UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIA M. KIAKOMBUA, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 19-1872 (KBJ)
KEVIN K. McALEENAN, Acting Secretary of Homeland Security, et al.,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendants Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security, and others, respectfully submit this Memorandum of Law in Support of Defendant's Motion for Summary Judgment.

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PRELIMINARY STATEMENT

This case is novel: it appears to be the first challenge to asylum training materials issued by the Department of Homeland Security ("DHS"), one of its components, U.S. Citizenship and Immigration Services ("USCIS"), or one of its predecessor agencies, the Immigration and Naturalization Service ("INS")—materials that have been issued in various forms for decades without challenge. Plaintiffs have upset this usual course of action in bringing this action here. In April 2019, USCIS issued an update of training material regarding asylum, statutory withholding of removal, and Convention Against Torture ("CAT") screenings for aliens in expedited removal proceedings under 8 U.S.C. § 1225(b)(1), titled the Lesson Plan on Credible Fear of Persecution and Torture Determinations ("Lesson Plan"). As with past lesson plan revisions, USCIS released the 2019 Lesson Plan to account for new case law and other developments in the complicated area of asylum and protection law impacting how its screening officers should assess "whether an alien subject to expedited removal or an arriving stowaway has a credible fear of persecution or torture." Lesson Plan, Administrative Record ("AR") at 1.

Plaintiffs are five aliens who came to the United States—three at a designated port of entry, and two encountered by U.S. Border Patrol between ports of entry—seeking asylum, statutory withholding of removal, or CAT protection. A USCIS officer interviewed them and concluded each lacked a "credible fear" of persecution or torture, which is the screening standard that aliens must satisfy in order to progress their claim for asylum, statutory withholding of removal, protection under the CAT. Despite the myriad reasons why each Plaintiff may have failed her screening, Plaintiffs have decided that USCIS's unremarkable Lesson Plan is the sole reason for their failure to pass the screening.

Plaintiffs sued, arguing that: the Lesson Plan violates the immigration laws and the Administrative Procedure Act ("APA"); asylum officers relied on the Lesson Plan; and such reliance is the sole reason why Plaintiffs failed to receive a positive credible fear determination. ECF No. 6 ¶¶ 14, 21, 23, 25, 27 ("Am. Compl."). As relief, Plaintiffs ask the Court to vacate the Lesson Plan and "all related credible fear guidance issued by Defendants on or around April 30, 2019," and enjoin Defendants from using such materials—effectively asking this court to bar USCIS from training its officers on the issues, court orders, and binding precedent that arose between April 2019 and the Lesson Plan's last revision in February 2017. *Id.* Prayer for Relief ¶¶ 4-7.

The Court should dismiss or deny Plaintiffs' unusual and flawed case. Plaintiffs' case is not justiciable. First, Plaintiffs cannot demonstrate Article III standing, as they present no evidence whatsoever that the Lesson Plan is the cause of their negative credible fear determinations, or that enjoining or vacating the Lesson Plan would remedy their alleged injuries. Second, the jurisdictional provision and cause of action invoked by Plaintiffs, 8 U.S.C. § 1252(e)(3), allows for review of "determinations under section 1225(b) of this title and its implementation." But the Lesson Plan is not an "implementation" of section 1225(b); rather it an is an implementation of the asylum standard under 8 U.S.C. §§ 1158 and 1101(a)(42), the statutory withholding of removal standard under 8 U.S.C. § 1231(b)(3), and the CAT standard under the regulations, none of which is governed by section 1225(b). Nor do Plaintiffs' claims involve a reviewable "determination" under section 1225(b)(1), because 8 U.S.C. § 1252(a)(2)(A)(iii) provides that any "determinations" under section 1225(b)(1), including the credible fear determination, are not subject to review at all, including under section 1252(e)(3). Third, for the APA claims incorporated by section 1252(e)(3), Plaintiffs cannot obtain any relief

under the APA because the Lesson Plan is not a reviewable "rule," much less a "final" rule, subject to judicial review or to notice-and-comment procedures.

Plaintiffs' challenge to the Lesson Plan fails on the merits as well. Plaintiffs' complaint fails to satisfy Rule 8, let alone their burden for summary judgment, because it fails to identify the instances in which the updated Lesson Plan allegedly misstates the law or otherwise violates the APA. Defendants are thus left to guess as to what, precisely, Plaintiffs believe is unlawful about the updated Lesson Plan. In the few areas where the Amended Complaint deviates from generalities and provides any examples—for instance, their claim that the Lesson Plan tells officers to specify the basis for only a negative credible fear finding and not a positive one, when the Lesson Plan says the opposite—the Lesson Plan and its context accurately state the law pertaining to asylum, statutory withholding of removal, and protection under the CAT. Plaintiffs' issue is really one of framing and wording, which is not grounds to enjoin an internal agency training material, let alone nationwide as applied to all aliens, nor is it a basis to declare the updated Lesson Plan arbitrary and capricious. And as aliens inside the United States without any substantial connections, Plaintiffs have diminished due process rights, and the Lesson Plan has not violated any due process rights they have identified.

For all of these reasons, the Court should dismiss the Amended Complaint for lack of jurisdiction, or else grant judgment to Defendants on the merits on all counts.

STATUTORY BACKGROUND[1]

I. EXPEDITED REMOVAL AND CREDIBLE FEAR SCREENING

Through the Immigration and Nationality Act ("INA"), Congress has authorized DHS to summarily remove from the United States certain aliens who recently entered the country and have no basis to remain here. 8 U.S.C. § 1225(b)(1).[2] Under this summary-removal mechanism—known as "expedited removal"—an alien "who is arriving in the United States" who lacks valid entry documentation or makes material misrepresentations shall be "order[ed] . . . removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under [8 U.S.C. § 1158] or a fear of persecution," or expresses a fear of torture or a fear of return to his or her country. 8 C.F.R. 235.3(b)(4); *see* 8 § 1225(b)(1)(A)(i); *see id.* § 1182(a)(6)(C), (a)(7).

If an alien makes no such indication, she can be removed immediately. *See id.* § 1225(b)(1)(A)(i). But if the alien indicates either an intention to apply for asylum or expresses a fear of persecution or torture or a fear of return, the immigration officer inspecting the alien must "refer the alien for" an interview conducted by an asylum officer, a DHS employee. 8 C.F.R. 235.3(b)(4); *see* 8 U.S.C. § 1225(b)(1)(A)(ii). In such an interview, the asylum officer assesses whether the alien has a "credible fear of persecution." 8 U.S.C. § 1225(b)(1)(B)(v); 8 C.F.R. § 208.30. A "credible fear of persecution" means that "there is a significant possibility,

[1] This section and the following "Procedural History" section constitute the statement of facts required by Local Rule 7(h)(2).

[2] The immigration laws, including section 1225(b), refer frequently to the Attorney General or the legacy INS. Under the Homeland Security Act of 2002, the former immigration functions of the INS were transferred from the Department of Justice to DHS. *See* 6 U.S.C. § 557. Therefore, for credible fear proceedings—outside of Immigration Judge review of negative credible fear determinations, 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 1208.30(g)(2)—implementation of section 1225(b)(1) procedures now is entrusted to the Secretary of Homeland Security.

taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, the alien can establish eligibility for asylum under section 208 of the Act [8 U.S.C. § 1158] or for withholding of removal under section 241(b)(3) of the Act [8 U.S.C. § 1231(b)(3)]." 8 C.F.R. 208.30(e)(2); *see* 8 U.S.C. § 1225(b)(1)(B)(v). By regulation, the officer also uses the interview to screen such an alien for protection under the CAT by inquiring whether she has a "credible fear of torture." 8 C.F.R. §§ 208.30(e)(2), 235.3. A credible-fear interview thus assesses whether the alien has a plausible basis to pursue asylum, statutory withholding of removal, or protection under the CAT, which would allow the alien to temporarily remain in the United States for that purpose despite her inadmissibility. *See* 8 U.S.C. § 1225(b)(1)(B)(v); *id.* § 1158.

To determine whether the alien passes the screening stage, the asylum officer must reference the substantive standards for asylum, statutory withholding of removal, and CAT protection. The substantive standard for asylum requires the alien to demonstrate that she is a "refugee," meaning someone who (1) has suffered (or has a well-founded fear of) "persecution" (2) "on account of" (3) one of five protected grounds—"race, religion, nationality, membership in a particular social group, or political opinion." *Id.* §§ 1101(a)(42), 1158(b)(1)(B)(i) (refugee definition and burden); *id.* § 1158(b)(2) (eligibility bars). The Attorney General (through its Immigration Judges) and the Secretary of Homeland Security (through USCIS) each have authority to grant asylum. *E.g.*, 8 U.S.C. §§ 1103, 1158; 6 U.S.C. § 271(b)(3).

Eligibility for protection under the CAT is governed by the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"). Pub. L. 105-277, div. G, tit. XXII, § 2242, Oct. 21,

1998, 112 Stat. 2681-822, *codified at* 8 U.S.C. § 1231 note.[3] By that Act and its implementing regulations, an alien may be granted CAT protection if she demonstrates "there are substantial grounds for believing the person would be in danger of being subjected to torture." *Id.*; 8 C.F.R. §§ 208.16-.18.

If the interviewing officer determines that the alien "has a credible fear of persecution" or a "credible fear of torture" by referencing those substantive standards, then the officer refers the alien to full removal proceedings under 8 U.S.C. § 1229a. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f). Full removal proceedings provide more extensive procedures than those available in expedited removal. *Compare, e.g.*, 8 U.S.C. § 1229a, *with id.* § 1225(b)(1). For example, if an alien is placed in full removal proceedings, then she may apply for asylum, or other relief or protection from removal. *Id.* § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f).

If, however, the interviewing asylum officer determines that the alien does not have a credible fear, the alien is not entitled to be placed into full removal proceedings. But she may seek review of the negative credible fear determination before an Immigration Judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(I), (III); 8 C.F.R. § 208.30(g). The Immigration Judge's review is *de novo*. 8 C.F.R. § 1003.42(d). The Immigration Judge must give the alien an opportunity to be heard and questioned by the judge, either in person or via remote connection. 8 U.S.C. § 1225(b)(1)(B)(iii)(III). As part of this hearing, the Immigration Judge may "receive into

[3] Plaintiffs repeatedly argue the lesson plan should be invalidated because it violates the CAT, implying that the CAT treaty itself is enforceable. *E.g.*, Am. Compl. ¶ 95 ("The credible fear policies contained in the Lesson Plan violate and are not in accordance with . . . the CAT . . . ."). That misapprehends the law. The CAT "treaty is non-self-executing and thus does not itself create any rights enforceable in U.S. courts." *Omar v. McHugh*, 646 F.3d 13, 17 (D.C. Cir. 2011). Instead, the source of CAT protection is FARRA plus the implementing regulations it directed the Executive Branch to promulgate. *See* FARRA § 2242(b).

evidence any oral or written statement which is material and relevant to any issue in the review." 8 C.F.R. § 1003.42(c).

If, after *de novo* review, the Immigration Judge concludes that the alien has established a credible fear, the Immigration Judge will vacate the asylum officer's decision and DHS will place the alien in full removal proceedings for adjudication of the alien's asylum and CAT claims (and other removal-related claims). *Id.* §§ 208.30(e)(5), 235.6(a), 1003.42(f), 1208.30(g)(2)(iv)(B); *see* 8 U.S.C. 1225(b)(1)(B)(ii). If the Immigration Judge concurs with the asylum officer's decision that the alien lacks a credible fear, however, the alien must be "removed from the United States without further hearing or review." 8 U.S.C. § 1225(b)(1)(B)(iii)(I); 8 C.F.R. § 1208.30(g)(2)(iv)(A). The INA precludes further review of the credible-fear determination by the Board of Immigration Appeals ("Board") or generally by any court. 8 U.S.C. §§ 1225(b)(1)(C), 1252(a)(2)(A)(iii), 1252(e)(2); 8 C.F.R. § 1003.42(f).

II. DHS TRAINING AND LESSON PLANS

As the above explanation demonstrates, "[i]mmigration law can be complex, and it is a legal specialty of its own." *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010). Accordingly, DHS makes a great effort to train its personnel in the intricacies of immigration law.

The INA contemplates such efforts. Generally, it empowers the Secretary of Homeland Security to "issue such instructions" necessary to "control, direct[], and supervis[e] all employees" and "files" of DHS and ensure that the immigration laws are being properly administered. 8 U.S.C. §§ 1103(a)(1)-(3). And in several places, the INA specifically requires specialized training of certain DHS employees. *See, e.g.*, *id.* §§ 1157(f), 1232(a)(2)(C)(iii), 1324b(e)(2), 1365b(f), (h), (i), 1375c(b)(3).

One such field where employees receive specialized training is fear screenings. Only an "asylum officer" may conduct asylum and CAT credible fear screenings and make credible fear determinations. *Id.* § 1225(b)(1)(A)-(B). The INA requires an "asylum officer" to receive "professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of [asylum] applications." *Id.* § 1225(b)(1)(E)(i). Asylum officers also must be supervised by another officer who has not only such training, but also "substantial experience adjudicating asylum applications." *Id.* § 1225(b)(1)(E)(ii). DHS has gone further than the INA; by regulation, the agency requires an asylum officer to receive "special training in international human rights law, nonadversarial interview techniques, and other relevant national and international refugee laws and principles." 8 C.F.R. § 208.1(b). However, neither the INA, FARRA, nor the regulations limit, delineate, or specify the exact form or content USCIS must use to train its asylum officers. The upshot is that the Secretary of Homeland Security or his delegatees decide how to structure the training; the training is not open sourced to the public.

Indeed, DHS and USCIS use a wide array of techniques and materials to train its asylum officers, with varying levels of formality, scope, and compulsion, and not all of which involve fear screenings in particular. For instance, USCIS issues or makes available to its officers:

- Policy memoranda on the topic. *See, e.g.*, AR at 801-11.
- Forms for officers to complete, ensuring compliance with procedures and the law. *See, e.g.*, *id.* at 215-17, 224-28.
- Worksheets for the officers to use as they work through various processes. *See, e.g.*, *id.* at 218-23.

- The immigration policies of USCIS's sister immigration agencies, including U.S. Immigration and Customs Enforcement. *See, e.g.*, *id.* at 795-800, 812-21.
- Various regulations, forms, directives, Board decisions, federal case law, statutes, and legislative history materials. *See, e.g.*, *id.* at 2, 5, 9.
- In-person training opportunities, which include a lecture, practical exercises, and a written test. *See, e.g.*, *id.* at 1-2.

Asylum officers are not to consume these materials in isolation. The materials cross-reference each other. *See, e.g.*, *id.* at 10, 11, 13, 14, 15, 18. The agency has reminded officers, including in the credible fear context, that a particular memorandum superseded only those existing materials that were inconsistent with the new policy. *See, e.g.*, *id.* at 801 n.1.

III. THE LESSON PLAN

Another one of these training tools is the "Lesson Plan," which USCIS issues, routinely revises, and circulates on a wide variety of topics. *See generally* AR at 1-37, 233-794. At issue in this case is the USCIS Lesson Plan on Credible Fear of Persecution and Torture Determinations. USCIS has revised its credible fear lesson plan during every presidential administration of the agency's existence: 2006,[4] 2013,[5] 2014,[6] 2017,[7] and 2019. Not until this lawsuit has an asylum lesson plan apparently ever been challenged as unlawful. The 2019 version is 37 pages long. Like previous lesson plans, this document is used in the asylum officer training course along with a lecture, practical exercises, and a written test. *Id.* at 1-2.

[4] AR at 85.

[5] AR at 135-73.

[6] AR at 88-134.

[7] AR at 38-84.

And like previous training materials, the Lesson Plan does not pretend to be "comprehensive." *Cf. Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 263 (2d Cir. 2006) (citing a USCIS asylum fact sheet that did state that it was "comprehensive" and "clarif[ied] the regulations"). Indeed, this Lesson Plan alone cited eleven other USCIS lesson plans, on topics ranging from credibility and evidence, to the nexus requirement for asylum claims, to the Safe Third Country Agreement the United States has concluded with Canada—collectively, material spanning over 550 pages. AR at 233-794.

USCIS's internal training material for asylum officers is not binding on Immigration Judges, the Board, or this Court. Asylum lesson plans do not carry the force of law and cannot be enforced by private litigants. *See, e.g.*, *Prokopenko v. Ashscroft*, 372 F.3d 941, 944 (8th Cir. 2004) ("[I]t is doubtful that internal agency memorandum of this sort [i.e., an Operating Policies and Procedures Memorandum] could confer substantive legal benefits upon aliens or bind the INS."); *infra* section IV.A. The Lesson Plan is thus intended to summarize existing legal and policy authorities that are pertinent to a credible fear determination.

PROCEDURAL HISTORY

Plaintiffs are five individuals who have been deported or claim to be at imminent risk of deportation and who have sought asylum in the United States. Am. Compl. ¶ 8. On June 25, 2019, Plaintiffs commenced this action and, three days later, filed an Amended Complaint. The Amended Complaint alleges three claims. Count I alleges that the alleged "credible fear policies contained in the Lesson Plan violate and are not in accordance with the INA, the Refugee Act, the Convention Against Torture, or customary international law" and therefore are arbitrary and capricious. *See* Am. Compl. ¶¶ 95-96. Count II alleges that Defendants did not follow notice-and-comment rulemaking procedures related to the Lesson Plan and thus violated the APA. *See*

id. ¶¶ 101-102. Count III alleges that the putative credible fear policies contained in the Lesson Plan violated Plaintiff's Fifth Amendment rights to due process in numerous ways. *See id.* ¶ 107. Among other things, Plaintiffs request a declaration that the Lesson Plan "and the credible fear proceedings conducted thereunder" are not in accordance with law and an injunction preventing Defendants from continuing to apply the Lesson Plan "and any related credible fear guidance." *Id.* at 26.

On July 8, 2019, Plaintiffs filed an Emergency Motion for Temporary Restraining Order, alleging that two of the five Plaintiffs, using the pseudonyms Ana and Emma, were in imminent risk of removal from the United States. ECF No. 13 at 1. On July 9, 2019, after a telephone conference, the Court issued an Order Granting Temporary Stay of Removal, in which the Court enjoined Defendants from removing Ana and Emma from the country pending resolution of the Court's determination of whether it has jurisdiction to enter a stay of removal in this case. ECF No. 18 at 2. On July 10, 2019, the Court issued a Scheduling Order setting forth the schedule for the production of the administrative record, the resolution of issues relating to the administrative record, and the briefing of summary judgment motions.[8] ECF No. 22.

On July 25, 2019, Defendants filed the Index to the Certified Administrative Record, ECF No. 23, and produced to Plaintiffs all of the non-public documents that the agency considered in connection with its issuance of the April 30, 2019, update to the Lesson Plan.[9]

[8] The Scheduling Order noted the parties' agreement that Defendants need not file an answer prior to filing its motion for summary judgment. ECF No. 22 at 3 (citing Fed. R. Civ. P. 56(b)).

[9] The parties are currently briefing a dispute over the certification of that record. On August 5, 2019, Plaintiffs filed a motion to compel Defendants to provide an administrative record certification that contained the language regarding personal knowledge that they believe was required; in the alternative Plaintiffs requested that Defendants produce a privilege log. ECF No. 24. On August 12, 2019, Defendants filed their opposition to this motion.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(a), summary judgment is appropriate when the moving party demonstrates that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). However, in a case involving judicial review of a final agency action under the APA, 5 U.S.C. § 706, "the standard set forth in Rule 56(a) does not apply because of the limited role of a court in reviewing the administrative record." *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 81 (D.D.C. 2007) (citing *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89-90 (D.D.C. 2006)). "Under the APA, it is the agency's responsibility to resolve the factual issues and arrive at a decision that is supported by the administrative record, and the court is left to 'determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'" *Mashack v. Jewell*, 149 F. Supp. 3d 11, 19 (D.D.C. 2016) (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769-70 (9th Cir. 1985) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)); *see also Richards v. INS*, 554 F.2d 1173, 1177 & n.28 (D.C. Cir. 1977).

In assessing agency action, the court must give the agency a "presumption of regularity," *Overton Park*, 401 U.S. at 415, and defer to how the agency synthesizes and organizes its internal training manuals at least to the extent it has the power to persuade, *see R.J. Reynolds Tobacco Co. v. U.S. Dep't of Agric.*, 130 F. Supp. 3d 356, 371 (D.D.C. 2015) (K.B. Jackson, J.).

ARGUMENT

I. PLAINTIFFS LACK STANDING TO CHALLENGE THE LESSON PLAN.

The Court should dismiss the Amended Complaint because no Plaintiff has standing to challenge the Lesson Plan. Courts are not "continuing monitors of the wisdom and soundness of

Executive action." *Allen v. Wright*, 468 U.S. 737, 760 (1984). Instead, a court must dismiss a complaint if it determines at any time that it lacks subject-matter jurisdiction. Fed. R. Civ. P. 12(h)(3).

A court has subject-matter jurisdiction only when a plaintiff establishes that she has standing to maintain the suit. *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 53 (D.C. Cir. 1991). The standing inquiry aims to prevent the judicial process from becoming "a vehicle for the vindication of the value interests of concerned bystanders." *Id.* at 56. Standing must exist at all stages of litigation. *Davis v. FEC*, 554 U.S. 724, 732-33 (2008).

To make that showing, plaintiffs must show: "(1) an 'injury in fact' that is 'concrete and particularized' as well as 'actual or imminent'; (2) a 'causal connection' between the injury and the challenged conduct; and (3) a likelihood, as opposed to mere speculation, 'that the injury will be redressed by a favorable decision.'" *Ark Initiative v. Tidwell*, 749 F.3d 1071, 1075 (D.C. Cir. 2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Plaintiffs bear the burden of establishing all three of these elements. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998). Because this case is at the summary judgment stage, Plaintiffs must produce "specific facts, not 'mere allegations,' to substantiate each leap necessary for standing." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 666 (D.C. Cir. 1996) (en banc).

Plaintiffs fail to make that heightened showing.

First, Plaintiffs Maria Kiakombua and Emma fail to show that USCIS's Lesson Plan has caused them a cognizable injury. Injury in fact, for standing purposes, is the "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 650 (cleaned up). An individual lacks standing

to challenge a government policy denying a particular benefit if she has not been denied that benefit as a result of the challenged policy.

Here, the Court should dismiss the claims of Plaintiffs Kiakombua and Emma. For Plaintiff Emma, the Immigration Judge disagreed with USCIS and vacated the negative credible fear determination. Decision of the Immigration Judge (attached as Ex. A).[10] For Plaintiff Maria Kiakombua, USCIS itself revisited its initial negative determination and reversed itself. Am. Compl. ¶ 19. Having advanced beyond the screening stage and having been put in full section 1229a removal proceedings, these Plaintiffs have not been denied the benefit (the opportunity to present an asylum or CAT claim in full section 1229a proceedings) they seek.

Plaintiffs resist this conclusion by alleging that because USCIS has, allegedly in error, given them a negative credible fear determination, in subsequent proceedings an Immigration Judge might use that finding against them when adjudicating their ultimate application for asylum, statutory withholding of removal, or CAT protection. Putting aside the fact that an Immigration Judge who makes the final determination of asylum or CAT is not subject to the Lesson Plan or bound by a past USCIS screening determination, and is required to review *de novo* USCIS's credible fear determinations, 8 C.F.R. § 1003.42(c)-(d), such a future action is wholly speculative. *See Nw. Airlines, Inc. v. FAA*, 795 F.2d 195, 201 (D.C. Cir. 1986) (explaining that standing "will not be satisfied simply because a chain of events can be hypothesized in which the action challenged eventually leads to actual injury").

[10] Although judicial review of APA challenges is limited to the administrative record, a court may consider evidence outside the record in determining its Article III jurisdiction. *See Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 174 (D.C. Cir. 2012). Defendants thus cite this exhibit for this limited purpose.

Second, Plaintiffs fail to show that any injury has a "fairly traceable connection" to the complained-of conduct. *Steel Co.*, 523 U.S. at 103. Plaintiffs must show more than a "bald allegation" that the challenged conduct is connected to their alleged injury. *Renal Physicians Ass'n v. HHS*, 489 F.3d 1267, 1275 (D.C. Cir. 2007) (discussing cases where standing was demonstrated with affidavits and declarations establishing traceability); *Fla. Audubon Soc'y*, 94 F.3d at 664 ("[T]he plaintiff must show that the government act performed without the procedure [desired by the plaintiffs] will cause a distinct risk to a particularized interest of the plaintiff."). Plaintiffs have produced zero evidence that the Lesson Plan, and the new standards it allegedly pronounced, played any role in Plaintiffs' negative credible fear determinations. From the record Plaintiffs have presented, any such determination could plausibly be predicated on cases unmentioned by the Lesson Plan, factors that predate the Lesson Plan, or the unquestionably correct statements in the Lesson Plan. *See infra* section IV.A (explaining how Plaintiffs have failed to identify the universe of statements in the Lesson Plan they find objectionable); *cf. Grace v. Whitaker*, 344 F. Supp. 3d 96, 120 (D.D.C. 2018) (finding standing because the parties agreed that the challenged policies impacted the plaintiffs).

Not only could USCIS have relied on the alien's failure to meet her burden, country conditions information, gaps in testimony, or something other than the Lesson Plan to find Plaintiffs lacked a credible fear, but Plaintiffs' alleged injuries plausibly *were* caused by different actors entirely: Immigration Judges. Where a party challenges government action that is itself caused by different government action, that party "needs to show that . . . invalidating [the challenged government action] will be reasonably likely to cause the [defendants] to" change the different government action. *Renal Physicians*, 489 F.3d at 1276. Plaintiffs must show a causal connection such that invalidating the Lesson Plan would be reasonably likely to change

Plaintiffs' eligibility for a positive credible fear determination. But given Immigration Judges' independent involvement and final say in concurring with negative credible fear determinations, 8 C.F.R. § 1208.30(g), the decisions of those Immigration Judges (who do not use the Lesson Plan) could be determinative irrespective of the decisions by USCIS asylum officers (who do use the Lesson Plan). Plaintiffs' bare allegation that the Lesson Plan impermissibly raised the credible fear substantive or procedural standards is insufficient for them to satisfy the requirement of traceability.

Third, Plaintiffs have not established that their claims are redressable. Plaintiffs must show "a likelihood that the requested relief will redress the alleged injury." *Steel Co.*, 523 U.S. at 103. For redressability, the D.C. Circuit has noted that "[a] case is moot if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Pharmachemie B.V. v. Barr Labs.*, 276 F.3d 627, 631 (D.C. Cir. 2002) (quotations omitted).

The relief that Plaintiffs seek—invalidation of the Lesson Plan and a new credible fear process from USCIS unaffected by its Lesson Plan—would not affect any Plaintiff's rights or affect them in the future. Plaintiffs Kiakombua and Emma are now in full removal proceedings under 8 U.S.C. § 1229a, where they may apply for asylum or other forms of protection and have an Immigration Judge (who is not bound by the Lesson Plan) adjudicate their claims.

Here, although USCIS asylum officers initially made a credible fear determination with regard to each Plaintiff, that determination was not the final word in whether they had credible fear sufficient to be placed in full removal proceedings. As discussed above, negative credible fear determinations rendered by a USCIS asylum officer are reviewable by an Immigration Judge from the Department of Justice, unless the alien declines such review. 8 C.F.R. §§ 208.30(g),

1208.30(g). For Plaintiffs Ana, Julia, and Sofia, an Immigration Judge, upon *de novo* review, independently concurred with the asylum officer's determination, and found that each of those Plaintiffs did not possess a credible fear of persecution or torture. Am. Compl. ¶¶ 21, 25, 27. In each instance, it was the Immigration Judge—not a USCIS asylum officer—who made the ultimate call on whether each Plaintiff had a negative credible fear of persecution or torture. Critically, Immigration Judges are not subject to USCIS training materials and do not apply those materials in reviewing credible fear determinations. Plaintiffs' failure to actually receive a final negative credible fear determination from USCIS means that none of them suffered a concrete and particularized injury.

In addition to being the final decision-maker, the Immigration Judge is an independent, contributing factor to the credible fear determination. A "plaintiff cannot demonstrate redressability when he challenges only one of two government actions that both independently produce the same alleged harm." *Kaspersky Lab, Inc. v. DHS*, 311 F. Supp. 3d 187, 219 (D.D.C. 2018). If "the undoing of the [challenged] governmental action will not undo the harm" caused by separate government action "because the new status quo is held in place by other forces," Plaintiffs' claims are not redressable because none of the relief they request will cure their alleged injuries. *Renal Physicians Ass'n*, 489 F.3d at 1277; *see Delta Constr. Co. v. EPA*, 783 F.3d 1291, 1296 (D.C. Cir. 2015). This means there is no "likelihood" that any Plaintiff's alleged injury can be "redressed by a favorable decision." *Ark Initiative*, 749 F.3d at 1075. Plaintiffs lack standing to pursue this action.

Because Plaintiffs lack standing, the Court should dismiss the Amended Complaint for lack of subject-matter jurisdiction.

II. THE LESSON PLAN IS NOT SUBJECT TO CHALLENGE UNDER THE INA.

Alternatively, the Court should dismiss Plaintiffs' Amended Complaint because the INA precludes the Court from exercising jurisdiction over this case. "District courts have jurisdiction over civil actions arising under the Constitution and laws of the United States, 28 U.S.C § 1331, but Congress may preclude district court jurisdiction by establishing an alternative statutory scheme for administrative and judicial review." *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 929 F.3d 748, 754 (D.C. Cir. 2019). For expedited removal, Congress has done exactly that: it enacted 8 U.S.C. § 1252(a)(2)(A), which bars district-court jurisdiction in cases involving orders of expedited removal, other than as permitted by section 1252(e).

Section 1252(e)(3) does not confer jurisdiction on the Court to hear a challenge to the Lesson Plan. Section 1252(e)(3), entitled "Challenges to the validity of the system," provides for review only of regulations and written policies that establish the structure and procedures for the expedited removal system. Section 1252(e)(3) authorizes "[j]udicial review of determinations under section 1225(b) of this title and its *implementation*." 8 U.S.C. § 1252(e)(3) (emphasis added). Congress accordingly directed that review of the "implementation" of section 1225(b) "shall be limited to determinations of" whether "such section, or any regulation issued to implement such section, is constitutional," and whether "a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." *Id.* § 1252(e)(3)(A)(ii).

The Court lacks jurisdiction under section 1252(e)(3) for three independent reasons: (1) the Lesson Plan does not "implement" the expedited removal statute; (2) the Lesson Plan is not a

statute, regulation, policy directive, policy guideline, or procedure; and (3) Plaintiffs' credible fear findings are not reviewable expedited-removal "determinations."

First, the Lesson Plan does not "implement[]" section 1225(b)(1). Rather, the Lesson Plan provides guidance to officers on how to apply the law governing asylum, statutory withholding of removal, and CAT protection in the credible fear screening context, which is premised on 8 U.S.C. § 1158(a), § 1231(b)(3), and FARRA, respectively. It does so as part of DHS's mandate under section 1103(a)(1)-(3) to control, direct, and supervise its employees. An "implementation" involves intentional action to accomplish a specific obligation, not a collateral consequence of actions taken to accomplish a different goal. *Implement*, *Webster's Third International Dictionary* (1987) (defining "implement" as "to give practical effect to and ensure of actual fulfillment by concrete measures").

The Lesson Plan does not complete, perform, or carry into effect or fulfill "authority" of USCIS under section 1225(b), or specifically the agency's authority under section 1225(b)(1) governing expedited removal, 8 U.S.C. § 1252(e)(3)(A). The Lesson Plan is also not "issued by or under the authority of the Attorney General to implement such section." *Id.* § 1252(e)(3)(A)(ii). Rather, the Lesson Plan recites the *substantive* standards of asylum law (and does so under section 1103(a)(2)'s training authorities), whereas section 1225(b)(1) provides *procedures* for screening and removing aliens expeditiously. Nowhere does section 1225(b)(1) define the *substantive content* of asylum law. *See id.* § 1225(b)(1)(B)(v) (defining "credible fear of persecution" by reference to whether alien can show "eligibility for asylum under *section 1158*"). Indeed, if Congress had sought to permit review of training materials issued by or under the authority of USCIS to implement *other* provisions of the INA that could incidentally affect credible fear proceedings, it would have listed as subject to review "decisions" or "policy

guidance" concerning *all* substantive provisions of the INA, rather than just the "validity of the system" established by "implementation" of section 1225(b) itself "under the authority of the Attorney General to implement" that section. Congress did not do so. *See id.* § 1252(e)(3)(A)(i), (ii).

This conclusion is further confirmed by section 1252(e)(3)'s 60-day limitations period for any action challenging implementation of new expedited removal procedures. Under section 1252(e)(3), even if the Court would otherwise have jurisdiction, any challenge "must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) *is first implemented*." *Id.* § 1252(e)(3)(B) (emphasis added). Congress included this provision "to have the validity of" the expedited removal statute and its implementing regulations "decided promptly." *AILA v. Reno*, 199 F.3d 1352, 1364 (D.C. Cir. 2000); *see also* 8 U.S.C. § 1252(e)(3)(D) (duty of the courts "to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph"). A Congress that wanted prompt resolution of the legality of the expedited removal framework—*i.e.*, challenges to "the validity of the system," 8 U.S.C. § 1252(e)(3) (heading)—would not have then permitted constant, broad-based challenges every time USCIS updated or tweaked its training materials on the topic of asylum or CAT standards.

Second, even if the Lesson Plan were an "implementation" of section 1225(b)(1), it is not one of the five types of action reviewable under section 1252(e)(3): a statute, a regulation, a "written policy directive," a "written policy guideline," or a "written procedure." 8 U.S.C. § 1252(e)(3). The Lesson Plan is clearly not a statute or regulation. Nor is it a "policy directive" or "policy guidance"—if anything, it is an interpretive material, as discussed *infra* section III.C.

And it is not a written "procedure"—it just states the law, as pronounced by statutes, regulations, and case law. *See infra* section III.A (discussing why the Lesson Plan is not an APA "rule").

Rather, the Lesson Plan is an administrative *training material* routinely updated to conform with 8 U.S.C. § 1225(b)(1)(E) and 8 C.F.R. § 208.1(b), which describe generally the training requirements that asylum officers must receive in connection with credible fear proceedings. The Lesson Plan has been used to train asylum personnel on various asylum, protection, and related issues for years, going back at least to 2004. *See* 8 U.S.C. § 1103(a)(1)-(3) (longstanding authority for the Executive Branch to train and supervise its employees in order to carry out the immigration laws). Had Congress intended for USCIS trainings under section 1225(b)(1)(E) to be subject to review under section 1252(e)(3), it could have easily added the term "training materials" to the list of terms triggering review under section 1252(e)(3).

Plaintiffs claim that the Lesson Plan alters substantive outcomes. Am. Compl. ¶¶ 8, 14, 21, 23, 25, 27. That is not correct. The underlying statutes, regulations, and agency and court precedent summarized by the Lesson Plan do that. But even if the *Lesson Plan* altered substantive outcomes, section 1252(e)(3) would not authorize review of such changes, because the Lesson Plan is not one of the five types of documents reviewable under section 1252(e)(3). *Cf. Grace*, 344 F. Supp. 3d at 116 (finding section 1252(e)(3) permitted review there because the challenged agency material was a "written policy directive' or "written policy guidance").

The operation of the statute of limitations under section 1252(e)(3) makes it all the more apparent that Congress did not intend that an interpretation of the asylum or CAT standard in administrative training materials constitutes a new implementation of section 1225(b)(1). Challenges to directives or guidelines implementing section 1225(b)(1) "must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure .

. . is first implemented." 8 U.S.C. § 1252(e)(3)(B). Agencies regularly and properly interpret new laws and case law and update their training materials. It would be incongruent to hold that Congress, which made clear its desire to limit challenges to the expedited removal system in 8 U.S.C. § 1252(a) and (e), would provide plaintiffs a new 60-day opportunity to challenge allegedly new interpretations of the INA and FARRA each and every time an office within USCIS issues a written document proximally related to expedited removal. Indeed, Congress was so intent on limiting the period that plaintiffs could challenge expedited removal policies that it made the 60-day limitation period jurisdictional. *AILA v. Reno*, 18 F. Supp. 2d 38, 47 (D.D.C. 1998), *aff'd*, 199 F.3d at 1357; *Dugdale v. CBP*, No. 14-cv-1175, 2015 WL 2124937, at *1 (D.D.C. May 6, 2015) ("the D.C. Circuit affirmed the [*AILA*] Court's determination that Section 1252(e)(3)(B)'s 60-day requirement is jurisdictional rather than a traditional limitations period"), *aff'd*, 672 F. App'x 35 (D.C. Cir. 2016). Such jurisdictional limitations are to be accorded strict effect. *Cf. United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1631 (2015).

Plaintiffs' contrary reading would render reviewable a vast swath of agency decision-making that Congress did not intend to be reviewable in this Court through section 1252(e)(3) or by any district court. *See E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 867 (N.D. Cal. 2018) (rejecting "the proposition that any rule of asylum eligibility that may *be applied* in expedited removal proceedings is swallowed up by § 1252(e)(3)[]").

Third, even if there were a reviewable implementation of section 1225(b)(1) here, the court would still lack subject matter jurisdiction because Plaintiffs are not challenging a reviewable "*determination*[] under section 1225(b)." 8 U.S.C. § 1252(e)(3)(A) (emphasis). But by the statute's own terms, not all "determinations under section 1225(b)" are reviewable through section 1252(e)(3). Indeed, credible-fear determinations issued under section 1225(b)(1)

are expressly carved out. In section 1252(a)(2), titled "Matters not subject to judicial review," Congress provided that, "[n]otwithstanding any other provision of law," "no court shall have jurisdiction to review" "the application of" section 1225(b)(1) "to individual aliens, including the determination made under section 1225(b)(1)(B) [*i.e.*, a credible-fear determination]." *Id.* § 1252(a)(2)(A)(iii). That is in direct contrast to the remainder of section 1252(a)(2)(A), which, while barring review, preserved review under section 1252(e). *Id.* § 1252(a)(2)(A)(i), (ii), (iv) (each allowing for review under section 1252(e) for certain *other* types of claims related to section 1225(b)(1)). Section 1252(a)(2)(A)(iii) contains no such preservation clause. Thus, Congress squarely prohibited this Court from using section 1252(e)(3) to exercise jurisdiction to review the credible-fear "determinations" concerning Plaintiffs, much less all such determinations in the future that may be made in reliance on the Lesson Plan. Yet that is just what Plaintiffs ask the Court to do here, by asking the Court to "[e]nter an order vacating the expedited removal orders issued to Plaintiffs," and declaring the Lesson Plan invalid and vacating it as applied to all aliens going forward. Am. Compl., Prayer for Relief, ¶¶ 3-5.

Plaintiffs' view also undermines Congress's aim, in establishing the expedited removal system, to "expedite the removal from the United States of aliens who indisputably have no authorization to be admitted," *AILA*, 199 F.3d at 1355—which Congress achieved in part by sharply limiting review of claims related to asylum. H.R. Rep. No. 104-469, pt. 1, at 107, 117-18. That effort would be for naught if, as Plaintiffs intimate, *every* credible-fear determination, or change or update in the training materials relating to such determinations, was subject to review. This view is irreconcilable with the statute's text, structure, and aims and should be rejected.

If Plaintiffs were correct that any lesson plan announcing a new judicial or agency precedent to asylum officers were reviewable under section 1252(e)(3), then the 60-day clock for district-court review would restart any time a new Article III decision or immigration case comes down and the agency takes the prudent course of informing line officers about these cases. Indeed, the INA and its implementing regulations *require* asylum officers to follow such decisions, which are binding authority on all immigration officers. *See* 8 U.S.C. § 1103(a); 8 C.F.R. § 1003.1(g) (providing that any new decision of the Board is binding on line officers). Yet as Plaintiffs read the statute, USCIS must ignore new precedent out of a fear that informing line officers of new precedent would open the entirety of expedited removal to renewed legal challenge. Such a state of affairs is far removed from "hav[ing] the validity of [implementations of section 1225(b)(1)] decided promptly," *AILA*, 199 F.3d at 1364, and exceeds the scope of section 1252(e)(3) for the reasons discussed above.

For these reasons, the Court lacks jurisdiction over this case and should dismiss it.

III. THE LESSON PLAN IS NOT REVIEWABLE UNDER THE APA.

If the Court reaches the merits of the Amended Complaint, it should grant summary judgment to Defendants on all counts. In the first and second counts, the Amended Complaint alleges that the Lesson Plan should be invalidated under 8 U.S.C. § 1252(e)(3)(A)(ii) because the Lesson Plan "is otherwise in violation of law," namely the APA. Specifically, the Amended Complaint alleges that the Lesson Plan is "arbitrary or capricious" or contrary to law under the APA, *see* Am. Compl. ¶ 91 (claiming a violation of 5 U.S.C. § 706(2)(A)), and that it should have undergone notice-and-comment rulemaking, *see id.* ¶ 103 (claiming a violation of 5 U.S.C. § 702(2)(D)).

These claims have a number of procedural deficiencies. The APA "is not so all-encompassing as to authorize us to exercise 'judicial review [over] everything done by an administrative agency.'" *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (Roberts, J.) (quoting *Hearst Radio, Inc. v. FCC*, 167 F.2d 225, 227 (D.C. Cir. 1948)). The Lesson Plan is a training module that agency instructors are supposed to use to train asylum officers to correctly make credible fear determinations consistent with applicable law. The Lesson Plan is not a "rule" as defined in the APA, it does not impose obligations or confer rights on anybody, and it has no legal significance. Accordingly, the Lesson Plan is not actionable under either the APA or the INA in section 1252(e)(3), and it did not need to undergo notice-and-comment procedures. Further, the Lesson Plan is not "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. In the alternative, if the Lesson Plan is a rule at all, then it is an interpretive rule and is thus not subject to the APA's notice-and-comment requirements.

A. The Lesson Plan Is Not a "Rule."

First, the Lesson Plan is not reviewable under the APA because it is not a reviewable agency action. *See* 8 U.S.C. § 1252(e)(3)(A)(ii); 5 U.S.C. § 706. Unless waived, sovereign immunity protects federal agencies from lawsuits. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). The APA only partially waives the federal government's sovereign immunity. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012). As relevant here, the APA waives sovereign immunity for a court to review "agency action." 5 U.S.C. § 706(2). The APA, in turn, defines "agency action" to include agency "rule[s]." *Id.* § 551(13). Plaintiffs allege that the type of "agency action" that the Lesson Plan constitutes is a "rule," Am.

Compl. ¶¶ 101-02, so the Court must examine whether the Lesson Plan is indeed a "rule" such that the APA permits judicial review here.

The Lesson Plan is not a "rule." Indeed, the APA elsewhere explicitly distinguishes between "administrative staff manuals and instructions to staff that affect a member of the public" and "rules of procedure, substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability," showing that such manuals are not rules of any kind. *Compare* 5 U.S.C. § 552(a)(1)(D), *with id.* § 552(a)(2)(C).

Moreover, a rule, in APA terms, "means the whole or a part of an agency statement of general or particular applicability and future effect [a] designed to implement, interpret, or prescribe law or policy or [b] describing the organization, procedure, or practice requirements of an agency." *Id.* § 551(4); *accord id.* 551(5) (defining "rule making").

The Lesson Plan fits into neither box. Much of the Lesson Plan's content merely describes or reproduces, without gloss, what the law is: for example, "The INA requires an applicant to identify 'specific facts,'" AR at 15; "In cases in which the feared persecutor is a government or is government-sponsored, there is a presumption that there is no reasonable internal relocation option," *id.* at 24; or "U.S. regulations require that several elements be met before an act is found to constitute torture," *id.* at 26. Where the Lesson Plan touches on policy, it is simply to direct the reader to other policy. *See, e.g.*, *id.* at 32 (citing internal practices, but citing another document). In other places, the Lesson Plan straightforwardly describes historical practice, for example, "The expedited removal provisions of the INA were added by section 302 of [the Illegal Immigration Reform and Immigrant Responsibility Act of 1996], and became effective on April 1, 1997." *Id.* at 5. Such content is not an APA "rule" because it is not

"designed" to "implement," "interpret," or "prescribe" law, policy, procedure, or practice requirements. *See also supra* section II (Lesson Plan does not "implement" the expedited removal statute). The legislative history of the APA confirms this understanding. *See* S. Rep. No. 752, 79th Cong., 1st Sess. 11 (1945) (rules "formally prescribe a course of conduct for the future rather than merely pronounce existing rights or liabilities"); H.R. Rep. No. 1980, 79th cong., 2d Sess. 20 (1946) (same).

Rather, the "design[]" of this content is to contextualize actual cases and USCIS rules, policies, and guidance, and to direct USCIS officers as to what the actual cases and USCIS rules, policies, and guidance are. Take, for example, the "terminal performance objective" of the Lesson Plan: "The Asylum Officer will be able to correctly make a credible fear determination consistent with the policies, procedures, and regulations that govern whether the applicant has established a credible fear of persecution or a credible fear of torture." AR at 13. As that indicates, the "design[]" of the lesson plan is simply to be an "explainer" to officers, not to promulgate any new cases, statutes, rules, policies, and guidance. *See Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (relying on "the agency's characterization of the guidance" to help determine the guidance's taxonomy). And beyond the "design[]," the *effect* of this content is not to "implement," "interpret," or "prescribe" new cases, statutes, rules, policies, or guidance. Rather, the Lesson Plan simply restates incontrovertible facts and law. *See Indep. Equip. Dealers Ass'n*, 372 F.3d at 428 (holding an agency letter was not a "rule" because "[b]y restating [the agency's] established interpretation of the certificate of conformity regulation, the [l]etter tread no new ground. It left the world just as it found it, and thus cannot be fairly described as implementing, interpreting, or prescribing law or policy.")

Similarly, the Lesson Plan does not meet the second prong of section 551(4)'s definition. The Lesson Plan does not describe the "organization, procedure, or practice requirements *of the agency*." 5 U.S.C. § 551(4) (emphasis added). Rather, the Lesson Plan describes universally applicable asylum, statutory withholding of removal, and CAT protection standards. These standards apply beyond USCIS (the agency that issued the Lesson Plan) and are used by: any other agency's asylum officers, *see* 8 U.S.C. § 1225(b)(1)(E), by the Department of Justice's Immigration Judges and Board members, *see, e.g.*, *id.* § 1158; 8 C.F.R. § 1003.1(b)(3), (9), by DHS attorneys that argue asylum and CAT issues on behalf of the government in immigration court or before the Board, *see* 8 C.F.R. § 1001.1(s), by Department of Justice attorneys that defend immigration court rulings in federal court, *see* 8 U.S.C. § 1252(b)(3)(A), and by federal judges applying these principles, *see id.* § 1252(a)(5), (b)(9). In short, the principles displayed in the Lesson Plan are not *USCIS*'s "organization, procedure, or practice requirements," but rather congressionally-created principles used by a wide variety of personnel outside of just USCIS. Therefore, the Lesson Plan is not a "rule." *See* 5 U.S.C. § 551(4).

The Lesson Plan is similar to the agency guidance at issue in *Paralyzed Veterans of America v. Secretary of Veterans Affairs*, 308 F.3d 1262, 1265 (Fed. Cir. 2002). There, the General Counsel of the Department of Veterans' Affairs issued a written opinion, upon request, to the Board of Veterans' Appeals. *Id.* at 1263-64. Although the "rendering of the opinion was an integral part of the Board's adjudicatory process," the "opinion itself had no immediate or direct impact upon any veteran." *Id.* at 1265. Rather, any impact on a veteran would come from "the Board's application of it in the particular case," not the General Counsel's opinion. *Id.* It was thus not a "rule" within the meaning of section 551(4). *Id.* Here, too, any impact on an alien in credible fear screening would come from the final decisonmaker in the screening

chain—the Immigration Judge—who is not bound by the Lesson Plan. The Lesson Plan is not a "rule."

Because the content in the Lesson Plan is not a "rule," it is therefore not "agency action," *see id.* § 551(13), thus its substance is immune to APA judicial review under the doctrine of sovereign immunity.

B. The Lesson Plan Is Not a Final Agency Action.

Second, another APA hurdle that Plaintiffs fail to surmount is the APA's requirement that agency action must be "final" to be eligible for judicial review. 5 U.S.C. § 704. Plaintiffs lack a cause of action under the APA (as incorporated by 8 U.S.C. § 1252(e)(3)(A)(ii)) because the Lesson Plan, even if it were a "rule," is not a "final" one.

The APA limits judicial review to "final agency action[s]." 5 U.S.C. § 704. An "agency action," again, includes "rule[s]." *Id.* § 551(13). An agency's action is "final" if it meets a two-pronged test: first, the action must be the "consummation" of the agency's decision making process, and second, it must be an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotations omitted). For the purpose of the second prong, this Circuit has repeatedly affirmed when an "'agency has not . . . issued any order imposing any obligation . . . , denying any right . . . , or fixing any legal relationship,' the agency action [is] not reviewable," thus the court lacks jurisdiction to consider the merits of the case. *Indep. Equip. Dealers Ass'n*, 372 F.3d at 427-28 (citing cases). If an agency pronouncement lacks the "force and effect of law," it is not a final agency action and so is not ripe for a challenge under the APA. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995).

Under the first prong, the Lesson Plan is tentative and interlocutory. Again, the Lesson Plan has been amended several times and is subject to future amendments. And an asylum officer or an Immigration Judge applying the underlying materials cited in the Lesson Plan, not the Lesson Plan itself, will be the basis for future screening determinations and decisions to place aliens into full section 1229a removal proceedings.

Under the second prong, no legal consequences flow from the Lesson Plan. At least as far as Plaintiffs have alleged, *see infra* section IV.A, the Lesson Plan: does not relate to a specific credible fear determination, does not contain any new mandatory language or directives outside of those it summarizes from other sources of law, does not describe itself as guidance or announce that it contains new interpretations of the law, and does not purport to impose new obligations on aliens in the credible fear process. The Lesson Plan merely restates, in a totally abstract setting, what the law requires of asylum officers. *See AT&T Co. v. EEOC*, 270 F.3d 973, 976 (D.C. Cir. 2001) (finding no final agency action: "The Commission has not inflicted any injury upon AT&T merely by expressing its view of the law—a view that has force only to the extent the agency can persuade a court to the same conclusion."). Therefore, the Lesson Plan is not final under *Bennett*'s second prong.

In short, legal consequences simply do not flow from the Lesson Plan in the way that *Bennett* and the law of this Circuit require. It is therefore not "final" agency action, *see* 5 U.S.C. § 704, and the Court lacks jurisdiction to consider the merits of the Lesson Plan under the doctrine of sovereign immunity.

C. The Lesson Plan Is Not Subject to Notice and Comment.

Plaintiffs also claim that the Lesson Plan is procedurally invalid for failing to follow notice-and-comment procedures. Am. Compl. ¶¶ 100, 102 ("Defendants did not follow notice-

and-comment rulemaking procedures related to the Lesson Plan.") (citing 5 U.S.C. § 706(2)(D)). Because such requirements apply only to proposed "rules," 5 U.S.C. § 553, but the Lesson Plan is not a "rule," *see supra* section III.A, the Lesson Plan is not unlawful on this basis.

Even if the Lesson Plan were reviewable for the purposes of the APA, and even if were a "rule," it would not be subject to notice-and-comment rulemaking because it is, at most, an exempt interpretive rule. The APA does not require notice-and-comment procedure for "interpretive" rules. 5 U.S.C. § 553(b)(A).

A legislative rule imposes legally binding obligations on regulated parties. *Id.* at 251-52. An interpretive rule, however, merely "clarifies" a statutory or regulatory term or "reminds" parties of existing statutory or regulatory duties. *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 236-37 (D.C. Cir. 1992). "[I]nterpretive rules" reflect "'the agency's construction of the statutes and rules which it administers.'" *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (quoting *Guernsey Mem'l Hosp.*, 514 U.S. at 99). An interpretive rule "derive[s] a proposition from an existing document whose meaning compels or logically justifies the proposition." *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010).

A training material can fit these qualifications and be properly classified as interpretive. *Notaro v. Luther*, 800 F.2d 290, 291 (2d Cir. 1986). Indeed, other circuit courts have held that the predecessors to the Lesson Plan are not binding materials. *Lumataw v. Holder*, 582 F.3d 78, 89 n.10 (9th Cir. 2009) (charactering the training manual as "not binding" on the court in a review of a Board asylum decision); *Abdirahman v. Ashcroft*, 110 F. App'x 727, 728 (8th Cir. 2004); *cf. Prokopenko*, 372 F.3d at 944 (holding that "it is doubtful that internal agency

memorandum of this sort [i.e., an Operating Policies and Procedures Memorandum] could confer substantive legal benefits upon aliens or bind the INS.").

The Court should reach the same conclusion. To determine whether a purported rule is interpretive, the D.C. Circuit typically considers three factors: (1) the actual legal effect (or lack thereof) of the agency action in question on regulated entities; (2) the agency's characterization of the guidance; and (3) whether the agency has applied the guidance as if it were binding on regulated entities. *Sierra Club v. EPA*, 873 F.3d 946, 951 (D.C. Cir. 2017) (quoting *Nat'l Mining Ass'n*, 758 F.3d at 252-53). In this case, these three factors weigh decisively in favor of the conclusion that, if the Lesson Plan could be interpreted as rising to the level of "agency action," it should be analyzed as a non-final interpretive statement that is not reviewable under the APA.

The Lesson Plan, if it can be deemed a rule, is at most an interpretive rule. *First*, the Lesson Plan has no legal effect on individuals seeking asylum. As a legal matter, the Lesson Plan is "meaningless" because it imposes no obligations or prohibitions on those seeking asylum. *See Nat'l Mining Ass'n*, 758 F.3d at 253. Similarly, "[a]nother indication of a legislative rule is whether, in the absence of the rule, the agency would lack an adequate legislative basis to ensure the performance of duties." *Broadgate Inc. v. U.S. Citizenship & Immigration Servs.*, 730 F. Supp. 2d 240, 244-45 (D.D.C. 2010). Here, asylum officers are completely able to conduct credible fear determinations without the Lesson Plan; they would simply rely on the underlying cases, statutes, regulations, and policy memoranda cited in the Lesson Plan. The Lesson Plan's design and intent is to teach and remind asylum officers of the cases, statutes, regulations, and policy documents from USCIS and other agencies bearing on asylum, statutory withholding of removal, and CAT screenings. *See supra* section III.A. The Lesson Plan thus derives its content

from "existing document[s] whose meaning compels or logically justifies the proposition[s]." *Catholic Health Initiatives*, 617 F.3d at 494. It is essentially a summary of existing legal authorities that are pertinent to a credible fear determination, *see Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (finding that an agency's guidelines on when to cite independent contractors for safety violations did not constitute final agency action), or at most, USCIS's view of how these legal sources should be construed in the credible fear context, *see Perez*, 135 S. Ct. at 1204. But in any event, it is the underlying source material—not the Lesson Plan—which has any legal effect on regulated entities. *See Adirondack Medical Center v. Sebelius*, 935 F. Supp. 2d 121, 126, 134 (D.D.C. 2013) (determining that an agency's updated instructions to financial intermediaries on how to calculate billing rates constituted an interpretive rule). The Lesson Plan is merely "hortatory and instructional," the essence of an interpretive rule. *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (quoting *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984)).

Second, USCIS has not characterized the Lesson Plan as any kind of "rule," or even a "policy." In assessing how the agency material portrays itself, a court should consider as the "most important" factor whether the material claims to change any existing rule or law. *Indus. Safety Equip. Ass'n, Inc. v. EPA* ("*ISEA*"), 837 F.2d 1115, 1120-21 (D.C. Cir. 1988). A court should also consider whether the agency publishes the material in the *Federal Register* or the *Code of Federal Regulations* as further evidence that the guide was not intended to be a rule. *Id.* at 1121.

Because the Lesson Plan did not "change any law or official policy presently in effect," *id.* at 1120, it is not final action. The Lesson Plan is an update to a training module. Its stated purpose is "to explain how to determine whether an alien subject to expedited removal or an

arriving stowaway has a credible fear of persecution or torture." AR at 1. The objective of the course is, through lecture and practice exercises, to enable the asylum officer "to correctly make a credible fear determination consistent with the statutory provisions, regulations, policies and procedures that govern whether the applicant has established a credible fear of persecution or a credible fear of torture." *Id.*

By its own terms, the Lesson Plan's objective is to teach asylum officers, not to pronounce changes in the law. *Id.* at 2. Like the guide in *ISEA*, the Lesson Plan did not itself change, and did not intend to change, any existing law or official policy. Moreover, the Lesson Plan was not published in the *Federal Register* or the *Code of Federal Regulations*. *See also Brock*, 796 F.2d at 537-39. The Lesson Plan "left the world just as it found it, and thus cannot be fairly described as implementing, interpreting, or prescribing law or policy." *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (determining that a letter from an agency official, expressing the agency's understanding of applicable law, was not a final agency action).

Third, the Lesson Plan provides instructors with training materials to provide to asylum officers to assist their credible fear determinations; it has no direct effect on seekers of asylum, withholding of removal, or CAT protection like Plaintiffs. As discussed *supra* section I, no final agency action can come before an asylum officer finds a credible fear—or when an Immigration Judge renders a ruling concurring with or vacating an asylum officer's negative credible fear determination—by applying the applicable law to the facts. The Lesson Plan merely summarizes the legal principles that are supposed to be conveyed to asylum officers as part of a training course. There is no indication in the administrative record that USCIS will apply the Lesson

Plan in a binding manner, nor could it given that an asylum officer's adverse determination is subject to Immigration Judge review.

The Lesson Plan is (at most) an interpretive rule, as other courts of appeals have held with regard to earlier iterations of that document. *See Lumataw*, 582 F.3d at 89 n.10; *Abdirahman*, 110 F. App'x at 728; *Notaro*, 800 F.2d at 291. It is therefore exempt from the APA's notice-and-comment requirement. *See* 5 U.S.C. § 553(b)(A). The Lesson Plan's issuance thus did not violate any procedures. *See id.* § 706(2)(D). Defendant is entitled to judgment with respect to Plaintiffs' Second Claim for Relief.

IV. THE LESSON PLAN IS CONSISTENT WITH THE INA, FARRA, AND THE APA.

Even if the Court finds that it has jurisdiction to hear this case, and that Plaintiffs may otherwise invoke the APA, it should nevertheless reject the First Claim for Relief on the merits. Under section 1252(e)(3), a court may determine whether certain agency action[11] is "consistent with applicable provisions of [8 U.S.C. §§ 1151-1382] or is otherwise in violation of law." 8 U.S.C. § 1252(e)(3)(A)(ii). Plaintiffs bear the burden of showing that the Lesson Plan is unlawful. *See Segar v. Smith*, 738 F.3d 1249, 1301 (D.C. Cir. 1984); *cf.* 5 U.S.C. § 556(d).

Plaintiffs identify two sets of laws that the Lesson Plan allegedly violates in this regard: (1) the INA (as amended by the Refugee Act), FARRA, and their respective regulations, Am. Compl. ¶¶ 92-95, and (2) the APA's proscription on "arbitrary or capricious" action, *id.* ¶¶ 96-97. Count I fails on both aspects.[12]

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[11] As argued *supra* sections II and III, the Lesson Plan is not "agency action" subject to review under section 1252(e)(3) or the APA. For the purposes of this section, however, the government will assume without conceding that section 1252(e)(3) review is available for the Lesson Plan.

[12] The First Claim for Relief also alleges that the Lesson Plan violates the CAT and "customary international law." Am. Compl. ¶ 95. As explained earlier, Plaintiffs have no enforceable rights under the CAT. *See supra* note 3. As for "customary international law," such law, consisting of

A. The INA, FARRA, and Their Implementing Regulations

Plaintiffs first claim the Lesson Plan misstate the immigration statutes and DHS's own regulations. Am. Compl. ¶¶ 95, 97 ("The credible fear policies contained in the Lesson Plan violate and are not in accordance with the INA . . . . Among other reasons, the credible fear policies contained in the Lesson Plan conflict with the statutory credible fear standard and process . . . .").

1. *Plaintiffs Have Failed Their Burden to Identify "Sufficient Particulars" of What in the Lesson Plan Is Allegedly Unlawful.*

Here, the Lesson Plan accurately states U.S. asylum law and in fact reinforces longstanding principles regarding the substantive and procedural components of the credible fear process. The Lesson Plan is transparent about the sources of its statements; it provides supporting citations to statutes, case law, and administrative decisions.

Defendants are unsure at this stage what, exactly, Plaintiffs believe is unlawful in the Lesson Plan. "[It is] incumbent on [a party] complaining of inconsistency and capriciousness in the agency's explanation of [her] treatment to bring before the reviewing court sufficient particulars . . . ." *P.I.A. Mich. City Inc. v. Thompson*, 292 F.3d 820, 826 (D.C. Cir. 2002). That

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state practice followed consistently out of a sense of legal obligation, is applicable only "where there is no treaty and no controlling executive or legislative act or judicial decision." *The Paquete Habana*, 175 U.S. 677, 700 (1900). Consequently, "no enactment of Congress can be challenged on the ground that it violates customary international law." *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988). The asylum officer training provisions, 8 U.S.C. §§ 1103(a)(1)-(3), 1225(b)(1)(E), and the statutes creating substantive asylum and CAT standards, *id.* § 1225, 1158; FARRA § 2242, are such congressional enactments. The standards set by these statutes is what the Lesson Plan must be measured against, and the Lesson Plan is thus immune to challenge on this basis.

In any event, the Amended Complaint gives no allegations or indications as to what "customs" or "usages" of what "civilized nations" the Lesson Plan might violate, much less cite to customary international law requiring an agency to issue training materials in the phraseology of Plaintiffs' choosing. *Bancoult v. McNamara*, 370 F. Supp. 2d 1, 5 n.3 (D.D.C. 2004). Plaintiffs' claims on this score are therefore meritless.

burden is heightened at this juncture: "Summary judgment is the put up or shut up moment in a lawsuit . . . ." *Garay v. Liriano*, 943 F. Supp. 2d 1, 20 (D.D.C. 2013).

Plaintiffs have failed their burden here, as shown by the Amended Complaint's sketchy and evasive description of what makes the Lesson Plan allegedly lawful. As Plaintiffs concede, the First Claim for Relief only "summariz[es]" the "most problematic aspects" of the Lesson Plan. Pls.' Mot. for Stay of Removal at 3 (ECF No. 13). Plaintiffs' self-description is apt. The Amended Complaint lists some examples of allegedly unlawful aspects of the Lesson Plan, but without explication, and with disclaimers that hinder a response from Defendants—and judicial review. The Amended Complaint repeatedly and explicitly tries to keep Plaintiffs' options open to lodge more complaints down the road: in describing supposedly objectionable facets of the Lesson Plan, the Amended Complaint applies the disclaimer "for example" four times; "among other things" five times; "one or more . . . , including . . ." once; and "numerous ways, including . . ." once. These equivocations distinguish the Amended Complaint from the Complaint in *Grace v. Whitaker*, which specifically identified six concrete problems that the plaintiffs found with the agency actions at issue. 344 F. Supp. 3d at 122; *accord id.*, Redacted Compl. ¶ 51 (ECF No. 54) (Sept. 11, 2018). Because the Amended Complaint declines to enumerate precisely all that is unlawful about the 37-page Lesson Plan, Plaintiffs wholly fail their burden to press their case on this count. *See P.I.A. Mich. City Inc.*, 292 F.3d at 826; Fed. R. Civ. P. 8(a)(2); *Garay*, 943 F. Supp. 2d at 20. The Court should grant summary judgment to Defendants on this basis.

2. *In the Few Examples Plaintiffs Provide, the Lesson Plan Accurately States Asylum, Statutory Withholding of Removal, and CAT Law.*

Even if the Court nevertheless wishes to entertain this count despite Plaintiffs' failure to identify the universe of objectionable statements in the Lesson Plan, then based on Plaintiffs' general allegations and the few examples they provide, the Lesson Plan accurately states the law

of asylum and the CAT. Indeed, the Eighth Circuit has held exactly this with regard to different asylum officer training material issued by INS, rejecting an interpretation of statements in the training materials that ignored the statements' context. *Abdirahman*, 110 F. App'x at 728.

This Court should follow the Eighth Circuit's lead and conclude that the Lesson Plan as a whole fairly states asylum and CAT law. Again, a court's duty here is to determine whether the Lesson Plan is "consistent with applicable provisions of [8 U.S.C. §§ 1151-1382] or is otherwise in violation of law." 8 U.S.C. § 1252(e)(3)(A)(ii). To do so, first a court should compare the language of the statutes and the regulations with the challenged agency action. *See Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). Second, a court must consider the full context of the agency's action in addition to its text. Interpreting legal language requires the court to consider not only "the language itself," but also "the specific context in which that language is used, and the broader context of the [provision] as a whole." *Nken v. Holder*, 556 U.S. 418, 426 (2009).

Neither the INA nor the APA requires such material to be a perfect copy. To the contrary, USCIS has generally unbounded statutory freedom to craft its training programs and materials. *See* 8 U.S.C. §§ 1103(a)(1)-(3), 1225(b)(1)(E); 8 C.F.R. § 208.1(b); *see supra* "Statutory Background" section. It is enough that the training material conveys the information sufficiently. *Cf. Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010) (cautioning that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity"). Overall, if the wording of the Lesson Plan comports with the INA, then that is the end of the matter; the court is "forbidden from substituting [its] judgment" for a how the Lesson Plan should be worded "for that of the agency." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 697 (D.C. Cir. 2016). As with jury instructions, a training material is not invalid

because the agency "simply chose to phrase the appropriate legal standard somewhat differently," or "less emphatically, than [the challengers] would have liked." *Miller v. Poretsky*, 595 F.2d 780, 788 (D.C. Cir. 1978).

To the extent there are multiple ways to interpret a statement in the material, the tie should go to the agency and the court should credit the agency's reasonable explanation for what its materials mean. This respects the agency's presumption of regularity, *see Overton Park*, 401 U.S. at 415, and properly accords the agency so-called "*Skidmore* deference," *see R.J. Reynolds Tobacco Co.*, 130 F. Supp. 3d at 371; *Brown v. United States*, 327 F.3d 1198, 1205-06 (D.C. Cir. 2003).

Finally, the Court may look only to those parts of the Lesson Plan that were changed for the 2019 version; parts of the Lesson Plan that appeared in previous iterations lie beyond Congress's 60-day jurisdictional bar. *See* 8 U.S.C. § 1252(e)(2)(B) ("Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure . . . is first implemented.").

Upon close inspection of the Amended Complaint's few concrete examples, the Lesson Plan reasonably portrays asylum and CAT law, and Plaintiffs' claims do not pass muster. Most egregiously, Plaintiffs complain about parts of the Lesson Plan that simply do not exist. Such complaints are bizarre, as the Lesson Plan says no such things. For example, Plaintiffs allege the Lesson Plan "instructs asylum officers—in contravention of law—that they need not provide the asylum seeker with an opportunity to address concerns that might lead to a negative credible fear determination." Am. Compl. ¶ 84. But the Lesson Plan affirmatively suggests that asylum officers follow up on all fraud and credibility concerns during the interview and give the interviewee "an opportunity to explain" those all concerns. AR at 15. Plaintiffs also object to

the Lesson Plan allegedly requiring "asylum officers to specify the bases for a positive credibility finding, but not for a negative one." Am. Compl. ¶ 86. But the Lesson Plan affirmatively suggests that asylum officers specify the bases for any negative credibility finding. AR at 17. Thus, these types of statements in the Lesson Plan are not "[in]consistent with" the INA or "otherwise in violation of law." 8 U.S.C. § 1252(e)(3)(A)(ii).

Plaintiffs also claim that the Lesson Plan "mischaracterizes controlling Supreme Court and other case law," without specifying exactly what the case law is and exactly what the mischaracterization is. Am. Compl. ¶ 85. Their related commentary certainly does not fill in the gaps. For example, Plaintiffs complain that the Lesson Plan requires "the asylum seeker to present more than 'significant evidence' of eligibility, contrary to the applicable standard." *Id.* ¶ 83; *see* AR at 12. But that is simply wrong; the credible fear standard is not significant *evidence*—the standard is significant *possibility*, 8 U.S.C. § 1225(b)(1)(B)(v), which is a wholly distinct, and higher, standard. *Holmes v. Amerex Rent-A-Car*, 180 F.3d 294, 297 (D.C. Cir. 1999) ("[S]ignificant possibility of success . . . implies a showing higher than the already recognized standard of 'significant evidence' . . . ." (quoting *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 852 (D.C. 1998))). The Lesson Plan tracks this D.C. Circuit case and is therefore accurate. AR at 12. Similarly, Plaintiffs allege the Lesson Plan prohibits, wrongfully, asylum officers from "making allowances for special circumstances—such as trauma, the passage of time, or cultural considerations." Am. Compl. ¶ 83. But the Lesson Plan reminds officers to consider "the totality of the circumstances," AR at 13, and in any event the INA and regulations nowhere *require* asylum officers to make additional "allowances for special circumstances" (whatever that phrase may mean) or to provide aliens with the opportunity to rebut a forthcoming negative credible fear determination.

Additional challenges to statements in the Lesson Plan wither when the statements are fairly read in context. Plaintiffs complain (without citation) that the Lesson Plan "directs asylum officers to make negative credible fear determinations based on *discretionary* factors" as opposed to "*eligibility* criteria." Am. Compl. ¶ 85. Plaintiffs' complaint is not wholly incorrect to the extent that a credible fear determination, unlike a final asylum grant, is not a matter of the officer's discretion. However, Plaintiffs' complaint fails because that is exactly what the sources cited by the Lesson Plan say. *See* AR at 1 (directing students to read sections 208 and 235 of the INA, which are codified at 8 U.S.C. §§ 1158 and 1225 and which draw the contrast between discretionary asylum and the non-discretionary credible fear process); *id. passim* (citing *Grace*, which analyzes this distinction, 344 F. Supp. 3d at 133-34). Read in context, then, the Lesson Plan is completely consistent with the INA. *See Abdirahman*, 110 F. App'x at 728; *Nken*, 556 U.S. at 426. And Plaintiffs' proffered reading certainly fails to surmount the presumption of agency regularity and, independently, the principles of agency deference. *See R.J. Reynolds Tobacco Co.*, 130 F. Supp. 3d at 371; *Brown*, 327 F.3d at 1205-06.

Many of Plaintiffs' complaints boil down to how the Lesson Plan is phrased. Revealing is Plaintiffs' complaint that the Lesson Plan omits instructions that would be "helpful to the asylum officer and favorable to the asylum seeker," Am. Compl. ¶¶ 84, 87, and their complaint that the Lesson Plan fails "to present [asylum law] according to the controlling question of whether the asylum seeker has a significant *possibility* of meeting those standards in the future," *id.* ¶ 82; *accord id.* ¶¶ 84 (disapproving of how the Lesson Plan "encourages" the use of impeachment), 87 (complaining that the Lesson Plan is worded to "artificially" achieve a goal). Just as a party in trial has no right to a particular wording of an accurate jury instruction, Plaintiffs have no right to dictate how USCIS "present[s]" asylum standards in a lesson plan that

adequately and accurately covers the topic. Nor do Plaintiffs have any legal right to impose on the agency their notions of what training material would be "helpful." *See Miller*, 595 F.2d at 788. Rather, that authority is reserved to USCIS. *See* 8 U.S.C. §§ 1103(a)(1)-(3), 1225(b)(1)(E).

Finally, Plaintiffs are using this lawsuit as a Trojan horse to sneak in lines of attack that are very time-barred. For instance, Plaintiffs complain that the Lesson Plan unlawfully refers to a "significant possibility of future persecution" standard. Am. Compl. ¶ 82. They also take issue with the Lesson Plan's requirement that the asylum seeker identify "specific facts sufficient to establish eligibility." *Id.* Putting aside whether these phrases are unlawful (and they are not), these exact phrases did not originate in the 2019 Lesson Plan—they appeared in at least the 2017 and 2014 versions of the Lesson Plan. AR at 60, 100, 157 ("significant possibility of future persecution"), 55, 97 ("specific facts"). Plaintiffs' opportunity to challenge these phrases' inclusion thus expired back in 2014 at the latest, well before they filed this lawsuit in June 2019. They are time-barred from challenging such pre-existing statements here. *See* 8 U.S.C. § 1252(e)(2)(B).

For these reasons, to the extent the Court does not dismiss this claim for failure to state its basis with any degree of particularity, the Court should still grant judgment to Defendants. Plaintiffs have failed their burden to show that the Lesson Plan is "not consistent with" the INA, FARRA, and their implementing regulations. Plaintiffs may disagree with how the Lesson Plan is worded, but they have no legal right to have the Court rewrite the Lesson Plan to fit their favored phraseology. *See U.S. Telecom Ass'n*, 825 F.3d at 697.

B. The Administrative Procedure Act.

The second law that Plaintiffs claim the Lesson Plan's substance violates is the APA. *See* 8 U.S.C. § 1252(e)(3)(A)(ii). More precisely, they claim the Lesson Plan is "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law" under the APA. Am. Compl. ¶ 92 (citing 5 U.S.C. § 706(2)(A)).

Again, myriad threshold problems preclude Plaintiffs from pressing any APA claim in this lawsuit. *See supra* sections I (lack of standing), II (lack of reviewability under the only available cause of action, 8 U.S.C. § 1252(e)(3)(A)), III.A (the Lesson Plan is not a reviewable "rule"), III.B (the Lesson Plan is not a reviewable "final" rule). Alternatively, the claim fails on the merits.

Under the APA, a court may "set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "[T]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A reviewing court must be satisfied that the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *accord Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006). The agency's decisions are entitled to a "presumption of regularity," *Overton Park*, 401 U.S. at 415, and although "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Id.* at 416.

The Lesson Plan is a rational and adequately explained work product of the agency. Chiefly, because the Lesson Plan is fully consistent with the statutes and regulations governing the credible fear process, *see supra* section IV.A, it is necessarily logical and legal, and thus neither arbitrary nor capricious. *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors*

of Fed. Reserve Sys., 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J.). ("Paragraph (A) of subsection 706(2)—the 'arbitrary or capricious' provision—is a catchall, picking up administrative misconduct not covered by the other more specific paragraphs.").

The only additional arguments Plaintiffs muster here are that USCIS (1) failed to "acknowledg[e]" the Lesson Plan revision and (2) failed to offer a "reasoned explanation therefor." Am. Compl. ¶ 97. Both contentions are incorrect.

First, assuming the Lesson Plan is indeed a rule, it is true that an agency promulgating a change must express awareness that it is making a change. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."). But Plaintiffs are simply incorrect that the 2019 Lesson Plan departed from the previous, 2017 Lesson Plan "without so much as an acknowledgement of [that] departure[]." Am. Compl. ¶ 97. Inherent in the concept of training materials is that they will be periodically revised. Indeed, USCIS revised its Lesson Plan in at least 2013, 2014, 2017, and 2019 to do so. *See, e.g.*, AR at 162, 165, 166 (2013 Lesson Plan, updated with new references), 112 (2014 Lesson Plan, updated with new references), 40, 44, 45, 46, 48, 58 (2017 Lesson Plan, updated with new references), 10, 13, 16, 21, 22, 23, 33, 35 (2019 Lesson Plan, updated with new references). It defies common sense that an agency could act irrationally by updating a training document. *See* 8 U.S.C. § 1103(a)(1)-(3) (contemplating that DHS can "control, direct[], and supervis[e] [all of its] files and records").

And the Lesson Plan was transparent in making these changes, as it issued a completely new document with an "April 30, 2019" date. AR at 1-37 (bottom left-hand corner: "April 30, 2019"). Each time, including in 2019, USCIS changed only parts of the Lesson Plan, to refine its overall presentation and to ensure all of its credible fear lesson plan materials were in one single

document. *Compare, e.g.*, AR at 46-47, 70-71 (2017 Lesson Plan), *with id.* at 8-9, 20-25 (identical parts of 2019 Lesson Plan); *compare also, e.g.*, *id.* at 64 (2017 Lesson Plan), *with id.* at 19-21 (changed, more explicated parts of 2019 Lesson Plan). But asylum officers did not have to wonder whether they should or could still reference the 2017 Lesson Plan. By issuing a new document with a new date stamp, both with new statements and with some older material from the 2017 Lesson Plan, USCIS clearly announced to its asylum officers that the 2019 Lesson Plan is the only credible fear lesson plan in use. The 2019 Lesson Plan's implicit supersession of the 2017 Lesson Plan demonstrates USCIS's awareness of its change, and no reasonable observer could conclude that USCIS was not aware that its 2019 Lesson Plan amended the 2017 Lesson Plan.

Second, an "agency must show that there are good reasons for the new policy." *Fox Television Stations*, 556 U.S. at 515. Here, USCIS did so. It issued the 2019 Lesson Plan after comprehensively surveying the 2017 Lesson Plan and deciding what was new case law, *see, e.g.*, AR at 16 (citing *Matter of J-C-H-F-*, 27 I. & N. Dec. 211 (B.I.A. 2018)), what case law was no longer good, *see, e.g.*, *id.* at 13, 16, 35 (the many cases USCIS could no longer rely upon following *Grace*), and what provisions should be reworded to be clear and most useful to asylum officers, *see, e.g.*, *id.* at 19-21 (more fully explaining the import of *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987)). This reasoning is evident from the fact that the Lesson Plan cited new cases and administrative decisions that did not exist at the time that, or were released right before, the 2017 Lesson Plan was issued. *See, e.g.*, AR at 13, 16, 22, 28. It is also evident from the common sense explanation for why USCIS had revised the credible fear lesson plan in 2014: to "reinforce" certain interpretations, the "incorporate substantive updates," and to "h[ew] more closely to" the existing law. AR at 85-87. This explanation is intuitive and suffices to show that

the Lesson Plan is neither arbitrary nor capricious: "That a standard . . . is strict, does not require that the evidence to meet it be voluminous . . . ." *Troy Corp. v. Browner*, 120 F.3d 277, 284 (D.C. Cir. 1997).

Further, it is irrelevant for APA purposes that USCIS could have worded its Lesson Plan differently, in the manner Plaintiffs desire. *See, e.g.*, Am. Compl. ¶ 87 (complaining that the Lesson Plan omits language "that is helpful to the asylum officer"). An agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *Fox Television Stations*, 556 U.S. at 515. USCIS has a zone of choice here, and its self-aware, amply justified Lesson Plan falls squarely within that zone. *See id.*; *U.S. Telecom Ass'n*, 825 F.3d at 697 ("[A court is] forbidden from substituting [its] judgment for that of the agency."). That USCIS could have worded its Lesson Plan differently or cited different cases does not make the Lesson Plan arbitrary or capricious.

And although the 2019 Lesson Plan did not expressly provide its justification (i.e., USCIS's continuing commitment to perfecting its training materials) in as many words, it did not need to. The agency may, in litigation following an agency decision, "provide additional explanation for an inadequately articulated decision." *Local 814 v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976). This contrasts with verboten post hoc rationalizations, which are offered rationales that have no basis whatsoever in the agency decision. *Id.* Here, the Lesson Plan, together with the context provided by previous revisions which are indistinguishable in their nature, clearly provide the outlines of this permissible justification. Plaintiffs bear the burden to show that USCIS did not adequately and fairly justify the Lesson Plan, *see P.I.A. Mich. City Inc.*, 292 F.3d at 826—and they have not met that burden here. *See Troy Corp.*, 120 F.3d at 284.

In conclusion, Plaintiffs fail to show that the Lesson Plan violates the APA's proscription on arbitrary or capricious action.

The Court should grant judgment to Defendants as to the First Claim for Relief.

V. THE LESSON PLAN IS CONSISTENT WITH THE DUE PROCESS CLAUSE.

Finally, Plaintiffs contend in the Third Claim for Relief that the Lesson Plan has "violated Plaintiffs' right to due process in numerous ways, including by depriving them of a meaningful opportunity to establish their eligibility for asylum and other forms of relief from removal." Am. Compl. ¶ 107. They claim to "have a protected interest in applying for asylum, withholding of removal, relief under the CAT, and in not being removed to countries where they face serious danger, persecution, and potential loss of life." *Id.* ¶ 105. Based on their purported liberty interest in applying for asylum under standards they prefer, they assert a right to credible fear hearings without application of the Lesson Plan. *Id.* ¶ 106; *id.* Prayer for Relief, ¶¶ 5-7.

As an initial matter, this count is redundant of Counts 1 and 2, which matters because "Plaintiffs cannot prevail on their due-process claim without also prevailing on their APA ones." *Damus v. Nielsen*, Civ. A. No. 18-578 (JEB), 2019 WL 1003440, at *3 (D.D.C. Feb. 28, 2019). Plaintiffs appear to be arguing that the Lesson Plan, by allegedly violating the INA, FARRA, and the APA, is also constitutionally deficient. "In order to succeed on their due-process claim, therefore, the asylum-seekers must prove that" the Lesson Plan falls short of the minimum constitutional procedures those statutes purport to provide. *Id.* "Yet once they have so proven, they will have necessarily prevailed on their APA claim. Resolving the legal dispute about Plaintiffs' constitutional rights is thus unnecessary . . . ." *Id.* Like Judge Boasberg did in *Damus,* the Court should dismiss for this reason.

Plaintiffs' due process claim also fails on the merits. Although the Due Process Clause applies to aliens in the United States such as Plaintiffs, the exact nature of the protection an alien is due "may vary depending upon status and circumstance." *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001). As an alien "increases [her] identity with our society," she is "accorded a generous and ascending scale of rights." *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). Therefore, an alien does not enjoy the same due process rights as U.S. citizens unless the alien has "come within the territory of the United States and *developed substantial connections with this country*." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (emphasis added); *see also Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (partially staying an injunction and permitting a challenged executive order to be enforced against aliens "who lack any bona fide relationship with a person or entity in the United States").

Plaintiffs Sofia and Julia are not in the United States, and so even if they returned seeking the "privilege" of "initial admission to the United States," they have "no constitutional rights regarding [their] application[s]" for entry. *Landon v. Plasencia*, 459 U.S. 21, 42 (1982). And if they have no constitutional rights with regard to entry, they have no constitutional rights regarding a request for asylum, statutory withholding of removal, or CAT protection. *See id.*; *see also Rasul v. Myers*, 563 F.3d 527, 531 (D.C. Cir. 2009) (alien "seeking admission" with "no previous significant voluntary connection with the United States" lacks due process rights with respect to their admission).

As for Plaintiffs Kiakombua, Ana, and Emma, once again the Amended Complaint fails to spell out their claim with any of the required specificity. *See supra* section IV.A; *Barber v. Dist. of Columbia Gov't*, Civ. A. 17-cv-620, 2019 WL 3804285, at *7 (D.D.C. Aug. 13, 2019) (K.B. Jackson, J.) (dismissing a due process count that had an "unclear" basis and thus did "not

provide adequate notice [to the defendants under Rule] 8"). Plaintiffs must point to a cognizable liberty interest before they may assert any right to additional process. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569-70 (1972). They allege they "have a protected interest in applying for asylum, withholding of removal, relief under the CAT, and in not being removed to countries where they face serious danger, persecution, and potential loss of life." Am. Compl. ¶ 105. Plaintiffs provide zero authority for their sweeping claim that they have a constitutional right to apply for asylum or CAT protection. Indeed, asylum is a discretionary benefit that the alien has the burden of demonstrating she merits. 8 U.S.C. §§ 1158(b)(1)(A), 1229a(c)(4)(A)(ii). Thus, "an alien seeking discretionary relief from removal has no cognizable liberty or property interest." *Jean-Louis v. U.S. Att'y Gen.*, 582 F.3d 462, 465-66 n.4 (3d Cir. 2009); *see Jafarzadeh v. Duke*, 270 F. Supp. 3d 296, 313 (D.D.C. 2017) (citing this as the holding of "numerous courts").

But even assuming Plaintiffs have such a constitutional interest, the Lesson Plan fully comports with the INA and FARRA. *See supra* section IV.A. Plaintiffs do not argue that those statutes are constitutionally deficient. *See* Am. Compl. ¶¶ 105-08 (taking issue only with the Lesson Plan). Therefore, the Lesson Plan meets the constitutional minimum. *See Maldonado-Perez v. INS*, 865 F.2d 328, 332 (D.C. Cir. 1989).

Moreover, Plaintiffs' complaint that the Lesson Plan prevents them from applying for asylum or other protection is belied by the record. The Lesson Plan applies only to *initial screening* decisions for asylum, statutory withholding of removal, and CAT protection. *See generally* AR at 1-37. Applying for asylum, statutory withholding of removal, and CAT protection is a separate process from the credible fear screening process. *Compare, e.g.*, 8 U.S.C. § 1225(b)(1), *with id.* § 1158(a), (d) *and* FARRA § 2242; 8 C.F.R. § 1208.16-.18. The

Lesson Plan does not prevent Plaintiffs or other aliens from making those applications (at least as far as Plaintiffs have alleged). Indeed, if Plaintiffs receive a negative credible fear determination, they may request review by an Immigration Judge, who is free to vacate the asylum officer's initial decision. *See* 8 C.F.R. § 1208.30(g). The Court should grant summary judgment to Defendants on this underdeveloped count.

Plaintiffs' due process claim must fail. Defendants are entitled to summary judgment as to the Third Claim for Relief.

As now-Chief Justice Roberts wrote, Congress has not given courts the authority to "exercise 'judicial review [over] everything done by an administrative agency.'" *Indep. Equip. Dealers Ass'n*, 372 F.3d at 427. If the Court accepts Plaintiffs' theory of the case, then every time a USCIS asylum supervisor cites 8 U.S.C. § 1225 or utters a word about credible fear or expedited removal—even just in an email—a person who thinks that message or email may be a misstatement of law can rush into D.C. federal court and seek an injunction halting the operation of the expedited removal process. All of the other case law, memoranda, opinions, or lesson plans that USCIS presents to its employees and which contextualize its messages would be ignored. Then, the plaintiffs could ask a judge to set aside the message or email, and instead use the plaintiffs' preferred wording. Such micromanaging is untenable as a matter of policy and as a matter of the APA and INA. For both this policy reason and all the legal reasons exhaustively discussed above, the Court should grant summary judgment to Defendants on all counts.

VI. IF THE COURT GRANTS SUMMARY JUDGMENT TO PLAINTIFFS, THE SOLE FORM OF AVAILABLE RELIEF IS TO DETERMINE UNLAWFUL THE APPLICABLE PARTS OF THE LESSON PLAN.

As a final matter, the Court has asked the parties to address "the scope of the relief that this Court is statutorily authorized to order if Plaintiffs succeed in their section 1252(e)(3)

challenge," and whether the Court has jurisdiction to enter a stay of removal for any individual plaintiffs during the pendency of this case. *Id.* at 3-4.

Under 8 U.S.C. § 1252(e)(3), the Court may only determine the Lesson Plan's lawfulness, and lacks statutory authority to enjoin or vacate the Lesson Plan or stay removals.

Section 1252(e)(1) provides that "no court may . . . enter declaratory, injunctive, or other equitable relief in an action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title *except as specifically authorized in a subsequent paragraph of this subsection*." (Emphasis added.) The italicized phrase plainly (or at least most naturally) refers to the "enter[ing] [of] declaratory, injunctive, or other equitable relief," not just an "action," as what must be "specifically authorized" in a subsequent subsection. Section 1252(e)(3)(A) specifically authorizes the court only to make a "determination" regarding the validity of certain regulations and written policies. Such a "determination" is a form of "declaratory" relief specifically authorized by section 1252(e)(3). Therefore, the sole, specifically authorized remedy in a "subsequent paragraph" is a "determination[]" whether any alleged new written policy "is not consistent with applicable provisions of this subchapter or is otherwise in violation of law," *id.* § 1252(e)(3)(A)(ii), and to issue an "order" to that effect, *id.* § 1252(e)(3)(C).

Accordingly, the Court has no authority to vacate or enter an injunction against the Lesson Plan, as Plaintiffs request. *See* Am. Compl. Prayer for Relief ¶¶ 5-6. In a proper suit under section 1252(e)(3)—challenging the validity of regulations or written policies that establish the structural and procedural features of the expedited removal system—the district court may order limited systemic relief at the behest of individual aliens. *See AILA*, 199 F.3d at 1360. That relief takes the form of a "determination[]" that the regulation or policy is invalid and thus may not be implemented. 8 U.S.C. § 1252(e)(3). In that respect, section 1252(e)(3) is

like, but more circumscribed than, special statutes such as the Hobbs Act, 28 U.S.C. § 2342, that provide for direct review of regulations in courts of appeals within a specified time limit such as sixty days. *See AILA*, 199 F.3d at 1358. But such provisions ordinarily provide only for *declaratory* relief or the setting aside or enjoining of a particular agency action—the particular regulation—being challenged. They do not ordinarily provide for prospective *injunctive* relief reaching future agency actions not before the court. And here, section 1252(e) affirmatively forecloses relief in the form of injunctions or vacatur.

But even if section 1252(e)(3) did authorize vacatur of a written policy it found invalid as a form of "other equitable relief," "determination" would not ordinarily connote *injunctive* relief, and had Congress intended otherwise it would have used language like that in the Hobbs Act, explicitly empowering a court "to enjoin ... the validity of" agency orders. 28 U.S.C. § 2342.

Moreover, even if a "determination" or vacatur could be thought to be a limited or specialized form of "injunctive" relief specifically authorized by section 1252(e)(3), nothing in section 1252(e)(3) "specifically authorizes" the sort of sweeping prospective injunction mandating or barring particular descriptions of section 1158 or relevant precedent in the Lesson Plan, or their application in future individual credible-fear determinations. Section 1252(e)(3) does not even authorize an "action" challenging credible-fear determinations made under section 1225(b)(1)(B), because section 1252(a)(2)(A)(iii) expressly bars such an action. So it would entirely incongruous with the statute to allow an injunction dictating what law may be applied in credible-fear proceedings going forward.

Furthermore, section 1252(e)(1)(B) prohibits "certify[ing] a class under Rule 23." As the D.C. Circuit has explained, that means Congress did not "intend[] to permit actions on behalf of a still wider group of aliens, actions in which no class representative appears as a party and the

plaintiffs are unconstrained by the requirements of [Rule] 23." *AILA*, 199 F.3d at 1359, 1364. But the prospective nationwide injunction sought by Plaintiffs, Am. Compl. Prayer for Relief ¶¶ 4-6 (*inter alia*, asking to enjoin the Lesson Plan and "related" guidance issued around the same time), reaches the future credible-fear determinations of hundreds of thousands of aliens "none of whom are parties to the lawsuit," and "unconstrained by the requirements" of Rule 23. *Id.* at 1364. Such a remedy would also be prohibited by 8 U.S.C. § 1252(f), which provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [8 U.S.C. §§ 1221-1231], other than with respect to the application of such provisions to an individual alien against whom proceedings ... have been initiated." *See AILA*, 199 F.3d at 1359 (noting applicability of section 1252(f)(1) in suits under section 1252(e)(3)). Plaintiffs' requested injunction would do what section 1252(f)(1) forbids, by mandating or barring the use of requirements and standards for future credible-fear determinations found nowhere in section 1225(b)(1)'s text, and therefore would impermissibly enjoin operation of section 1225(b)(1) as written. *See Hamama v. Adducci*, 912 F.3d 869, 879-80 (6th Cir. 2018).

Even if the Court could go beyond section 1252(e)(3) and use APA remedies, the Court could only "hold unlawful and set aside" the unlawful agency action. 5 U.S.C. § 706(2). In that instance, the Court could declare the unlawful parts of the Lesson Plan as such and remand to the agency to "justify its decision." *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). In any event, if the Court holds any part of the Lesson Plan unlawful, then the Court should specify what, exactly, in the Lesson Plan is no longer valid, to enable USCIS to know exactly what must be changed upon remand.

Finally, as the above analysis shows, a court cannot stay the removals of section 1252(e)(3) plaintiffs, and the Court should dissolve its order staying Plaintiffs' removal. Chiefly,

the Court lacks subject-matter jurisdiction over the case, *see supra* sections I, II, which includes the jurisdiction to stay removals. Further, section 1252(e) is unequivocal that such limited jurisdiction does not authorize the Court to stay the execution of orders of expedited removal: "[w]ithout regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may . . . may enter declaratory, injunctive, or other equitable relief in any action pertaining to an order" of expedited removal, "except as specifically authorized in a subsequent paragraph of" section 1252(e). 8 U.S.C. § 1252(e)(1).

The only relief available in a section 1252(e)(3) case, again, is a "determination[]" that the regulation or policy at issue is "in violation of law" and thus may not be implemented. *Id.* § 1252(e)(3)(A). A "determination" is a form of *declaratory* relief concerning particular agency action (here, the Lesson Plan) being challenged, and only after the merits have been adjudicated. This provision, by its own terms, does not overcome section 1252(e)(1)'s bar on staying aliens' removals during the pendency of litigation.

The sole exception to subsection (e)(1) is that if the court finds that an alien has satisfied the limited bases for review under subsection (e)(2), the "court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title." *Id.* § 1252(e)(4). Plaintiffs have not claimed that the limited bases of section 1252(e)(2) apply here. But even in those instances, section 1252(e)(2) courts have applied subsection (e)(1) to find no basis to stay removal. *See, e.g.*, *Castro v. U.S. Dep't of Homeland Sec.*, 163 F. Supp. 3d 157, 163, 175 (E.D. Pa. 2016); *M.S.P.C. v. U.S. Customs & Border Prot.*, 60 F. Supp. 3d 1156, 1162 (D.N.M. 2014).

The only case to stay an expedited removal in the section 1252(e)(3) context was *Grace*, where the court temporarily stayed the plaintiffs' removal but without a reasoned opinion.

Grace, Civ. A. No. 18-1853 (ECF No. 21) (D.D.C. Aug. 9, 2018) (attached as Ex. B). But Defendants respectfully submit that the *Grace* court erred. That court concluded that a court always has jurisdiction to determine its own jurisdiction, and thus stay removal. That may be true as a general proposition, but Congress controls the jurisdiction over the federal courts, and can limit the equitable relief the courts can issue. *See Antone v. Block*, 661 F.2d 230, 235 (D.C. Cir. 1981) (holding that a district court's remedial powers "are necessarily limited by a clear and valid legislative command counseling against the contemplated judicial action."). Congress has done exactly that here with section 1252(e). *See also Am. Fed'n of Gov't Emps., AFL-CIO*, 929 F.3d at 754 (noting Congress may establish alternate judicial review schemes).

Even if the Court could order a stay, Plaintiffs fail to demonstrate their entitlement to one. Requests for stays of removal (when legally permissible) are governed by the *Nken* test: whether the applicant "has made a strong showing that he is likely to succeed on the merits"; whether the applicant will be "irreparably injured absent a stay"; and a balancing of the parties' interests. *Nken*, 556 U.S. at 434. This is a demanding standard and "courts should not grant stays of removal on a routine basis." *Id.* at 438 (Kennedy, J., concurring). Plaintiffs have failed to make any showings on these prongs, so the Court should dissolve its earlier stay order.

Therefore, the only remedy the Court can order is to declare unlawful those parts of the Lesson Parts that it finds are unlawful.

CONCLUSION

For the reasons set forth above, the Court should dismiss the Amended Complaint for lack of jurisdiction, or alternatively grant summary judgment in favor of Defendants on all counts.

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Respectfully submitted,

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