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IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IMMIGRANT DEFENDERS LAW CENTER, *et al.*,

Plaintiffs,

v.

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

Defendants.

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

IMMIGRATION REFORM LAW INSTITUTE'S *AMICUS CURIAE* MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Judge:	**Hon. Fernando M. Olguin**
Date:	**July 7, 2021**
Time:	**10:00 am**
Crtrm	**6D, First St. Courthouse**

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MEMORANDUM OF POINTS AND AUTHORITIES

Amicus Curiae the Immigration Reform Law Institute ("IRLI") files this memorandum of points and authorities in support of the federal defendants' opposition to the plaintiffs' motion for a preliminary injunction.

INTEREST OF *AMICUS CURIAE*

Amicus Curiae IRLI is a nonprofit 501(c)(3) public-interest law firm incorporated in the District of Columbia.[1] IRLI is dedicated to litigating immigration-related cases on behalf of and in the interests of, United States citizens and lawful permanent residents, and to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus* briefs in many important immigration cases. For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from IRLI's affiliate, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has direct interests in the issues here.

[1] Consistent with Fed. R. App. P. 29(a)(4)(E), counsel for *amicus curiae* authored the motion and brief in whole, and no counsel for any party authored the brief in whole or in part, nor did any person or entity, other than the *amicus* and its counsel, make a monetary contribution to the preparation or submission of this brief

ARGUMENT

A party moving for a preliminary injunction must establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs seek to expand the due process rights and statutory procedures applicable to unaccompanied alien children by asserting a right to a restarting of immigration proceedings upon apprehension for attempting a subsequent reentry. Only Congress has the authority to grant such rights and procedures, and it has not done so. Thus, Plaintiffs' motion for preliminary injunction should be denied.

Aliens denied entry or admission are only entitled to such process as Congress has granted them. *See Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."). The Ninth Circuit, consistent with the Supreme Court, "ha[s] . . . held that non-admitted aliens are not entitled to any procedure vis-à-vis

their admission or exclusion." *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1084 (9th Cir. 2011).

To be sure, immigrant children who arrive in the United States without an adult are afforded certain protections with respect to the conditions of their detention while awaiting an immigration hearing. *See Flores v. Sessions*, 862 F.3d 863, 866 (9th Cir. 2017) (explaining that the 1997 settlement agreement "sets the minimum standards for the detention, housing, and release of non-citizen juveniles who are detained by the government"). The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) ("TVPRA") "paralleled certain aspects of the *Flores* Settlement and affirmed ORR [Office of Refugee Resettlement]'s responsibility for the care and custody of unaccompanied minors." *Id*. at 867. *See also Flores v. Barr*, No. CV 85-4544-DMG (AGRx), 2020 U.S. Dist. LEXIS 168136, at *24-25 (C.D. Cal. Sep. 4, 2020) (explaining that the TVPRA "codified many of the same protections that the *Flores* Agreement guarantees to unaccompanied minors"). These protections, however, do not establish a new kind of immigration proceeding under the Immigration and Nationality Act ("INA"), as alleged by plaintiffs, ECF 29-1, at 6; instead, they reflect Congress's decision to protect such children *during* their (already-instituted) proceedings. Further, adhering to such procedures by

continuing proceedings that were properly begun under the Migrant Protection Protocols ("MPP") does not impose "a significant substantive restriction," and is thus not a due process violation. *Goodisman v. Lytle*, 724 F.2d 818, 820 (9th Cir. 1984).

I. THE TVPRA DOES NOT ESTABLISH A RIGHT TO ASYLUM OR A RIGHT TO AVOID REMOVAL

The TVPRA acts in conjunction with the procedures and protections of the INA. It is not "intended to encompass the entire framework for unaccompanied minors"; rather, it is "concerned with ensuring the welfare" of unaccompanied alien children. *Flores v. Sessions*, 862 F.3d 863, 876 (9th Cir. 2017). In fact, Congress enacted the TVPRA "to improve the procedures governing the treatment of unaccompanied minors . . . [and] to assist children in *complying with immigration orders*." *Id*. at 880 (emphasis added) (internal citation omitted). *See also Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1178 (N.D. Cal. 2017) (explaining that "Congress created this framework to address the concern that unaccompanied minors may be victims of human trafficking operations or other criminal activity"). This language reflects the clear intent of Congress that the TVPRA not interfere with already-instituted removal proceedings, but rather ensure that children subject to such proceedings are protected.

The TVPRA deals with conditions of detention and sets forth procedures for the return of certain unaccompanied alien children. It does not establish automatic relief from removal, but merely "requires ORR to decide where to place the minor *while the removal proceedings are pending*." *Id*. at 1196 (emphasis added). It thereby reflects Congress's intention that unaccompanied alien children are in fact subject to removal. Therefore, as long as these children are provided these statutory protections, including written notice and the chance to plead their case, processing an unaccompanied alien child under a properly-instituted proceeding does not give rise to a due process violation. *Flores*, 862 F.3d at 876. *Cf. Saravia*, 280 F. Supp. 3d at 1200 (finding a due process violation only when aliens "were shipped across the country to a secure facility on the basis of gang allegations *without* adequate notice and an opportunity to be heard.") (emphasis added).

Plaintiffs misconstrue the meaning and reach of the TVPRA by claiming it vests unaccompanied alien children with "inalienable rights and protections regardless of prior immigration history." ECF 29-1, at 2. It does not. Section 240 of the INA, not the TVPRA, establishes the procedures and protections for removal. *See, e.g.,* 8 U.S.C. § 1229a. These are the same proceedings that apply regardless of whether an alien is processed under the MPP. The TVPRA codified the required protections for the detention of unaccompanied alien children and the procedures

for those who *qualify* for asylum and the repatriation of those who do not. 8 U.S.C. § 1232. Because the TVPRA makes no guarantees of asylum or withholding of removal there is no "significant substantive restriction" involved and therefore no constitutionally protected interest. *Goodisman, supra*.

The INA guarantees that aliens have the right to *apply* for asylum and establishes the procedures to ensure a fair proceeding. 8 U.S.C. § 1158. The TVPRA simply ensures that this right is available to children who are potential victims of trafficking and establishes additional protections and procedures to ensure fairness. 8 U.S.C. § 1232. There is no constitutionally-protected interest in being *granted* asylum, and no statutory right to such a grant. *Id.; cf. Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."). In fact, as long as the government complies with the required statutory procedures, as is the case here, it may grant or deny an asylum petition and still comport with due process requirements. Continuing with an already begun immigration proceeding does not prevent an asylum application, especially where such application has already been made in that prior proceeding.

There is no statutory language requiring that applications for asylum or withholding of removal from such children must be granted. Instead, the TVPRA requires that such applications be "governed by regulations which take into account the specialized needs of unaccompanied children[.]" 8 U.S.C. § 1232(d)(8). *See also Pena Pocasangre v. Kelly*, No. 16-cv-06930-JSC, 2017 U.S. Dist. LEXIS 109860, at *12-13 (N.D. Cal. July 14, 2017) (explaining that the TVPRA "details protections for certain at-risk children, including unaccompanied minors.").

The Supreme Court has consistently held "that the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law[.]" *United States ex rel. Turner v. Williams*, 194 U.S. 279, 289-90 (1904). The TVPRA is aimed at combatting human trafficking, not at creating a new right to circumvent properly-issued final orders of removal. 8 U.S.C. § 1232(a) (emphasis added) ("In order to enhance the efforts of the United States *to prevent trafficking in persons* . . ."). In fact, evidence that Congress intended unaccompanied alien children be removed can be found in the plain language of the statute, which contemplates the removal of unaccompanied alien children, not a protection from deportation or any other substantive or procedural entitlement. *Id*. ("the Secretary of Homeland Security . . . shall develop policies and procedures to ensure that unaccompanied alien children in the United States are safely

repatriated to their country of nationality or of last habitual residence."). Clearly, the TVPRA does not and cannot block validly-instituted proceedings or immigration court orders.

The TVPRA also anticipates that these unaccompanied alien children will be placed in removal proceedings. Congress explicitly provided that certain unaccompanied alien children are amenable to return to the contiguous country from which they arrived. Inadmissible unaccompanied alien children may be returned to contiguous territory when

> (i) such child has not been a victim of a severe form of trafficking in persons, and there is no credible evidence that such child is at risk of being trafficked upon return to the child's country of nationality or of last habitual residence; (ii) such child does not have a fear of returning . . . owing to a credible fear of persecution; and (iii) the child is able to make an independent decision to withdraw the child's application for admission into the United States.

8 U.S.C. § 1232(a)(2)(A). Furthermore, in cases where contiguous country return is not available, but the unaccompanied alien child is still amenable to removal, the TVPRA requires that the child be "(i) placed in removal proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C. § 1229a); (ii) eligible for relief under section 240B of such Act (8 U.S.C. § 1229c) at no cost to the child; and (iii) provided access to counsel in accordance with subsection (c)(5)." 8 U.S.C. § 1232(a)(5)(D).

II. THE TVPRA DOES NOT PROVIDE A RIGHT TO VOID PROPERLY-INSTITUTED PROCEEDINGS UPON A SUBSEQUENT ILLEGAL REENTRY OR ATTEMPTED REENTRY.

Alien children who have been properly processed with their family cannot circumvent that process for another chance at admission by subsequently attempting to enter the U.S. alone. Neither the INA nor the TVPRA prohibits DHS from pursuing properly instituted proceedings or executing a final order of removal. Additionally, the INA already provides a mechanism for review of final orders of removal, and it is not the TVPRA. *Na Li v. Chertoff*, No. CV 07-5634-JFW (AJWx), 2008 U.S. Dist. LEXIS 126261, at *10 (C.D. Cal. Jan. 31, 2008) (rejecting Plaintiff's due process claims because "th[e]Court is not an appropriate court of appeals" under 8 U.S.C. § 1252(a)(2)(D).

In fact, as explained above, the TVPRA anticipates and provides rules for the return of unaccompanied alien children to the contiguous territory from which they arrived, a clear indication that they are not entitled to remain in the U.S. 8 U.S.C. § 1232(a)(5) (instructing DHS to "develop and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied alien children"). Because the proceedings that these unaccompanied alien children will be subject to under 8 U.S.C. § 1229a are the same regardless of where they are required to await such proceeding, they are not subjected to prejudice when DHS

carries out lawfully instituted MPP proceedings and orders of removal. Furthermore, unless otherwise provided, the INA instructs that full removal "shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." 8 U.S.C. § 1229a(a)(3). Because neither the INA nor the TVPRA contemplates the restarting of immigration hearings or cancellation of unexecuted final orders of removal, unaccompanied alien children who attempt a subsequent reentry are not denied due process by being subject to such hearings.

The TVPRA does not and cannot divest jurisdiction from the immigration court that instituted the prior MPP proceeding. *See, e.g., Harmon v. Holder*, 758 F.3d 728, 735 (6th Cir. 2014) (holding that "the TVPRA does not transfer initial jurisdiction over asylum applications filed by former unaccompanied alien children to the USCIS."). Contrary to Plaintiffs' assertions, "[a] person's status as an unaccompanied child for purposes of TVPRA's initial-jurisdiction provision is determined as of the date the person applies for asylum, not as of the date the person enters the United States or the date the person was abandoned by his or her parents." *Mazariegos-Diaz v. Lynch*, 605 F. App'x 675, 676 (9th Cir. 2015). According to the Board of Immigration Appeals, "the most natural reading of the statutory language is that an asylum officer only has initial jurisdiction over a UAC's asylum

application if it is filed *while the applicant is in UAC status*."). *Matter of M-A-C-O-*, 27 I. & N. Dec. 277, 279 (B.I.A. 2018) (emphasis added). Furthermore, any issue regarding unaccompanied alien child status may be reviewed by an immigration judge, giving Plaintiffs adequate opportunity to be heard. *Id*. ("Neither the TVPRA nor any other authority . . . states that a DHS or HHS determination of UAC status is binding on an Immigration Judge in removal proceedings."). There are thus no constitutional violations when DHS allows already instituted proceedings to continue.

III. NEITHER THE TVPRA NOR THE INA REQUIRES ISSUANCE OF A NEW NOTICE TO APPEAR WHEN AN ALIEN CHILD PROCESSED UNDER MPP SUBSEQUENTLY ATTEMPTS AN ILLEGAL ENTRY.

Congress has determined that fundamental fairness requires the government to provide aliens with written notice when initiating section 240 removal proceedings. 8 U.S.C. § 1229. This written notice, known as a Notice to Appear ("NTA"), is required to contain certain information, including but not limited to "[t]he nature of the proceedings[,]" "[t]he legal authority under which the proceedings are conducted[,]" "[t]he time and place at which the proceedings will be held[,]" and "[t]he consequences under section 240(b)(5) [8 U.S.C. § 1229a(b)(5)] of failure, except under exceptional circumstances, to appear at such

proceedings." 8 U.S.C. §§ 1229(a)(1)(A), (B), (G)(i), (G)(ii). Additionally, while aliens are "permitted the opportunity to secure counsel," Congress made clear that failure to do so within the prescribed time does not "prevent the Attorney General from proceeding against an alien pursuant to section 240." 8 U.S.C. §§ 1229(b)(1), (3). The statute also provides for "prompt initiation of removal proceedings" for aliens convicted of a removable offense. 8 U.S.C. § 1229(d). Although it requires removal proceedings to be initiated "as expeditiously as possible," Congress also made clear that such requirement "shall [not] be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." *Id*. There is no language, and Plaintiffs point to no supporting case law, that requires the re-initiation of proceedings and reissuance of an NTA to an alien who already has either a pending proceeding or final order of removal.

Furthermore, Plaintiffs acknowledge that the unaccompanied alien children at issue in this case were given a proper Notice to Appear ("NTA") when they were initially processed under the MPP. They thus can point to no deprivation of a constitutionally protected interest that entitles them to injunctive relief from this court.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for preliminary injunction should be denied.

Date: June 17, 2021

Respectfully submitted

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