stating that MPP would be implemented “on a large scale basis;” a

memorandum issued a few days later by then-Customs and Border Patrol (“CBP”) Commissioner Kevin McAleenan, announcing that the CBP would begin implementing MPP at the San Ysidro Port of Entry in California on January 28, 2019, with expansion to other ports of entry “in the near future;” and a Policy Guidance issued by USCIS on January 28, 2019. CBP began enforcing MPP at the San Ysidro Port of Entry on January 28, 2019; it subsequently expanded into Texas in stages throughout 2019 and to Arizona in January 2020.

45. Under the administration’s implementing documents, certain groups, including unaccompanied children, are exempt from MPP. For others, the decision to send a person or family back to Mexico under MPP rests entirely with individual CBP officers or Border Patrol agents. Individuals who cross the border at the same time may be treated differently, with one person sent back under MPP and another permitted to seek asylum through the normal process. In some situations, families have been separated at the border, with one parent sent back to Mexico and the other parent and child or children allowed to enter the United States. To date, approximately 60,000 individuals—the vast majority of asylum seekers presenting themselves at the southern border—have been sent back to await their asylum proceedings in Mexico under MPP.

46. Asylum proceedings in MPP are far different than normal asylum proceedings that occur in the United States. Most notably, the Trump administration has set up large tent facilities at certain ports of entry. These tents function as “virtual immigration courtrooms” where hearings for asylum seekers subject to MPP are conducted by Immigration Judges appearing remotely by videoconference. Plaintiffs and their mother went through one such hearing.

47. Unlike immigration proceedings in the United States, the “tent courts” were completely closed to the public when they began operating in September 2019, even though DOJ regulations require public access to immigration hearings. Although EOIR made the tent courts

nominally open to the public in January 2020, journalists and attorneys have reported limitations on their ability to watch hearings, take notes, and meet with clients. Asylum seekers in the tent courts, moreover, do not receive the usual Legal Orientation Program benefits that other migrants in immigration detention facilities, or who are released on their own recognizance, receive in the United States. These benefits include group orientations, one-on-one meetings, workshops, and referrals to free or low-cost legal services.

48. Asylum seekers who are permitted to wait in the United States while their asylum cases progress are *seven times* more likely to find an attorney to represent them than are those required to remain in Mexico under MPP. This is due in large part to the fact that U.S.-based attorneys familiar with U.S. immigration law face severe logistical challenges meeting clients in Mexico. According to an independent analysis of data obtained from EOIR under the U.S. Department of Justice, fewer than 5% of asylum seekers in MPP have an attorney. In comparison, 32% of asylum seekers who are allowed to remain in the United States are able to obtain an attorney. Given that asylum seekers also are *five times* more likely to obtain asylum when represented—a figure that increases more than *fourteen times* specifically for women and children—the challenges involved in obtaining representation in MPP are outcome-determinative, leaving meritorious asylum claims unheard or not granted.

49. But even if MPP asylum seekers are lucky enough to find an attorney to assist and represent them, there is no safe place on the Mexican side of the border for an attorney to speak with clients and prepare their cases; the lack of such a facility places significant handicaps on the asylum seekers' claims. DHS, moreover, severely curtails the amount of meeting time between attorneys and clients before hearings—sometimes to as little as 15 minutes—thereby undermining

attorneys' ability to conduct the fact-finding, diligence, and preparation necessary to present the strongest case for their clients.

50. Having to remain in Mexico under MPP, moreover, significantly impairs asylum seekers' ability to attend their court hearings. While nine out of ten immigrants who are allowed to remain in the United States attend all their court hearings, at least 50% of MPP asylum seekers fail to appear for a hearing, leading to Immigration Judges closing their cases with an *in absentia* removal order.

51. *In absentia* removal orders are all too common because asylum seekers in MPP face kidnapping, rape, and other forms of violence along the border. Many, moreover, have no permanent address, which means that there is no way for the immigration courts to notify them of the date, time, and location of their hearing. Notices that do reach asylum seekers may not have accurate or complete information about their hearing or about where and how to cross the border into the U.S. to attend their hearings.

### **The Impacts of MPP**

52. MPP has now been in effect for over a year and during that time approximately 60,000 people, including 16,000 children and nearly 500 infants under the age of one, have been sent back to Mexico to await court hearings. Conditions at the border have become dire for asylum seekers waiting in Mexico. Under MPP, asylum cases take even longer to adjudicate than cases that proceed in the United States. Most individuals must spend many months waiting to have their asylum cases decided while living in squalid conditions, in some of the most dangerous areas in Mexico where they face discrimination, sexual exploitation, and assault, and targeting because of their nationality, gender, and sexual orientation, among other reasons. *See, e.g., Lawyer defending Trump policy makes stunning admission*, CNN (Mar. 11, 2020), <https://www.cnn.com/videos/politics/2020/03/11/valencia-migrant-kidnapped-awaiting-asylum->

hearing-pkg-lead-vpx.cnn (describing conditions at a border camp in Reynosa, Tamaulipas, Mexico).

53. For example, asylum seekers sent to the Laredo or Brownsville courts, like Plaintiffs, must reside in or pass through the Mexican state of Tamaulipas, which the State Department has designated as a “no travel zone” for U.S. citizens and classifies at the *same danger level* as Syria, Afghanistan, and Yemen—all countries with active war zones. Human Rights First reports that as of February 28, 2020, there have been at least 1,001 publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers and migrants forced to return to Mexico. Victims include 228 children returned to Mexico who were kidnapped or nearly kidnapped.

54. Some asylum seekers returned to Mexico are lucky to find housing in shelters, hotels, or rooms for rent. Many have no choice but to make do with tents and tarps in encampments that have sprung up around the bridges linked to U.S. ports of entry along the Rio Grande. Asylum seekers in these camps live without basic necessities like clean drinking water, public toilets, and warm clothes. They face heightened risks of extortion, kidnapping, torture, and rape at the hands of cartels and other criminals. At the camp in Matamoros, children under five make up one-quarter of the 2,500 asylum seekers who live in tents by the port of entry; these children have suffered near-freezing temperatures, sexual and physical assaults, malnutrition, and a range of other life-threatening conditions.

### **Family Separations Under MPP**

55. MPP has returned families with minor children, including very young ones, to conditions in Mexico that are dangerous and life-threatening. In recent months, attorneys serving unaccompanied children in the United States have reported that more children are arriving without parents or legal guardians after spending time in life-threatening conditions with a parent or

guardian in MPP. According to U.S. Department of Health and Human Services (“HHS”) figures, between October 1, 2019 and January 13, 2020, 352 children have crossed the U.S. border without their parents or legal guardians after spending time in Mexico in MPP. *See* Priscilla Alvarez, *At least 350 children of migrant families forced to remain in Mexico have crossed over alone to US*, CNN (Jan. 24, 2020), <https://www.cnn.com/2020/01/24/politics/migrant-children-remain-in-mexico/index.html>. Attorneys and advocates for unaccompanied children in the United States report that this figure has steadily increased in the months since January 2020. These trends suggest that parents with children sent back under MPP to dangerous conditions in Mexico are making the heart-wrenching decision to face these dangers alone rather than with their children, and to separate in order to ensure the physical safety of their children.

56. These MPP family separations are not only causing pain and severe trauma; they are also artificially undermining the families’ legitimate claims of asylum. For example, when a parent suffered the persecution or abuse that caused the family to flee their home country, but the children are in the United States facing immigration court proceedings separately, it is difficult for the children to present a compelling case for asylum. Likewise, when a child (such as a teenager) was the target of gang violence and threats and is now in the U.S. alone, separated from her parents in Mexico, her parents’ asylum claim often falters due to the separation, not the claim’s underlying merits.

#### **Legal Framework and Policies Governing Treatment of Unaccompanied Immigrant Children**

57. Children who separate from their families under MPP and present themselves at the border alone are apprehended by CBP, transferred to the custody of ORR, and designated as “unaccompanied alien children” (“UAC”). “UAC” are statutorily defined as children under the age of 18 with no lawful immigration status and no parent or legal guardian in the United States to

provide care and physical custody. 6 U.S.C. § 279(g)(2). If a child is designated as a UAC and transferred to ORR custody, USCIS will generally take initial jurisdiction over the child's asylum application, and the UAC designation remains with the child, even where the child is eventually released to the custody of a parent, relative, or other caregiver after CBP or ICE makes the UAC determination. *See* Congressional Research Service, *Asylum Policies for Unaccompanied Children Compared with Expedited Removal Policies for Unauthorized Adults: In Brief* (July 30, 2014), <https://fas.org/sgp/crs/homsec/R43664.pdf> (last visited Mar. 16, 2020).

58. Originally enacted in 2008 and revised in 2013, the TVPRA sets out specific protections for unaccompanied immigrant children. *See* Pub. L. 110-457, 122 Stat. 5044 (Dec. 23, 2008). For example, the statute requires that children be screened within 48 hours of being apprehended to determine whether they have a credible fear of returning home. 8 U.S.C. § 1232(a)(4).

59. In addition, although typically only the immigration court has jurisdiction over an asylum application filed by an individual in removal proceedings, the TVPRA provides that USCIS has initial jurisdiction over an unaccompanied immigrant child's asylum application. This is the mandate even if the child has since reunited with a parent or legal guardian, has pending claims in immigration court or the Board of Immigration Appeals, and/or is in removal proceedings under INA § 240. 8 U.S.C. § 1158(b)(3)(c); *see also* Congressional Research Service, *Asylum Policies for Unaccompanied Children Compared with Expedited Removal Policies for Unauthorized Adults: In Brief* (July 30, 2014), <https://fas.org/sgp/crs/homsec/R43664.pdf> (last visited Mar. 16, 2020).

60. The USCIS asylum process for unaccompanied immigrant children is less adversarial than immigration court and it seeks to be more sensitive to the special needs of children

who cannot be expected to know how to navigate the complexities of an immigration system designed for adults. For example, in USCIS asylum proceedings, unaccompanied immigrant children are not cross-examined in a courtroom by government attorneys; instead, they engage with USCIS Asylum Officers trained to apply child-sensitive and trauma-informed interview techniques and to conduct non-adversarial interviews that take into account the child's age, stage of language development, and background. Although it does not guarantee a right to counsel without expense, the TVPRA directs USCIS to help make *pro bono* counsel available to these children. 8 U.S.C. § 1232(c)(5). And while asylum applicants generally must file their asylum applications within one year of entering the United States, *see* 8 U.S.C. § 1158(a)(2)(B), the TVPRA exempts unaccompanied immigrant children from this deadline. 8 U.S.C. § 1158(a)(2)(E).

61. Even if a USCIS Asylum Officer decides that an unaccompanied immigrant child in removal proceedings is not eligible for asylum, that child may nevertheless present her asylum claim in immigration court removal proceedings. The TVPRA requires that all unaccompanied immigrant children, except those from contiguous countries who agree to voluntary return, receive the full and formal removal proceedings afforded under INA § 240, 8 U.S.C. § 1229a. *See* 8 U.S.C. § 1232(a)(5)(D)(1). Accordingly, all unaccompanied immigrant children from another country, other than Mexico and Canada, cannot be subject to expedited removal or reinstatement of prior removal orders, because they are entitled to formal removal proceedings with an Immigration Judge before removal.

62. Such full removal proceedings under INA § 240 must be initiated by the filing of an NTA. *See* 8 C.F.R. § 1239.1 (“[E]very removal proceeding conducted under section 240 of the Act (8 U.S.C. § 1229a) to determine the deportability or inadmissibility of an alien is commenced by the filing of a notice to appear with the immigration court.”). During Section 240 removal

proceedings, the Immigration Judge will review the Asylum Officer's findings and will accept additional evidence and argument as to why asylum is warranted. Unaccompanied immigrant children, moreover, are entitled to pursue any forms of immigration relief for which they might qualify, including asylum, Special Immigrant Juvenile Status, relief under the Violence Against Women Act, and family-based options. EOIR, moreover, has adopted special guidance governing how Immigration Judges should conduct hearings involving unaccompanied immigrant children, including establishing an "age-appropriate" hearing environment. EOIR, Operating Policies and Procedures Memorandum 07-01, Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children, at 3 (Dec. 20, 2017), <https://www.justice.gov/eoir/file/oppm17-03/download> (last visited Mar. 16, 2020).

63. Unaccompanied immigrant children are therefore entitled to seek asylum and other relief from removal at least twice as they move through full removal proceedings under INA § 240: first, in a non-adversarial interview with a USCIS Asylum Officer; and second, through their formal, statutory EOIR removal proceedings, in an age-appropriate hearing before an Immigration Judge. These protections reflect the special circumstances of unaccompanied immigrant children, many of whom have experienced violence and trauma, and who require accommodations not afforded to adults in order to navigate the U.S. immigration system and have a legitimate opportunity to present their asylum claims.

#### ***PLAINTIFFS' BACKGROUND***

64. Plaintiffs A.C.H.C.—a 16-year-old girl; B.B.H.C.—a 14-year-old girl, and J.S.C.C.—a 9-year-old boy, are siblings from El Salvador. Plaintiffs share the same mother, Ms. C.; her husband, Jose C., is the stepfather of Plaintiffs A.C.H.C. and B.B.H.C., and the father of Plaintiff J.S.C.C. and one other daughter with Ms. C. When Plaintiffs A.C.H.C. and B.B.H.C. were

young, MS-13 gang members murdered their biological father. Their mother married Jose C. when Plaintiff A.C.H.C. was six and Plaintiff B.B.H.C. was four, and the two girls consider him their father. Plaintiffs also have two older sisters.

65. Jose C., Ms. C., Plaintiffs, and their siblings resided in a small town within Usulután, El Salvador. The family was very active in their local church and would frequently evangelize to the community, offer food and clothing to those in need, and organize public church events to spread the word of God. Jose C. was the director of the church's youth outreach program; his wife was the director of the church's elder ministry. Their children were always part of their parents' religious activities and accompanied them whenever they evangelized.

66. The family's religious work made them a target of MS-13 criminal activity, as the gang often singles out churches and charity groups with religious affiliations. In a 2018 report on religious freedom in El Salvador, for example, the State Department referenced reports that gangs expelled or denied access to church leaders in their communities, extorted a "tax" to allow churches to operate in specific geographic territories, and demanded that churches divert charitable items to the families of gang members. U.S. Dep't of State, *El Salvador 2018 International Religious Freedom Report* (2018), <https://www.state.gov/wp-content/uploads/2019/05/EL-SALVADOR-2018-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf>. The *New York Times* has identified MS-13 specifically as "the largest of the ruthless gangs that have made El Salvador the murder capital of the world," and gang violence is commonplace in Plaintiffs' hometown. See Óscar Martínez, et al., *Killers on a Shoestring: Inside the Gangs of El Salvador*, NYTimes (Nov. 20, 2016), <https://www.nytimes.com/2016/11/21/world/americas/el-salvador-drugs-gang-ms-13.html>; see also *One Day in Usulután: Gangs of El Salvador (Part 3)*, YouTube (Nov. 25, 2015), <https://www.youtube.com/watch?v=2SNjnk6AmKY> (one of a five-part series on the gangs of El

Salvador produced by VICE News in 2015, this part devoted entirely to gang violence in Usulután). Jose C. also personally witnessed gangs in his hometown work in conjunction with the police, making it impossible to request or receive from governmental authorities any protection from the gangs.

### **Death Threats, Violence, and Persecution in El Salvador**

67. MS-13 gang members frequently threatened Plaintiffs' family because of their religious activities and their family kinship ties. In 2013, gang members threatened to beat Jose C. 13 times with a belt buckle if he continued evangelizing but only three times if he stopped. Jose C. agreed to stop evangelizing and received three lashes, but continued his religious work in secret. Gang members also pressured Jose C. to transport arms or drugs for them, but he always refused.

68. MS-13 also began threatening and extorting Ms. C. that same year. Gang members passed by her tortilla stand every day, demanding that she pay a daily tax of tortillas and cash. When Ms. C. refused to give the gang members money, they reminded her that MS-13 gang members left her first husband "cut up in a field," referring to the fact that they had slashed him to death with machetes.

69. The family's problems intensified in April 2014 based on a series of events that led to MS-13 gang members suspecting that Jose C. was collaborating with police.

70. After MS-13 had attempted to assassinate a police officer and church acquaintance of Jose C., the church acquaintance abandoned his home and fled the community. When he did so, he offered to let Ms. C. store her tortilla equipment in the abandoned house because it was much closer than her own home to the place where Ms. C. sold her tortillas, and she would not have to transport the equipment so far every day.

71. About two weeks later, the church acquaintance called Jose C. and asked him to retrieve a few items from the garden at the abandoned house, which he did. A neighbor overheard this phone conversation and, because the church acquaintance was a former police officer, reported to the gang that Jose C. was collaborating with the police. Gang members interrogated Jose C. that same night. When Jose C. tried to explain that he had only been talking to the church acquaintance and former police officer about using the abandoned house, the gang ordered Jose C. to vacate the abandoned house immediately. Later that night, as instructed, he removed all the family's belongings from the house and fled.

72. The next night, MS-13 demolished the church acquaintance's house. But because Jose C. had removed the family's belongings the day before, the church acquaintance suspected that Jose C. had received advance notice and accused him of collaborating with the gang. When the local police investigated the demolition of the home, they detained and beat Jose C.'s nephew because they suspected he had been involved.

73. For three days after the demolition, Jose C. and his eldest daughter from a prior marriage hid in a bathroom because they had heard from a friend that the gang was planning to kill him. They then fled to Chiapas, Mexico, with the plan of later bringing the rest of the family members.

#### **Attempted Relocation for Plaintiffs and Their Family in Mexico Ends in Deportation to El Salvador**

74. In Mexico, Jose C. made arrangements to present himself to Mexican officials to seek asylum, but before he could attend the necessary appointment, he received a call from his wife, who said she had received death threats against their children from MS-13 and had fled their hometown in El Salvador. After Jose C.'s departure, armed MS-13 gang members had threatened

Ms. C., telling her that they would kill her children if she did not inform the gang of Jose C.'s location.

75. When Jose C. spoke with his wife, she was crying and distraught and already near the Mexico-Guatemala border with their children. He immediately left to find them, missing his asylum appointment, because he knew that once they crossed the border, their cell phone would not work and he would lose contact with his family.

76. The family reunited and lived together in Mapastepec, Chiapas, Mexico, near the Southern border of Mexico, for two years. Jose C. worked for a moving company; Ms. C. worked in a restaurant. Their family was building a life together there, but then Ms. C. was arrested by immigration authorities in 2016. She and the children were deported the following day back to El Salvador. Afraid that his family would again be subjected to further persecution, Jose C. voluntarily returned to El Salvador with his family in an effort to protect them.

#### **A Return to Death Threats and Persecution in El Salvador**

77. The family knew they could not return to their hometown in Usulután because of the gang threats. To avoid MS-13, the family moved constantly to different areas of El Salvador from 2016 to the summer of 2019: first to El Congo, then Puerto El Triunfo, then Cocosica, and then San Felipe. But in each location, someone from their original hometown would always recognize them. Because of MS-13's extended network of informants, the family became fearful every time they were recognized. Moving around frequently was extremely difficult; the children could never complete a school year in one place, and the family lived in constant fear of the gang. Indeed, Plaintiff J.S.C.C., now 9, never learned to read and can barely write.

78. These fears were only confirmed in 2017; while the family was living in El Congo, Ms. C.'s brother assaulted her when she traveled to El Transito to buy supplies for her tortilla

stand. Without warning, her brother viciously beat her in front of J.S.C.C. and threatened to kill her.

79. The attack was so brutal that Ms. C.'s bone was visible through her skin and she was unable to work for over two weeks due to the extent of her injuries, which prevented her from sitting without the wounds on her knees opening. Plaintiff J.S.C.C. was traumatized by the event and frequently woke up with nightmares, screaming, "Leave my mother alone!" Although the family suspects the attack occurred because the stepson of Ms. C.'s brother was an MS-13 gang member, they were too afraid to tell the police exactly what happened. The police often collaborate with, or are sometimes even members of, the gangs, and the family feared retribution.

80. Their fears only grew when, in 2017, one of Jose C.'s nephews called and said that gang members had asked where they could find Jose C. and his family. Shortly after Jose C.'s nephew refused to divulge the family's location, he was murdered by MS-13 gang members. Two of Jose C.'s other nephews were also murdered by MS-13. The family fears that these deaths are related to the gang's attempts to find Jose C., and are heartbroken and traumatized that the gang has begun targeting their extended relatives.

81. Finally, in early June 2019, when the family was residing in San Felipe, a young man recognized Ms. C. at her tortilla stand, identifying her as the same woman who had sold tortillas in their hometown. This man's brothers were the very same gang members who had threatened Ms. C. years ago in their hometown.

### **Fleeing to the United States**

82. After Ms. C. had been recognized yet again in San Felipe, the family realized they would never be safe anywhere in El Salvador. Avoiding their hometown, they had already moved four times and had been recognized each time; Ms. C. had been brutally beaten and warned she

would be killed; and the gang was threatening, and even murdering, their family members in an effort to obtain information about the family's whereabouts.

83. The family did not have enough money, however, to flee together. Jose C. and his second oldest daughter fled to the United States first, in June 2019, while Ms. C. took the other children to stay with Jose C.'s uncle for a short period of time before fleeing El Salvador yet again. The family planned to reunite in the safety of the United States.

84. Jose C. and his daughter entered the United States in June 2019 at Laredo, Texas. After their apprehension by immigration officers, Jose C. and his daughter were released on their own recognizance and now reside in Maryland, where Jose C. is awaiting a hearing in Baltimore Immigration Court and plans to apply for asylum for himself and his family.

85. Ms. C. and Plaintiffs left El Salvador two months later, in or around August 2019, traveling through Guatemala and Mexico. In Mexico, a guide led them from house to house, from one town to another, with other migrants. At one of these houses, a group of armed men broke in, pointed guns at the occupants, threatened to call Mexican immigration authorities, and took the occupants' cell phones and money, threatening to kidnap two minors if the migrants did not hand over all they had. The men then kidnapped the guide, who returned later that night after being severely beaten.

86. Plaintiffs and their mother finally entered the United States on or around September 13, 2019, when they were apprehended by immigration officers and detained in an extremely cold border patrol detention facility, or *hielera* (icebox/freezer), for several days. Their delayed departure after Jose C. had fateful consequences: by that time, implementation of MPP had expanded to South Texas, and an immigration officer informed Ms. C. that she and Plaintiffs could not stay in the United States and would be forced to return to Mexico. During their entire time in

CBP custody, no immigration officials ever addressed Plaintiffs or asked them about their fears of returning to Mexico. Plaintiffs and their mother were processed through MPP, given Notices to Appear in immigration court on December 16, 2019, and placed on buses to Matamoros, Mexico, to await their immigration hearings approximately three months later.

### **Plaintiffs' Hardship and Trauma in MPP**

87. In Matamoros, Ms. C. and Plaintiffs were processed by Mexican authorities. Although they were told that they would be taken to a shelter, they were instead taken to a camp packed with other MPP asylum seekers.

88. Forced to wait in Matamoros for months until their immigration hearing, Plaintiffs and their mother lived by the river in a tent they received from a local church. They endured intense heat during the days, then freezing nights as winter approached. They survived on what they could buy with the limited money Jose C. sent them and whatever Ms. C. earned when she could sell tortillas. Sometimes the money ran out and they did not have enough food. On one occasion, a grown man assaulted and robbed Plaintiff J.S.C.C., beating him on the head and stealing the little money he was taking to buy food.

89. Plaintiffs' mother subsequently got sick with a high fever and a bad cold; then the entire family contracted chicken pox in October. Rather than providing medical care, Mexican officials evicted Plaintiffs and their mother from the camp and sent them to a shelter where other individuals were using drugs and behaving erratically. Plaintiffs and their mother were only able to leave the shelter after a local friend came to rescue them. Plaintiff A.C.H.C. recalls "being sick for a long time."

90. Kidnappings and crimes against individuals in the camp were frequent. Plaintiffs witnessed women and children being kidnapped by the *Zetas* gang. The family knew a woman

who was kidnapped as soon as she exited a taxi. They encountered a corpse floating in the river where they bathed. At the camp, a man sexually assaulted Plaintiff A.C.H.C., grabbing her from behind and attempting to rape her. Ms. C. reported the crime to Mexican authorities, but the perpetrator convinced the police that he was innocent, and the police declined to act. Plaintiff A.C.H.C. and her sister recall being scared every day.

### **Plaintiffs' MPP Immigration Proceedings**

91. Finally, on December 16, 2019, Plaintiffs and their mother went to the bridge to cross into the United States for their first court hearing in Brownsville, Texas. The courtroom was crowded and Plaintiff A.C.H.C. recalls that it was filled with many chairs, one table, and one TV, on which the Immigration Judge appeared by video to preside over the hearing.

92. During Ms. C. and Plaintiffs' first hearing, the Immigration Judge called Ms. C. to a table at the front of the room. The judge questioned only Ms. C., who had no counsel and is not fluent in English. The judge did not speak to or even appear to acknowledge Plaintiffs, who remained in the back of the courtroom and could not hear the proceedings.

93. The Immigration Judge gave Ms. C. asylum applications and instructed her to complete and return them during their next hearing, scheduled for January 7, 2020.

94. Given her limited English language capabilities, Ms. C. could not complete the asylum applications by herself, so she paid a man to help her complete them. She and Jose C. also worked together to assemble evidence to help support her and Plaintiffs' immigration cases. Ms. C. had heard from other asylum seekers in the Matamoros camp that it was important to obtain translated documents, declarations, and witnesses to support their cases. She and her husband gathered a list of signatures, with contact information and identifying information of neighbors

and others, to confirm the family's story. They were able to find people willing to support the family's case, despite the danger of MS-13 and their threats.

95. Ms. C. submitted asylum applications for herself and Plaintiffs when they appeared for their second hearing in Brownsville on January 7, 2020. Plaintiffs never saw the applications themselves, but even if they had, none of them could have known what the applications said because none of them is fluent in English. The second hearing was like the first. The Immigration Judge addressed only Ms. C., who again had no counsel. Indeed, Plaintiff A.C.H.C. recalls that her mother attempted to inform the Immigration Judge that she has two daughters who are 16 and 14 years old, and who would be able to speak for themselves, but the Immigration Judge refused to hear from them and said Ms. C. would speak for the entire family.

96. Although asylum proceedings in the U.S. are normally conducted in private, Ms. C. had to testify in public in her MPP proceeding, while her children and other MPP asylum seekers looked on. During the hearing, the Immigration Judge did not ask Ms. C. or Plaintiffs for any information to support their asylum claim. None of the Plaintiffs had an opportunity to speak. After speaking with only Ms. C. for a short time, the Immigration Judge ordered Plaintiffs and their mother removed.

97. Ms. C. was then given several documents that she believed were removal orders, in addition to two notices that neither she nor Plaintiffs fully understood, but which seemed to concern an appeal deadline and hearing dates of February 6 and 21, 2020, respectively. The Immigration Judge informed Ms. C. that she needed a good attorney to appeal the decision, which Ms. C. understood to mean that she could not file an appeal without having an attorney.

98. After the hearing, Plaintiff J.S.C.C. recalls the family leaving the courtroom and crying because they had no money, they had nothing to eat, and his mother had just lost her case. The family then returned to the camp in Mexico.

99. Because Ms. C. understood the Immigration Judge to have told her that she could not appeal without an attorney, she thought that she could not appeal her case and has not done so.

### **Family Separation and Imminent Deportation Back to El Salvador**

100. Taking their only chance of escaping the violence in Mexico and El Salvador, Plaintiffs crossed the bridge into the United States and presented themselves to border officials approximately one week after the Immigration Judge had ordered them removed. Their mother remained in Mexico. Although Plaintiffs were designated as UAC, they were not issued new Notices to Appear—the charging document necessary to initiate removal proceedings in immigration court—and still have not been issued such Notices that would reflect their new entry into the United States as unaccompanied immigrant children.

101. Thereafter, DHS transferred Plaintiffs' custody to ORR and on January 18, 2020, Plaintiffs were transferred to a government-affiliated shelter in Maryland, where they were placed in temporary foster care. As part of the ORR reunification process, shelter staff requested Jose C., who resides in Maryland, to submit several pieces of paperwork and pass a required background check before they would release the children into his custody. Jose C. complied with all these requests within 10 days of Plaintiffs' arrival.

102. Because of the removal order that Plaintiffs received with their mother through MPP, ORR halted all efforts to release Plaintiffs to their father in January. Instead of reuniting with their father, Plaintiffs were able to visit with him at the shelter only once a week. They were happy to see him when he arrived and cried when he left. During these visits, Jose C. brought gifts

for Plaintiffs, such as snacks, to boost their morale, but the shelter staff refused to give them to Plaintiffs.

103. On Wednesday, March 4, 2020, immigration counsel for Plaintiffs, Laura Michelle Nally, received notice that DHS intended to remove Plaintiffs and had scheduled them for deportation to El Salvador on Monday, March 16, 2020.

104. Plaintiffs have no parents or other caretakers in El Salvador to take custody of them, let alone to keep them safe because of the murders of multiple relatives and the continued death threats MS-13 has made against the family.

105. DHS has not filed NTAs to initiate and place Plaintiffs in removal proceedings under INA § 240, as required by the TVPRA and implementing regulations whenever DHS seeks to remove an unaccompanied immigrant child. As a result, Plaintiffs have had no opportunity to present their asylum claims to a USCIS Asylum Officer or to an Immigration Judge in an age-appropriate setting.

106. On March 9, 2020, Plaintiffs filed I-246 Applications for Stay of Removal. The Applications were hand delivered to the ICE Enforcement and Removal Office (“ERO”) in Baltimore, Maryland. Ms. Nally followed up with ICE with multiple phone calls.

107. That same day, Ms. Nally filed Emergency Motions to Reopen, Emergency Motions for Stay of Removal, and Motions to Change Venue for each Plaintiff via overnight delivery to the Harlingen Immigration Court, which has administrative control over cases proceeding under MPP in Brownsville. Ms. Nally followed up with the Harlingen Immigration Court with multiple phone calls.

108. On March 12, 2020, the Harlingen Immigration Court issued an order granting Plaintiffs’ motions for stay of removal. The stay order allows the Harlingen Immigration Court to

adjudicate Plaintiffs’ motions to reopen the removal order and to change venue from Harlingen, Texas to the Immigration Court in Maryland, including “adequate time” (10 days from receipt of Plaintiffs’ motions)<sup>2</sup> for DHS “to file a response to [Plaintiffs’] motions.”

109. Plaintiffs filed a habeas corpus petition on March 17, 2020, and a motion for temporary restraining order and preliminary injunction on March 20, 2020. Following this Court’s hearing on that motion on the latter date, Defendants agreed to consider Plaintiffs for release to their father and agreed informally not to remove Plaintiffs until 30 days after the Harlingen Immigration Court rules on Plaintiffs’ motion to reopen. Thus, Defendants’ informal agreement not to remove Plaintiffs to El Salvador could lapse as soon as April 30, 2020.

110. Although there was initial confusion after the March 20 hearing as to whether Defendants intended to oppose Plaintiffs’ motion to reopen in the Harlingen Immigration Court, or indeed whether Defendants had already filed an opposition, Defendants confirmed on Monday, March 23, 2020, that they had already filed an opposition to Plaintiffs’ motion to reopen their removal orders.

111. Plaintiffs were released to and reunified with their father at noon on March 25, 2020—after spending more than nine weeks in government custody while he lived in the same state, only miles away. The prospect of removal and indefinite separation from their parents has been and continues to be extremely stressful and upsetting to Plaintiffs, who have shown long-term trauma, attributable to past instances of assaults against themselves and their parents, that has required significant mental health sessions with ORR care providers.

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<sup>2</sup> See Immigration Court Manual (2020), Rules 3.1 (c)(ii)(E) and 5.2, <https://www.justice.gov/file/1250706/download>.

**CAUSES OF ACTION**

**COUNT I**

**Violation of TVPRA, 8 U.S.C. § 1232(a)(5)(D) and APA, 5 U.S.C. § 706(1) (Agency Action Unlawfully Withheld)**

**(Against All Defendants)**

112. Plaintiffs reallege and incorporate the allegations of all the preceding paragraphs.

113. The TVPRA expressly requires that when DHS seeks to remove any unaccompanied immigrant child, that child “*shall* be placed in removal proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C. 1229a).” 8 U.S.C. § 1232(a)(5)(D) (emphasis added).

114. As explained above, Defendants have not taken, and are not taking, this statutorily required action and instead continue to deny Plaintiffs their rights.

115. The Court may “compel agency action unlawfully withheld or unreasonably delayed . . . .” 5 U.S.C. § 706(1). To make a showing under 5 U.S.C. § 706(1), Plaintiffs must demonstrate “that an agency failed to take a discrete agency action that it is required to take.” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (emphasis omitted).

116. Accordingly, Plaintiffs seek a court order under 5 U.S.C. § 706(1) and the TVPRA, compelling Defendants to take the actions they are required to take under Section 1232(a)(5)(D) and place Plaintiffs in INA § 240 removal proceedings before seeking to remove them.

**COUNT II**

**Violation of TVPRA, 8 U.S.C. § 1232(a)(5)(D) and APA, 5 U.S.C. § 706(2) (Arbitrary and Capricious Agency Action and Action in Excess of Authority)**

**(Against All Defendants)**

117. Plaintiffs reallege and incorporate the allegations of all the preceding paragraphs.

118. Defendants are attempting to remove Plaintiffs without first placing them in removal proceedings under Section 240 of the Immigration and Nationality Act.

119. Defendants' failure to place Plaintiffs in full removal proceedings under INA § 240 violates 8 U.S.C. § 1232(a)(5)(D), which requires that "[a]ny unaccompanied alien child sought to be removed by the Department of Homeland Security . . . *shall* be placed in removal proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C. § 1229a)" (emphasis added).

120. Defendants' disregard of the requirements of 8 U.S.C. § 1232(a)(5)(D) violates the APA in that Defendants' actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," 5 U.S.C. § 706(2)(C).

### **COUNT III**

#### **Violation of 8 C.F.R. §§ 239.1, 1239.1; *Accardi* Doctrine and APA**

#### **(Against All Defendants)**

121. Plaintiffs reallege and incorporate the allegations of all the preceding paragraphs.

122. When DHS seeks to remove any unaccompanied immigrant child, the TVPRA requires that the child "shall be placed in removal proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C. § 1229a)." 8 U.S.C. § 1232(a)(5)(D).

123. Implementing regulations from EOIR, codified under the heading "Initiation of Removal Proceedings" at Title 8, Part 1239, unequivocally state that "[e]very removal proceeding conducted under section 240 of the Act (8 U.S.C. § 1229a) to determine the deportability or inadmissibility of an alien *is commenced by the filing of a notice to appear with the immigration court.*" 8 C.F.R. § 1239.1 (emphasis added).

124. Implementing regulations from DHS, also codified under the heading “Initiation of Removal Proceedings” at Title 8, Part 239, identify which immigration officers may issue an NTA to “an arriving alien at a port-of-entry” to initiate removal proceedings. 8 C.F.R. § 239.1.

125. Defendants are attempting to remove Plaintiffs, who are unaccompanied immigrant children, without placing them in removal proceedings or commencing those removal proceedings by issuing and filing an NTA with the immigration court.

126. Defendants’ actions violate agency policy and procedures, including those found at 8 C.F.R. §§ 239.1, 1239.1, which state that removal proceedings must be commenced by the filing of an NTA.

127. Defendants’ actions, as set forth above, should therefore be set aside under the principle articulated in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (ruling that administrative agencies are obliged to follow their own regulations).

#### **COUNT IV**

#### **Violation of Withholding of Removal Statute, 8 U.S.C. § 1231(b)(3), and APA, 5 U.S.C. § 706(2) (Arbitrary and Capricious Agency Action and Action in Excess of Authority)**

#### **(Against All Defendants)**

128. Plaintiffs reallege and incorporate the allegations of all the preceding paragraphs.

129. Defendants are attempting to remove Plaintiffs to their home country of El Salvador, where they have no parent or caretaker to receive them, and where they and their family were threatened with specific death threats and physically assaulted by the MS-13 gang and their affiliates based on their family’s kinship ties and their religious activities.

130. The 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees, to which the United States is party, requires that the United States not “expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or

freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” United Nations Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 150; *see also* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

131. The Refugee Convention prohibits the return of individuals to countries where they would face persecution on a protected ground as well as to countries that would deport them to conditions of persecution.

132. Congress has codified these prohibitions in the “withholding of removal” provision at INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), which bars the removal of an individual to a country where it is more likely than not that he or she would face persecution.

133. Pursuant to regulation, only an Immigration Judge can determine whether an individual faces such a risk of persecution and is entitled to withholding of removal after full removal proceedings in immigration court. *See* 8 C.F.R. § 1208.16(a).

134. Defendants’ attempt to remove Plaintiffs to El Salvador, where they have no parent or guardian to receive them, and where they are subject to persecution on account of various protected grounds including their family kinship ties and their religious activities, violate 8 U.S.C. § 1231(b)(3)(A), which states that an individual “may not” be removed to a country if that individual’s “life or freedom would be threatened in that country because of the [individual’s] race, religion, nationality, membership in a particular social group, or political opinion.”

135. Defendants’ attempt to remove Plaintiffs to El Salvador in violation of 8 U.S.C. § 1231(b)(3) violates the APA in that Defendants’ actions are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), and “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” 5 U.S.C. § 706(2)(C).

**COUNT V**

**Mandamus**

**(Against All Defendants)**

136. Plaintiffs reallege and incorporate the allegations of all the preceding paragraphs.

137. “To secure mandamus relief, a plaintiff must demonstrate that (1) he has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff.” *Walpin v. Corp. for Nat’l. and Cmty. Servs.*, 630 F.3d 184, 187 (D.C. Cir. 2011) (quotation omitted).

138. Here, Plaintiffs have a clear right to, and Defendants have a clear duty to issue and file NTAs to place Plaintiffs in INA § 240 proceedings.

139. When DHS seeks to remove any unaccompanied immigrant child, the TVPRA requires that the child “*shall* be placed in removal proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C. § 1229a).” 8 U.S.C. § 1232(a)(5)(D) (emphasis added).

140. As Defendant EOIR’s implementing regulations establish, such removal proceedings are commenced *only* “by the filing of a notice to appear with the immigration court.” 8 C.F.R. § 1239.1.

141. Further, the Attorney General “may not” remove an individual to a country if that individual’s “life or freedom would be threatened in that country because of the [individual’s] race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1231(b)(3).

142. Defendants have failed to respect Plaintiffs’ statutory rights and place them into INA § 240 proceedings.

143. Moreover, there is no adequate remedy apart from ordering Defendants to carry out these duties.

144. Accordingly, Plaintiffs seek a writ of mandamus to require Defendants to act immediately to carry out these duties.

## COUNT VI

### **Procedural and Substantive Due Process Violations**

#### **(Against All Defendants)**

145. Plaintiffs reallege and incorporate the allegations of all the preceding paragraphs.

146. The Due Process Clause of the Fifth Amendment applies to all “persons” on United States soil and thus applies to Plaintiffs.

147. Plaintiffs have a liberty interest and a fundamental right under the Due Process Clause in remaining together as a family with their father, who is seeking asylum in Maryland, as well as with their mother, who is currently in Mexico but may be granted asylum as a derivative if Jose C.’s asylum claim is granted. *See D.B. v. Cardall*, 826 F.3d 721, 740 (4th Cir. 2016).

148. Under the INA and TVPRA, Plaintiffs have procedural due process rights to apply for asylum and to a meaningful and fair evidentiary hearing, consisting first of an asylum interview and, if they are referred, a hearing before an Immigration Judge. *See Gutierrez-Rogue v. INS*, 954 F.2d 769, 773 (D.C. Cir. 1992) (citing *Maldonado-Perez v. INS*, 865 F.2d 328, 332-33 (D.C. Cir. 1989)).

149. In seeking to deport Plaintiffs and separate them from their parents without issuing them NTAs or placing them into INA § 240 proceedings, Defendants violate Plaintiffs’ procedural and substantive due process rights by depriving Plaintiffs of a hearing or any adequate procedural protections and by encroaching on Plaintiffs’ fundamental rights.

**COUNT VII**

**Violation of Customary International Law: Prohibition on Refoulement**

**(Against all Defendants)**

150. Plaintiffs reallege and incorporate the allegations of all the preceding paragraphs.

151. DHS is attempting to remove Plaintiffs to their home country of El Salvador, where they and their family were threatened with death and physically assaulted by members and affiliates of the MS-13 gang based on their family's kinship ties and religious activities.

152. The prohibition on refoulement is a specific, universal, and obligatory norm of customary international law. That norm prohibits returning an individual to a country where the individual would be subject to torture or where the individual's life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion.

153. Defendants' actions in removing Plaintiffs to El Salvador will cause a grave and foreseeable injury to Plaintiffs, in violation of the non-refoulement protections afforded to them under international law.

154. Plaintiffs do not have an adequate damages remedy at law to address the violations alleged herein.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court:

- a. Declare pursuant to 28 U.S.C. § 2201 that Defendants' actions in attempting to remove Plaintiffs without issuing and filing a Notice to Appear for each Plaintiff to commence removal proceedings conducted under INA § 240 are arbitrary, capricious, not in accordance with law, in excess of statutory authority, and unconstitutional;

- b. Enjoin Defendants from removing Plaintiffs without placing Plaintiffs in full removal proceedings under INA § 240, with all protections provided in such proceedings, including the opportunity to present their asylum claims to a USCIS Asylum Officer in a non-adversarial setting;
- c. Issue a writ of mandamus requiring Defendants' compliance with the terms of the TVPRA, immigration regulations, and withholding statute, including ordering that Defendants issue and file Notices to Appear for each Plaintiff to commence INA § 240 removal proceedings;
- d. Award Plaintiffs their attorneys' fees and costs; and
- e. Grant any other relief this Court deems just and proper.

March 30, 2020

Respectfully submitted,

/s/ David J. Leviss

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 30, 2020, the foregoing document was electronically filed through CM/ECF with the Clerk of Court for the United States District Court for the District of Columbia. All parties were served via CM/ECF.

*/s/ David J. Leviss*

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