IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TEXAS CIVIL RIGHTS PROJECT, as Next Friend, on behalf of UNNAMED CHILDREN #1-100, *Plaintiffs*, v. CHAD F. WOLF, Acting Secretary of Homeland Security, in his official capacity, et al., *Defendants*.	No. 20-cv-_____

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER ALLOWING ATTORNEY ACCESS TO UNNAMED CHILDREN AND STAY OF REMOVAL

INTRODUCTION

Defendants are stashing children in a hotel at the border, away from advocates and lawyers, in order to hurriedly expel them without hearings or any of the mandatory protections to which unaccompanied minors are statutorily entitled, under a new shadow immigration system called the "Title 42 Process" that Judge Nichols in this District has already found likely is unlawful in the only ruling thus far on the issue. *See* Exhibit A, Transcript of June 24, 2020 Preliminary Injunction Hearing and Oral Ruling, *J.B.B.C. v. Wolf*, No. 20-cv-1509, ECF No. 39, at 44-53 (D.D.C. June 24, 2020) (issuing preliminary injunction on ground that the new expulsion process likely lacks statutory authorization and conflicts with the specific statutory protections accorded to unaccompanied children).

Defendants will not provide the names of the children, and to the extent they permit the child to call a parent, they do not permit the child to tell the parent their location (if these young

children even know where they are). **The children are in imminent danger of unlawful removal, perhaps as soon as today**.

The Texas Civil Rights Project ("TCRP") – a legal organization acting as next friend of the children – has now learned that some unknown number of children may be or recently were being secretly held in the Hampton Inn & Suites Hotel in McAllen, Texas. Plaintiffs seek an emergency temporary restraining order (1) requiring Defendants to inform the children and/or their parents that the Plaintiff organization is prepared to represent them if they want counsel, and (2) if any of the children wish for counsel to represent them, prohibiting Defendants from expelling the children from the country under the Title 42 Process until such time as the Court can rule on the legality of that Process after briefing and a hearing.

BACKGROUND

The following facts are set forth in the declarations accompanying this motion.

As of July 23, 2020, possibly dozens of unaccompanied children were detained by U.S. Department of Homeland Security ("DHS") at the Hampton Inn & Suites hotel in McAllen, Texas pending their expulsion pursuant to the Title 42 Process. On information and belief, it is TCRP's understanding that the children held in that hotel are about to be transferred to unknown locations, if such transfer has not already occurred, potentially for expulsion from the United States. These transfers could occur as early as today, Friday, July 24, 2020, or over the weekend. Many if not all of the children likely have legitimate claims for humanitarian relief in the United States, including asylum. Accordingly, their deportation would result in their return to significant danger.

As explained more fully in Plaintiffs' Complaint, the Title 42 Process is a new immigration system established under the government's public health powers codified in Title 42

of the U.S. Code. Specifically, in a series of agency documents the Centers for Disease Control and Prevention (CDC) and U.S. Customs and Border Protection ("CBP") have invoked 42 U.S.C. § 265 to bar and expel noncitizens who come to the border or enter the country without documents.[1] Defendants have implemented this Title 42 process as an alternative immigration system, ignoring various mandatory statutory protections for vulnerable noncitizens, including unaccompanied minors.

Defendants have largely sought to carry out this new expulsion process in secret. In the early weeks of the process, there was almost no public information about how Defendants operated the Title 42 Process. Immigration lawyers who work with unaccompanied children noticed a severe drop in the numbers of children coming into ORR shelters (where unaccompanied children are initially housed). But because noncitizens subject to the Title 42 Process are deported with no access to counsel and no hearings, lawyers had no practical means of connecting with potential clients. Defendants also kept secret the locations where they detained noncitizens subject to the Title 42 Process, which prevented lawyers from making pro bono legal services available to them or even to inform them of their rights. Defendants held unaccompanied children for days in secret locations before deporting them.

[1] *See* Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16559 (Mar. 24, 2020) (effective date Mar. 20, 2020); Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060 (Mar. 26, 2020) (effective date Mar. 20, 2020); Extension of Order Under Sections 362 and 365 of the Public Health Service Act, 85 Fed. Reg. 22,424 (Apr. 22, 2020) (effective date Apr. 20, 2020); Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act, 85 Fed. Reg. 31,503 (May 26, 2020) (effective date May 21, 2020); U.S. Customs and Border Protection and U.S. Border Patrol, "Operation Capio" Memo, *available at* https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html.

Only in recent weeks has the public gained some information concerning how Defendants have operated the Title 42 Process. Immigration lawyers began hearing sporadically of children held in hotels for brief periods of time before deportation. Until very recently, Defendants kept those locations secret. But in the last week, public reports stated that children were being held in certain specific hotels in cities and towns at or near the U.S.-Mexico border.

The Hampton Inn & Suites in McAllen, Texas has been identified as one of those hotels. Plaintiff TCRP became aware of a significant number of unaccompanied children held in that hotel awaiting expulsion pursuant to Title 42. TCRP sought to gain access to the hotel so it could offer pro bono representation to the children, but were blocked by unknown people (apparently working on behalf of DHS) from accessing the locations where children were detained. Defendants have also subsequently refused requests by counsel to provide access to the children or to provide the children with a means of contacting counsel. Thus, TCRP initiated this suit on behalf of these unnamed minors as Next Friend. [2]

Of critical importance at this stage, Defendants have an affirmative statutory obligation to ensure "to the greatest extent practicable" that *all* unaccompanied children in DHS custody have

[2] TCRP easily satisfies both prongs of the *Whitmore* test for next friend standing. First, the unaccompanied children currently held in the Hampton Inn & Suites McAllen "cannot appear on [their] own behalf to prosecute the action," *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990), because—as demonstrated in the Complaint—they are minors who, on information and belief, are being denied access to counsel. TCRP seeks access to the children to ascertain whether the children wish to have legal representation but have been denied such access by Defendants. Second, there can be no dispute that TCRP is "truly dedicated to the best interests of the person on whose behalf [it] seeks to litigate," *id.*, because it is a nonprofit with a longstanding mission and practice of serving unaccompanied children and asylum seekers, as discussed more fully in the Complaint. Moreover, TCRP has represented other unaccompanied children subject to the Title 42 Process and regularly serves unaccompanied children in the Texas area. *See also Am. Civil Liberties Union Found. on behalf of Unnamed U.S. Citizen v. Mattis*, 286 F. Supp. 3d 53, 57, 56-60 (D.D.C. 2017) (concluding that legal organization had standing under the *Whitmore* test for the purpose of accessing an unnamed detainee in U.S. custody in Iraq to determine whether he wished to have counsel, noting that a next friend need not have a "significant relationship" with a party detained in "extreme circumstances").

legal counsel "in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking," and to "make every effort" to connect unaccompanied children with pro bono service providers in fulfilling this obligation. 8 U.S.C. § 1232(c)(5); *see also* H.R. Rep. No. 110-430, at 57 (2007) (stating that in enacting § 1232, Congress intended to require the government to "take steps to assist children in . . . accessing pro bono representation"). Service providers such as TCRP stand ready to represent these children in their immigration matters, but the operation of the Title 42 Process prevents them from doing so.

LEGAL STANDARD

The general four-factor test for injunctive relief applies to TROs: Plaintiffs must show (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of a TRO; (3) that the balance of equities tips in their favor; and (4) that a TRO is in the public interest. *See, e.g.*, *Shelley v. Am. Postal Workers Union*, 775 F. Supp. 2d 197, 202 (D.D.C. 2011). Similarly, courts deciding whether to grant a stay of removal weigh: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009).

ARGUMENT

I. The Unnamed Children are Being Irreparably Injured by Defendants' Denial of Access to Pro Bono Counsel, and Face Further Irreparable Injury If Expelled.

As an initial matter, Defendants' denial of access to counsel for the Unnamed Children itself constitutes irreparable harm warranting immediate relief. "[T]he irreparable harm [caused by] denial of access to legal counsel, is apparent on its face." *Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 416 F. Supp. 3d 249, 251 (E.D.N.Y. 2019); *cf. Valentine v. Beyer*, 850

F.2d 951, 957 (3d Cir. 1988) ("Clearly no greater harm than the inability to meet filing deadlines, potentially precluding litigation forever, is possible when the question of access to the courts is at issue."). This irreparable harm has repeatedly been recognized in the context of individuals seeking humanitarian protection. *See, e.g.*, *Doe v. McAleenan*, 415 F. Supp. 3d 971, 979 (S.D. Cal. 2019) (finding irreparable harm shown by "unsophisticated migrants in stressful and foreign circumstances" who were denied access to counsel during interviews to determine whether they would be returned to Mexico to await asylum hearings); *Innovation Law Lab v. Nielsen*, 342 F. Supp. 3d 1067, 1081 (D. Or. 2018) ("The harms likely to arise from the denial of access to legal representation in the context of asylum applications are particularly concrete and irreparable."). The irreparable harm of denying the opportunity to access counsel is even greater for unaccompanied children, who are far less equipped even than adult migrants to vindicate their rights under the immigration laws without access to counsel. Indeed, it is precisely because of the particularly critical role of counsel in *preventing* harm to unaccompanied children taken into custody by immigration authorities that Congress requires the government to ensure that *all* such children are provided with access to counsel. *See* 8 U.S.C. § 1232(a)(5)(D)(iii) (requiring that "[a]ny unaccompanied child" from a non-contiguous country DHS seeks to remove "shall be . . . provided access to counsel"); *id.* § 1232(c)(5) (government "shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge").

Moreover, the children would suffer grave harm absent a stay of deportation. While Defendants' unlawful denial of access to counsel to the children has prevented TCRP from ascertaining their countries of origin, its experiences with unaccompanied children detained pending their expulsion under the Title 42 Process gives it strong reason to believe that most (if

not all) of the children are from Guatemala, Honduras, and El Salvador. All three countries are extremely violent and dangerous, and most, if not all, of the children will likely therefore have claims for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT").

Honduras is one of the most violent countries in the world. *See* U.S. Dep't of State, 2019 Country Reports on Human Rights Practices: Honduras at 1-2 (describing extreme gang violence directed at vulnerable populations, including "acts of homicide, torture, kidnapping, extortion, human trafficking, intimidation, and other threats").[3] The State Department reports that "child abuse remain[s] a serious problem" in the country, and that youth are particularly vulnerable to forced displacement, targeting by gangs, domestic violence, and other forms of discrimination and oppression. *See id.* at 17. Children in El Salvador are similarly in danger due to uncontrolled gang violence, "the worst forms of child labor," "serious and widespread" child abuse, and pervasive "sexual exploitation of children." U.S. Dep't of State, 2019 Country Reports on Human Rights Practices: El Salvador, at 1-2, 19-20, 25-6.[4] Child abuse and sexual exploitation of children are also "serious problem[s]" in Guatemala, where "[t]raffickers exploit Guatemalan children in forced begging and street vending," and "[c]riminal organizations, including gangs, exploit[] girls in sex trafficking and coerce[] young males in urban areas to sell or transport drugs or commit extortion." U.S. Dep't of State, 2019 Country Reports on Human Rights Practices: Guatemala at 17-18, 28.[5]

[3] *Available at* https://www.state.gov/wp-content/uploads/2020/02/HONDURAS-2019-HUMAN-RIGHTS-REPORT.pdf.
[4] *Available at* https://www.state.gov/wp-content/uploads/2020/02/EL-SALVADOR-2019-HUMAN-RIGHTS-REPORT.pdf.
[5] *Available at* https://www.state.gov/wp-content/uploads/2020/02/GUATEMALA-2019-HUMAN-RIGHTS-REPORT.pdf.

These facts satisfy the TRO standard at this stage, which requires "*only a likelihood* of irreparable injury." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8-9 (D.C. Cir. 2016) (preliminary injunction request) (emphasis added). Nor is there any doubt that the harms Plaintiffs face are *irreparable*; indeed, they would be "beyond remediation." *Damus v. Nielsen*, 313 F. Supp. 3d 317, 342 (D.D.C. 2018). Numerous courts have held that similar showings show irreparable injury. *See, e.g., J.B.B.C. v. Wolf*, No. 20-cv-1509, ECF No. 39, at 51-52 (granting stay for child subjected to Title 42 Process facing imminent deportation); *Demjanjuk v. Holder*, 563 F.3d 565 (6th Cir. 2009) (granting stay for noncitizen who asserted removal would violate CAT); *Grace v. Whitaker*, 344 F. Supp. 3d 96, 146 (D.D.C. 2018) (finding fear of "domestic violence, beatings, shootings, and death in their countries of origin" constitute irreparable injury); *Devitri v. Cronen*, 289 F. Supp. 3d 287, 296–97 (D. Mass. 2018) (risk of persecution if removed is irreparable harm). And there is "a public interest in preventing aliens from being wrongfully removed . . . to countries where they are likely to face substantial harm." *Nken v. Holder*, 556 U.S. 418, 436 (2009). At a minimum, a stay of removal is appropriate in light of Defendants' actions blocking the Unnamed Children's access to counsel, which would facilitate the presentation of more specific evidence of the harm of their removal.

II. Plaintiffs are Likely to Succeed on the Merits of Their Claims.

Plaintiffs are likely to succeed on the merits of their challenge to the government's novel efforts to deport the Unnamed Children without ensuring their access to pro bono counsel, under the supposed authority of 42 U.S.C. § 265. As explained below, § 265 does not authorize deportation at all. But even if such deportations were otherwise permitted, the Unnamed Children as unaccompanied children are entitled to explicit statutory procedures and protections, including the specific and mandatory requirement in 8 U.S.C. § 1232 that the government assist

them in accessing pro bono representation. Those specific, later-enacted statutes must be applied here, regardless of whatever § 265 may authorize in general. The only court to have considered these claims thus far recently granted a stay of removal and held the plaintiff in that case had demonstrated likelihood of success on the merits. Specifically, Judge Nichols held (in an oral ruling) that:

> In my view, the plaintiff is likely to succeed on the question of whether 42 U.S.C. 265 grants the director of the CDC the power the government articulates here for three related reasons. The first is that the statute authorizes the director of the CDC to prohibit the introduction of persons and property by its plain terms. There's a serious question about whether that power includes the power also to remove or exclude persons who are already present in the United States. There are other provisions, obviously, in the immigration statutes that reference the power to return or to remove. The fact that Congress did not use those terms here, I think, is – suggests at a minimum that the power to remove is not granted by section 265.
>
> Even if the power to remove were read by section 265, the plaintiff has likelihood of success because the provision, in the Court's view, should be harmonized, to the maximum extent possible, with immigration statutes, including those already referenced that grant special protections to minors and also those immigration statutes that deal with communicable diseases and quarantines.
>
> The Court, in addition, does not believe that the CDC director is likely entitled to *Chevron* deference; whereas, here the provision at issue, 42 U.S. Code 265, needs to also be read in light of statutes that the CDC director quite plainly has no special expertise regarding, and also whereas, here the order does very little by way of an analysis of what exactly the power to prohibit the introduction of persons and property means.

J.B.B.C. v. Wolf, No. 20-cv-1509, ECF No. 39, at 49-51.

A. Title 42 Does Not Authorize Deportation.

The CDC Immigration Orders were issued under the purported authority of 42 U.S.C. § 265, a provision that has laid dormant and largely forgotten in the U.S. Code for over a hundred years. Defendants claim to have discovered in this statute a source of unlimited authority to execute summary deportations as they see fit, without regard for the carefully crafted policy judgments of the Nation's immigration laws. But when an agency claims to discover "an unheralded power" lying dormant "in a long-extant statute," courts "typically greet its

announcement with a measure of skepticism." *Util. Air Reg. Group v. EPA*, 573 U.S. 302, 324 (2014). And, indeed, this novel, sweeping assertion of Executive dominance in the realm of immigration exceeds the power granted by § 265. Nothing in § 265, or Title 42 more generally, purports to authorize *any* deportations, much less deportations in violation of the specific protections described below.

Section 265 authorizes the CDC to prohibit the "introduction of persons" under certain circumstances. It says nothing about any power to physically remove people from the United States. Nor does a neighboring provision laying out the "penalties" for violation of "any regulation prescribed" under § 265 make any mention of such deportation or expulsion authority. *See* 42 U.S.C. § 271. Instead, § 271 provides for fines and imprisonment of individuals for violation of public health regulations. Nowhere in Title 42 does any statute mention the newly asserted power to deport, in the name of public health, independent of Congress's carefully reticulated immigration scheme.

That silence speaks volumes. The Supreme Court has "long recognized that deportation is a particularly severe 'penalty.'" *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)). Thus, the extreme exercise of governmental power involved in physically removing a person from the country is one that must be granted by Congress, as "the Constitution creates no executive prerogative to dispose of the liberty of the individual." *Valentine v. U.S. ex rel. Neidecker*, 299 U.S. 5, 9 (1936) (holding that extradition power "does not exist save as it is given by act of Congress or by the terms of a treaty").

Such powers of physical removal from the country—whether called deportation, removal, extradition, or expulsion—"in order to exist must be *affirmatively* granted" by Congress. *Id.* at

12 (emphasis added) (rejecting argument that power to extradite U.S. citizens could be implied from provision stating that United States was not bound to extradite them). Accordingly, where Congress seeks to authorize that extraordinary physical control, it does so in explicit terms. *See, e.g.*, 8 U.S.C. § 1231 (immigration removals); *id.* § 1225(b)(2)(c) ("may return the alien" to contiguous country); 18 U.S.C. §§ 3185, 3186, 3196 (extradition authority). Courts do not—and, given the gravity of the asserted power, must not—lightly read an expulsion power into statutes that do not explicitly grant it. *Valentine*, 299 U.S. at 12; *cf. Util. Air Regulatory Grp.*, 573 U.S. at 324 ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.") (internal quotation marks omitted). Nowhere in Title 42 has Congress granted that power.

Indeed, the context, structure, and history of § 265, and the original 1893 statute from which it derives, only underscore that Congress never authorized any deportations under the auspices of § 265. *See* Reply in Support of TRO, *JBBC v. Wolf*, No. 20-cv-1509, ECF No. 34, at 3-10 (explaining in detail the history and structure of Section 7 of the Act of February 15, 1893, ch. 114, 27 Stat. 449, 452, which became § 265 without material change in the Public Health Service Act, Pub. L. 78-410, § 362, 58 Stat. 682, 704 (1944)). The statute was rather designed to regulate *transportation* entities that brought persons and goods to the United States, and it imposed fines and imprisonment on such transportation entities if they violated a public health order. *Id.* That is, furthermore, precisely how the statute was used the one time it has been invoked to bar introduction of persons (by shipping companies) from abroad, in 1929. *Id.*

That is not to say that Congress has ignored public health considerations in crafting immigration policy. To the contrary, from the earliest days of immigration regulation—predating the 1893 enactment of the predecessor to § 265—Congress has explicitly authorized

the deportation of individuals based on public health concerns. *See* Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084, 1085. And similar statutes exist today. *See* 8 U.S.C. § 1182(a)(1) ("[h]ealth-related grounds" of inadmissibility, including communicable diseases); 8 U.S.C. § 1222 (medical detention and examination as part of immigration processing). Because courts "presume differences in language like this convey differences in meaning[,]" particularly where contemporaneous statutes address related issues, Congress's decision to grant deportation power in the immigration statutes but not in Title 42 is conclusive. *See Wisc. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071-72 (2018) (internal quotation marks omitted).

Furthermore, § 265, the provision on which the Administration relies for its new power, could not be read to authorize expulsions because that section applies without differentiation to citizens and noncitizens alike. If the government is correct that § 265 authorizes expulsions, it would therefore mean that Congress gave the executive branch the power to expel citizens as well as noncitizens. *See Clark v. Martinez*, 543 U.S. 371, 386 (2005) (rejecting "the dangerous principle that judges can give the same statutory text different meanings in different cases" even if only some applications raise constitutional concerns). It is inconceivable that Congress would seek to give the executive branch that (plainly unconstitutional) power.

Had Congress sought to authorize the mass deportations on health-related grounds which are now underway, and particularly had it authorized the removal of vulnerable unaccompanied children like the Unnamed Children who are entitled to unique statutory safeguards, it would have needed to clearly say so. It has not, and these deportations are thus unlawful.

B. The Unnamed Children's Deportation Also Violates the Specific Protections Established By Congress.

1. The Unnamed Children's Deportation Without Being Ensured Prior Access to Counsel Violates Mandatory Duties Imposed by the TVPRA.

Congress has carefully and repeatedly worked to ensure that unaccompanied children like the Unnamed Children are afforded unique, mandatory, and protective procedures when they face deportation. Defendants have jettisoned that entire statutory scheme. Most critically for this emergency motion, Defendants are violating Congress's explicit command that the government must take affirmative measures to ensure that all unaccompanied children Defendants seek to remove have access to counsel.

In 2002, Congress included provisions in the Homeland Security Act ("HSA") to "ensur[e] that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child." 6 U.S.C. § 279(b)(1)(B). Through the HSA, Congress vested responsibility for the care of unaccompanied children, including the provision of housing and access to legal services to pursue claims for immigration relief, in an agency—ORR—that had demonstrated experience working with vulnerable immigrants and refugees. 6 U.S.C. § 279(a). In 2008, Congress enacted the Trafficking Victims Protection Reauthorization Act ("TVPRA"), which strengthened those protections by providing for the swift referral of unaccompanied children to ORR custody, who would then take responsibility for their safety and release to community members in the United States. *See J.D. v. Azar*, 925 F.3d 1291, 1301-02 (D.C. Cir. 2019) (describing TVPRA statutory scheme and ORR shelter system).

Thus, Congress prescribed a careful and comprehensive set of directions to federal agencies for how unaccompanied children should be processed and cared for upon their apprehension. Among other protections, Congress required the relevant agencies, including CBP, to expeditiously transfer children to ORR custody. 8 U.S.C. § 1232(b)(3). It then required ORR to provide safe and secure placements for all children in its care, and to facilitate their release to sponsors. 8 U.S.C. § 1232(c)(2)-(3). And it prevented DHS from removing such

children absent placement in full removal proceedings before an immigration judge. 8 U.S.C. § 1232(a)(5)(D)(ii). Through these provisions, Congress sought to satisfy its domestic and international obligations to protect a uniquely vulnerable set of children, most (if not all) of whom likely qualify for various forms of humanitarian protection. Indeed, the legislative history of the TVPRA is replete with statements describing this country's "special obligation to ensure that [unaccompanied] children are treated humanely and fairly." 154 Cong. Rec. S10886-01, S1088–S10887, 2008 WL 5169970 (Dec. 10, 2008); *see also* 153 Cong. Rec. H14098-01, H14118 (Dec. 4, 2007) (discussing statute's purpose of "provid[ing] critical immigration mechanisms to protect children").

Congress also recognized that timely and effective access to counsel—and in particular to representation by pro bono immigration legal services organizations like TCRP—is essential to unaccompanied children's ability to enjoy and vindicate these other rights guaranteed under this statutory scheme. The TVPRA thus requires such access: "Any unaccompanied alien child sought to be removed by the Department of Homeland Security, except for an unaccompanied alien child from a contiguous country . . . , shall be . . . provided access to counsel in accordance with subsection (c)(5)." *Id.* § 1232(a)(5)(d)(iii); 8 U.S.C. § 1232(c)(5). The TVPRA's legislative history further underscore that in enacting § 1232, Congress intended to affirmatively require the government to "*take steps to assist* children in . . . accessing pro bono representation." H.R. Rep. No. 110-430, at 57 (2007) (emphasis added).

Through their creation of an alternative immigration system for unaccompanied children, Defendants have circumvented the reticulated scheme Congress set forth for their treatment, care, and legal representation. Instead of making every effort to ensure that every unaccompanied child has access to pro bono legal counsel in connection with any effort by DHS

to remove them, Defendants are affirmatively *preventing* TCRP and other providers from representing these unaccompanied children.

Whatever Title 42 authorizes in general, it cannot override the provisions of the immigration laws designed to ensure protection and legal representation for unaccompanied minors and those seeking protection, *see infra* – even where such individuals are suspected of having a communicable disease. Such an interpretation would violate numerous canons of statutory construction, including that the specific should be read to control over the general. *See, e.g.*, *Air All. Houston v. EPA*, 906 F.3d 1049, 1061 (D.C. Cir. 2018) ("[A]n agency may not circumvent specific statutory limits on its actions by relying on separate, general rulemaking authority."). As with all potential conflicts, the Court must read § 265 and the refugee and child protections statutes together, to make sense of all Congress's work without discarding any of it. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("The classic judicial task of reconciling many laws enacted over time, and getting them to make sense in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.") (internal quotation marks omitted). Thus, as Judge Bybee explained in another asylum case, "the President may not 'override particular provisions of the INA' through the power granted him in" 8 U.S.C. § 1182(f), despite the breadth of language in that emergency provision. *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 760 (9th Cir. 2018) (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2411 (2018)). So too with § 265. Even if § 265 could be read to authorize some summary deportations (which it cannot), it must be read to accommodate Congress's subsequent specific legislative protections and commands. *See Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 643 (D.C. Cir. 2000) ("A broad statute when passed 'may

have a range of plausible meanings,' but subsequent acts can narrow those meanings . . . .") (quoting *Brown & Williamson*, 529 U.S. at 143).

Moreover, the TVPRA embodies Congress's focus on a particularly vulnerable group of noncitizens seeking safety in this country. It is "a precisely drawn, detailed statute," *Brown v. GSA*, 425 U.S. 820, 834 (1976), that comprehensively delineates what the government must do before it seeks to remove an unaccompanied child. By contrast, § 265 says nothing at all about removal; or children; or steps the government must take or may skip. The general terms of § 265 cannot be construed to bypass the specific provisions of the TVPRA. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, n.2 (1976) ("[T]he more specific legislation will usually take precedence over the more general."); *cf. Clinton v. City of New York*, 524 U.S. 417, 443 (1998) (holding Congress may not give the President "the power to cancel portions of a duly enacted statute"). This interpretive principle has particular force where the more specific statute is the later-enacted one; that is the case here, as § 265 was originally enacted in 1893 and last amended in 1944. *See United States v. Juvenile Male*, 670 F.3d 999, 1008 (9th Cir. 2012) (explaining that "[w]here two statutes conflict, the later-enacted, more specific provision generally governs"). Recent Congresses have spoken clearly and explicitly regarding the required treatment and access to counsel of unaccompanied minors; the Executive is not at liberty to ignore those commands.

2. The Unnamed Children' Deportation Violates the Asylum and Withholding Statutes, and the Statute Implementing the Convention Against Torture.

The children also have a right to seek protection from persecution and torture, as Congress has long prescribed. TCRP's past experience with unaccompanied children scheduled for removal under the Title 42 Process indicates that many if not all of the children have viable

claims for asylum, withholding of removal, and CAT protection. But the Title 42 Process unlawfully sidesteps these safeguards.

First, the asylum statute, 8 U.S.C. § 1158, provides that "[a]ny alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, may apply for asylum." 8 U.S.C. § 1158(a)(1). Moreover, Congress expressed a special concern with expanding access to asylum for unaccompanied children by exempting them from the one-year deadline that ordinarily applies to asylum applications, 8 U.S.C. 1158(a)(2)(B), preventing their removal to a "safe third country," *id.* 1158(a)(2)(A), and by providing them the opportunity to apply for asylum in the first instance before an asylum officer in a non-adversarial setting rather than before an immigration judge, *id.* 1158(b)(3)(C).

Second, the withholding of removal statute, 8 U.S.C. § 1231(b)(3), provides that a noncitizen "may not" be removed to a country where their "life or freedom" would be threatened based on a protected ground. A grant of withholding is mandatory if the individual meets the statutory criteria. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 420 (1999). Congress enacted this statute to "conform[] it to the language of Article 33 [of the 1951 U.N. Convention of Refugees]," *INS v. Stevic*, 467 U.S. 407, 421 (1984), in several respects, including by making withholding "mandatory" where the eligibility criteria are satisfied, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 n.25 (1987), and by giving it broad application where a noncitizen fears return, *see Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1088 (9th Cir. 2020). Congress again outlined specific and narrow bars to withholding of removal, none of which apply to the children at issue here.

Third, the CAT prohibits returning a noncitizen to a country where it is more likely than not that she would face torture. Article 3 of CAT provides that "[n]o State Party shall expel,

return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 20 (1988). Congress has implemented Article 3 of CAT. *See* Foreign Affairs Reform and Restructuring Act of 1998 § 2242(a), Pub. L. No. 105-207, Div. G. Title XXI, 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note); 8 C.F.R. § 1208.16-.18 (implementing regulations). There are no bars to eligibility for CAT protection. *See Negusie v. Holder*, 555 U.S. 511, 514 (2009).

In short, Congress carefully crafted the statutory provisions governing asylum, withholding, and CAT protection to ensure that noncitizens within our country or at the border could seek relief from persecution. In so doing, Congress sought to satisfy its domestic and international obligations to protect those fleeing persecution and torture. And, critically, Congress enshrined procedural access to these forms of protection before a person can be deported from the country. The Title 42 Process jettisons all those protections and safeguards, subjecting these children to summary deportation back to persecution and torture.[6]

[6] The only humanitarian protection provided under the Title 42 Process is limited to CAT, and is totally inadequate—especially for unrepresented unaccompanied children. Noncitizens are only be referred for a CAT screening if they "make an *affirmative, spontaneous and reasonably believable* claim that they fear being tortured in the country they are being sent back to." CBP Memo 4 (emphasis added). This means that children must know precisely what to say when they arrive in the U.S., and may be summarily returned to the countries they fled without the government ever even asking whether they would face torture in that country.

Unsurprisingly, this screening offers essentially no protection: As of May 13, 2020, out of thousands of expulsions under Title 42, Defendants reportedly conducted a mere 59 screening interviews for CAT, of which only two applicants passed the screening stage. Nick Miroff, Under Trump Border Rules, U.S. Has Granted Refuge to Just Two People Since Late March, Records Show, Wash. Post (May 13, 2020), https://www.washingtonpost.com/immigration/border-refuge-trump-records/2020/05/13/93ea9ed6-951c-11ea-8107-acde2f7a8d6e_story.html; Camilo Montoya-Galvez, Only 2 Migrants Allowed to Seek Humanitarian Protection Under Trump's Coronavirus

C. The Unnamed Children' Removal is Arbitrary and Capricious

Defendants' application of the Title 42 Process to unaccompanied children also violates the APA in several respects. *First*, Defendants have provided no reasoned explanation for their actions. "An agency action that lacks explanation is a textbook example of arbitrary and capricious action." *Mori v. Dep't of the Navy*, 917 F. Supp. 2d 60, 64 (D.D.C. 2013). Nowhere do any of the documents setting forth the Title 42 Process offer any reasoned explanation for their failure generally to exempt unaccompanied children, including unaccompanied children fleeing abuse, persecution, and torture.

Second, in adopting the Title 42 Process and applying it to unaccompanied children, Defendants "entirely failed to consider [multiple] important aspect[s] of the problem," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), because they "failed to grapple with . . . [their] statutory mandate" to protect unaccompanied children and ignored the "potential consequences for asylum seekers." *See Grace v. Barr*, No. 19-5013, 2020 WL 4032652, at *13 (D.C. Cir. July 17, 2020); *see also Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1915 (2020) (holding agency action arbitrary and capricious where it "entirely failed to consider [an] important aspect of the problem"); *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1105-06 (D.C. Cir. 2019) (agencies must "analyze the impact" of their actions on affected individuals); *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017) (agencies must "adequately analyze the . . . consequences" of their actions).

As demonstrated above, Congress through the TVPRA clearly expressed a paramount concern for the protection and well-being of unaccompanied children who arrive at ports of entry

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Border Order, CBS News (May 13, 2020), https://www.cbsnews.com/news/only-2-migrants-allowed-to-seek-humanitarian-protection-under-trumps-coronavirus-border-order/.

or are apprehended near the border. *See, e.g.*, *Flores v. Sessions*, 862 F.3d 863, 880-81 (9th Cir. 2017) ("The overarching purpose of the HSA and TVPRA was quite clearly to give unaccompanied minors more protection, not less."). Defendants were required to consider and address this clear and weighty concern, and how their adoption of the Title 42 Process would impact unaccompanied children, who Congress has sought to protect. *See Grace*, 2020 WL 4032652, at *13; *Nat'l Lifeline Ass'n*, 921 F.3d at 1113 (holding action was arbitrary and capricious for failing to consider that eliminating a subsidy would cause "many low-income consumers on Tribal lands [to] lose access to affordable telecommunications service"). Defendants' failure to consider or address how their new process would impact unaccompanied children renders the process arbitrary and capricious.

Defendants also failed to consider and address the need to protect individuals fleeing persecution. Removing asylum seekers is "replete with danger." *Cardoza-Fonseca*, 480 U.S. at 449. None of the documents comprising the Title 42 Process addresses the obvious dangers of returning asylum seekers—let alone unaccompanied child asylum seekers—to the countries they fled.

Third, the Title 42 process exempts numerous categories of individuals, such as students and commercial truck drivers, who carry at least as great a risk of COVID-19 as asylum seekers unaccompanied minors. Public health experts have overwhelmingly concluded that the Title 42 process cannot be justified on public health grounds, especially as applied to children.

IV. The Remaining Injunction Factors Weigh Heavily in Favor of Emergency Relief

Because of the severity of the injuries the children face, the balance of harms weighs strongly in favor of granting a TRO and stay of deportation. Requiring Defendants to comply with their statutory obligation to permit unaccompanied children access to willing pro bono

counsel, and preventing Defendants from removing one group of children until the Court can address these issues would not substantially injure the government.

The public interest also weighs strongly in favor of the emergency relief Plaintiffs seek. First, the Supreme Court has recognized that the public interest lies "in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken*, 556 U.S. at 436. Treating asylum seekers with basic fairness and dignity is among our nation's best traditions. *See, e.g.*, Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102 ("[I]t is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including . . . admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States.").

Second, the TVPRA embodies this nation's commitment to vulnerable children seeking humanitarian relief. The public interest is also served when the government complies with its obligations under U.S. law, including the Administrative Procedure Act. *See O'Donnell Const. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992); *Damus*, 313 F. Supp. 3d at 342; *R.I.L-R*, 80 F. Supp. 3d at 191. The public also "has an interest in ensuring that its government respects the rights of immigrants[.]" *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 124 (D.D.C. 2018) (enjoining immigration authorities from removing Plaintiffs pursuant to expedited removal orders).

In short, the balance of harms and the public interest decisively favor affording the these unaccompanied children the statutory safeguards to which they are entitled—including access to representation by pro bono counsel—and affording them a meaningful opportunity to seek relief in full removal proceedings

CONCLUSION

This Court should enter a TRO prohibiting the expulsion of these children and requiring Defendants to permit pro bono attorneys from TCRP to consult with each of the children to determine whether they wish representation to challenge their expulsion under Title 42. And if the children wish for representation to challenge their expulsion, the Court should further stay deportation (whether denominated expulsion, removal, or any other term) and set a preliminary injunction or summary judgment briefing schedule to address the legality of the Title 42 process.

Dated: July 24, 2020

Respectfully submitted,

/s/ Celso J. Perez

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**Pro hac vice application forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2020, I will cause a copy of this motion, supporting exhibits and proposed order to be served on the following, together with the summons and complaint:

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