IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

A.M.P.V., a minor, by and through her next friend, Miriam Aguayo,

Plaintiff,

v.

WILLIAM P. BARR, in his official capacity as United States Attorney General; 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; DANIEL BIBLE, in his official capacity as Field Office Director for the San Antonio Field Office of 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 U.S. Immigration and Customs Enforcement; OFFICE OF REFUGEE AND RESETTLEMENT; HEIDI STIRRUP, in her official capacity as Acting Director of the Office of Refugee and Resettlement.

Defendants.

Case No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR WRIT OF MANDAMUS

INTRODUCTION

1. Plaintiff A.M.P.V. is a child from Honduras who is currently in the custody of the Office of Refugee Resettlement ("ORR") and being detained at the Upbring New Hope Center in McAllen, Texas. She has suffered physical and sexual assault; has endured harassment, extreme conditions, and severe emotional trauma in her efforts to seek refuge in the United States; and is now gravely at risk of being deported to a country where she has no parent or legal guardian to protect her and faces a serious threat of additional harm or violence. Because Plaintiff was properly designated as an "unaccompanied alien child" ("UAC") upon entry into the United States,

she must be placed in removal proceedings pursuant to section 240 of the Immigration and Naturalization Act ("INA"). Instead, the government intends to imminently remove Plaintiff to Honduras without providing the protections required by U.S. law.

2. The Trafficking Victims Protection Reauthorization Act ("TVPRA") and the Due Process Clause of the Fifth Amendment to the Constitution require the Department of Homeland Security ("DHS") to implement certain protections for unaccompanied immigrant children such as Plaintiff. 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. Critically, the continued threat of immediate removal by DHS violates the TVPRA, which provides protections to immigrant children by requiring, *inter alia*, that whenever 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)" before the child can be removed. *See* 8 U.S.C. § 1232(a)(5)(D) (emphasis added). 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. The protections afforded by full INA § 240 proceedings are even more important for unaccompanied immigrant children like Plaintiff, who enter the United States without a parent or guardian and, in the case of Plaintiff, have survived violence and trauma in both their home country and in Mexico under the federal government's recently adopted Migrant Protection Protocols ("MPP"), also known as the "Remain in Mexico" program, 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 or has pending claims in immigration court or the Board of Immigration Appeals, the TVPRA's protections still apply. Defendants, however, have not afforded these protections to Plaintiff.

4. Plaintiff has endured unspeakable hardships and the U.S. government refuses to honor its legal commitment to protect unaccompanied immigrant children by providing Plaintiff her statutorily mandated right to INA § 240 removal proceedings. Instead, Defendants seek to remove Plaintiff to Honduras—where she has no parent or legal guardian to protect her from the serious threat of harm that awaits—and in doing so, have violated and continue to violate Plaintiff's rights under the TVPRA, the INA, and the Due Process Clause of the Fifth Amendment to the United States Constitution. Plaintiff respectfully requests that this Court order Defendants to cease their efforts to remove Plaintiff to Honduras and comply with their legal obligations by placing Plaintiff in INA § 240 removal proceedings, as required by 8 U.S.C. § 1232(a)(5)(D), before attempting to remove her to Honduras.

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.

7. The Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), waives the federal 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, 705, 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. Plaintiff is informed and believes, and based thereon alleges, that Defendants' decisions regarding the policies and procedures relating to the detention and processing of unaccompanied immigrant children, including those previously subject to MPP, have been and are being made in the District of Columbia.

PARTIES

14. Plaintiff A.M.P.V. is a sixteen-year-old girl from Honduras who is filing this petition by and through her next friend, Miriam Aguayo. Ms. Aguayo is familiar with A.M.P.V.'s ongoing immigration case and is dedicated to her best interests in this case.

15. 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 and is empowered to grant relief from removal. He is sued in his official capacity.

16. Defendant U.S. Department of Homeland Security ("DHS") is responsible for enforcing the immigration laws of the United States.

17. 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.

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

19. Defendant Daniel Bible is the Field Office Director for ICE's San Antonio Field Office, overseeing Enforcement and Removal Operations, and is responsible for and has authority over the removal of noncitizens within his jurisdiction, including Plaintiff. He is sued in his official capacity.

20. Defendant Matthew T. Albence is the Deputy Director and Senior Official Performing the Duties of the Director of ICE, and he directs the nation's immigration detention system and oversees the removal of noncitizens in the United States. He is sued in his official capacity.

21. Defendant Office of Refugee and Resettlement ("ORR") is the component of the U.S. Department of Health and Human Services ("HHS") that provides placement and care for unaccompanied immigrant children and is directly responsible for Plaintiff's detention.

22. Defendant Heidi Stirrup is the Acting Director of ORR. ORR is the government entity directly responsible for the detention of Plaintiff. She is a legal custodian of Plaintiff and is sued in her official capacity.

STATEMENT OF FACTS

OVERVIEW

23. After enduring severe physical, emotional, and sexual abuse by her father in Honduras; a difficult journey from Honduras to Mexico and the United States; and finally,

separation from her mother who remains in Mexico, Plaintiff—a sixteen-year-old girl from Honduras—is detained in the United States and faces imminent removal from the country.

24. In Honduras, Plaintiff suffered great harm from her father, including prolonged physical abuse throughout her childhood, witnessing her father beat her mother and abuse her siblings, and a devastating sexual assault when she was thirteen years old. After reporting the sexual assault, which resulted in the arrest and imprisonment of her father, she and her family were threatened by her paternal uncle, an individual who had served time in prison for murder. Fleeing this threat and the threat of her father's retribution once released from prison, Plaintiff and her mother sought asylum in the United States but were forced by MPP into Mexico to wait for their hearing in dangerous and unstable conditions.

25. On January 10, 2020, an Immigration Judge presiding over MPP proceedings issued a removal order against Plaintiff and her mother. Given Plaintiff's continued psychological trauma, including Post-Traumatic Stress Disorder ("PTSD"), Plaintiff did not feel comfortable sharing her deeply personal and traumatic story, and she therefore did not have the opportunity to explain her situation to the Immigration Judge. Plaintiff also speaks no English and was not represented by an attorney at the proceedings. Plaintiff did not understand most of what happened at the hearing and was not aware of what the next steps would be.

26. After their hearing, on January 10, 2020, Plaintiff and her mother were returned to Mexico. Facing constant dangers there, on or about January 24, 2020, Plaintiff presented herself to U.S. border officials alone.

27. On February 18, 2020, Plaintiff's newly retained *pro bono* counsel filed a motion to reopen removal proceedings. This motion, brought pursuant to 8 U.S.C. § 1229a(c)(7) and 8 C.F.R. §§ 1003.2(c) and 1003.23(b)(3) is not the proper vehicle for seeking the relief requested

here, for which Plaintiff has no recourse other than the U.S. federal courts. The Department of Homeland Security ("DHS") filed an opposition on February 28, 2020, and Plaintiff filed supplemental evidence on March 6, 2020. On March 10, 2020, the immigration court denied the motion to reopen. Plaintiff's *pro bono* counsel filed an appeal with the Board of Immigration Appeals ("BIA"). That appeal—which challenges the denial of the motion to reopen, not the underlying removal order—is currently pending.

28. On April 1, 2020, Plaintiff's *pro bono* counsel learned that DHS intended to execute the MPP removal order against Plaintiff on April 3, 2020. On April 2, 2020, Plaintiff's *pro bono* counsel filed an emergency stay with BIA to halt Plaintiff's removal pending BIA's review of her appeal, which BIA denied that same day. Plaintiff's *pro bono* counsel also filed a Form I-246 Application for a Stay of Removal with ICE pending resolution of the BIA appeal. This stay request is pending. Although Plaintiff has not been removed as of the time of the filing of this lawsuit, the government may imminently remove her.

29. This threat of immediate removal, with no opportunity for Plaintiff to explain why she should not be deported to Honduras—where she has no parent or legal guardian and faces imminent danger—directly violates the TVPRA, which states that whenever 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)" before the child can be removed. 8 U.S.C. § 1232(a)(5)(D) (emphasis added). To date, no such proceeding has commenced.

30. If executed, the removal order would return Plaintiff to a country where she has no parent or legal guardian to take custody of her and where she has endured sexual abuse and has been threatened with imminent harm. As an unaccompanied immigrant child, Plaintiff is entitled

to numerous protections intended to prevent such an unconscionable outcome. Plaintiff, for example, is entitled to full, formal removal proceedings under section 240 of the INA. As part of that process, she is entitled to present her asylum claims to a U.S. Citizenship and Immigration Services ("USCIS") Asylum Officer in a non-adversarial, child-sensitive setting. If the Asylum Officer does not approve her asylum claims, she is then entitled to a second opportunity to present her asylum claims to an Immigration Judge, who will review the Asylum Officer's findings and consider additional evidence and arguments showing why she is entitled to asylum.

31. Notably, the applicable TVPRA sections and INA § 240 do not provide exceptions or carve-outs for certain classes of children—its language and protections are mandatory for all children, including Plaintiff. Moreover, the congressionally mandated proceedings under INA § 240 are procedures that are *automatically afforded* to unaccompanied immigrant children by virtue of their UAC status, regardless of any prior immigration history. Accordingly, an immigrant child such as Plaintiff must be afforded a section 240 proceeding. This is true even if the child, like Plaintiff, has previously been ordered removed.

32. In every respect, Defendants' treatment of Plaintiff has failed to comply with the TVPRA and the Constitution. The threat of deportation hanging over Plaintiff is just the most recent in a series of actions demonstrating how Defendants' treatment of unaccompanied immigrant children continues to violate the law and Plaintiff's 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 overtly ignore the TVPRA's statutory mandate that unaccompanied immigrant children automatically receive full and formal INA § 240 proceedings, and instead turn a deaf ear to the very credible fears of a vulnerable class of people that Congress designated for special protection: young, unaccompanied immigrant children. This is the case for A.M.P.V, who was subjected to violence and fear in Mexico, and now faces potential removal to Honduras without the processes that Defendants are duty-bound to carry out under the laws of the United States.

LEGAL BACKGROUND

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

33. 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.

34. 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. 8 C.F.R. § 1239.1(a).

35. 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.

36. 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

37. On December 20, 2018, then-Secretary Nielsen of DHS 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 being permitted to pursue these proceedings while remaining 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.

38. The Trump administration issued several memoranda and guidance documents in January 2019 to implement MPP. These directives included a January 25, 2019 memorandum from then-DHS Secretary Nielsen, stating that MPP would be implemented "on a large scale basis"; a memorandum issued shortly thereafter 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 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 MPP into Texas throughout 2019 and into Arizona in January 2020.

39. Under the Trump administration's implementing documents, certain groups, including unaccompanied immigrant 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 since the program's implementation—have been sent back to Mexico to await their asylum proceedings under MPP.

40. Asylum proceedings in MPP are far different from 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. Plaintiff and her mother went through one such hearing.

41. 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 U.S. Department of Justice ("DOJ") regulations require public access to immigration hearings. Although the Executive Office for Immigration Review ("EOIR"), a sub-agency of the DOJ,

nominally opened the tent courts 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 who are housed 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.

42. 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 with clients in Mexico. According to an independent analysis of data obtained from EOIR, 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 to more than *fourteen times* for women and children—the challenges involved in obtaining representation in MPP are outcome-determinative, leaving meritorious asylum claims unheard or not granted.

43. 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.

44. 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.

45. *In absentia* removal orders are all too common because asylum seekers in MPP face kidnapping, rape, and other forms of violence along the border. Moreover, many asylum seekers have no permanent address, which means that there is no way for the immigration courts to notify them of the date, time, or 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

46. 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, 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).

47. For example, asylum seekers sent to the Laredo or Brownsville tent courts, like Plaintiff, 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 has classified 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.

48. Some asylum seekers returned to Mexico are lucky to find housing in shelters, hotels, or rooms for rent. Many, however, 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, where Plaintiff was sent, 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

49. 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 figures released by HHS, between October 1, 2019 and January 13, 2020, 352 children 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.

50. 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 suffers 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 alone in the United States, separated from her parents in Mexico, her parents' asylum claims often falters due to the separation, not due to the claims' underlying merits.

Legal Framework and Policies Governing Treatment of Unaccompanied Immigrant Children

51. 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"). "Unaccompanied alien children" 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/homesec/R43664.pdf (last visited Mar. 16, 2020).

52. 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). The TVPRA favors providing unaccompanied immigrant children with a full and fair opportunity to have their claims heard through a process that is sensitive to the needs of the child and the trauma the child has endured. The TVPRA effectuates its goal of protecting the needs of the child by ensuring that immigrant children are provided two opportunities to seek asylum and other relief from removal: first, in a non-adversarial interview with a USCIS Asylum Officer; and second, in an age-appropriate hearing before an Immigration Judge.

53. 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 mandate remains applicable even if the child has since reunited with a parent or legal guardian, has pending claims in immigration court or with 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/homesec/R43664.pdf (last visited Mar. 16, 2020).

54. The USCIS asylum process for unaccompanied immigrant children is less adversarial than immigration court and seeks to more sensitively attend to the special needs of children who cannot be expected to know how to navigate the complexities of an immigration system designed for adults. Once placed in full removal proceedings, the child can raise her asylum claim in a non-adversarial, child-sensitive, trauma-informed setting. *See* 8 U.S.C. §§ 1158(b)(3)(c), 1232(d)(8). 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).

55. Importantly, the TVPRA ensures that even if the government 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. Pursuant to the TVPRA, *all* unaccompanied immigrant children, except those from Mexico and Canada, 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 the government attempts removal.

56. 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 arguments 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 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.

57. 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.

PLAINTIFF'S BACKGROUND

58. Plaintiff A.M.P.V. is a sixteen-year-old girl from Honduras. Plaintiff is an unaccompanied minor and currently in the care of the Office of Refugee Resettlement ("ORR") in McAllen, Texas and is facing imminent deportation from the United States. Plaintiff's mother is still in Mexico and her father is serving a fifteen-year prison sentence in Honduras for his sexual assault of Plaintiff when she was thirteen years old.

Past Abuse and Trauma

59. Plaintiff lived with her mother and father in Choloma, Cortes, Honduras. Her father was prone to violence and abuse against Plaintiff, her mother, and her siblings. Plaintiff's mother was frequently subjected to her father's violence and was unable to protect the children from him, especially during the day when she worked outside the home. Plaintiff suffered severely at the hands of her father, who would beat her with his fists and a studded metal belt to the point where she could barely move the following day. She learned to withdraw into herself and hide her emotions in an attempt to avoid angering her father and suffering more violence.

60. When Plaintiff was thirteen, her father sexually abused and raped her, threatening to beat her and kill her mother if she told anyone. Frightened for herself and for her younger sister who was also vulnerable to her father's abuse, she told her grandmother who reported the matter to the police. Her father was subsequently arrested, convicted, and incarcerated.

61. Plaintiff and her family then received threats from Plaintiff's uncle that he would take revenge on them for his brother's imprisonment. Plaintiff was and is terrified by these threats as her uncle was himself recently released from prison where he had been held for murder.

Flight to the United States and MPP Immigration Proceedings

62. Fleeing threats to her and Plaintiff for reporting the abuse Plaintiff's father inflicted on her, Plaintiff's mother decided to take Plaintiff to the United States to seek refuge. After an arduous journey, the pair crossed the border into the United States and presented themselves to United States immigration officials near Brownsville, Texas on September 16, 2019. The immigration officials placed Plaintiff and her mother on the Migrant Protection Protocol Docket and sent them to Mexico to await their hearing date. Plaintiff spent several months in Matamoros, Mexico with her mother before their hearing.

63. Plaintiff and her mother filed I-589 applications for asylum, withholding of removal, and withholding of removal under the Convention Against Torture. On January 10, 2020, Plaintiff and her mother appeared for a hearing in the immigration tent court in Brownsville, Texas. Plaintiff did not understand what occurred at this hearing as it was primarily conducted in English, which she does not speak. Due to the depth of trauma Plaintiff experienced, she was unable to speak and share the abuse she had been subject to in such a setting, relying solely on her mother throughout the hearing process to tell both of their stories. Neither she nor her mother were represented by counsel during this process.

64. At the conclusion of their hearing, the Immigration Judge issued an oral order of removal to Honduras for Plaintiff and her mother, advising them that they had until February 10, 2020 to appeal. Plaintiff's mother protested at the hearing that her daughter was not safe in the camp in Mexico. Despite Plaintiff's well-held fear of returning to Mexico, the government sent Plaintiff and her mother back to the encampment in Matamoros, Mexico.

Return to the United States

65. Conditions at the refugee camp in Mexico were difficult and dangerous, with the threat of violence and assault ever present. Days after her hearing, Plaintiff learned that a group of men in the camp had attempted to kidnap another young female friend. Fearing for her safety, Plaintiff sought protection in the United States, this time on her own. Upon arrival in the United States, she presented herself at a port of entry and was processed as a UAC and sent to the Upbring New Hope Center in McAllen, Texas. Though she was properly designated as a UAC, Plaintiff did not receive an NTA—as is required to initiate removal proceedings in an immigration court—and still has not been issued such a notice to reflect her entry into the United States as an unaccompanied minor.

Motion to Reopen and BIA Appeal

66. While at New Hope, Plaintiff was finally able to obtain representation through the South Texas Pro Bono Asylum Representation Project ("ProBar"); however, this representation came too late to meet the appeal deadline of February 10, 2020—a deadline that Plaintiff was unaware of, having not understood the outcome of the January 10, 2020 hearing. Plaintiff's new counsel quickly filed a motion to reopen the removal proceedings on February 18, 2020 with the Immigration Court in Harlingen, Texas. On February, 28, 2020, the Department of Homeland Security filed an opposition in response to the motion to reopen. On March 6, 2020, Plaintiff's attorney filed supplementary evidence to the motion to reopen consisting of a psychological evaluation report of Plaintiff, detailing the serious and devastating trauma she had suffered and its lasting effects The immigration judge denied the motion to reopen on or about March 10, 2020.

67. On or about March 26, 2020, Plaintiff, through her representative, filed an appeal of the immigration court's decision to the Board of Immigration Appeals. The appeal noted that

Plaintiff had not had adequate access to representation and that her mother had spoken for her but was not a lawyer and did not have the legal knowledge to sufficiently represent Plaintiff's interests. The appeal also explained that Plaintiff is and was limited by her past trauma in her ability to speak about her sufferings in front other individuals and therefore was not able to explain what happened to her to the judge during the prior proceeding. This appeal is currently pending.

Imminent Threat of Deportation

68. In spite of her pending BIA appeal, ICE is attempting to remove Plaintiff from the country. On April 1, 2020, Plaintiff's *pro bono* counsel were informed that she was scheduled to be removed from the country on April 3, 2020 in execution of Plaintiff's MPP removal order that had been issued to Plaintiff and her mother before she entered the United States as a UAC. Plaintiff's *pro bono* counsel filed an emergency stay with the BIA pending review of her appeal on April 2, 2020. The stay was summarily denied that same day. Plaintiff's representatives have also filed an I-246 Application for a Stay of Removal with ICE for an emergency stay pending resolution of the BIA appeal. That stay is still pending. Plaintiff faces an imminent threat of removal.

69. Plaintiff will face grave danger if Defendants deport her to Honduras. Her father is in prison and her mother is, to Plaintiff's knowledge, in Mexico. Moreover, Plaintiff has received threats from members of her family for reporting the abuse by her father. In particular, Plaintiff's paternal uncle has expressly threatened to avenge his brother and was recently released after serving a prison sentence for murder.

CAUSES OF ACTION

COUNT I

Violation of TVPRA, 8 U.S.C. § 1232(a)(5)(D), (c)(2)(A), and APA, 5 U.S.C. § 706(1)
(Agency Action Unlawfully Withheld)

(Against All Defendants)

70. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs.

71. 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).

72. As explained above, Defendants have not taken, and are not taking, this statutorily required action and instead continue to deny Plaintiff her rights.

73. 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), Plaintiff 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).

74. Accordingly, Plaintiff seeks 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 sections 1232(a)(5)(D) and (c)(2)(A).

COUNT II

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

(Against All Defendants)

75. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs.

76. Defendants are attempting to remove Plaintiff without first placing her in removal proceedings under section 240 of the Immigration and Nationality Act.

77. Defendants' failure to place Plaintiff in full removal proceedings under INA § 240 violates the TVPRA, 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)." 8 U.S.C. § 1232(a)(5)(D) (emphasis added).

78. Defendants' disregard of the requirements of 8 U.S.C. §§ 1232(a)(5)(D) and 1232(c)(2)(A) 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, 5 U.S.C. § 706(2)(A) (Arbitrary and Capricious Agency Action)

(Against All Defendants)

79. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs.

80. 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).

81. 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).

82. 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.

83. Defendants are attempting to remove Plaintiff, who is an unaccompanied immigrant child, without placing her in removal proceedings or commencing those removal proceedings by issuing and filing an NTA with the immigration court.

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

85. 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).

86. Defendants' actions, as set forth above, fail to comply with the issuing agencies' regulations and are therefore arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

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)

87. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs.

88. Defendants are attempting to remove Plaintiff to her home country of Honduras, where she faces an imminent risk of harm.

89. 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.

90. 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.

91. 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.

92. 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).

93. Defendants' attempt to remove Plaintiff to Honduras—where she has no parent or legal guardian to care for her and where she faces an imminent risk of harm—violates 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."

94. Defendants' attempt to remove Plaintiff to Honduras 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)

95. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs.

96. "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).

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

98. 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).

99. 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.

100. 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).

101. Defendants have failed to respect Plaintiff's statutory rights and place her into INA § 240 proceedings.

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

103. Accordingly, Plaintiff seeks a writ of mandamus to require Defendants to act immediately to carry out these duties.

COUNT VI

Procedural Due Process Violations

(Against All Defendants)

104. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs.

105. The Due Process Clause of the Fifth Amendment applies to all "persons" on United States soil and thus applies to Plaintiff.

106. Under the INA and TVPRA, Plaintiff has procedural due process rights to apply for asylum and to a meaningful and fair evidentiary hearing, consisting first of an asylum interview and, if she is 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)).

107. In seeking to deport Plaintiff without issuing her an NTA or placing her into INA § 240 proceedings, Defendants violate Plaintiff's procedural due process rights by depriving her of a hearing or any adequate procedural protections.

COUNT VII

Violation of Customary International Law: Prohibition on Refoulement

(Against all Defendants)

108. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs.

109. DHS is attempting to remove Plaintiff to her home country of Honduras, where she faces an imminent risk of harm.

110. 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.

111. Defendants' actions in removing Plaintiff to Honduras will cause a grave and foreseeable injury to Plaintiff, in violation of the non-refoulement protections afforded to her under international law.

112. Plaintiff does not have an adequate damages remedy at law to address the violations alleged herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully request that this Court:

a. Assume jurisdiction over this matter;

b. Stay execution of the prior MPP removal order against Plaintiff to maintain the *status quo* and allow Plaintiff to seek relief on the aforementioned counts from this Court;

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

d. Enjoin Defendants from removing Plaintiff without placing her in full removal proceedings under INA § 240, with all protections provided in such proceedings, including the opportunity to present her asylum claims to a USCIS Asylum Officer in a non-adversarial, age-appropriate, and trauma-informed setting;

e. 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 Plaintiff to commence INA § 240 removal proceedings;

f. Award Plaintiff her attorneys' fees and costs; and

g. Grant any other relief this Court deems just and proper.

Respectfully submitted,

DATED: April 6, 2020

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