IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIA M. KIAKOMBUA, *et al*.,

Plaintiffs,

– versus –

KEVIN K. MCALEENAN, in his official capacities as Acting Secretary of Homeland Security & Commissioner of United States Customs and Border Protection, *et al.*,

Defendants.

Case No. 1:19-CV-1872-KBJ

PLAINTIFFS' COMBINED CORRECTED MEMORANDUM OF LAW IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case challenges Defendants' efforts to undermine this country's asylum system through an unlawful directive to the asylum officers responsible for making life or death decisions for people seeking humanitarian protection at our borders. The directive—a Lesson Plan on Credible Fear of Persecution and Torture Determinations ("Lesson Plan"), AR 1—sets agency policy on who may be found to have a "credible fear" such that they may access court process to make their humanitarian claims, and who will be summarily deported through expedited removal.

Plaintiffs are women from Angola, El Salvador, and Cuba who requested the opportunity to apply for asylum but were determined to lack a credible fear of persecution or torture under the Lesson Plan. Congress designed the credible fear system to enable asylum officers to quickly and accurately distinguish potentially meritorious claims from frivolous ones within the procedural constraints of the expedited removal process. But as Plaintiffs demonstrate, the Lesson Plan's instructions and guidance on credible fear diverges wildly from the system Congress created, the agency's own regulations, and its own prior policies and guidance. Among other fatal defects, the Lesson Plan unlawfully heightens the asylum seeker's burden of proof and production; instructs asylum officers to base negative credible fear determinations on factors irrelevant under the governing law; and requires asylum officers to test statements of asylum seekers against Department of State country condition reports and to treat the latter as "objective" fact.

This Court has jurisdiction and authority to review the legality of the Lesson Plan. Plaintiffs were injured by it and filed suit under 8 U.S.C. § 1252(e)(3), which vests in this Court jurisdiction to review whether "a written policy directive, written policy guideline, or written procedure" like the Lesson Plan is inconsistent with or otherwise in violation of governing law. On the merits, Plaintiffs are entitled to summary judgment on their claims that the Lesson Plan is inconsistent with the statutory and regulatory scheme, violates the APA's requirement that the

agency engage in reasoned decisionmaking, as well as its requirement that the agency go through notice-and-comment procedures when it effects changes of the nature and magnitude made by the Lesson Plan. The Lesson Plan likewise violates due process, although the Court need not reach that claim in light of the statutory violations.

Defendants, for their part, assert a bevy of reasons why this Court should not review the Lesson Plan, all of which are premised on the representations of their counsel that the Lesson Plan has no real impact on the credible fear process; that it simply relays to asylum officers "incontrovertible" law and facts; and that its recent revision was just a minor update to account for developments in the case law. *See generally* Mem. of Law in Supp. of Defs.' Mot. for Summ. J. ("Defs.' Br."), ECF No. 31-1. The representations, however, are not supported by the record; in fact, they are all sharply contradicted by even the limited set of documents Defendants chose to produce. As a simple redline of the Lesson Plan against its former version shows, *see* Ex. A, the recent revisions were not an innocuous "update to a training module," but rather effected significant changes to USCIS policy and process on credible fear determinations, and in ways that are contrary to well-settled law and that flout APA procedural requirements.

The authority Defendants claim is breathtaking. Per Defendants, they have the power to develop and apply their own legal requirements for the credible fear process—and the authority to shield them from judicial review—simply by laundering them through a document that litigation counsel labels "administrative training material." There would be no need to bother with sweeping executive orders; a simple lesson plan would suffice. This is not the system Congress created.

BACKGROUND

A. HUMANITARIAN PROTECTIONS UNDER U.S. LAW

Reflecting our history as a land of refuge, Congress has enshrined in U.S. law several forms of protection to ensure that noncitizens at or within our borders facing persecution or torture in

their countries of origin will not be deported to the dangerous conditions they fled. *See, e.g.*, Refugee Act of 1980, Pub. L. No. 96-212 § 101(a), 94 Stat. 102, 102 ("[I]t is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands"); Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-822 (announcing "the policy of the United States not to expel . . . any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture").

Chief among the forms of protection is asylum. Federal asylum law provides that a noncitizen physically present or arriving in the United States—whether or not arriving at a designated port of entry and regardless of immigration status—may apply for asylum. *See* 8 U.S.C. §1158(a). To be eligible for asylum, the noncitizen must be a "refugee" within the meaning of 8 U.S.C. § 1101(a)(42)(A). *See* 8 U.S.C. § 1158(b)(1)(A); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987). A "refugee" is "any person who is outside of any country of such person's nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail [themselves] of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id*. § 1101(a)(42)(A). The government has discretion whether to ultimately grant asylum to an eligible individual. *See id.* § 1158(b)(1)(A).

An asylum application consists of, at minimum, a completed Form I-589, *see* 8 C.F.R. § 208.3(a), which typically is accompanied by supporting evidence, *see* Form I-589 Instructions at 7-9 (Apr. 9, 2019), *available at* https://tinyurl.com/yyfurpnw (instructing on submission of "supplementary sheets and supplementary statements"). Such evidence "may include but is not limited to newspaper articles, affidavits of witnesses or experts, medical and/or psychological

records, doctors' statements, periodicals, journals, books, photographs, official documents, or personal statements or live testimony from witnesses or experts." *Id.* at 8. For a person who "ha[s] difficulty discussing harm . . . suffered in the past," the application may include "a health professional's report explaining this difficulty." *Id.*

The asylum application may be submitted affirmatively to an asylum office of U.S. Citizenship and Immigration Services ("USCIS"), *see* 8 C.F.R. § 208.9(a); 6 U.S.C. § 271, or defensively in formal (or "full") removal proceedings, *see* 8 U.S.C. § 1229a(c)(4)(A). In affirmative applications before USCIS, the noncitizen has the right to be represented by counsel, to present witnesses, and to submit witness affidavits and other evidence. *See* 8 C.F.R. § 208.9(b). Should the asylum officer be unable to grant asylum, the noncitizen can have an immigration judge ("IJ") consider their asylum claim *de novo* if they are placed in removal proceedings. *See id.* § 208.14(c) (1), (4); *Abtew v. U.S. Dep't of Homeland Sec.*, 47 F. Supp. 3d 98, 101 (D.D.C. 2014). In removal proceedings, the noncitizen has the rights, among others, to be represented by counsel, *see* 8 U.S.C. § 1229a(b)(4)(A); to present evidence, to examine and object to evidence against them, and to cross-examine any government witnesses, *see id.* § 1229a(b)(4)(B); 8 C.F.R. § 1240.10(a)(4); to appeal the IJ's decision to the Board of Immigration Appeals, *see* 8 U.S.C. § 1229a(b)(5); 8 C.F.R. § 1240.15; and eventually to seek review from a federal court of appeals, *see* 8 U.S.C. § 1252(b). Thus, no one permitted to submit a full asylum application is deported without access to full process, including federal court review, of their claim.

Whereas asylum ultimately requires a favorable exercise of discretion, Congress also created mandatory forms of humanitarian protection. Codifying the international law principle of *nonrefoulement*, the withholding of removal statute bars the government from deporting a noncitizen to a country where their "life or freedom would be threatened" because of a protected

ground. 8 U.S.C. § 1231(b)(3)(B); *see also Cardoza-Fonseca*, 480 U.S. at 423, 440. Congress has also prohibited the government from removing a noncitizen to a country where they are more likely than not to be tortured, consistent with commitments under the Convention Against Torture ("CAT"). *See* FARRA, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822; 8 C.F.R. § 1208.16(c)(4). An asylum application is automatically considered one for withholding, and may be considered one for CAT protection, as well. *See* 8 C.F.R. § 1208.13(c)(1).

B. EXPEDITED REMOVAL AND THE CREDIBLE FEAR SCREENING PROCESS

Before 1997, any person whom the government sought to deport from the United States was entitled to a full hearing before an IJ and had the right to seek review from the Board of Immigration Appeals and a federal court of appeals. *See Am. Immigration Lawyers Ass'n v. Reno* ("*AILA*"), 199 F.3d 1352, 1354-55 (D.C. Cir. 2000). With its enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which went into effect in 1997, Congress created a system of expedited removal that empowered immigration officers to deport from the United States "without further hearing or review," 8 U.S.C. § 1225(b)(1)(A)(i), certain individuals arriving at a port of entry, *see id.* § 1225(b)(1)(A)(i), or who entered the country without inspection, *see id.* § 1225(b)(1)(A)(iii).[1]

To ensure that individuals facing danger in their countries of origin would have an opportunity to apply for protection, Congress created a "credible fear" screening process within the expedited removal system for those who "indicate[] either an intention to apply for asylum . . . or a fear of persecution." *Id*. § 1225(a)(1)(A)(ii). In the screening process, a USCIS asylum officer

[1] Until recently, a person who entered without inspection could be subject to expedited removal only if apprehended within 14 days of entry and within 100 miles of a land border. *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,880-81 (Aug. 11, 2004) (AR Index No. 40). As of July 23, 2019, individuals who entered without inspection apprehended anywhere in the United States may be subject to summary deportation through the expedited removal process if they cannot prove "to the satisfaction of an immigration officer" that they entered at least two years prior. *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409, 35,413-44 (July 23, 2019).

interviews the noncitizen to determine whether the individual has a "credible fear" of persecution or torture. *Id.* § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30 (e)(2), (3). If the asylum officer determines that the individual lacks a "credible fear," the noncitizen may seek IJ review, *see* 8 C.F.R. § 1208.30(g)(2)(i), in which the IJ evaluates the adverse finding *de novo*, *id.* § 1003.42(d)(1), albeit based on the "record of the [asylum officer's] negative credible fear determination," *id.* § 1208.30(g)(2)(ii), supplemented with any additional "oral or written statement" that they decide, in their discretion, to receive into evidence, *id.* § 1003.42(c). An IJ's decision "may not be appealed," but an asylum officer may reconsider and reverse a negative determination even after an IJ has concurred. *Id.* § 1208.30(g)(iv)(A). After IJ review, there is no further recourse for the noncitizen beyond this purely discretionary reconsideration by the agency. *See id.* The statutorily prescribed credible fear process is specific to asylum, *see* 8 U.S.C. § 1225(b)(1)(B)(v), but the responsible agencies have adapted this standard to screen applicants for eligibility for withholding of removal or CAT protection, as well, *see* 8 C.F.R. § 208.30 (e)(2), (3). Those who pass the credible fear screening avoid expedited removal and can apply for asylum, withholding of removal, and CAT protection in removal proceedings before an IJ with the procedural protections guaranteed by § 1229a. *See* 8 C.F.R. § 208.30 (f). Those found not to have a credible fear are summarily deported and barred from seeking admission to the United States for at least five years. *See* 8 U.S.C. § 1182(a)(9)(A)(i); 8 C.F.R. § 1003.42(f); § 1208.30(g)(iv)(A).

By statute, "the term 'credible fear of persecution' means that there is a significant possibility, 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 [asylum] officer, that the alien could establish eligibility for asylum under [8 U.S.C. § 1158]." 8 U.S.C. § 1225(b)(1)(B)(v). Because the statutory definition turns on the possibility of establishing "eligibility" for asylum under § 1158,

which itself incorporates the definition of a "refugee" under § 1101(a)(42), the question at the credible fear stage is thus: whether there is a significant possibility that the asylum seeker could establish in full removal proceedings either that they suffered persecution in the past or that they have a well-founded fear of persecution in the future.[2] The Supreme Court has held that a ten percent chance of future persecution is sufficient to make the fear of it well founded. *Cardoza-Fonseca*, 480 U.S. at 431; *accord* AR 273 (Evidence Training Module) ("One in ten chance").

Because the credible fear process focuses on asylum *eligibility*, the reasons why a noncitizen who is eligible for asylum might nonetheless not ultimately receive it—such as the mandatory bars or the bases for discretionary denials—are irrelevant at the screening stage, with the exception of those subject to the Safe Third Country Agreement with Canada. *See* 8 C.F.R. § 208.30(e)(5)(i), (e)(6); *see also* Defs.' Br. at 41 (conceding that discretionary factors are irrelevant at the credible fear stage). Congress intended the credible fear standard "to be a low screening standard for admission into the usual full asylum process," 142 Cong. Rec. S11,491 (Sept. 27, 1996) (statement of Sen. Hatch), setting a "low threshold of proof of potential entitlement to asylum," Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,320 (Mar. 6, 1997) (AR Index No. 37), so as to avoid the possibility of deporting individuals back to countries where they will face persecution, contravention of domestic and international law. Reflecting that low standard, the screening itself is unsuited to complex factfinding or legal analysis. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999) (AR Index No. 38) (process designed "to quickly identify potentially meritorious

[2] *See* USCIS, Questions & Answers: Credible Fear Screening (last updated July 15, 2015), https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening (a credible fear of persecution is "a 'significant possibility' that you can establish in a hearing before an Immigration Judge that you have been persecuted or have a well-founded fear of persecution on account of your race, religion, nationality, membership in a particular social group, or political opinion if returned to your country").

claims to protection and to resolve frivolous ones with dispatch"). The asylum seeker is not permitted to be represented, *see* 8 C.F.R. § 208.30(d)(4); SUF ¶¶ 10-12; and has no right to call witnesses, *see id.* ¶ 13; *accord* 8 C.F.R. § 1003.42(c).[3] Before the interview, and for the duration of the screening process, the asylum seeker is in detention. *See* 8 U.S.C. § 1225(b)(iii)(IV). There is little time to prepare a case: the interview may take place as soon as the calendar day after the asylum seeker is detained, SUF ¶¶ 7-8, and any IJ review must be "conclude[d] . . . to the maximum extent practicable within 24 hours, but in no case later than 7 days" after the credible fear determination, 8 C.F.R. § 1003.42(e).

C. THE LESSON PLAN

The agency policy and procedure at issue in this case, the Lesson Plan, governs how asylum officers are to conduct credible fear screenings. *See* AR 1; SUF ¶¶ 23-41, 47-81.[4] USCIS Asylum Division lesson plans are comprehensive documents used for training, for reference, for supervision, and for quality assurance review. *See id.* ¶¶ 28-40. Asylum officers are expected to comply with the lesson plans. *See id*. ¶¶ 28-40, 47-81; *see also* 8 U.S.C. § 1103 (a)(2)-(3) (empowering the Secretary of Homeland Security to "issue such instructions" as necessary to "control, direct[], and supervis[e] . . . all employees"). Lesson plans are thus foundational policy guidance documents in the Asylum Division. Defense counsel's repeated attempts[5] to downplay

[3] *See also* Immigration Court Practice Manual § 7.4(d)(iv)(C), at 115-16 (Aug. 9, 2019), https://www.justice.gov/eoir/file/1192636/download ("the alien is not represented," and "persons acting on [their] behalf are not entitled to make opening statements, call and question witnesses, conduct cross examinations, object to evidence, or make closing arguments").

[4] The Court may consider Plaintiffs' submissions regarding the nature of the Lesson Plan in determining its Article III jurisdiction, *Grocery Mfrs. Ass'n*, 693 F.3d at 174; Defs.' Br. at 14 n.10, as Defendants' characterizations of the Lesson Plan are in support of their jurisdictional arguments. Plaintiffs offer the evidence for that limited purpose.

[5] *E.g.*, Defs.' Br. at 21 ("[I]t just states the law"); *id.* at 27 ("simply restates incontrovertible facts and law"); *id.* at 28 ("describes universally applicable asylum, statutory withholding of removal, and CAT protection standards"); *id.* at 30 ("does not contain any new mandatory language or directives outside of those it summarizes from other sources of law"); *id.* ("merely restates . . . what the law requires of asylum officers"); *id.* at 33 ("essentially a summary of existing legal authorities that are pertinent to a credible fear determination"); *id.* ("did not 'change any law or official policy presently in effect'" (citation omitted)); *id.* ("an update to a training module"); *id.* at 34 ("did not itself change, and

the significance of lesson plans including the challenged Lesson Plan are unsubstantiated, and cannot in any case be considered, since they come from counsel, not the agency. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

Here, Defendants used the revision of the credible fear lesson plan to effectuate significant unexplained policy changes as to how credible fear interviews are conducted, as is evident from a simple redline comparing the Lesson Plan to its prior version, from 2017. *See* Ex. A (Redline); Ex. H (Decl. of Serena Kumalmaz) (describing creation of Redline); *see also* SUF ¶¶ 47-81 (documenting changes, as well as instances where it diverges from other documents in the record). The Lesson Plan does not just reproduce law and policy found elsewhere, as Defendants' counsel represent[6]; nor is there a basis to conclude that it was issued merely "to account for new case law and other developments" since the last revision in 2017, Defs.' Br. at 1. Neither the Lesson Plan nor the administrative record contains any explanation, justification, or even acknowledgment of the changes. *Accord id.* at 46 (conceding the Lesson Plan does not "provide its justification").

The challenged Lesson Plan was issued amidst the current Administration's ongoing attacks on the asylum system generally and the credible fear process in particular. *See, e.g.*, *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal docketed*, No. 19-5013 (D.C. Cir.) (enjoining attempts to make it more difficult to receive positive credible fear determinations, particularly for those fleeing gang and domestic violence). Administration officials, including the President, have repeatedly characterized migrants seeking an opportunity to apply for asylum at

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did not intend to change, any existing law or official policy"); *see also id.* at 25 ("a training module that agency instructors are supposed to use to train asylum officers"); *id.* at 34 ("summarizes the legal principles that are supposed to be conveyed to asylum officers as part of a training course").

[6] Defs.' Br. at 26 ("Where [it] touches on policy, it is simply to direct the reader to other policy."); *id.* at 34 ("[T]he Lesson Plan did not itself change, and did not intend to change, any existing . . . official policy"); *see also* n.5, *supra*.

our southern border as invading fraudsters undeserving of protection or access to the courts, and our asylum system itself as a "hoax."[7] SUF ¶¶ 3-4. The Administration has identified the credible fear standard as too lenient, repeatedly labeling it a "loophole" in our immigration system, and has endeavored to drive down the credible fear passage rate. *See id.* ¶¶ 5-6.

D. PLAINTIFFS

Plaintiffs are five asylum seekers who were determined to lack a credible fear under the Lesson Plan. *See generally* SUF ¶¶ 88-96. Plaintiff Maria Kiakombua was forced to flee Angola because of harm she faced and feared would continue at the hands of her boyfriend, who is in the military, and other government officials. Plaintiff Ana left El Salvador after being threatened with death by gang members who shot her husband and granddaughter and targeted the family because her husband is a landowner. Plaintiff Emma fled El Salvador to escape abusive relationships with men who treated her as if she were their property. Plaintiff Sofia fled Cuba after suffering a miscarriage in connection with threats, surveillance, and detention by Cuban government officials. Plaintiff Julia fled her home country of El Salvador to escape death threats by a gang after she witnessed its members murder a neighbor. Each received notice of the asylum officer's negative credible fear determination on a checkbox form in May or June of 2019. *See id*. ¶¶ 95-96. The U.S. government deported Sofia and Julia to Cuba and El Salvador, respectively, in June 2019. *See id.* ¶ 97. All Plaintiffs seek, *inter alia*, an order vacating the Lesson Plan as unlawful and, if necessary, a new credible fear screening under lawful standards or referral to full removal proceedings, and parole into the United States for those proceedings. *See* § III, *infra*.

LEGAL STANDARD

[7] The Court may take judicial notice of the fact of these and other public statements of Defendants and President Trump, as they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see also Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 67-68 (D.D.C. 2014).

In considering the merits in this record review case, the typical Rule 56 standard does not apply, as this Court does not resolve factual issues; instead, this Court sits as an appellate tribunal, and its task to determine whether, as a matter of law, the evidence in the administrative record permitted the agency to make the decision that it did. *See Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083-84 (D.C. Cir. 2001); *Maher v. Pension Benefit Guar. Corp*., 271 F. Supp. 3d 296, 301–02 (D.D.C. 2017). The Court may consider evidence outside the administrative record in determining its jurisdiction and Plaintiffs' "entitlement to judicial review." *Grocery Mfrs. Ass'n v. E.P.A*., 693 F.3d 169, 174 (D.C. Cir. 2012) (citation omitted).

ARGUMENT

I. THIS COURT HAS JURISDICTION, PLAINTIFFS HAVE STANDING, AND THE LESSON PLAN IS REVIEWABLE

Defendants spend a bulk of their brief arguing that this Court lacks authority to review this dispute, no matter what the Lesson Plan says or how unlawful it is. *See* Defs.' Br. at 12-35. Defendants are wrong. "Congress rarely intends to prevent courts from enforcing its directives to federal agencies," and so there is "a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1651 (2015) (citation omitted). This principle has been "consistently applied . . . to legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." *Kucana v. Holder*, 558 U.S. 233, 251 (2010) (collecting cases). To overcome it, Defendants bear a "heavy burden," *Mach Mining*, 135 S. Ct. at 1651, as they must show by "clear and convincing evidence" that Congress intended to foreclose judicial review, *Kucana*, 558 U.S. at 252.

Defendants have failed to meet their burden. This is an action challenging a "written policy directive, written policy guideline, or written procedure" implementing the expedited removal statute, which Congress specifically authorized in 8 U.S.C. § 1252(e)(3), even as it limited review

of other aspects of expedited review. Moreover, even were Defendants correct that there is no § 1252(e)(3) jurisdiction here because the Lesson Plan is not a written policy or procedure implementing the expedited removal statute, this Court would instead have jurisdiction under 28 U.S.C. § 1331, as Defendants' arguments would necessarily mean that no statutory provision strips this Court of its jurisdiction under the general federal question statute. Thus, regardless of whether Defendants correctly characterize the Lesson Plan (and they do not), this Court has statutory jurisdiction. Defendants' attacks on Plaintiffs' standing likewise fail: all five were unquestionably injured when the unlawful Lesson Plan was applied to them and they were determined to lack a credible fear of persecution or torture thereunder, and this Court can provide all with meaningful relief. Finally, Defendants' arguments about reviewability under the APA are legally irrelevant to this Court's jurisdiction and are wrong on their merits besides.

A. This Court has statutory jurisdiction

The Lesson Plan is reviewable under the plain text of 8 U.S.C. § 1252(e)(3). Although § 1252 strips jurisdiction to review various aspects of the expedited removal process, in § 1252(e)(3) Congress expressly authorized judicial review of "Challenges on the validity of the [expedited removal] system." In relevant part, § 1252(e)(3)(A) states that "judicial review" of the "implementation" of § 1225(b), the expedited removal statute, "is available in an action instituted in" this Court, which is empowered to determine whether a challenged regulation, "written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General [or Secretary of Homeland Security[8]] to implement" the expedited removal statute is lawful. This case is just such an action: Plaintiffs seek this Court's review of a written policy and procedure (the Lesson Plan) issued by the Secretary of Homeland Security (through its

[8] As Defendants note, Defs.' Br. at 4 n.2, the reference to the Attorney General in § 1252(e)(3) is "deemed to refer" to the Secretary of Homeland Security as well, 6 U.S.C. § 557.

component USCIS) to implement § 1225(b). *See Grace*, 344 F. Supp. 3d at 115-17 (holding reviewable written directives and guidance regarding the expedited removal process); *see also Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 45, 47, 60 (D.D.C. 1998) (holding that two individuals summarily deported through expedited removal process had standing under § 1252(e)(3), but dismissing their claims on the merits), *aff'd AILA*, 199 F.3d at 1357.

Defendants claim that § 1252(e)(3) does not provide this Court subject matter jurisdiction, but they do not offer a plausible way to read the statute that leads to that conclusion. First, Defendants assert that the Lesson Plan is not an "implementation" of § 1225(b), but rather an "implementation" of the substantive standards for asylum, withholding, and CAT. *See* Defs.' Br. at 2, 18-20. This argument cannot be reconciled with what § 1225(b) and the Lesson Plan actually say. Section 1225(b) details how the government will determine which noncitizens must be taken out of expedited removal (and provided more process before they can be removed) because they have a credible fear of persecution. *See, e.g.*, 8 U.S.C. § 1225(b)(1)(A) ("Screening"); (b)(1)(B) ("Asylum interviews"); (b)(1)(B)(iii)(II) ("Record of [credible fear] determination"); (b)(1)(B)(v) ("'Credible fear of persecution' defined"); (b)(1)(E) (training requirements for asylum officers conducting credible fear interviews). Likewise, the Lesson Plan's stated purpose "is to explain how to determine whether an alien subject to expedited removal . . . has a credible fear of persecution or torture." AR 1. The Lesson Plan covers much of the same terrain as § 1225(b); in fact, it directly references that statute (INA § 235(b)) some dozen times and its implementing regulations (8 C.F.R. §§ 208.30 & 235.3) some thirty more. Defendants' argument that the Lesson Plan does not "implement[]" § 1225(b) is unsupportable. *See also Grace*, 344 F. Supp. 3d. at 116, 118 (holding that an Attorney General opinion and a USCIS memorandum that expressly invoked § 1225(b) and provided guidance to credible fear adjudicators both implemented the expedited

removal statute within meaning of § 1252(e)(3)).

To be sure, the Lesson Plan discusses the substantive legal standards for protection claims, but that overlap is written into the statutory scheme. The credible fear standard is itself defined with reference to eligibility for asylum, *see* § 1225(b)(1)(B)(v). And far from indicating an intent to strip jurisdiction over writings implementing § 1225(b) when they overlap with substantive asylum (or other) law, Congress provided in § 1252(e)(3) that this Court can review whether a challenged writing is "consistent with" sections 1151 through 1382 of Title 8— which includes the INA's provisions setting out eligibility for asylum —*and* whether the challenged writing "is otherwise in violation of law," without restriction on the law under which the writing could reviewed.

Defendants next argue that the Lesson Plan is not a written "policy directive," "policy guideline," or "procedure" under § 1252(e)(3) because it is "an administrative training material," Defs.' Br. at 20-21 (emphasis omitted). Here, too, Defendants' argument cannot be reconciled with the statutory text or the content of the Lesson Plan. Section 1252(e)(3) evidences congressional intent to make reviewable a broad range of writings—from formal regulations down to "procedure[s]" and "guideline[s]"—defined by what they say or do, not the particular form they take or the label they are given. Nowhere in § 1252 can be found the kind of "clear and convincing evidence" necessary, *Kucana*, 558 U.S. at 251, to conclude that Congress intended to foreclose judicial review of guidance, directives, or procedures simply because they are in a format that the agency labels a training document, rather than something else. This Court is not bound "by an administrative agency's classification of its own action," and for good reason: "an agency cannot outflank either the strictures of its enabling legislation or the APA's rulemaking framework by definitional fiat." *U.S. Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1149 (5th Cir. 1984).

The Court admittedly can consider "the agency's characterization of the guidance," Defs.' Br. at 27 (quoting *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014)), but the relevant "characterization" of the challenged agency action is not based on the form or label given, but what it actually says and does, as *McCarthy* itself makes clear, *see* 758 F.3d at 252-53 (examining what challenged guidance "disclaims," "caveats," and "commands"). Here, Defendants concede that the Lesson Plan provides policy guidance applied in the expedited removal process, Defs.' Br. at 19 ("[T]he 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 enough to hold that it falls within § 1252(e)(3). And while Defendants wish to compare the Lesson Plan to other documents and argue that it does not meet this or that administrative law definition, this Court need only decide whether the Lesson Plan is encompassed by § 1252(e)(3), as that is the only characterization that Congress made relevant. *Cf. Calif. Cmtys. Against Toxics v. EPA* ("*Calif. Toxics*"), __ F.3d ___, 2019 WL 3917540, at *2 (D.C. Cir. Aug. 20, 2019) ("[C]ourts should resist the temptation to define the [agency] action by comparing it to superficially similar actions in the caselaw," and instead, "should take as their NorthStar the unique constellation of statutes and regulations that govern the action at issue"). "[V]iewed in its specific regulatory context," *id.* at *7, the Lesson Plan easily fits within § 1252(e)(3)'s expansive language. *See also Grace*, 344 F. Supp. 3d at 116 (language of challenged agency action "sufficient to bring [it] under the ambit of section 1252(e)(3)").

Defendants' third argument for why this Court allegedly lacks jurisdiction under § 1252(e)(3) is to point to § 1252(a)(2)(A)(iii), *see* Defs.' Br. at 22-23, but it does not apply here. That provision states that "no court shall have jurisdiction to review . . . the application of [§ 1225(b)(1)] to individual aliens, including the determination made under [§] 1225(b)(1)(B)."

Plaintiffs do not seek review of the application of the expedited removal statute to them, nor of their negative credible fear determinations—Plaintiffs seek review of the Lesson Plan, and that review is expressly contemplated by § 1252(a)(2)(A)(iv) and expressly authorized by § 1252(e)(3). This "[c]hallenge[] on [the] validity of the system" does not involve review of the application of the expedited review to individual Plaintiffs or of their credible fear determinations,[9] and so § 1252(a)(2)(A)(iii) is inapplicable. *See Grace*, 344 F. Supp. 3d at 117, 119 (so holding); *see also O.A. v. Trump*, Nos. 18-2718 & 18-2838, 2019 WL 3536334, at *19 & n.12 (D.D.C. Aug. 2, 2019).

Defendants resist this conclusion by claiming that the *relief* Plaintiffs seek—including vacatur of the unlawful Lesson Plan and the final orders of expedited removal that resulted from it—amounts to a request that this Court "exercise jurisdiction to review the credible-fear 'determinations' concerning Plaintiffs . . . and all such determinations in the future that may be made in reliance on the Lesson Plan." Defs.' Br. at 23. To be crystal clear: Plaintiffs do not seek review of any credible fear determination, of Plaintiffs or of anyone else. Even more to Defendants' jurisdictional argument, the scope of review and what relief is appropriate are "analytically distinct," *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 65-66 (1992) (citation omitted), and Defendants never explain how the Court should divine congressional intent to circumscribe available relief from language in § 1252(a)(2)(A)(iii) that at most limits the scope of review.[10] "A statute affecting federal jurisdiction 'must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes.'" *Kucana*, 558 U.S. at 252 (citation omitted). Plaintiffs do not seek review of "the application of [§ 1225(b)(1)] to individual

[9] Defendants appear to share this understanding, as the Administrative Record contains nothing about the Plaintiffs, the application of expedited removal to them, or their credible fear determinations.

[10] Less than a year ago in *Grace*, Defendants took the position that "once the Court finds [under § 1252(e)(3)] that a regulation or policy violates the law, the appropriate relief is to vacate the [individual plaintiff's] expedited removal determination that was issued based on that erroneous policy." Defs.' Mot. for Stay Pending Appeal at 2, *Grace v. Whitaker*, No. 18-1853 (D.D.C. filed Dec. 19, 2018), ECF No. 107.

aliens," so the jurisdictional bar in § 1252(a)(2)(A)(iii) is irrelevant. *Accord Grace*, 344 F. Supp. 3d at 117 ("[T]he Court concludes that section 1252(a)(2)(A) does not eliminate this Court's jurisdiction over plaintiffs' claims, and that section 1252(e)(3) affirmatively grants jurisdiction.").

Defendants' related jurisdictional argument that the Court may not review parts of the Lesson Plan that are similar to previous agency guidance is also baseless. *See* Defs.' Br. at 39, 42. Defendants cite no law or logic for immunizing from judicial review a part of a writing that meets § 1252(e)(3)'s definition merely because some of its words appeared in prior guidance; nor do they explain how, precisely, a Court is to determine whether particular language is "new" (a word that does not appear in the statute), especially when its context or presentation has changed. Had Congress wanted to grant immunity on such a piecemeal basis, it "could easily have said so." *Kucana*, 558 U.S. at 248. It didn't. Instead, it provided that written guidance is subject to judicial review if suit is brought within 60 days of it being "first implemented," 8 U.S.C. § 1252(e)(3)(D), and Defendants do not dispute that Plaintiffs filed this action within the first 60 days after the Lesson Plan was first implemented.[11] Regardless, even if the Court were barred from reviewing guidance identical to that previously issued, what Plaintiffs challenge is not identical to guidance in previous lesson plans. Plaintiffs do not challenge isolated statements: they challenge statements taken together and in context. As Defendants themselves contend, a reviewing court cannot understand language without considering "the specific context in which that language is used, and the broader context of the [provision] as a whole," Defs.' Br. at 38 (citation omitted).

The remainder of Defendants' arguments regarding statutory jurisdiction boils down to their view that judicial review of their actions would interfere with their desire, and what they

[11] The absurdity of Defendants' position is well illustrated by their assertion that the individual Plaintiffs' opportunity to challenge vaguely-defined portions of the Lesson Plan issued in April 2019, under which they were found in May and June of 2019 not to have a credible fear of persecution, "expired back in 2014 at the latest." Defs.' Br. at 42.

understand as Congress's intent, to deport people as quickly as possible through the expedited removal statute. *See, e.g.*, Defs.' Br. at 20-21, 24 (invoking § 1252(e)(3)'s 60-day statute of limitations as supporting their position that the review authorized thereunder is vanishingly narrow); *id*. at 23 (arguing that review of the Lesson Plan would "undermine[] 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.'" (citation omitted)); *see also id.* at 22, 24 (arguing that exercising jurisdiction here would result in USCIS "ignor[ing] new precedent out of a fear that informing line officers of [it] would open the entirety of expedited removal to renewed legal challenge"). These arguments all beg the question, because in creating the expedited removal system, Congress *also* had the aim of not subjecting to summary removal migrants with non-frivolous claims for asylum—expressly including those with no authorization to be admitted. *See* 8 U.S.C. § 1225(b)(1)(A)(i) (subjecting to immediate summary removal arriving aliens who are inadmissible under 8 U.S.C. § 1182(a)(7) for failure to possess a valid entry document such as a visa, *unless* they indicate "either an intention to apply for asylum . . . or a fear of persecution"). And Congress explicitly authorized juridical review of every "section, regulation, directive, guideline, or procedure" implementing § 1225(b) in a suit brought within 60 days after the challenged policy or procedure "is first implemented." 8 U.S.C. § 1252(e)(3)(D). Defendants ignore that "no law pursues its purpose at all costs." *Kucana*, 558 U.S. at 252 (citation omitted).

Congress did not make it easy to challenge an implementation of an expedited removal policy or procedure, as § 1252(e)(3)'s window for judicial review is narrow. But here—despite their indigency, lack of English fluency, unfamiliarity with the American legal system, and trauma related to the violence they fled—Plaintiffs climbed through that window and have properly presented their claims to this Court, which is empowered to consider them. Given the obstacles to

such an action, Defendants' suggestion that holding reviewable this incarnation of the Credible Fear Lesson Plan would result in a deluge of litigation that paralyzes the agency is nightmare speculation (and belied by 20 years of relative disuse of § 1252(e)(3)). If another lesson plan merely reproduces what the law is, as Defendants wrongly contend this one does, there would be no need for anyone to expend resources challenging it; but surely the agency cannot instruct asylum officers to apply law that is *wrong* in a document that the officers are expected to follow, yet shield that Executive action from judicial review by having litigation counsel label it "administrative training material." Defs. Br. at 21. "While Congress pared back judicial review in IIRIRA, it did not delegate to the Executive authority to do so." *Kucana*, 558 U.S. at 252-53.

* * * *

In the alternative, this Court has jurisdiction under 28 U.S.C. § 1331. If, as Defendants contend, the Lesson Plan is not a policy or procedure implementing the expedited removal process for purposes of § 1252(e)(3)'s grant of jurisdiction, this Court would still have subject matter jurisdiction—just under the general federal question statute instead. *See* Am. Compl. ¶ 11 (alleging both bases of subject matter jurisdiction). This is how Judge Moss recently resolved a similar jurisdictional challenge, agreeing with the government there that § 1252(e)(3) did not grant jurisdiction to review a rule making certain noncitizens ineligible for asylum, but holding that, as a consequence, "§ 1252—as a whole—does not apply," and therefore the court had jurisdiction under § 1331. *O.A.*, 2019 WL 3536334, at *17.

Defendants' solitary argument for why § 1331 does not provide jurisdiction is to assert that § 1252(a)(2)(A) "bars district-court jurisdiction in cases involving orders of expedited removal, other than as permitted by section 1252(e)." Defs.' Br. at 18. This is a dramatic over-reading of that statutory provision, *contra Kucana*, 558 U.S. at 252 (jurisdictional statutes "must be construed

. . . with precision"). Section 1252(a)(2)(A) limits judicial review in four discrete provisions, and if Defendants are correct that the Lesson Plan does not implement the expedited removal statute, then none of its provisions apply. Subsection (i) prohibits review of "any individual [expedited removal] determination" and claims "arising from or relating to the implementation or operation" of an expedited removal order. 8 U.S.C. § 1252(a)(2)(A)(i). Defendants do not claim this provision is applicable, and it is not: Plaintiffs do not seek review of any individual determination, and their claims do not arise from or relate to the implementation or operation of an expedited removal order. Subsections (ii) and (iii) are similarly irrelevant: they prohibit review only of "a decision by the Attorney General to invoke" § 1225(b)(1) or "the application of such section to individual aliens," respectively, *id.* § 1252(a)(2)(A)(ii)-(iii). Plaintiffs seek review of neither.

Subsection (iv) would seem to be the most likely to apply here. It states that, "except as provided in [§ 1252(e)]," no court shall have jurisdiction to review "procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title." *Id.* § 1252(a)(2)(A)(iv). As explained at length above, the Lesson Plan is precisely the kind of writing to which this provision refers, and this action comes within the exception "provided in" § 1252(e) (specifically, § 1252(e)(3)). Defendants strenuously disagree that the Lesson Plan falls within § 1252(e)(3), contending that it is neither a policy or procedure nor an implementation of the expedited removal statute. Defs.' Br. at 19-22. If Defendants are correct on those arguments, that would mean that § 1252(e)(3) does not provide this Court jurisdiction; however, it would *also* mean that § 1252(a)(2)(A)(iv) would not apply in the first place to strip this Court of the subject matter jurisdiction it has under 28 U.S.C. § 1331. *See O.A.*, 2019 WL 3536334, at *9-17. It would make no sense to conclude that the Lesson Plan is not a policy or procedure implementing the expedited removal statute for purposes of § 1252(e)(3)'s *grant* of jurisdiction, while also

concluding that it is such a policy or procedure for purposes of § 1252(a)(2)(A)(iv)'s *stripping* of general federal question jurisdiction. Thus, one way or another, this Court has jurisdiction.

B. Plaintiffs have standing

Plaintiffs have the personal stake necessary to establish standing. As Defendants do not dispute, all five had their protection claims evaluated under the Lesson Plan, and all were found thereunder not to have a credible fear of persecution or torture. *See* SUF ¶¶ 88-96. Plaintiffs allege that Defendants' evaluation of their protection claims under an unlawful set of standards deprived them of a fair opportunity to seek asylum and escape persecution, which is an injury-in-fact fairly traceable to Defendants' actions.[12] *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). There is no question, moreover, that the Court can provide relief to Plaintiffs, including by invalidating the unlawful Lesson Plan and permitting Plaintiffs another opportunity to pass the credible fear screening without its application. *See id.* at 561-62; *see also Gutierrez*, 532 F.3d at 925 (standing exists where "an order from the district court could redress [plaintiff's] injury, at least in part"); *Grace*, 344 F. Supp. 3d at 141-44.

Defendants make three arguments to the contrary, but each fails. First, Defendants argue that Plaintiffs Maria Kiakombua and Emma (and only they) fail to show injury-in-fact because USCIS reversed Ms. Kiakombua's negative credible fear determination two days after she filed suit, *see* Am. Compl. ¶¶ 14-19, and an IJ entered an order vacating Emma's negative credible fear determination some ten days after she was amended into the case, *see* Ex. A to Defs.' Br. There are several problems with Defendants' argument. For one, standing is measured as of the time of filing, *see Grupo Dataflux v. Atlas Glob. Grp. L.P.*, 541 U.S. 567, 570-71 (2004), and Defendants

[12] "'[I]n reviewing the standing question, the court must . . . assume that on the merits the plaintiffs would be successful in their claims.'" *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 924 (D.C. Cir. 2008) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003); *see also Grace*, 344 F. Supp 3d at 119-20.

have made no effort to carry their "heavy" burden, as the party asserting mootness, to show both that "there is no reasonable expectation . . . that the alleged violation will recur," *and* that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Am. Bar Ass'n v. FTC*, 636 F.3d 641, 648 (D.C. Cir. 2011) (alteration in original, internal quotation marks omitted). For another, although Defendants assert as much, Defs.' Br. at 14 & 16, there is no evidence in the record that Ms. Kiakombua or Emma *are* in full removal proceedings, which do not commence until a proper Notice to Appear is filed with the immigration court. *See* 8 C.F.R. § 1239.1(a); *O.A.*, 2019 WL 3536334, at *18 n.11. Even if they have been or are put in formal removal proceedings, moreover, they could still be returned to the expedited removal process, which prevents post-filing transfer to full removal proceedings from mooting their claims under the voluntary cessation doctrine. *See Hardaway v. D.C. Hous. Auth*., 843 F.3d 973, 979-80 (D.C. Cir. 2016); *see also O.A.*, 2019 WL 3536334, at *19 (rejecting government's argument that it can avoid judicial review under § 1252(e)(3) simply by "mov[ing] a plaintiff from expedited to full removal proceedings"); *id.* at *22-23 (preliminary injunction of challenged action in different case did not moot claims, where injunction is on appeal and plaintiffs could be returned to expedited removal proceedings). Regardless, the Court need not reach this issue, because Defendants do not dispute that Plaintiffs Ana, Julia, and Sofia suffered injuries in fact, and one plaintiff with standing makes the dispute justiciable. *J.D. v. Azar*, 925 F.3d 1291, 1323-24 (D.C. Cir. 2019).

Although Defendants do not contest that the Lesson Plan was applied to Plaintiffs, they next argue against traceability, faulting Plaintiffs for not identifying the specific part(s) of the unlawful Lesson Plan that caused their negative credible fear determinations. *See* Defs.' Br. at 15; *see also id.* at 1-2 (twice suggesting that Plaintiffs need to prove that the Lesson Plan was the "sole reason" for their negative credible fear determinations). Defendants misapprehend the conduct

challenged in this case and the nature of Plaintiffs' injuries. Plaintiffs challenge the Lesson Plan as denying them a fair opportunity to have their protection claims considered through a process that is substantively and procedurally consistent with the law. *See* 8 U.S.C. § 1252(e)(3)(A)(ii); Am. Compl. ¶¶ 89-108; *see also* 8 U.S.C. § 1158(a)(1) (stating that "[i]n general," noncitizens in or arriving to the United States may apply for asylum, either thereunder "or, where applicable," through the credible fear statute). Assuming that Plaintiffs will prove that the Lesson Plan is unlawful—which must be assumed in assessing standing, *see supra* n.12, and which in any case is demonstrated in § II, *infra*—then the Lesson Plan denied Plaintiffs that opportunity, which is a particularized injury-in-fact conferring standing. *See Ramirez v. U.S. Immig. & Customs Enforcement*, 338 F. Supp. 3d 1, 24 (D.D.C. 2018) ("Plaintiffs' asserted injury—in essence, that they have suffered due to the loss of the opportunity to be considered for a type of benefit or relief for which Congress made them eligible—is the type of injury that courts in this jurisdiction have recognized as cognizable for purposes of standing." (collecting cases)). From there, "the normal standards" for traceability and redressability are "relaxed." *Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014) (citing *Lujan*, 504 U.S. at 572 n.7). Where, as here, there is a causal relationship between the challenged agency action (the Lesson Plan) and the alleged injuries (the loss of the opportunity to have their asylum claims considered under the lawful standards), traceability is "assume[d]." *Id.* at 218 (citation omitted); *see also Lujan*, 504 U.S. at 572 n.7 ("There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."); *Ramirez*, 338 F. Supp. 3d at 30 (causation requirement satisfied where agency conduct "inarguably linked" to injuries).

For these reasons, there is no requirement, as Defendants contend, that Plaintiffs trace their

injuries to a particular part of the Lesson Plan or its revision. Nor do Plaintiffs have to prove that they would have received positive credible fear determinations but for the unlawful Lesson Plan.[13] *See, e.g.*, *Mendoza*, 754 F.3d at 218 ("Plaintiffs need not demonstrate that but for the procedural violation the agency action would have been different."); *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002) ("A plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result."); *Ramirez*, 338 F. Supp. 3d at 30 (same).

Finally, Defendants argue against redressability, contending that this Court cannot provide relief to Plaintiffs because, per Defendants, the check-box IJ review of the negative credible determinations means the immigration judges were an "independent[]" cause of Plaintiffs injuries, "h[o]ld[ing] in place" the "status quo," that cannot be "undo[ne]" by a favorable decision by this Court. Defs.' Br. at 15-17 (citations and quotation marks omitted). Defendants fundamentally misapprehend the nature of IJ review, and their arguments based therein are simply irrelevant, as demonstrated by the fact that, if Plaintiffs obtain the relief sought, *see* Am. Compl. at 25-26 ¶¶ 3, 7, their expedited removal orders will be vacated and they will get another opportunity to receive a positive credible fear determination from an asylum officer under the correct legal standards. *See Grace*, 344 F. Supp. 3d at 146 (granting this relief). Positive credible fear determinations are not reviewed by IJs. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(III). Defendants' argument that the Court

[13] In arguing to the contrary, *see* Defs.' Br. at 15, Defendants rely on *Renal Physicians Association v. U.S. Department of Health & Human Services*, 489 F.3d 1267, 1279 (D.C. Cir. 2007), but it supports Plaintiffs. There, the court endorsed the principle that "the plaintiff in a procedural-injury case is relieved of having to show that proper procedures would have caused the agency to take a different substantive action," but rejected standing on redressability grounds because "the independent choice" of third parties "will hold in place the alleged effect" of the challenged action "even if a court were to invalidate [it]." *Id.* at 1278-79. Here, by contrast, nothing would hold in place injuries to Plaintiffs were the Court to issue the requested relief, as discussed *infra*.

cannot provide relief is meritless. *See also Ramirez*, 338 F. Supp. 3d at 30-31 ("Plaintiffs' cognizable interest in the *opportunity* to be considered for placement in the least restrictive setting available would be redressed by an order requiring DHS to consider them for such placements.").

C. The Lesson Plan is reviewable under the APA

The last two of the government's reviewability arguments—that the Lesson Plan is unreviewable because of sovereign immunity or because it is not "final agency action," Defs.' Br. at 24-30—are red herrings.

Defendants contend that the Lesson Plan does not fall within the APA's waiver of sovereign immunity because it is not a "rule" within the meaning of 5 U.S.C. § 551(4) and therefore is not "agency action" within the meaning of § 551(13). *See* Defs.' Br. at 25-29. Defendants are wrong that the Lesson Plan is not a "rule" or "agency action"—their arguments are based on the assertion that the Lesson Plan "simply restates incontrovertible facts and law," *id.* at 27, which is both incorrect and a merits question—but that does not matter, because Defendants' premise is mistaken. The Lesson Plan does not have to be a "rule" or "agency action" for the APA's waiver of sovereign immunity, 5 U.S.C. § 702, to apply; it waives sovereign immunity so long as the lawsuit challenges agency action and seeks non-monetary relief. *See Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 620 (D.C. Cir. 2017) ("We have 'repeatedly' and 'expressly' held in the broadest terms that 'the APA's waiver of sovereign immunity applies to any suit whether under the APA or not.'") (citation omitted); *Calixto v. U.S. Dep't of the Army*, No. 18-1551 (ESH), 2019 WL 2139755, at *3 n.3 (D.D.C. May 16, 2019) ("The D.C. Circuit has rejected the idea that an 'agency action' within the meaning of § 551(13) is required to invoke § 702's waiver of sovereign immunity."). Section 702's waiver also applies regardless of whether the Lesson Plan is "final agency action." *See Trudeau v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006); *contra* Defs.' Br. at 30.

Defendants are likewise wrong that the Lesson Plan is unreviewable due to "the APA's

requirement that agency action must be 'final' to be eligible for judicial review." Defs.' Br. at 29 (quoting 5 U.S.C. § 704). Defendants misstate the law. Section 704 reflects that *two* kinds of agency action are "subject to judicial review": "final agency action" *and* "[a]gency action made reviewable by statute." 5 U.S.C. § 704. The latter need not be "final." *See Lujan*, 497 U.S. at 882 (explaining that "the 'agency action' in question must be 'final agency action'" unless "review is sought . . . pursuant to specific authorization in the substantive statute"); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1278 (D.C. Cir. 2005) ("final agency action" review available under § 704 if "no more specific statute provides for judicial review"). The Lesson Plan is "made reviewable by statute"—8 U.S.C. § 1252(e)(3)—and as held in *Grace*, "[t]here is no suggestion that Congress limited the application of section 1252(e)(3) to only claims involving legislative rules or final agency action."[14] 344 F. Supp. 3d at 118.

Regardless, the Lesson Plan *is* "final agency action." First, there is no question that it "mark[s] the 'consummation' of the agency's decisionmaking process," *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation omitted), as there is nothing tentative or interlocutory about the Lesson Plan. It was issued by and in the name of the agency itself, and it "unequivocally states" the agency's view of what the law requires of asylum applicants and asylum officers in the credible fear process, satisfying *Bennett*'s first prong. *Calif. Toxics*, 2019 WL 3917540, at *5 (holding that a memorandum issued by an EPA official with "authority to speak for the EPA" that reversed and superseded a prior memorandum on the same topic "can only reasonably be described" as meeting *Bennett*'s first prong, where it "unequivocally stated" the EPA's position on a question of legal interpretation). In opposition to this conclusion, Defendants observe that the Lesson Plan "has been amended several times and is subject to future amendments," Defs.' Br. at 30, but that "is a

[14] The government did not appeal this holding. Appellant Brief, *Grace v. Barr*, No. 19-5013 (D.C. Cir. June 3, 2019).

common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1814 (2016). Defendants' other argument—that the "underlying materials cited in the Lesson Plan, not the Lesson Plan itself, will be the basis for future screening determinations," Defs.' Br. at 30—(a) goes to the second prong of *Bennett*, not the first; (b) is question begging, as it depends entirely on the conclusion that the Lesson Plan merely reproduces what the law requires; and (c) proves far too much, as the same can be true virtually any time an agency takes a position on what a law means—the law being interpreted will always be the asserted *basis* for subsequent agency actions, but that has nothing to do with whether the agency has concluded its decision-making process.

Bennett's second prong is satisfied as well, 520 U.S. at 178, because "legal consequences will flow" from the Lesson Plan—based on it, asylum seekers will either be found to have a credible fear of persecution (entitling them to a full opportunity to apply for asylum in formal removal proceedings) or not (leading to summary deportation, with no opportunity for judicial review, and subject to a five-year inadmissibility bar). *See* SUF ¶¶ 14-22. As the D.C. Circuit recently emphasized, "courts are to make *Bennett* prong-two determinations based on the concrete consequences an agency action has or does not have as a result of specific statutes and regulations that govern it." *Calif. Toxics*, 2019 WL 3917540, *6. "[W]hen viewed in its specific regulatory context," *id.* at *7, the Lesson Plan has significant and concrete consequences: due to the various statutory bars to judicial review of many issues related to the expedited removal process, asylum seekers will be deported without judicial review[15] based on the unlawful directives in the Lesson

[15] Defendants' reliance on *AT&T v. EEOC*, 270 F.3d 973, 976 (D.C. Cir. 2001), is thus inapposite, and for the reason stated in their parenthetical quotation, Defs.' Br. at 30—there, the agency stated its view of the law, but its view "ha[d] force only to the extent the agency c[ould] persuade a court to the same conclusion" in a subsequent enforcement action, during which the respondent could contest the agency's legal conclusions. 270 F.3d at 976. The same is not true here: Defendants do not have to persuade any court that their view of the law expressed in the Lesson Plan is correct before they can enforce it, as starkly evidenced by their deportation of Plaintiffs Julia and Sofia on its basis.

Plan—indeed, Plaintiffs Sofia and Julia already have been. This is more than enough to meet *Bennett*'s second prong. *See id.* at *6 (unavailability of judicial review of future applications of the challenged agency action a significant factor in analysis); *O.A.*, 2019 WL 3536334, at *13 (interim final rule making certain noncitizens ineligible for asylum was final agency action).

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT

On the merits, the Court can set aside the Lesson Plan on numerous independent grounds, including that: (a) it is not consistent with the governing statutes and regulations; (b) regardless of whether it is consistent with the law, it was revised in an arbitrary and capricious manner; (c) it was required to, but did not, go through notice and comment rulemaking, again regardless of whether the agency could reach the same conclusions had it gone through the required procedures; and (d) it is not consistent with due process.

Defendants' contention that Plaintiffs failed to carry their burden at *summary judgment* because their *complaint* does not provide the detail Defendants wanted is meritless on its face. *See* Defs.' Br. at 36-37. The Amended Complaint more than satisfies the relevant pleading standard, which "does not require 'detailed factual allegations,'" but merely "sufficient factual matter" to state plausible claims. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (citation omitted); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 563 (2007) ("[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint").[16] Defendants, moreover, will have ample opportunity to respond to Plaintiffs' summary judgment arguments in their opposition brief, as this Court noted. *See* Tr. of July 9, 2019 Conf., ECF No. 25 at 14-15.

A. <u>The Lesson Plan is inconsistent with the INA, the Refugee Act, the CAT, and their</u>

[16] Had Defendants wanted more particulars, the proper vehicle would have been a motion for a more definite statement under Rule 12(e), which they did not file and which would have been baseless anyway. Moreover, Defendants expressly disclaimed any intent to make Rule 12 arguments. *See* Tr. of July 9, 2019 Conf., ECF No. 25 at 13.

implementing regulations

Section 1252(e)(3) authorizes the Court to determine whether the Lesson Plan is "consistent with" the immigration statutes or "otherwise in violation of law." Contrary to Defendants' assertion, there is no basis here for the Court to defer to the agency's explanation for what the Lesson Plan means, Defs.' Br. at 39, because the agency has not provided an explanation at all, much less a reasonable one. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2417-18 (2019) ("[A] court should decline to defer to a merely convenient litigating position or *post hoc* rationalization advanced to defend past agency action against attack" (alteration and citations omitted)). Moreover, far from a "mere[] restate[ment]" of the law as Defendants seek to portray, Defs.' Br. at 30, the Lesson Plan is inconsistent with and otherwise in violation of the INA, the Refugee Act, the CAT, and their implementing regulations in numerous respects.

1. The Lesson Plan requires consideration of discretionary factors. The Lesson Plan is inconsistent with the credible fear standard and asylum statute and regulations because it directs asylum officers to consider and to make negative credible fear determinations based on discretionary factors when there is a significant possibility that the asylum seeker could establish eligibility based on past persecution alone. *See* AR 18 & n.4; 35; 15; 19, 24. Credible fear determinations are assessments of whether there is a "significant possibility" that the asylum seeker "could establish *eligibility* for asylum," 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added)—not of whether an eligible asylum seeker will ultimately benefit from a favorable exercise of discretion. Past persecution alone renders a person a "refugee" under the statutory definition, 8 U.S.C. § 1101(a)(42)(A) ("because of persecution *or* a well-founded fear of persecution" (emphasis added)), and thus eligible for asylum, *see id.* § 1158(b)(1)(A) (person eligible for asylum if a "refugee"); *accord Gutierrez-Rogue v. I.N.S.*, 954 F.2d 769, 771-72 (D.C. Cir. 1992) (same). Thus, once it is determined that there is a significant possibility that the asylum seeker

could establish asylum eligibility based on past persecution, the credible fear standard is met and the inquiry should end.

Defendants concede that asylum officers are prohibited from considering whether an asylum seeker might benefit from a favorable exercise of discretion when making a credible fear determination. *See* Defs.' Br. at 41; *Grace*, 344 F. Supp. 3d at 134 (noting government's acknowledgment that "requiring asylum officers to consider the exercise of discretion at the credible fear stage 'would be inconsistent with section 1225(b)(1)(B)(v)'"). The Lesson Plan nonetheless requires asylum officers to undertake the discretionary analysis that is only appropriate at the merits stage: whether a person who is a refugee based on past persecution does not deserve a favorable exercise of discretion because they lack a well-founded fear of future persecution, or whether they do in any event based on "humanitarian" grounds. *See* AR 18 & n.4 (instructing that a "negative credible fear determination is appropriate" if asylum seeker does not make a sufficient showing of entitlement to discretionary approval based on factors set out in 8 C.F.R. § 208.13(b)(1)); *id.* at 35 (same); *id.* at 15 (asserting, without qualification for past persecution cases, that "[i]f . . . internal relocation is reasonable, the applicant does not have a credible fear of persecution"); *id.* at 19, 24 (requiring asylum officer to consider internal relocation even in past persecution cases); *see also* 8 C.F.R. § 208.13 (b)(1)(i), (iii) (noting that analysis pertains to "exercise of . . . discretion"); *Matter of Chen*, 20 I&N Dec. 16, 18-19 (BIA 1989) (noting that "asylum may be denied as a matter of discretion if there is little likelihood of present persecution," unless "the favorable exercise of discretion is warranted for humanitarian reasons").

That the Lesson Plan also happens to cite statutes and a case that demonstrate the error of the Lesson Plan's own explicit and contrary instructions does not cure it of this defect. *Contra* Defs.' Br. at 41. Like jury instructions, which Defendants contend are analogous, *see id.* at 38-39,

to warrant deference the "instructions" in the Lesson Plan must be "legally correct," *Miller v. Poretsky*, 595 F.2d 780, 788 (D.C. Cir. 1978), and they must be consistent with the law to withstand scrutiny under § 1252(e)(3). Here and throughout the Lesson Plan, citation to applicable law does not make incorrect instructions correct; if anything, it makes them incoherent.

2. Even were those discretionary factors relevant (and they are not), the Lesson Plan misstates the law. Illustrating the impropriety of undertaking such a complex analysis at the credible fear stage, the Lesson Plan also wrongly instructs asylum officers as to what the discretionary analysis related to "humanitarian" grounds for asylum properly entails.

As explained in 8 C.F.R. § 208.13(b)(1), past persecution not only renders an asylum seeker a refugee eligible for asylum, but also creates a presumption that the asylum seeker has a well-founded fear of future persecution and is eligible for asylum on that basis as well. The government must rebut the presumption of well-founded fear in order to demonstrate that a favorable exercise of discretion may not be warranted, by showing, by a preponderance of the evidence, either that (i) the circumstances relating to the past persecution have fundamentally changed, or (ii) the asylum seeker could avoid future persecution by relocating within the country of origin *and* that such relocation would be reasonable. *See* 8 C.F.R. § 208.13(b)(1)(i), (ii). If the government carries its burden, the asylum seeker may show that a grant of protection through asylum is still warranted by pointing to the severity of the past persecution or other serious harm they might suffer on return. *See id.* § 208.13(b)(1)(iii).

The Lesson Plan errs on several fronts. It ignores entirely the government's burden. *See* AR 19 (requiring asylum seeker to "demonstrate[] past persecution based on continuing country conditions"); *see also* AR 18, 35 (requiring showing of "continu[ing]" country conditions and inability to relocate, when, in fact, the question is whether the government has established the

opposite). It places a burden on the asylum seeker to present evidence of a humanitarian basis for asylum even when the presumption of a well-founded fear has not been rebutted—and even when it has been reinforced. *See* AR 18, 35 (explaining that a negative credible fear determination is appropriate unless the asylum seeker makes such a showing, even when dangerous circumstances continue and internal relocation would not be possible or reasonable). And it overlooks that, in past persecution cases in which the presumption is rebutted, asylum may nonetheless be warranted on a humanitarian basis. *See* AR 15 ("[i]f . . . internal relocation is reasonable, the applicant does not have a credible fear of persecution").

3. The Lesson Plan unlawfully raises the noncitizen's burden of proof. The Lesson Plan sets out the asylum seeker's burden in a manner that is inconsistent with the credible fear statute and regulations. Citing *Holmes v. Amerex Rent-a-Car*, 180 F.3d 294, 297 (D.C. Cir. 1999), the Lesson Plan claims that the credible fear standard "requires the applicant to identify more than 'significant evidence' that the applicant is a refugee entitled to asylum, withholding of removal, or deferral of removal." AR 12 (which also incorrectly suggests that a person must meet the refugee definition to be eligible for deferral of removal under CAT); *see also id.* at 18. This is wrong.

First, here and elsewhere, *see* § II.A.4, *infra*, the Lesson Plan wrongly construes the credible fear standard as requiring analysis of whether the asylum seeker "*is* a refugee." AR 12 (emphasis added). The proper inquiry is whether the asylum seeker "*could establish* eligibility for asylum" as a refugee in a full hearing. 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added).

Second, the Lesson Plan wrongly construes the credible fear standard to require an asylum seeker to clear an unduly high evidentiary hurdle—requiring them "to identify more than 'significant evidence' that the applicant is a refugee entitled to asylum, withholding of removal, or deferral of removal," AR 12 (citing *Holmes v. Amerex Rent-A-Car*, 180 F.3d 294, 297 (D.C. Cir.

1999))—when, under the statute, an asylum seeker may be determined to have a credible fear based only on "statements" and "other facts" known to the officer. 8 U.S.C. § 1225(b)(1)(B)(v); *see also* Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,320 (Mar. 6, 1997) ("credible fear standard sets a low threshold of proof of potential entitlement to asylum").

Defendants' suggestion that the Lesson Plan is "accurate" in its construction of the credible fear statute because it "tracks" language from *Holmes*, Defs.' Br. at 40, is absurd. In *Holmes*, the D.C. Circuit discussed the standard under District of Columbia law for determining when a defendant's spoliation of evidence proximately caused harm to a plaintiff pursuing a claim against a third party. *See* 180 F.3d at 295-96. *Holmes* quoted the D.C. Court of Appeals' holding that an element of this proximate cause standard—a showing in light of "both existing and spoliated evidence" that there "had been a significant possibility of success in the underlying claim against the third party"—"implies a showing higher than the already recognized standard of 'significant evidence.'" *Id.* at 296-97 (quoting *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 847, 852 (D.C. 1998)). The Lesson Plan plucks its language regarding "significant possibility" and uses it to the interpret the credible fear standard. AR 12, 18. But statutory interpretation is about congressional intent, and there is no reason to believe Congress intended to define the "credible fear of persecution" probability standard with reference to how the District of Columbia defines an evidentiary standard applicable to its common law tort for the spoliation of evidence. *Cf. Calif. Toxics*, 2019 WL 3917540, at *2 (explaining why "it is a mistake to assume" that even "facially similar" agency actions "can lend each other definition through comparison").

4. The Lesson Plan improperly requires the asylum seeker to provide evidence going to every element of an asylum claim. The Lesson Plan is also inconsistent with the statutory credible fear standard because it requires the asylum seeker to present evidence going to every

element of an asylum claim to receive a positive credible fear determination.[17] Under the credible fear statute, however, what is at issue is something different: whether the asylum seeker "*could establish eligibility*" for relief in a full immigration hearing. 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added). Credible fear interviews "are not designed to elicit all the details of an [asylum seeker's] claim," and the governing "significant possibility" of establishing eligibility standard reflects that reality. *Zhang v. Holder*, 585 F.3d 715, 724 (2d Cir. 2009); *see also Grace*, 344 F. Supp. 3d at 107 ("Congress intended the credible fear determinations to be governed by a low screening standard."); AR 221 (Form I-870) ("There may be areas of the individual's claim that were not explored or documented for purposes of this threshold screening"); *cf.* 8 C.F.R. § 208.30(e)(4) ("novel or unique issues . . . merit consideration in a full hearing before an [IJ]").

The distinction between establishing, by a significant possibility, each element of the asylum claim, on the one hand, and that one "could establish eligibility for asylum" (as the statute provides), on the other, is critical: there are myriad respects in which credible fear screenings differ from removal proceedings in immigration court—*e.g.*, lack of counsel, mandatory detention, scant time or opportunity to gather or present supporting evidence such as witness statements and expert reports, close proximity to trauma, *see supra*—that might lead an asylum officer properly to conclude that there is a significant possibility that the asylum seeker "could establish eligibility" for asylum at a hearing in the future even if unable to present evidence going to a particular element

[17] *See* AR 10 ("the applicant must produce sufficiently convincing evidence that establishes the facts of the case, and . . . those facts must satisfy every element of the relevant legal standard" (citing discussion in *Matter of A-B-*, 27 I&N Dec. 316, 340 (AG 2018), regarding burden in full removal proceedings)); *id.* (testimony sufficient only if it "refers to specific facts sufficient to demonstrate that the applicant is a refugee"); *id.* 18, 35 (requiring showing of "significant possibility of future persecution"); *id.* 18 & n.4, 19, 23, 35 (same for past persecution); *id.* at 21 (asylum seeker must establish that there is "a significant possibility that the persecutor was or will be motivated to harm him or her on account of" a protected characteristic and "a significant possibility that at least one reason motivating the persecutor is the applicant's possession or perceived possession of a protected characteristic"); *id.* at 24 (asylum seeker must establish that there is "a significant possibility that the applicant cannot reasonably internally relocate within his or her country"); *id.* at 19 ("If the applicant is not able to establish all of the elements, the applicant must receive a negative credible fear determination.").

of eligibility—such as the motivation of their persecutor, *see* AR 21—in the present. In misstating what must be proven, the Lesson Plan instructs asylum officers to disregard these considerations, and thus make negative determinations when positive determinations would be warranted by statute. *See* AR 14 ("An applicant may claim that his or her ability to identify [specific facts supporting the main points of the claim] is impacted by the context and nature of the credible fear screenings, but the INA requires the applicant to identify such facts in order to satisfy his or her burden of proof."); *see also Grace*, 344 F. Supp. 3d at 135 (holding that a policy memorandum "requir[ing] an alien—at the credible fear stage—to present facts that clearly identify the alien's proposed particular social group" is "contrary to the INA").

5. The Lesson Plan imports an inapplicable corroboration requirement. The Lesson Plan improperly imports a corroboration requirement from asylum adjudications on the merits, *see* 8 U.S.C. § 1158(b)(1)(B)(ii), directing asylum officers that the asylum seeker "*must* provide" evidence that corroborates even credible testimony when an asylum officer demands. AR 11; *see also* Ex. A (Redline), at 15 (discussion of difficulties of corroboration "in the credible fear context of expedited removal and detention" deleted). This corroboration requirement, enacted through the REAL ID Act of 2005, Pub. L. No. 109-13, § 101(a)(3), 119 Stat. at 303, does not apply at the credible fear stage. This much is evident from the statutory text itself, which refers to an "applicant's burden" of proving that the applicant "*is* a refugee," § 1158(b)(1)(B)(i), (ii) (emphasis added)—when the statutory credible fear definition requires only a "significant *possibility*" that the individual "*could establish*" that they are a refugee, 8 U.S.C. § 1225(b)(1)(B)(v) (emphases added). Confirming that conclusion is the requirement's placement within § 1158, which governs merits determinations, and not § 1225, which governs expedited removal, *see id*. § 1158(a)(1) (contrasting applications made "in accordance with this section" with those under § 1225(b)).

Importing this corroboration requirement to the credible fear stage is not only inconsistent with the credible fear standard but also contravenes the agency's own regulations, under which the credible fear interviewee is permitted, but not required, to "present other evidence, if available." 8 C.F.R. § 208.30(d)(4).

6. The Lesson Plan directs asylum officers to apply an erroneous standard regarding persecution by non-governmental actors. Under a longstanding construction of the meaning of "persecution," when an asylum seeker flees violence perpetrated by a non-governmental actor, they must demonstrate that the government of their home country is "unable or unwilling to control" the persecutor. *See Matter of Acosta*, 19 I&N Dec. 211, 222 (B.I.A. 1985), *overruled on other grounds* by *Matter of Mogharrabi*, 19 I&N Dec. 439 (B.I.A. 1987). Last year, Defendants sought to raise the "unable or unwilling to control" standard by defining it to require a showing at the credible fear stage that the government either "condoned the private actions or at least demonstrated a complete helplessness to protect the victim." *Grace*, 344 F. Supp. 3d at 127 (citation omitted). Judge Sullivan enjoined Defendants' effort, holding that their formulation was "not a permissible construction," since the "unable or unwilling" standard may be satisfied even when "there [i]s a significant police response to the claimed persecution." *Id.* at 129.

Defendants double down on their attempt to raise the "unable or unwilling" standard in the credible fear context, instructing asylum officers in the Lesson Plan that for this standard to be satisfied, the asylum seeker's home government "must have abdicated its responsibility to control persecution." AR 23. Their formulation is inconsistent with the statute, not least because it conflates the two prongs of the relevant standard—that the government be "unable *or* unwilling to control" the persecutor. *Matter of Acosta*, 19 I&N Dec. at 222 (emphasis added).

7. The Lesson Plan improperly raises the standard for whether a fear of persecution

is "well founded." The Lesson Plan conflicts with *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987), and BIA and Circuit precedent by rejecting the principle that a one-in-ten chance of persecution is sufficient to make fear thereof "well founded." *Compare* AR 19-21 (asserting that that there is no "binding interpretation" establishing "how much fear is 'well-founded'"); *with Matter of E-P-*, 21 I&N Dec. 860, 877 (BIA 1997) ("The quantum of evidence which substantiates a well-founded fear of persecution . . . has been addressed by the Supreme Court as a 10 percent chance of facing persecution in the future."); *Salim v. Lynch*, 831 F.3d 1133, 1140 (9th Cir. 2016) ("[A]sylum may be granted where an applicant demonstrates a one-in-ten chance of future persecution"); *Touch v. Holder*, 568 F.3d 32, 38 (1st Cir. 2009) ("Proof that persecution has a ten percent chance of occurring suffices to make a fear of persecution 'well-founded.'"); *accord O.A.*, 2019 WL 3536334, at *3 n.3; *Grace*, 344 F. Supp. 3d at 127; AR 273.

In addition to mischaracterizing *Cardoza-Fonseca* and its progeny, the Lesson Plan fails in its guidance to account for *Grace*'s ruling that the noncitizen should get the benefit of any disagreement among the circuits on an issue. 344 F. Supp. 3d at 139-40.

8. The Lesson Plan's instructions regarding State Department reports and Border Patrol encounters are inconsistent with the law. The Lesson Plan requires asylum officers to test an asylum seeker's statements against Department of State country reports and to treat the information within those reports (in contrast to information derived from the asylum seeker or other sources) as "objective" fact. *See* AR 23, 24, 28, 30, 36. By regulation, asylum officers "may" consult these reports, among many other sources of information, 8 C.F.R. § 208.12(a), but the Lesson Plan *requires* asylum officers to do so. In addition to contravening the regulation, the Lesson Plan's treatment of these reports is inconsistent with binding precedent, under which it is well established that State Department reports have their own biases and limitations that cannot be

ignored. *See, e.g.*, *Koval v. Gonzales*, 418 F.3d 798, 807 (7th Cir. 2005) ("[C]ountry reports are prepared in general terms and offer more of a statement on the relationship of the [U.S.] Government to that country than an account of individual circumstances"); *He Chun Chen v. Ashcroft*, 376 F.3d 215, 226 (3d Cir. 2004) ("[Country reports are] evidence and sometimes the only evidence available, but the [BIA] should treat [them] with a healthy skepticism, rather than, as is its tendency, as Holy Writ" (citation omitted)); *Chen v. INS.*, 359 F.3d 121, 130 (2d Cir. 2004) ("We note the widely held view that the State Department's reports are sometimes skewed toward the governing administration's foreign-policy goals and concerns.").

The Lesson Plan similarly requires asylum officers to judge the noncitizen's statements against records of encounters with Border Patrol in assessing credibility, *see* AR 16, without regard to the circuit precedent establishing that those records "are not always reliable indicators of credibility," *Moab v. Gonzales*, 500 F.3d 656, 660-61 (7th Cir. 2007) (citation omitted).

9. The Lesson Plan authorizes asylum officers to make negative credible fear determinations without giving the noncitizen an opportunity to address credibility concerns. Under prior guidance, asylum officers were required to provide an applicant the opportunity to address any credibility concerns prior to making a negative credible fear determination on that basis. *See, e.g.*, AR 222 (officer notes "must reflect that the applicant was asked to explain inconsistencies or lack of detail on material issues and that the applicant was given every opportunity to establish a credible fear"). This guidance was consistent with the regulatory requirement that the asylum officer "elicit *all* relevant and useful information," 8 C.F.R. § 208.30(d) (emphasis added), as well as circuit precedent, *see, e.g.*, *Li v. Mukasey*, 529 F.3d 141, 148 (2d Cir. 2008) (noting requirement "to solicit more detail from the alien" prior to making an adverse credibility determination). The Lesson Plan alters this guidance, changing the instruction

from one in which asylum officers "must" give the noncitizen an opportunity to explain, to one in which they merely "should." AR at 15, 17; *see* Ex. A (Redline), at 25, 26-27, 31. The Lesson Plan thus permits asylum officers to make negative credible fear determinations without providing the asylum seeker an opportunity to address credibility concerns, *id.* at 31 (showing removal of guidance that "[u]nresolved credibility issues should not form the basis of a negative credibility determination"), which is inconsistent with controlling law.

B. The agency revised the Lesson Plan in an arbitrary and capricious manner

The Lesson Plan also violates the APA. Under the APA, a reviewing court must set aside agency action that is "arbitrary [or] capricious." *Judulang v. Holder*, 565 U.S. 42, 52 (2011) (alteration in original) (quoting 5 U.S.C. § 706(2)(A)). Defendants' issuance of the Lesson Plan suffers from several procedural defects that provide independent and adequate bases for setting it aside, without regard to whether the Lesson Plan permissibly interprets the governing statutes and regulations. Defendants' unsupported contention that the Lesson Plan cannot be arbitrary and capricious because it is "fully consistent with" governing statutes and regulations, Defs.' Br. at 43, is incorrect both as a factual matter, *see* § II.A *supra*, and as a legal one: whether an agency engaged in reasoned decisionmaking is entirely distinct from whether the substantive result of its process is lawful. *See, e.g.*, *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."); *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019) (declining to hold agency decision substantively invalid, but vacating as arbitrary and capricious because "agencies must pursue their goals reasonably").

Through the APA, Congress has mandated that when Executive agencies exercise their considerable authority, they do so on an informed basis, that they ground their justifications on neutral and rational principles, *see State Farm*, 463 U.S. at 43, and that they "offer genuine

justifications for important decisions." *Dep't of Commerce*, 139 S. Ct. at 2575-76. Although relatively "narrow," in that it does not permit a court "to substitute its judgment for that of the agency," *Judalang*, 565 U.S. at 52-53 (citation omitted), arbitrary and capricious review of whether an agency's action reflects reasoned decision-making "is to be searching and careful." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *see Judulang*, 565 U.S. at 53 ("[C]ourts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking."). To facilitate judicial review, it is an "elementary precept[] of administrative law" that "an agency has no choice but to provide a reasoned explanation for its actions." *Policy & Research, LLC v. U.S. Dep't of Health & Human Servs.*, 313 F. Supp. 3d 62, 83 (D.D.C. 2018); *see Dep't of Commerce* 139 S. Ct. at 2576-76 ("agencies must provide reasons that can be scrutinized by courts and the interested public"). The task of the reviewing court is to examine the proffered reasons—"or, as the case may be, the absence of such reasons." *Judulang*, 565 U.S. at 53. A court may not "attempt itself to make up for [any] deficiencies" in an agency's reasons, *State Farm*, 463 U.S. at 43, but "must judge the propriety of [agency] action solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Here, Defendants' issuance of the Lesson Plan was arbitrary and capricious in at least four respects, each of which independently warrants setting it aside in its entirety.

First, Defendants have failed to provide any reasons at all for their revisions to the Lesson Plan. This fact alone makes Defendants' actions arbitrary and capricious under controlling precedent. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("[W]here the agency has failed to provide even a minimal level of analysis" on its decision, "its action is arbitrary and capricious."); *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) ("[A] 'fundamental requirement of administrative law is that an agency set forth its reasons for

decision; an agency's failure to do so constitutes arbitrary and capricious agency action.'") (citation omitted); *see also Judulang*, 565 U.S. at 64 ("[Courts] must reverse an agency policy when we cannot discern a reason for it," and doing so on that basis).

Defendants concede that the Lesson Plan "did not expressly provide its justification." Defs.' Br. at 46. They nonetheless contend that the Court should accept litigation counsel's purported justification—"USCIS's continuing commitment to perfecting its training materials"—observing that an "agency may, in litigation following an agency decision, 'provide additional explanation for an inadequately articulated decision.'" *Id.* (quoting *Local 814 v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976)). But Defendants' observation about what the agency could theoretically do once in litigation is irrelevant, because here the agency has provided no explanation whatsoever. The assertion that the Lesson Plan is justified by the agency's alleged "commitment to perfecting its training materials" is just an argument of litigation counsel; it thus cannot be considered, as established by Defendants' own case citation. *See Local 814*, 546 F.2d at 992 (courts are "forbid[den]" from "uphold[ing] agency action on the basis of rationales offered by anyone other than the proper decisionmakers," and neither "litigation affidavits" nor "arguments of counsel" can be considered). Moreover, even if it *could* be considered, the parenthetical sentence fragment regarding USCIS's alleged commitment does not explain the revisions to the Lesson Plan. *See State Farm*, 463 U.S. at 43 (requiring a "satisfactory explanation" including "a rational connection between the facts found and the choice made" (citation omitted)).

Second, the Lesson Plan makes a host of substantive changes to how asylum officers make credible fear determinations, without so much as an acknowledgment from the agency. *See generally* Ex. A (Redline); SUF ¶¶ 47-81. Agencies are of course "free to change their existing policies," but an agency "must at least 'display awareness that it is changing position' and 'show

that there are good reasons for the new policy.'" *Encino Motorcars*, 136 S. Ct. at 2125 (citation omitted); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."). The issues discussed in § II.A, *supra*, constitute significant changes to agency policy, yet none are explained or even acknowledged. The Lesson Plan is replete with still other unacknowledged and unexplained departures from prior policy, as the redline (Ex. A) illustrates. In several places, for example, the Lesson Plan silently retracts previous instructions that would have favored noncitizens in the credible fear process, such as the regulation-based instruction that asylum officers "shall consider whether the applicant's case presents novel or unique issues that merit consideration in a full hearing," AR 53, 83; Ex. A at 20, 66. The Lesson Plan also deletes an instruction—effectuating congressional intent that credible fear interviews serve as a screening mechanism—that aspects of torture claims that require complex legal and factual analyses may be more appropriately considered in a full hearing before an immigration judge." AR 72; Ex. A (Redline), at 53-54. The "unavoidable conclusion" here is that the Lesson Plan "was issued without the reasoned explanation that was required in light of" USCIS's various changes in position; it therefore must be set aside. *Encino Motorcars*, 136 S. Ct at 2126.

Defendants concede that agencies must acknowledge changes and provide good reasons for any new policy, Defs.' Br. at 44-45, but argue, baselessly, that their actions suffice. Defendants first contend that they were "transparent in making . . . changes" by "issu[ing] a completely new document with an 'April 30, 2019' date." *Id*. at 44. They cite no authority to support the proposition that noting the date the document issued constitutes the required acknowledgement for purposes of arbitrary or capricious review, and it plainly is not: A new date stamp provides no indication that Defendants have changed any positions, let alone which positions have changed.

See Fox Television, 556 U.S. at 515 (prohibiting an agency from "depart[ing] from a prior policy *sub silentio*"). As to the requirement that they provide their reasons for changing position, Defendants argue that their counsel's unsubstantiated but "intuitive" explanation—comprised of the unadorned assertion that Defendants "issued the 2019 Lesson Plan after comprehensively surveying the 2017 Lesson Plan," combined with the agency's 2014 description of a separate action—is sufficient. *Id.* at 45-46. It isn't. Defendants "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one," but they do have to convince the Court that "there are good reasons" for the change, *Fox Television*, 556 U.S. at 515; at the very least they must articulate a "rational connection between the facts found and the choice made," *State Farm*, 463 U.S. at 43 (citation omitted). And all of this must come from the agency itself—not its litigation counsel. *See Local 814*, 546 F.2d at 992; *accord Friedler v. GSA*, 271 F. Supp. 3d 40, 52 (D.D.C. 2017). Defendants have provided neither an acknowledgment of their various changes in position nor their "good reasons" for making them.

Third, Defendants failed to "examine the relevant data." *State Farm*, 463 U.S. at 43, 46-49. As demonstrated by the Administrative Record, Defendants made several substantive omissions in the Lesson Plan without even considering what it was that they were removing from previous guidance. *See* SUF ¶¶ 76-78; Ex. A (Redline). For example, Defendants omitted multiple-page guidance present in the 2017 lesson plan, *see* AR 65-67, regarding the test for determining well-founded fear set out in *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987), *see* AR 564 (describing *Mogharrabi* as the "main component of determining whether an applicant's fear is well-founded"), without even considering that case, *see* Certified Index to Administrative Record, ECF 23-1 (case absent from the index). In its place, Defendants inserted an exposition of *Cardoza-Fonseca*, notwithstanding the fact that the BIA issued *Mogharrabi* after *Cardoza-*

Fonseca specifically to address (at length) how well-founded fear should be determined. *See* Ex. A (Redline), at 35-37, 44-46. In context, the agency's decision to replace the extensive and detailed guidance from *Mogharrabi* with its exegesis on the meaning of *Cardoza-Fonseca* appears intended only to confuse; at a minimum, the failure even to consider the agency's own controlling precedent on the same subject was arbitrary and capricious.

Fourth, as is evident from consideration of its totality, the Lesson Plan is simply not a coherent document. In seeking to tip the scale as far as possible away from positive credible fear determinations and toward summary deportation, the current iteration of the Lesson Plan fails to achieve its stated purpose of providing clear and accurate guidance to asylum officers on what the law requires of them and what it requires of asylum seekers. To pick just one (recurring) example, the Lesson Plan repeatedly sets up lengthy contingent instructions that asylum officers "must" either "additionally follow" or "instead follow" "[i]f the order in *Grace* . . . is lifted." AR 13, 16-17, 21-22, 28, 35. Yet the Lesson Plan never explains what counts as the order being "lifted," how officers are to tell, or what they are to do if it is only partially "lifted" (whatever that means). Here and elsewhere, the Lesson Plan appears designed and destined to confuse asylum officers about what law they are to apply, and why. Such arbitrary and self-defeating guidance cannot stand, particularly where, as here, it could have life or death ramifications.

C. <u>The Lesson Plan is an invalid substantive rule</u>

The APA requires agencies to publish "[g]eneral notice of proposed rulemaking" in the Federal Register and to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b), (c). It is uncontested here that Defendants provided neither that notice nor an opportunity to comment on the challenged Lesson Plan. SUF ¶¶ 44-45. Thus, regardless of whether its content is lawful, the Lesson Plan must be set aside for failure to follow that procedure unless there is an applicable exception to

rulemaking in 5 U.S.C. § 553(d). *See* 5 U.S.C. § 706(2)(D). The exceptions to rulemaking are to be narrowly construed. *N.J. Dep't of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

Defendants assert that the Lesson Plan is an exempt interpretive rule. *See* Defs.' Br. at 31. It is not. The D.C. Circuit has explained that the bottom-line question in determining whether a rule is an interpretive one "is whether the new rule effects a substantive regulatory change to the statutory or regulatory regime." *Mendoza*, 754 F.3d at 1021 (citation omitted). Interpretive rules "clarify a statutory or regulatory term, remind parties of existing statutory or regulatory duties, or 'merely track[]' preexisting requirements and explain something the statute or regulation already required." *Id.* (citation omitted, alteration in original). An interpretive rule "must derive a proposition from an existing document whose meaning compels or logically justifies the proposition." *Id.* (citation omitted). On the other hand, a rule is substantive (or "legislative")—and therefore should have gone through notice and comment—"if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy. " *Id.* (citation omitted).

For many of the same reasons already discussed, the Lesson Plan is a substantive rule, and not an interpretive one. Take, for example, the Lesson Plan's requirement that an asylum seeker present at the credible fear stage evidence going to every element of the asylum claim. *See supra* § II.A.4. Even if that is a *permissible* interpretation of the credible fear definition—and for the reasons Plaintiffs explain above, it is not—there would still be no question that neither the statutory nor (essentially identical) regulatory definition of credible fear, *see* 8 U.S.C. § 1225(b)(1)(B)(v); 8 C.F.R. § 208.30(e)(2), "compels or logically justifies" the conclusion that an asylum seeker must provide evidence going to every element of the asylum claim at the credible fear stage. *Mendoza*, 754 F.3d at 1021. Nor can Defendants identify any other "existing document" that serves that

purpose. *Id*. Instead, and at a minimum, the Lesson Plan "supplements" the statutory language when it requires evidence going to every element; that requirement is therefore a legislative rule that should have gone through notice and comment, even were it a permissible interpretation of the statute. *See id.*; *see also EPIC v. DHS*, 653 F.3d 1, 6-7 (D.C. Cir. 2011) (holding that a challenged Transportation and Security Administration decision to screen airline passengers by using "advanced imaging technology" instead of metal detectors was a substantive rule and not an interpretative one because it "substantially change[d] the experience of airline passengers").

Likewise, if Defendants want to define "credible fear of persecution" in such a way that aligns it with the proximate causation standard applicable to the tort of reckless or negligent spoliation of evidence under the common law of the District of Columbia—*i.e.*, to require that asylum seekers show "more than significant evidence" that they are eligible for asylum, *see supra* § II.A.3—then the agency at least needs to go through notice and comment, because doing so supplements the statutory definition. *See Mendoza*, 754 F.3d at 1022; *EPIC*, 653 F.3d at 6-7.

The Lesson Plan's repeated instruction to asylum officers that they "must" consult the State Department country condition reports, *see* § II.A.8 *supra*, effectively amends the regulatory provision on which it is purportedly based, 8 C.F.R. § 208.12(a), which provides merely that asylum officers "may" consult those reports, among other sources of information. It too should have gone through notice and comment, as it "effectively amends" a prior legislative rule. *See Huashan Zhang v. USCIS*, 344 F. Supp. 3d 32, 58 (D.D.C. 2018) (noting "[i]t is well-settled that a policy that adds a requirement not found in the relevant regulation is a substantive rule that is invalid unless promulgated after notice and comment," and collecting cases), *appeal docketed*, No. 19-5021 (D.C. Cir.); *id.* at 59 (discussing significance of mandatory "must" language). The Lesson Plan's treatment of various other issues is also inconsistent with the regulatory scheme and

therefore had to go through notice and comment, including its treatment of past persecution and the discretionary factors related to "humanitarian" asylum, *see supra* § II.A.1-2; its directive that asylum seekers "must provide" corroborating evidence when demanded, AR 11, which directly conflicts with the agency's regulation providing that they "*may* present other evidence, if available," 8 C.F.R. § 208.30(d)(4) (emphasis added), *see* § II.A.5, *supra*; and its instruction that asylum officers are not required to give interviewees the opportunity to explain issues that could give rise to a negative credibility determination, in contravention of the regulatory requirement that they "elicit *all* relevant and useful information," 8 C.F.R. § 208.30(d) (emphasis added). In fact, virtually all of the issues that render the Lesson Plan inconsistent with the statutory and regulatory scheme *also* make it an invalid substantive rule, though there is a significant distinction: under this claim, the Court need not decide whether Defendants' legal interpretations are correct.

Defendants assert that other courts have held other training material to be interpretive rules, *see* Def. Br. at 31-32, 35, but their case citations are inapposite.[18] Defendants' claim that those cases dealt with "predecessors to" and "earlier iterations of" the Lesson Plan at issue here, *id.* at 31 & 35, are unsubstantiated as to one of the cases cited (*Abdirahman*) and false as to the other two.[19] *See supra* n.18. Only one of the cases considered whether the document at issue was an interpretive rule, and its holding was expressly premised on the finding that the document "accord[ed] with the [agency]'s regulations and past practices," *Notaro*, 800 F.2d at 291, which is not the case with the Lesson Plan. Regardless, Plaintiffs do not dispute that training materials *can*

[18] *Lumataw v. Holder*, 582 F.3d 78, 89 n.10 (9th Cir. 2009), stated the truism that an INS training manual on the one-year asylum filing deadline was "not binding" on the court. *Abdirahman v. Ashcroft*, 110 F. App'x 727 (8th Cir. 2004) (unpub.), faulted a petitioner for inaccurately describing an unspecified INS training document. *Notaro v. Luther*, 800 F.2d 290, 291 (2d Cir. 1986) (per curiam), concerned a "training aid" of the Parole Commission.

[19] Defendants' arguments concerning prior litigation on alleged predecessors to the Lesson Plan are in considerable unexplained tension with its opening assertion that "[t]his case is novel" because "it appears to be the first challenge to asylum training materials issued by" DHS, USCIS, "or one of its predecessor agencies, the [INS]." Defs.' Br. at 1.

be interpretive, but whether *this* Lesson Plan is an interpretive rule depends on what it purports to do, not what other documents labeled training materials do and say. *See Calif. Toxics*, 2019 WL 3917540, at *2 ("superficially similar actions" not a basis for defining agency action). And here, as explained above, *this* Lesson Plan is subject to notice and comment because it "supplements" the statutory framework, effectively amends existing regulations, and "otherwise effects a substantive change in existing law or policy," *Mendoza*, 754 F.3d at 1021.

Defendants focus on whether the Lesson Plan is "binding." Defs.' Br. at 31-32. Although merely one way of determining whether a rule is substantive, the Lesson Plan meets that test, too. Throughout, the Lesson Plan gives asylum officers "their 'marching orders'"—"[i]t commands, it requires, it orders, it dictates," *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000), dictating what they "must" do more than twenty times and what they "should" and "may" do countless more. It contains few, if any, "caveats" or "disclaim[ers]." *McCarthy*, 758 F.3d at 252. It is "for all practical purposes 'binding.'" *Appalachian Power*, 208 F.3d at 1021.

D. <u>The Lesson Plan is not consistent with due process</u>

Because the Lesson Plan is unlawful as a statutory matter, Plaintiffs agree with Defendants that this Court need not reach Plaintiffs' due process claim.[20] Nonetheless, Plaintiffs have a due process right to seek asylum, withholding, and CAT protection under the circuit precedent in *Maldonado-Perez v. I.N.S.*, 865 F.2d 328, 332 (D.C. Cir. 1989). That they do reinforces the gravity of this dispute and the importance of preserving judicial review over agency actions like this one that undercut that right. *See Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("[W]hen constitutional questions are in issue, the availability of judicial review is presumed.").

[20] Defendants are wrong, however, that the court in *Damus v. Nielsen*, No. 18-578 (JEB), 2019 WL 1003440 (D.D.C. Feb. 28, 2019), dismissed the due process claim. *See* Defs.' Br. 47. In fact, the *Damus* court denied without prejudice the government's motion to dismiss that claim. *See Damus*, 2019 WL 1003440, at *41. To the extent that this case moves past summary judgment, this Court should also allow Plaintiffs to proceed on the due process claims.

Defendants ignore *Maldonado-Perez*, citing it in passing without explanation, Defs.' Br. at 49. *Maldonado-Perez* involved an asylum petition of a noncitizen inside the United States, but even noncitizens outside of U.S. borders are entitled at minimum to the process Congress mandated. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (stating, with respect to noncitizens at the threshold of initial entry, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned" (citation omitted)). *Maldonado-Perez* identified the INA and the Refugee Act as sources of the due process right to seek asylum, 865 F.2d at 332, and those Acts explicitly allow noncitizens who are "physically present in the United States" or who "arrive in the United States" the right to apply for asylum, including, "where applicable," through expedited removal. 8 U.S.C. § 1158(a)(1).

Instead of confronting *Maldonado-Perez*, Defendants conflate the right to enter the country with the right to the process Congress provided. It is inaccurate to say, as Defendants do, Defs.' Br. at 49, that because noncitizens like Plaintiffs have no constitutional right to be admitted, they have no right to *request* admission. It is likewise inaccurate to say, as Defendants do, *id.*, that because the grant of asylum is discretionary there is no right to *apply* for asylum. *See Maldonado-Perez*, 865 F.2d at 332. This is the same illogic that Defendants advanced and that a court of this district rejected in the very case that Defendants cite for their argument. *See* Defs.' Br. at 49 (citing *Jafarzadeh v. Duke*, 270 F. Supp. 3d 296, 313 (D.D.C. 2017) (holding fact that adjustment of status is discretionary irrelevant to the right to have the application reviewed in accordance with law)).[21]

[21] The court in *Jafarzadeh* granted the government's motion to dismiss because the plaintiff there failed to identify a protected interest in having his adjustment of status applications adjudicated pursuant to particular procedures, *see* 270 F. Supp. 3d at 313, but here, Plaintiffs' identified interest is in being permitted to exercise their congressionally-conveyed right to apply for asylum, and to have their claims considered pursuant to the procedures Congress specified. The other case cited by Defendants for this proposition, *Jean-Louis v. U.S. Att'y Gen.*, 582 F.3d 462, 465-66 n.4 (3d Cir. 2009), is similarly inapposite in that there the court summarily dismissed the due process claim regarding entitlement to another type of discretionary relief without discussing whether there was a protected interest in the procedure for applying for the discretionary relief.

Here, Plaintiffs alleged that they have the constitutionally protected right to apply for asylum under the INA, Am. Compl. ¶¶ 105-06, and they alleged the Lesson Plan violates that right, including by imposing unlawful standards, *see id.* ¶ 107. The complaint thus leaves no room for confusion that Plaintiffs' due process claim relates to the Lesson Plan, which distinguishes it from the case cited by Defendants that failed the basic standard under Rule 8. *See* Defs.' Br. at 48 (citing *Barber v. Dist. of Columbia Gov't*, No. 17-cv-620, 2019 WL 3804285, at *7 (D.D.C. Aug. 13, 2019) (holding that an employment discrimination complaint did not adequately allege whether the due process claim related to the termination process or to reputational injury). As Plaintiffs have amply demonstrated above, moreover, the Lesson Plan does not comport with the governing statutes, and so those authorities do not make it constitutional, *contra* Defs.' Br. at 49.

III. PLAINTIFFS ARE ENTITLED TO PERMANENT RELIEF

Plaintiffs seek an order vacating the Lesson Plan in its entirety, enjoining its use prospectively in credible fear proceedings, and declaring that negative credible fear determinations made thereunder were unlawful. As to Plaintiffs Sofia and Julia (who were deported by the government), Plaintiffs request that the Court order Defendants to parole them back into the United States, to vacate any negative credible fear determinations and removal orders issued to them, and to provide new credible fear proceedings applying the correct legal standards; or, alternatively, to place them in full removal proceedings. All Plaintiffs seek an order that the government not return them to the expedited removal process after they are placed in full removal proceedings.

Defendants contend that if the Court holds the Lesson Plan unlawful, it lacks authority under § 1252(e)(3) "to enjoin or vacate the Lesson Plan or stay removals."[22] Defs.' Br. at 50-51.

[22] Defendants conceded that the proper remedy for an APA violation would be to "hold unlawful and set aside [the] agency action." Opp'n to Mot. to Compel, ECF No. 27 at 5 n.4. Defendants also represented to Judge Sullivan that vacatur of individual plaintiffs' removal orders is an appropriate remedy in a § 1252(e)(3) case. *See* n.10, *supra*.

The *Grace* court already roundly rejected Defendants' interpretation of the statute. *See Grace*, 344 F. Supp. 3d at 141-43. As Judge Sullivan explained, Defendants' position relies on an untenable reading of another paragraph of § 1252(e), which provides in relevant part: "[N]o court may enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with [the expedited removal statute] except as specifically authorized in a subsequent paragraph of . . . subsection [(e)]." In a subsequent paragraph under the heading "[c]hallenges on validity of the system"—the paragraph that gives the Court jurisdiction in this case—§ 1252(e)(3) provides for "[j]udicial review of determinations . . . of whether . . . a written [policy or procedure] . . . is . . . in violation of law." Defendants argue that the interaction of these statutes means Congress limited the Court to the "determination" of whether the written directive is lawful. Defs.' Br. at 51. With no support whatsoever, Defendants define "determination" here as only "a form of 'declaratory' relief." *Id.*

Defendants' argument fails for at least two reason. First, § 1252(e)(1)(A) does not apply to this action at all. As explained above, Plaintiffs' action is a "[c]hallenge[] on [the] validity of the system," 8 U.S.C. § 1252(e)(3), not "an action pertaining to an order to exclude an alien in accordance with section 1225(b)(1)." *Id.* § 1252(e)(1)(A). Section 1252(e)(1)(A) is inapplicable wholesale. *Cf. Grace*, 344 F. Supp. at 143 n.30 (noting but not reaching this argument).

Second, even if a § 1252(e)(3) challenge were an "action pertaining to an order to exclude an alien" under § 1252(e)(1)(A), the "more natural reading" § 1252(e) is that § 1252(e)(3) specifies the actions that can be brought under § 1252, not the remedies. *Grace*, 344 F. Supp. 3d at 142. In other words, § 1252(e) should be read to prohibit the Court from entering "declaratory, injunctive, or other equitable relief in any action" if the action is not authorized thereunder, but the full panoply of remedies is available to the Court when an action challenging the validity of the system

(like this one) is authorized by § 1252(e)(3). This reading avoids Defendants' awkward attempt to treat "determination" as a term of art for declaratory relief, when it is not. *Cf.* Black's Law Dictionary (11th ed. 2019) ("determination" an "act of deciding something officially"). It explains the specific limitation that the statute sets for habeas relief, § 1252(e)(4)(B), which would be superfluous if relief were already precluded by § 1252(e)(1). *See Grace*, 344 F. Supp. 3d at 142. And it respects the presumption against limiting the court's equitable powers, particularly where, as here, there is no clear statement that Congress intended to do so. *See Chambers v. NASCO*, 501 U.S. 32, 47 (1991) ("'[W]e do not lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power." (citation omitted)); *see also Grace*, 344 F.3d at 142 (refusing to assume that Congress provided jurisdiction but "deprived the Court of any authority to provide *any remedy*, . . . effectively allowing the unlawful agency action to continue"). Where, as here, § 1252(e)(3) authorizes the action, § 1252(e)(1)'s limitation on remedies falls away. *Grace*, 2019 WL 329572, at *2 (§ 1252(e)(3) "contains no limitation on relief once a court makes a determination that a policy directive is unlawful").

Given that § 1252(e) does not curtail this Court's authority to issue a remedy, Plaintiffs are entitled to a vacatur of the Lesson Plan, as controlling precedent establishes that vacatur is the presumptive and mandatory remedy here. *See O.A.*, 2019 WL 3536334, at *28. The APA mandates that the Court "shall . . . set aside agency action" found to be unlawful under the APA. 5 U.S.C. § 706. This is "'the ordinary result.'" *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (citation omitted); *see also O.A.*, 2019 WL 3536334, at *28 ("That reading of the APA is consistent with longstanding and consistent practice in this circuit," and citing cases). Should Defendants represent without reservation that they will abide by the Court's order regarding vacatur of the Lesson Plan and the specific injunctive relief for individual

Plaintiffs, further injunctive relief may not be necessary. *See id.* at *29.

Defendants have provided no reason for the Court to deviate from the ordinary course. The most Defendants have said is to request, without explanation, that the Court remand the Lesson Plan to the agency to enable USCIS to change specific portions in response to the Court's decision. *See* Defs.' Br. at 53. The Court's decision to vacate rather than remand, however, depends on "the seriousness of the [agency action]'s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (internal quotation marks omitted). As described above, the Lesson Plan's deficiencies are serious, pervasive, and not severable. *See Appalachian Power*, 208 F.3d at 1028 (setting aside challenged guidance in its entirety "[i]n view of the intertwined nature of [its] challenged and unchallenged portions"). Vacating the Lesson Plan would not have disruptive consequences, moreover, as the former lesson plan would return to effect, and Defendants will remain free to make changes in the future that they deem necessary to reflect changes in the law. *Contra* Defs.' Br. at 2 (asserting without support that Plaintiffs "effectively ask[] 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"). As Defendants themselves recognize, the Court should not "rewrite the Lesson Plan" for the agency, Defs.' Br. at 42, and so should vacate it instead.

Plaintiffs are also entitled to an injunction granting specific relief to the individual Plaintiffs. *See Grace*, 344 F. Supp. 3d at 145-46 (virtually identical relief granted to individual plaintiffs). As in *Grace*, Plaintiffs here have met the standard for a permanent injunction by showing that they have or likely will suffer irreparable injury, that traditional legal remedies are inadequate, that the balance of hardships warrants equitable relief, and that the injunction is not

contrary to the public interest. *See id.* at 146 (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). Plaintiffs have shown that they have suffered irreparable harm from the negative credible fear determinations that put them at risk of grave danger. *See* SUF ¶¶ 14-15, 19-22, 88-97; *Grace*, 344 F. Supp. 3d at 146 (finding irreparable harm based on testimony of risk of violence in their country of origin). For Plaintiffs Sofia and Julia, who have been deported, this harm cannot be remedied until they are returned to the United States for another credible fear interview. All Plaintiffs remain at risk of being returned to the expedited removal process even if placed in full removal proceedings. *O.A.*, 2019 WL 3536334, at *22-23. Finally, as here, where an injunction ends an unlawful practice, it serves the public interest and does not harm the government.

Defendants do not appear to contest that Plaintiffs satisfy the permanent injunction standard, but argue incorrectly that 8 U.S.C. §§ 1252(e)(1)(B) and 1252(f)(1) preclude injunctive relief. The former prohibits class actions under § 1252(e), but has no application to this case, which is brought on behalf of individuals. Contrary to Defendants' argument, Defs.' Br. at 52-53, an injunction (or vacatur) of an unlawful policy is not the same as a class action: the remedy here is limited to enjoining the implementation of the policy prospectively and would not, as unfair as it may be, entitle any of the thousands of individuals who had their protection claims decided under the unlawful Lesson Plan to any specific relief. *See Grace*, 344 F. Supp. 3d at 144 n.31 (rejecting Defendants' argument based on § 1252(e)(1)(B)); *Grace*, 2019 WL 329572, at *2-3 (same).

As for § 1225(f)(1), that section is inapplicable here as it only limits the authority of the court to "enjoin or restrain the operation of [8 U.S.C. §§ 1221-1231]."[23] Section 1252(f)(1) does not preclude the Court from enjoining conduct that is unlawful under the statute and enforcing the

[23] Moreover, to the extent Defendants are correct that the Lesson Plan implements the asylum statute rather than the expedited removal statute, *see* Br. at 19, their arguments about § 1252(e) and § 1252(f) would not apply as a threshold matter, *see O.A.*, 2019 WL 3536334, at *33 (noting that Section 1252(f)(1) only applies to efforts to enjoin the operation of part IV of the INA, but the asylum provision is contained in part II).

correct implementation of the statute, as Plaintiffs request here. *See O.A.*, 2019 WL 3536334 at *34 (citing other D.C. district court cases holding the same, including *Grace*, 344 F. Supp. 3d at 143); *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 183-84 (D.D.C. 2015) (same). *Hamama v. Adducci*, 912 F.3d 869 (6th Cir. 2018), cited by Defendants, is inapposite as the court there concluded that plaintiffs sought to enjoin the statute as written. *See id.* at 879.

The final remedy question is whether the Court has the authority under § 1252(e)(3) to issue a temporary stay of removal. For the reasons discussed above, § 1252(e)(3) does not limit this Court's remedial authority in a case brought thereunder, including this Court's authority to issue a temporary stay of removal to avoid irreparable injury. *See Grace*, 344 F. Supp. 3d at 141-43. Moreover, as Defendants concede, Defs.' Br. at 55, this Court always has jurisdiction to determine its own jurisdiction, *United States v. Ruiz*, 536 U.S. 622, 628 (2002); Defendants merely fault the Court for not adopting their erroneous interpretation of § 1252(e), Defs.' Br. at 55.

CONCLUSION

Through the Lesson Plan, Defendants have sought to make significant substantive changes to the legal framework governing a vital legal and humanitarian process while avoiding any legal responsibility for doing so because of the label they gave it. Cases like this one are why § 1252(e)(3) and the APA exist: Asylum officers need to know what law they are supposed to apply in making life-and-death decisions; people like Plaintiffs Maria Kiakombua, Ana, Emma, Sofia, and Julia have a legal and moral entitlement to fair consideration; and the law of the United States does not permit Defendants' actions. This Court is empowered to review the Lesson Plan and to set it aside, and Plaintiffs respectfully request that it do so.

Dated: September 5, 2019

Respectfully submitted,

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