IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION

J.O.P., *et al.*,

Plaintiffs,

v.

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

Defendants.

Civil Action No. 8:19-CV-01944-GJH

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO AMEND THE PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs, who came to the United States as unaccompanied children to escape violence and persecution in their home countries, brought this case to stop Defendants from implementing a deeply flawed new policy—that set forth in the 2019 Redetermination Memorandum. Under that policy, U.S. Citizenship & Immigration Services ("USCIS") asylum officers were instructed to perform factfinding in order to reject jurisdiction over an asylum application filed by a child previously determined to be an "unaccompanied alien child" ("UAC") who had applied for asylum after turning 18 or reunifying with a parent or legal guardian. In doing so, Defendants deprived these children of their opportunity to have their asylum applications considered through USCIS's child-appropriate procedures. The Court has enjoined Defendants from implementing the defective 2019 Redetermination Memorandum and ordered them to revert to the 2013 Kim Memo, the previously established agency policy. Since the Court closed the front door by enjoining the 2019 Redetermination Memorandum, Defendants have assiduously explored back doors to effectuate the same policy goal while maintaining that "USCIS is now operating under this Court's Order to revert to the 2013 Memo." D.I. 101-01 at 14. In doing so, they have placed numerous prospective class members at risk of adverse enforcement actions that very well may be taken before the Court has the opportunity to issue a final order on the merits (or even before the production of the administrative record) in this case.

Plaintiffs therefore respectfully request amendments to the preliminary injunction order to stop Defendants from engaging in practices that are inconsistent with the 2013 Kim Memo and Defendants' practice prior to the unlawful issuance of the 2019 Redetermination Memorandum, in order to effectuate the Court's expectation that the status quo be preserved pending a final adjudication of the legal issues that are now scheduled to be briefed. Although

the Court previously denied Plaintiffs' Motion to Enforce the Preliminary Injunction—determining that the practices at issue had been included in Plaintiffs' amended complaint, and a ruling on the merits would be improper without an administrative record—the instant motion presents a distinct issue: While the Court awaits the administrative record and substantive briefing, it must act to ensure that the prospective class members who stand to benefit from the Court's decision will not be irreparably traumatized, or even removed from the United States, in the meantime. Defendants, seemingly operating under the principle that it is better to seek forgiveness than to ask permission, will otherwise charge forward with new practices, put into place without notice and comment or consideration of reliance interests, that undermine the procedures that prospective class members relied on in the 2013 Kim Memo.

In particular, Plaintiffs have identified three practices whereby Defendants are rejecting jurisdiction over prospective class members, thereby upsetting the status quo. First are instances in which Defendant USCIS has deferred to immigration judge determinations that an asylum application was not one filed by a UAC because the applicant had turned 18 or been reunited with a parent or legal guardian, at times treating this determination as an "affirmative act" sufficient to extinguish USCIS's original jurisdiction as granted by the Trafficking Victims Protection Reauthorization Act ("TVPRA"). *See* D.I. 91-4 at 2 (instructing asylum officers to accept initial jurisdiction over applications filed by those previously determined to be a UAC, "[u]nless there was an affirmative act by HHS, ICE or CBP to terminate the UAC finding before the applicant filed the initial application for asylum"). Second, Defendant U.S. Immigration and Customs Enforcement ("ICE") has advocated in immigration courts for immigration judges to exercise jurisdiction over prospective class members, contending that USCIS does not have jurisdiction over such applications, despite the preliminary injunction in this case. Third,

Defendant USCIS has adopted a practice of treating agency records, indicating nothing more than that a UAC has turned 18 or been reunited with a parent or legal guardian, as an "affirmative act" even though that interpretation is at odds with the 2013 Kim Memo and the asylum applicants are never made aware of any putative redetermination.

Each of these practices is inconsistent with the purposes of the statute creating USCIS's initial jurisdiction over unaccompanied children's asylum claims, the TVPRA, as well as the Due Process Clause, the substance of the 2013 Kim Memo, and Defendants' practice prior to the unlawful issuance of the 2019 Redetermination Memorandum. Although, as noted above, the Court denied Plaintiffs' Motion to Enforce the Preliminary Injunction pending its consideration of the administrative record, the Court recognized that Plaintiffs may move for emergency relief to prevent any irreparable harm. D.I. 115 at 24-25. In light of the risks of imminent removal or forfeiture of the asylum-office forum facing several prospective class members, such an amended and clarified preliminary injunction is appropriate (and necessary) now. Further, insofar as Defendants have engaged in novel practices to upend the rights of prospective class members under the TVPRA and pursuant to the 2013 Kim Memo, an amended preliminary injunction is necessary to provide guidance to Defendants as well as the universe of prospective class members, and to avoid potentially duplicative litigation outside of this proposed class action. Because each of these practices came to light only since this Court entered its preliminary injunction and because failing to enjoin these practices would result in manifest injustice, Plaintiffs now respectfully move the Court to amend its preliminary injunction to maintain the status quo until the Court may resolve this case on its merits.

I. BACKGROUND

The historical and factual background of Plaintiffs' claims are set forth in more detail in their First Amended Complaint and memorandum in support of their Motion to Enforce the

Preliminary Injunction, D.I. 91, 76, and in extensive detail in this Court's order denying the motions to dismiss and to enforce the preliminary injunction, D.I. 115.

In relevant part, Plaintiffs filed a motion for a temporary restraining order on July 1, 2019, the same day they filed their initial complaint. D.I. 14. After a July 19, 2020 hearing on the motion, the Court entered a temporary restraining order (TRO) against Defendants on August 2, 2019. D.I. 54, 55. The Order "enjoined and restrained [Defendants] from applying their new asylum eligibility policy, as set forth in USCIS's May 31, 2019 memorandum, to bar individuals previously determined to be unaccompanied alien children ('UACs') from seeking asylum before the agency," and further "enjoined and restrained [Defendants] from rejecting jurisdiction over the application of any UAC . . . under the [TVPRA] whose application would have been accepted under the USCIS policy predating the May 31, 2019 memorandum." D.I. 55 at 1. After the Court extended the TRO several times, Plaintiffs filed a consent motion to convert the TRO to a preliminary injunction on October 9, 2019, D.I. 70, and on October 15, 2019, this Court granted the preliminary injunction with the same substantive text as the TRO, D.I. 71.

Since the Court entered its preliminary injunction, Plaintiffs have learned of several concerning cases wherein Defendants appear to have adapted their practices in order to effect the policies set forth in the 2019 Redetermination Memorandum despite the Court's Order requiring that Defendants maintain the status quo until the Court is able to rule on the merits of Plaintiffs' action. Among other practices, Defendant USCIS has rejected jurisdiction over asylum applications filed by UACs in deference to an immigration judge's determination that the applicant is not a UAC,[1] Defendant ICE has advocated in removal proceedings that USCIS does

[1] This practice is exemplified by the case of E.D.G., who was added to Plaintiffs' Amended Complaint as a named plaintiff. D.I. 91. USCIS's practice of deferring to EOIR jurisdictional determinations was the subject of Plaintiffs' motion to enforce the preliminary injunction, which

not have jurisdiction over asylum applications in contradiction of this Court's preliminary injunction order, and Defendant USCIS has rejected jurisdiction over asylum applications based on "affirmative acts" that are nothing more than computerized notations that a UAC has turned 18 or been reunited with a parent or legal guardian.

A. Deference to Immigration Judges' Jurisdictional Determinations

Plaintiff E.D.G. is a 21-year-old from Honduras who seeks asylum in the United States. Mariscal Decl. ¶ 2. Defendant DHS determined that E.D.G. was a UAC when he entered the United States on July 4, 2016. *Id.* ¶ 3. A day later, DHS served E.D.G. with a Form I-862, Notice to Appear (the immigration-court charging document) and placed E.D.G. in removal proceedings. *Id.* ¶ 4. At a November 16, 2017 master calendar hearing in immigration court, the immigration judge scheduled a merits hearing on his asylum application for September 26, 2018. *Id.* ¶ 7.

On November 14, 2017, while his removal proceedings were pending in immigration court, E.D.G. filed his asylum application with USCIS. *Id.* ¶ 6. Although E.D.G. was 18 years old at the time he filed his asylum application, USCIS was required to exercise initial jurisdiction under the 2013 Kim Memo because he had been determined to be a UAC and neither HHS, ICE, nor CBP had taken any affirmative act to terminate his UAC status as of that date.

On March 6, 2018, an asylum officer interviewed E.D.G. on the merits of his asylum claim for approximately 2.5 hours. *Id.* ¶ 8. During the interview, E.D.G. recounted being the victim of sexual abuse for years as a child. E.D.G had a difficult time recounting this traumatic past and shut down at times. *Id.* ¶ 9.

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this Court denied as "superseded" by the filing of the Amended Complaint. *See* D.I. 115 at 24-25. However, this Court specified that the denial was "without prejudice . . . to Plaintiffs' right to move for emergency equitable relief to enjoin enforcement of the IJ deferral policy if Plaintiffs believe such enforcement threatens impending irreparable harm." *Id.*

On June 26, 2018, E.D.G. through his counsel contacted ICE's Assistant Chief Counsel seeking assistance in requesting that USCIS issue a decision in E.D.G.'s case so that E.D.G. could avoid duplicative proceedings before the asylum office and the immigration court. *Id.* ¶ 9. He also contacted the asylum office on July 6, 2018, requesting that it expedite E.D.G.'s pending asylum application in light of his upcoming hearing before the immigration court, to no response. *Id.* ¶ 10.

On September 26, 2018, E.D.G. and his counsel attended a merits hearing on his asylum application before the immigration court. *Id.* ¶ 11. At the hearing, E.D.G.'s counsel alerted the immigration judge to E.D.G.'s pending asylum application with USCIS and asked the immigration judge to hold his case in abeyance until USCIS's decision. *Id.* The immigration judge proceeded with the hearing, noting that if USCIS granted E.D.G.'s asylum application then this would moot his removal proceedings. *Id.*

On October 10, 2018, about 10 months after E.D.G. had filed his asylum application with USCIS, and seven months after USCIS had interviewed him, an immigration judge issued a decision denying E.D.G.'s asylum application. *Id.* ¶ 12. E.D.G. appealed the asylum denial to the Board of Immigration Appeals. *Id.* ¶ 13.

USCIS then waited until July 2019, 16 months after the interview and after the 2019 Redetermination Policy had gone into effect, to reject E.D.G.'s asylum application for lack of jurisdiction. *Id.* ¶ 14. Specifically, on July 25, 2019, USCIS rejected his asylum application on the ground that he had not established that he was under 18 years old at the time of filing. *Id.* A week later, this Court issued the TRO enjoining USCIS from applying the 2019 Redetermination Policy and ordering USCIS to reinstate consideration of such cases for the agency to exercise its initial jurisdiction under the terms set by the 2013 Kim Memo. *Id.* ¶ 15. On August 5, 2019,

USCIS reopened E.D.G.'s case in response to his attorney's request based on this Court's Order. *Id.* ¶ 16.

On September 30, 2019, while the Court's TRO remained in effect, USCIS again rejected E.D.G.'s asylum application, relying on the 2019 Redetermination Policy. *Id.* ¶ 17. USCIS issued a Notice of Lack of Jurisdiction on grounds that the "Immigration Judge made an affirmative act to terminate UAC status on October 10, 2018" (almost 10 months after he filed the application with USCIS). *Id.*; Mariscal Decl., Ex. A at 2.

E.D.G.'s appeal of the immigration judge's asylum denial is fully briefed and pending before the Board of Immigration Appeals. *Id.* ¶ 18. Defendant ICE filed a brief with the BIA on December 5, 2019, approving of the immigration judge's jurisdictional determination and urging affirmance. *Id.*

B. ICE Advocacy Against USCIS Jurisdiction in Removal Proceedings

Prospective class member J.S.G.C. is an 18-year-old from Mexico who seeks asylum in the United States. Elder Decl. ¶ 2. Defendant DHS determined that J.S.G.C. was a UAC when he entered the United States on June 26, 2019. *Id.* ¶ 3. DHS released J.S.G.C. to the care of his mother on his eighteenth birthday. *Id.* ¶ 4. In August 2019, DHS served J.S.G.C. with a Form I-862, Notice to Appear, and placed him in removal proceedings. *Id.* ¶ 5. On December 20, 2019, J.S.G.C.'s counsel filed an asylum application with USCIS on his behalf. *Id.* ¶ 6. His application remains pending, but USCIS has not scheduled an asylum interview for J.S.G.C. yet.

At a master calendar hearing in immigration court held on February 12, 2020, J.S.G.C.'s counsel moved to in effect hold his removal proceedings in abeyance while USCIS adjudicated his asylum application, in reliance upon this Court's preliminary injunction order. *Id.* ¶¶ 8, 10. In April 2020, the ICE Assistant Chief Counsel filed an opposition to the motion, arguing that USCIS does not have initial jurisdiction over J.S.G.C.'s asylum application under *Matter of*

M-A-C-O-, 27 I. & N. Dec. 477 (BIA 2018). Elder Decl. ¶¶ 11-12. In particular, ICE argued that J.S.G.C. filed his asylum application with USCIS after he turned 18 years old and dismissed this Court's preliminary injunction as a "district court decision[] from [an]other jurisdiction[]." *Id.* ¶ 12.

On April 16, 2020, the immigration judge denied J.S.G.C.'s motion, explicitly relying on ICE's arguments against USCIS's initial jurisdiction. *Id.* ¶ 13. Through further motion practice based on his pursuit of an additional form of relief, J.S.G.C.'s counsel persuaded the judge to hold his removal proceedings in abeyance—though ICE could request that the immigration judge return J.S.G.C.'s case to the active immigration court docket at any time. *Id.* ¶ 15.

If the immigration judge were to resume active removal proceedings, J.S.G.C. risks being required to take part in a hearing on the merits of his asylum application in the adversarial setting of immigration court, in violation of his statutory right to avoid that setting entirely by making his case first in a USCIS interview. He faces the further risk that the immigration judge will find that his asylum application was not one filed by a UAC, potentially resulting in USCIS declining jurisdiction over his asylum application altogether as it did with E.D.G., violating the substantive right to have his claim considered by an asylum officer trained in child-sensitive practices.

C. USCIS Treatment of Mere Determination or Notation that a Child Has Been Reunited with a Parent as an "Affirmative Act"

Prospective class member L.M.Z. is a 9-year-old from Mexico who seeks asylum in the United States. Frank Decl. ¶ 2. When L.M.Z. entered the United States on or about May 20, 2018, Defendant DHS determined that L.M.Z. was a UAC, issued L.M.Z. a Form I-862, Notice to Appear, and placed him in removal proceedings in immigration court. *Id.* ¶¶ 3-4. On or about June 8, 2018, the Department of Health and Human Services, Office of Refugee Resettlement released L.M.Z. to the care of his mother. *Id.* ¶ 5. On August 14, 2018, L.M.Z.'s immigration

counsel emailed ICE attorneys to inform them that she had recently been retained by L.M.Z. and was seeking a continuance of his master calendar hearing in immigration court. *Id.* ¶ 6.

On February 8, 2019, while his removal proceedings were pending in immigration court, L.M.Z. filed his asylum application with USCIS. *Id.* ¶ 7. At a master calendar hearing on October 10, 2019, L.M.Z.'s counsel informed the immigration judge that his asylum application remained pending with USCIS and that he had not yet received notice of a scheduled asylum interview. *Id.* ¶ 8.

On February 5, 2020, L.M.Z appeared with counsel for his scheduled asylum interview with USCIS. *Id.* ¶¶ 9-10; Serrano Decl. ¶ 7. The officer did not ask any questions about the merits of L.M.Z.'s asylum claim, and instead asked a series of questions about the care provided by his mother. Serrano Decl. ¶¶ 7-8. Following these questions, the asylum officer ended the interview, stating that she was making a factual finding that L.M.Z. was not a UAC. *Id.* ¶ 8. L.M.Z.'s counsel informed the officer that USCIS must exercise jurisdiction under the 2013 Kim Memo, as affirmed by this Court's Order, but the officer, after conferring with her supervisor, refused to complete the interview. *Id.* In an email on February 11, 2020, L.M.Z.'s counsel again objected to the asylum officer's having rendered a determination that L.M.Z. was not a UAC, and ending the interview on that basis. Frank Decl. ¶ 11. On March 13, 2020, USCIS issued a "Notice of Lack of Jurisdiction (Non-UAC)," denying jurisdiction over L.M.Z.'s case. *Id.* ¶ 12; *id.* Ex. C. The notice states that "USCIS has determined that we do not have initial jurisdiction over your asylum application as a UAC" because L.M.Z. was "not unaccompanied at the time of filing your I-589 because you had a parent or legal guardian in the United States who was available to provide care and physical custody of you." *Id.* Thus, USCIS denied jurisdiction

based on a USCIS factual determination, as contemplated by the enjoined 2019 Redetermination Policy.

Plaintiffs' counsel attempted to resolve this matter by conferring with Defendants' counsel. Plaintiffs raised the matter in an email sent on April 3, 2020. DeJong Decl., Ex. A. On April 22, 2020, Defendants' counsel responded by emailing the no-jurisdiction letter previously sent to L.M.Z., an interoffice memorandum dated February 19, 2020 relating to the jurisdictional denial, and a declaration dated April 16, 2020 from the asylum officer (Ms. Austin) who conducted L.M.Z.'s asylum interview. DeJong Decl., Exs. B-E. In her declaration, Ms. Austin stated that she had "reviewed the comments tab in the ENFORCE Alien Removal Module (EARM) and determined that ICE had taken affirmative action on August 14, 2018 that terminated the prior UAC designation." DeJong Decl., Ex. E ¶ 6. On that date, an ICE agent purportedly entered a notation in the computer system that "[s]ubject is no longer designated a UAC under the TVPRA as of date of release to sponsor-mother- on 06/08/2018." *Id.* Ms. Austin further stated that, in issuing L.M.Z.'s denial of jurisdiction letter, she neglected to check the box indicating that her jurisdictional decision supposedly was based on the premise that his UAC "finding had been terminated" prior to his filing an asylum application with USCIS. *Id.* ¶ 8.

II. ARGUMENT

A. The Court Should Amend the Preliminary Injunction Order Based on New Evidence of Defendants' Conduct and to Prevent Manifest Injustice

As interlocutory orders, preliminary injunctions "are left within the plenary power of the Court that rendered them to afford such relief from them as justice requires." *Fayetteville Inv'rs v. Commercial Builders, Inc.*, 936 F.2d 1462, 1473 (4th Cir. 1991) (quoting 7 Moore's Fed. Practice ¶ 60.20). As a result, interlocutory orders are subject to amendment "at any time prior to the entry of a final judgment." *Id.* at 1469. "It is well-established that the appropriate Rule

under which to file motions [to amend] an interlocutory order is Rule 54(b)," which "provides that 'any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.'" *Cezair v. JPMorgan Chase Bank, N.A.*, 2014 WL 4955535, at *1 (D. Md. Sept. 30, 2014) (quoting Fed. R. Civ. P. 54(b)). Although the exact standard governing a motion to amend an interlocutory order is "unclear" in the Fourth Circuit, "courts frequently look to [Rules 59(e) and 60(b)] for guidance in considering such motions." *Id.*

In this District, a motion to amend an interlocutory order is appropriate in three situations: where there is "(1) a change in controlling law; (2) the availability of new evidence; or (3) the need to correct a clear error or prevent manifest injustice." *Beyond Sys., Inc. v. Kraft Foods, Inc.*, 2010 WL 3059344, at *2 (D. Md. Aug. 4, 2010). Although these factors are the same as the Fourth Circuit's test for amending a judgment under Rule 59(e), motions to amend interlocutory orders "are not subject to the strict standards applicable to motions for reconsideration of a final judgment" as they do not implicate issues of finality and "a district court retains the power to reconsider and modify its interlocutory judgments . . . at any time prior to final judgment when such is warranted." *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514-15 (4th Cir. 2003).

The Court should grant the present motion and amend its preliminary injunction because Plaintiffs, as well as the Court, were not aware of the three practices applied to E.D.G., J.S.G.C., and L.M.Z. when the preliminary injunction was entered. In fact, these practices appear to have emerged *since* the Court entered its TRO, and apparently in an effort to accomplish the policy goals of the 2019 Redetermination Memorandum *despite* the Court's Orders enjoining

Defendants from putting that policy into effect. Although the Court broadly enjoined Defendants from enacting the 2019 Redetermination Memorandum's policy, new evidence indicates that more specific prohibitions are required to protect prospective class members while this case is still pending. This Court initially entered its TRO in order to "protect the status quo and to prevent irreparable harm during the pendency of a lawsuit, ultimately to preserve the court's ability to render a meaningful judgment on the merits." D.I. 54 at 7 (quoting *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003)). It would be manifestly unjust for some prospective class members, who would share in the relief afforded by a favorable resolution of the claims in the Amended Complaint, to be excluded from the preliminary injunction and thus potentially subject to removal before those claims could proceed to judgment. Because Plaintiffs seek to supplement the preliminary injunction with these new practices based on new evidence and in order to prevent manifest injustice, reconsideration is appropriate.

Plaintiffs believe that the three practices applied to E.D.G., L.M.Z., and J.S.G.C. are barred by the current preliminary injunction, which enjoins Defendants "from applying their new asylum eligibility policy, as set forth in USCIS's May 31, 2019 memorandum, to bar individuals previously determined to be [UACs] from seeking asylum before the agency" and "from rejecting jurisdiction over the application of any UAC . . . whose application would have been accepted under the USCIS policy predating the May 31, 2019 memorandum." D.I. 55 at 1. Each of these practices is both an application of the 2019 Redetermination Memorandum's policy and is also inconsistent with the 2013 Kim Memo. However, to avoid any ambiguity, to fully preserve the status quo, and in light of Defendants' position that these practices are not enjoined,

Plaintiffs now move the Court to specifically bar these practices until this case may be resolved on its merits.

B. The Court Should Enjoin Defendants from Engaging in Practices that Violate the APA and Are Inconsistent with the 2013 Kim Memo

In light of the Court's broad discretion to revisit its interlocutory orders, amending the preliminary injunction is appropriate where the practices discussed herein qualify for emergency injunctive relief. To receive emergency injunctive relief, the plaintiff must establish that she is likely to succeed on the merits, that she is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in her favor, and that an injunction is in the public interest. *Citizens for a Responsible Curriculum v. Montgomery Cty. Pub. Sch.*, 2005 WL 1075634, at *7 (D. Md. May 5, 2005); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Each factor weighs in favor of a preliminary injunction here.[2]

1. Defendants Should Be Enjoined from Deferring to Immigration Judges' Jurisdictional Determinations

a) Plaintiffs Are Likely to Succeed in Showing that USCIS's Deference to Immigration Judge's Jurisdictional Determinations Violates the APA

The 2013 Kim Memo directs USCIS to process asylum applications as long as the applicant had been determined to be a UAC before she filed her application, and even if the applicant had turned 18 or been reunited with a parent or legal guardian before she filed. *See* D.I. 76. The only exception where USCIS can decline initial jurisdiction of an asylum applicant

[2] As the Court noted in its Memorandum Opinion granting the TRO, "analysis of the last two factors—the balance of the equities and the public interest—merge here because the Government is a party, and they favor maintaining the status quo." D.I. 54 at 15. Just as the Court determined then, "[t]here is no evidence in the existing record that either Defendants or children applying for asylum will be harmed by pressing pause on enforcing the redetermination policy, but Plaintiffs have shown that the new policy will cause them harm." *Id.* Because the same analysis applies to the present motion, Plaintiffs address only the first two factors below.

with a previous UAC determination are narrow circumstances where another DHS entity or the U.S. Department of Health and Human Services ("HHS") had expressly taken an "affirmative act" before the filing of the asylum application. In the 2019 Redetermination Memorandum, however, USCIS instructed its asylum officers to defer to an immigration judge's decision as to whether USCIS had initial jurisdiction over an asylum application: "If EOIR has explicitly determined that USCIS does not have jurisdiction over an asylum application because it is not one filed by a UAC, the asylum officer will defer to that determination." *See* D.I. 91-1 at 4 n.5. The jurisdiction granted to USCIS by the TVPRA is initial jurisdiction; deferring to an EOIR assertion of jurisdiction thus upends the statutory order by displacing initial jurisdiction that USCIS was, in terms of its operative policy, prepared to exercise.

E.D.G. is likely to succeed on the merits for the same reason that the Court previously found the initially named plaintiffs were likely to succeed: Defendants instituted the 2019 Redetermination Memorandum, including the footnote instructing asylum officers to defer to immigration judge determinations, without notice and comment in violation of the APA. *See* D.I. 54 at 10-11. Further, as this Court noted, Defendants' policy changes are arbitrary and capricious when they do not "provide a reasoned explanation" for a change where the agency's "prior policy has engendered serious reliance interests that must be taken into account." *Id.* at 12-13 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)). Defendants' new policy deferring to immigration judges prejudicially harms individuals who relied on their previous policies without any "reasoned explanation." This is no less true of E.D.G. or other similarly situated UACs than it was of the original named plaintiffs.

Moreover, Defendants' new policy of treating an immigration judge's jurisdictional determination as an "affirmative act" is arbitrary, capricious, and contrary to law, as it departs

from the 2013 Kim Memo's use of that term without any explanation or even acknowledgment. Under the 2013 Kim Memo, "affirmative acts" that may terminate UAC status defeat USCIS initial jurisdiction are limited to acts taken by one of three specified agencies before the applicant files her asylum application with USCIS: "Unless there was an affirmative act by HHS, ICE or CBP to terminate the UAC finding before the applicant filed the initial application for asylum, Asylum Offices will adopt the previous DHS determination that the applicant was a UAC." D.I. 91-4 at 2. USCIS's own Asylum Manual explains the same point in different words: "Unless there was an affirmative act terminating the UAC finding before the applicant filed the initial application for asylum, Asylum Offices will adopt the previous DHS UAC status determination." DeJong Decl., Ex. F at 33. Accordingly, the immigration judge's decision could not possibly terminate UAC status as an "affirmative act" under the 2013 Kim Memo: The decision both occurred after E.D.G. filed his asylum application and it was made by an Executive Branch employee who is not HHS, ICE, or CBP.

Finally, Defendants' practice of deferring to immigration judge jurisdictional determinations implicates the same reliance interests underlying the original named plaintiffs' due process claims. Under the 2013 Kim Memo, UACs could wait until after they turned 18 or were reunited with a parent or legal guardian before filing their asylum application without prejudice to their right to have USCIS exercise jurisdiction over it. The immigration judge determinations to which USCIS now, following the 2019 Redetermination Memorandum, defers result directly from the previously discussed prospective class members' reliance. If USCIS cannot itself upend these reliance interests, it should not be permitted to delay consideration of a UAC's asylum application until another arm of the federal government does so for it. Defendants should not be allowed to accomplish by delay what it has been forbidden by action.

See D.I. 54 at 15 ("Defendants have conceded that Plaintiffs are likely to succeed on the merits of their constitutional claims[.]").

This Court is rightly chary of ruling on the merits of Defendants' practice of deferring to immigration judge jurisdictional determinations at this stage because, as Plaintiffs noted in their opposition to Defendants' motion, the administrative record is "the focal point for judicial review." D.I. 109 at 25 (quoting *Mayor & City Council of Balt. v. Trump*, 2019 WL 6970631, at *6 (D. Md. Dec. 19, 2019)). But to protect E.D.G. from a precipitous removal, this Court does not need to finally resolve his claims; instead, it is only required to find that E.D.G. is *likely* to succeed on the merits. The Court may decide whether E.D.G. is likely to succeed prior to production of the administrative record, as it did for the original named plaintiffs in granting the TRO. *See* D.I. 54 at 8; *see also, e.g.*, *Guilford Coll. v. McAleenan*, 389 F. Supp. 3d 377, 395 (M.D.N.C. 2019) (granting preliminary injunction prior to production of administrative record).

b) Plaintiffs Will Be Irreparably Harmed if USCIS Continues to Unlawfully Defer to Immigration Judge's UAC Findings

As the Court previously stated, Plaintiffs may "move for emergency equitable relief to enjoin enforcement of the IJ deferral policy if Plaintiffs believe such enforcement threatens impending irreparable harm." D.I. 115 at 24-25. Plaintiff E.D.G.'s case raises precisely this threat. E.D.G.'s appeal of his asylum denial is pending before the BIA, and if the BIA dismisses his appeal, he will have a final, enforceable removal order. Mariscal Decl. ¶ 21. Based on Mr. Mariscal's experience, "I anticipate that within weeks of the BIA decision ICE would issue a 'bag and baggage' letter requiring E.D.G. to report to ICE with his belongings for removal to Honduras." *Id.* If the BIA issues its decision before this Court is able to rule on the merits of the parties' cross-motions for summary judgment (after Defendants finally produce the

administrative record on July 24, 2020), then E.D.G. could be deported, suffering clearly irreparable harm absent preliminary injunctive relief.

In light of how quickly E.D.G. may be deported after receiving an adverse decision from the BIA, it is likely that his removal could be effected before this Court has an opportunity to consider an emergency motion to enjoin Defendants' practice and E.D.G.'s corresponding removal. In short, if this Court waits until E.D.G. has *actually* suffered an adverse enforcement action taken by Defendants, then it will be too late to maintain the status quo and ultimately resolve his claims on the merits. The Court previously granted a TRO, and later a preliminary injunction, based on the risk of irreparable harm to the original named plaintiffs even before they had a final removal order in place. *See* D.I. 54 at 14-15 (asylum applicants "who relied on USCIS's longstanding policy . . . may miss their opportunity to file for asylum all together" or "will be forced to proceed before an adversarial system where they will be subject to cross-examination by trained government lawyers even though they believed that they would be able to proceed before an asylum officer trained in trauma-informed interviewing"). The same is appropriate here, as maintaining the status quo will avoid prejudicially affecting E.D.G. and avoid the bureaucratic difficulties of reversing or holding in abeyance final orders already issued.

Beyond E.D.G., there are likely many more prospective class members who are at risk of irreparable harm—Defendants have admitted in their Answer that they intentionally "delayed scheduling asylum interviews of applicants who claimed that they were filing as UACs and who had turned 18 prior to filing in anticipation [sic]." D.I. 118 ¶ 104.

2. ICE Should Be Enjoined from Advocating Against USCIS Jurisdiction in Removal Proceedings

a) Plaintiffs Are Likely to Succeed in Showing that ICE's Practices Violate the APA

As Plaintiffs have alleged in their Amended Complaint and as exemplified by the experience of J.S.G.C., ICE has advocated in immigration court for immigration judges to exercise jurisdiction over asylum applications filed by UACs in order to "deny[] UAC applicants the initial non-adversarial hearing to which the TVPRA entitles them." D.I. 91 ¶ 108. On its own and in concert with USCIS's practice of deferring to immigration judge jurisdictional determinations, ICE's advocacy has the effect of encouraging immigration judges to redetermine whether asylum applicants were UACs when they filed their applications, potentially resulting in the UACs being forced to pursue their asylum application in immigration court.[3]

Plaintiffs are likely to succeed on the merits of their claim as to ICE's advocacy, just as they are likely to prevail on the claim that USCIS's deference to immigration judge jurisdictional determinations is arbitrary and capricious as it is inconsistent with the TVPRA's commands. *See* D.I. 115 at 39 ("Because Count I asserts that the policies adopted in the 2019 Redetermination Memo violate the TVPRA, Plaintiffs have set forth an APA claim against ICE and Acting Director Albence based on their implementation of those policies."). In the same way that deference to an immigration judge jurisdictional determination results in USCIS's abdication of its initial jurisdiction, so too is the result of successful ICE advocacy a usurpation of jurisdiction that would otherwise properly be exercised by USCIS. Ultimately, Plaintiffs' claim against ICE reduces to the principle that if USCIS is commanded by the TVPRA to accept jurisdiction over

[3] Plaintiffs also note that, in advocating against USCIS jurisdiction over asylum applications, ICE has misrepresented the nature and effect of this Court's preliminary injunction, merely referring to it as a "district court decision[] from [an]other jurisdiction" despite the nationwide effect of the injunction. Elder Decl., Ex. B, at 3.

UACs' asylum applications, and if USCIS sets forth and adheres to a reasoned policy for exercising that jurisdiction, USCIS's sister agency ICE cannot work to subvert that result. *See id.* at 40-41 (noting that Defendants' brief in a BIA proceeding "demonstrates the plausibility of Plaintiffs' allegations that ICE's advocacy before EOIR concerning UACs is part of a broader, cross-agency policy of interpreting the TVPRA's initial jurisdiction provision in a certain manner."); *see also, e.g.*, *Safir v. Gibson*, 432 F.2d 137, 143 (2d Cir. 1970) (estopping Maritime Administration from redetermining an issue previously decided by the Federal Maritime Commission, noting "it would be quite unseemly" for one agency "to conclude that its sister agency had been wrong on a fully litigated issue the decision of which Congress had confided to it").

b) The Prospective Class Members Will Be Irreparably Harmed by ICE's Conduct

Prospective class members, including J.S.G.C., are at risk of irreparable harm as a result of Defendants' policy. First, when an immigration judge accepts ICE's position, presented in direct opposition to the policy of its sister agency within DHS, and determines that it has jurisdiction to evaluate the UAC's asylum application notwithstanding a pending application at USCIS, the UAC must defend his asylum claim in immigration court, subject to cross-examination and without the benefit of the child-sensitive and trauma-informed interview techniques employed by USCIS's asylum officers. Regardless of whether an asylum applicant later succeeds in bringing his asylum application before USCIS, as the TVPRA entitles him to do, the experience of reliving his trauma in the face of hostile interrogation cannot be undone. Thus, even if USCIS is ultimately ordered not to defer to immigration judge jurisdictional determinations, ICE's advocacy may still result in the prospective class member suffering irreparable harm. And so, for example, prospective class members may be put through the

unnecessary trauma of an immigration court merits hearing, and then upon a final judgment in this case, be given their opportunity for an administrative hearing at the same claim at USCIS—where, having already suffered through a trying immigration court process, their ability to testify comfortably and openly will be impaired. Second, when combined with USCIS's deference to immigration judge jurisdictional determinations, ICE's advocacy can result in a prospective class member being denied consideration of his asylum application by USCIS entirely. Finally, the multiplicity of these injuries threatens duplicative litigation, undermining the value of a Rule 23 proposed class action, if prospective class members threatened with these practices initiate separate litigation to protect their own rights in the face of USCIS's inconsistent actions.

3. USCIS Should Be Enjoined from Denying Jurisdiction over a Child's Asylum Application Based on an Alleged "Affirmative Act" Involving a Mere Determination or Notation that the Child Has Been Reunited with a Parent or Legal Guardian or Has Turned 18 Years Old

a) Plaintiffs Are Likely to Succeed in Showing that USCIS's Practices Violate the APA and Are Inconsistent with the TVPRA

Under the 2013 Kim Memo, asylum officers were instructed to accept initial jurisdiction over applications filed by those previously determined to be a UAC, "[u]nless there was an affirmative act by HHS, ICE or CBP to terminate the UAC finding before the applicant filed the initial application for asylum." D.I. 91-4 at 2. By the express terms of the 2013 Policy, evidence that an individual had turned 18 or reunited with a parent or legal guardian before filing an asylum application could not negate USCIS jurisdiction, and thus could not qualify as an "affirmative act by HHS, ICE or CBP." *Id.* Under the enjoined 2019 Redetermination Policy, USCIS sought to change established agency policy by re-examining UAC status in all cases and declining initial jurisdiction if USCIS concluded that an asylum applicant had turned 18 or had been reunited with a parent or legal guardian at the time they filed their asylum application.

Despite the Court's preliminary injunction order, USCIS continues to reject jurisdiction over asylum applications on the same basis contemplated by the 2019 Redetermination Policy but expressly foreclosed under the 2013 Kim Memo: that children have reunited with a parent or legal guardian or turned 18. In examples identified by Plaintiffs' counsel, USCIS contends that these rejections are permissible, notwithstanding the injunction, on the theory that an agent's notation in a government record or database reflecting the child's age or reunification constitutes an "affirmative act . . . to terminate the UAC finding before the applicant filed the initial application for asylum."

USCIS's litigation-inspired reinterpretation of an "affirmative act" as described in the 2013 Kim Memo is substantively indistinguishable from the 2019 Redetermination Policy that this Court enjoined: The interpretation allows USCIS to take evidence that a child has turned 18 or has been reunited with a parent or legal guardian—evidence that by the plain language of the 2013 Kim Memo cannot be a sufficient basis for declining jurisdiction—and treat it as a reason to decline jurisdiction merely by deeming the recording of the information to be an "affirmative act" by the agency that did the recording. Defendants have thereby overstretched the 2013 Kim Memo's narrow "affirmative act" exception into a broad tool for implementing policies of the enjoined 2019 Redetermination Policy under a different guise.

Plaintiffs are likely to succeed on the merits of their claim that Defendants acted unlawfully by departing from the 2013 Kim Memo in a manner that is arbitrary and capricious, eschewed the notice and comment procedures required by the APA, and violated due process by applying its new practice retroactively and by upsetting reliance interests without proper consideration. Defendants' practice of treating a mere recognition that a UAC had turned 18 or been reunited with a parent or legal guardian—and/or an ICE employee making notes to that effect in a

government database—cannot, consistently with the 2013 Kim Memo, constitute an "affirmative act" that justifies USCIS declining jurisdiction over an asylum application. Accordingly, by summarily reinterpreting this exception without the required process and without considering established reliance interests, Defendants have once again acted unlawfully to the detriment of the prospective class members in this case.

First, under the 2013 Kim Memo, asylum officers "no longer need to make independent factual inquiries about UAC status in cases in which another DHS entity has already determined the applicant to be a UAC." *Id.* It is undisputed that L.M.Z.'s was a "case[] in which CBP or ICE has already determined that the applicant is a UAC"; accordingly, the asylum office was required to "adopt that determination and take jurisdiction over the case." *Id.* Second, jurisdiction lies with the asylum office based on a prior UAC determination "even if there appears to be evidence that the applicant may have turned 18 years of age or may have been reunited with a parent or legal guardian since the CBP or ICE determination." *Id.* Although the 2013 Kim Memo provides for a narrow exception to USCIS's accepting the previous UAC determination where HHS, ICE, or CBP terminates the UAC finding through an "affirmative act," that exception cannot be interpreted in a way that would swallow the rule. In short, an "affirmative act" cannot merely be recording evidence that a child has turned 18 or been reunited with a parent or legal guardian, as those are the very facts that the 2013 Kim Memo expressly identifies as being insufficient to negate USCIS's jurisdiction.

Under Defendants' problematic position, and contrary to the 2013 Kim Memo's clear intent, an applicant turning 18 or reuniting with a family member would *routinely* result in USCIS's refusal to exercise initial jurisdiction, because CBP, ICE, or HHS have routinely recorded such events in their computer systems throughout the time they have implemented the

TVPRA. For instance, HHS regularly releases UACs to parents or legal guardians, and it must record the person to whom it releases children. Defendants' interpretation of the 2013 Kim Memo would mean that, in every such case, *any* notation by DHS or HHS recognizing that a child no longer meets a component of the UAC definition would strip USCIS of jurisdiction on the theory that the notation is an "affirmative act." If that were enough to qualify as an affirmative act, then the 2013 Kim Memo's affirmative-act exception to the adoption of a previous UAC determination, which is mentioned once without elaboration in a memorandum setting forth the procedure for determining jurisdiction in great detail, would utterly swallow the rule. In short, Defendants' interpretation of the 2013 Kim Memo would undermine all of its purposes—USCIS would constantly revisit UAC determinations, children would be subject to significant delay and confusion, and the TVPRA's protections would expire at the moment a child turned 18 or was reunited with a parent or legal guardian.

Because Defendants' new policy, of treating records evidencing that a child has turned 18 or been reunited with a parent or legal guardian as an "affirmative act," is essentially identical to its enjoined 2019 Redetermination Memorandum in permitting asylum officers to consider evidence that the asylum applicant would no longer qualify as a UAC, this policy stands in violation of the APA's notice-and-comment requirements. Further, because Defendants have implemented this policy without considering "the serious reliance interests engendered by the prior rules," and without any "reasoned explanation" for its change of course, the new policy is arbitrary and capricious. *See* D.I. 54 at 13 ("If an agency ignores such reliance interests it may have entirely failed to consider an important aspect of the problem, rendering the agency's action arbitrary and capricious." (citation and internal quotation marks omitted)); *see also Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 2020 WL 3271746, at *14 (U.S. June 18, 2020)

("When an agency changes course, . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account" and "[i]t would be arbitrary and capricious to ignore such matters." (citation and internal quotation marks omitted)).

In addition to Defendants' litigation-inspired reinterpretation of the "affirmative act" exception violating the APA, a secret "affirmative act" that redefines a child's legal rights without any notice or opportunity to respond gravely impacts that child's due process rights. Even Defendants acknowledged, at the hearing before this Court on the motion for a temporary restraining order, that denying jurisdiction over asylum applications from children who had reasonably relied upon the Defendants' preexisting policy would violate the Due Process Clause. D.I. 53 at 5-6. The same is true here. To interpret the 2013 Kim Memo's "affirmative act" exception in this expansive manner would frustrate prospective class members' prior reliance on the 2013 Kim Memo as well as the TVPRA.

Further, the secretive manner in which ICE's purported "affirmative act" was taken in the example of L.M.Z., by making a notation in an internal database with no notice to the UAC of any purported change to his legal rights and status, threatens to strip immigrant children of their legal rights without adequate process or protections. *See, e.g.*, *Kaur v. Holder*, 561 F.3d 957, 962 (9th Cir. 2009) ("[T]he use of secret evidence is cabined by constitutional due process limitations."). According to USCIS, ICE's computerized notation that L.M.Z.'s UAC status was terminated was entered on August 14, 2018. But L.M.Z. was never informed of ICE's purported "affirmative act," Frank Decl. ¶ 15, and thus had no notice of this change in his legal rights or opportunity to respond. In fact, reasonable reliance on the previous UAC determination could have compromised L.M.Z's asylum eligibility if he had not filed for asylum within a year—UACs are not subject to the one-year deadline to file an asylum application, but non-UACs are.

See 8 U.S.C. § 1158(a)(2)(B). If L.M.Z. had waited more than one year to file his asylum application, then he might have been found ineligible for asylum solely on the basis of that bar. A child who relied on his UAC determination, only to later learn that an agency had reversed it without informing him, would be in a worse position than if the TVPRA's exemption from the one-year bar did not exist.

b) The Putative Class Members Will Be Irreparably Harmed if USCIS Rejects Jurisdiction Based on an Improper "Affirmative Act"

Defendants' practice of denying jurisdiction based on recognition or notation of evidence that the applicant has turned 18 or been reunited with a parent or legal guardian presents the same risk of irreparable harm that was presented in Plaintiffs' original motion for a TRO: Individuals who relied on USCIS's policy of exercising jurisdiction over individuals who had previously been designated UACs may miss their opportunity to file for asylum, or may be required to defend their asylum application in an adversarial setting rather than the non-adversarial forum mandated by the TVPRA. Just as with E.D.G. and J.S.G.C., L.M.Z. and other prospective class members will, without a modified preliminary injunction, be forced to defend asylum claims in immigration court, being subject to an adversarial process rather than the child-appropriate procedures they are entitled to by the TVPRA. And even if the Court later orders USCIS to exercise its initial jurisdiction over those asylum claims at a later date, the experience of cross-examination in immigration court , which will further traumatize a vulnerable child like L.M.Z. and potentially prevent him from testifying comfortably and openly in a proceeding before USCIS, cannot be repaired. Even more severely, prospective class members like L.M.Z., who has an upcoming hearing scheduled in immigration court, could be removed before this Court is able to rule on the merits, as summary judgment briefing will not be complete until

October 2020 at the earliest. Amending the preliminary injunction to maintain the status quo would prevent these irreparable harms with little burden to the Government.

Moreover, USCIS could exercise this practice in as-yet undiscovered cases, including those where children may have filed asylum applications more than one year after entering the United States in reliance on the TVPRA's exemption from the one-year bar for children determined to be UACs. Where USCIS treats undisclosed notations by other agencies that these children have turned 18 or been reunited with a parent or legal guardian as "affirmative acts," these prospective class members may lose their opportunity to file for asylum entirely due to their reliance on USCIS's previous practice. Such prospective class members would suffer irreparable harm simply for having relied on their rights under the TVPRA, but an amended preliminary injunction would preserve the status quo.

CONCLUSION

For all of the above reasons, Plaintiffs respectfully request that the Court amend the preliminary injunction to enjoin and restrain Defendants from engaging in the identified practices, in order that the status quo be maintained as to prospective class members until the Court is able to rule on the merits.

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Respectfully submitted,

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