IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIA M. KIAKOMBUA, *et al.*, **Plaintiffs,** **v.** **KEVIN K. MCALEENAN, in his official capacities as Acting Secretary of Homeland Security & Commissioner of United States Customs and Border Protection, *et al.*,** **Defendants.**	**Civil No. 19-cv-01872-KBJ** **HON. KETANJI BROWN JACKSON**

BRIEF OF THE TAHIRIH JUSTICE CENTER
AS *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Local Rules of the United States District Court for the District of Columbia LCvR(o)(5) and Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* submit the following corporate disclosure statement:

The Tahirih Justice Center is a private, non-profit organization. It has no parent company, and no publicly held company holds more than 10% of its stock.

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STATEMENT OF INTEREST[1]

The Tahirih Justice Center is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls who survive gender-based violence. In five cities across the country, Tahirih offers legal and social services to women and girls fleeing all forms of gender-based violence, including human trafficking, forced labor, domestic violence, rape and sexual assault, and female genital cutting/mutilation. Since its beginning in 1997, Tahirih has provided free legal assistance to more than 20,000 individuals, many of whom have experienced the significant psychological and neurobiological effects of that trauma. Through direct legal and social services, policy advocacy, and training and education, Tahirih protects immigrant women and girls and promotes a world where they can live in safety and dignity. Tahirih amicus briefs have been accepted in numerous federal courts across the country.

INTRODUCTION

Tahirih submits this brief in support of Plaintiffs' challenge to Defendants' attempt to undermine the asylum system in the United States through an unlawful directive known as the Lesson Plan on Credible Fear of Persecution and Torture Determinations ("Lesson Plan"). The Lesson Plan sets forth new policy that asylum officers must apply during initial screening interviews to determine whether asylum seekers have a "credible fear" of persecution. Based on these interviews, the asylum officer then decides whether an asylum seeker may have access to a court process or whether he or she will be summarily deported. These decisions happen every hour or every day. And, for those seeking asylum in the United States, these decisions often

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[1] No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus*, its members, or its counsel made such a monetary contribution. *See* Local Civil Rule 7(o)(5); Federal Rule of Appellate Procedure 29(a)(4)(E).

mean the difference between life and death. Indeed, the Plaintiffs here are women from Angola, El Salvador, and Cuba who have been denied the opportunity to apply for asylum because they were determined under the new Lesson Plan to lack a credible fear of persecution or torture.

Congress designed the credible fear system to enable asylum officers to quickly and accurately distinguish *potentially* meritorious claims from plainly frivolous ones. Because these decisions are made quickly, under difficult circumstances, and with limited information, Congress set a low threshold for establishing credible fear. This low threshold ensured that asylum seekers with potentially valid asylum claims were not summarily returned to countries where they would suffer torture and persecution.

Unfortunately, the Lesson Plan diverges radically from the system that Congress created. It is at odds with Defendants' own prior policies and guidance. And, it is inconsistent with well-established case law on the credible fear standard.

Tahirih is in a particularly good position to comment on the changes made by the Lesson Plan because its clients have fled violence, torture, and persecution around the world. In addition, Tahirih has first-hand knowledge of the effect that trauma has on women who are survivors of violence. This perspective is extremely important to this case because the Lesson Plan deletes all references from prior guidance regarding the effect that trauma may have on the ability of survivors of persecution to adequately present their asylum case. This implicit direction to ignore the effects of trauma is contrary to established legal principles and science.

For these reasons, Tahirih urges the Court to grant the Plaintiffs' motion for summary judgment and deny the motion for summary judgment filed by the Defendants.

ARGUMENT

I. CONGRESS SET A LOW THRESHOLD FOR "CREDIBLE FEAR" TO BE CONSISTENT WITH THE UNITED STATES' LEGAL OBLIGATIONS TO REFUGEES UNDER INTERNATIONAL LAW.

Following World War II, and its stark reminder that persecution for religious, ethnic, racial, and other differences is both real and dangerous, the United States joined other nations to provide refuge for those fleeing such dangers. Our country's legal obligations are codified in several treaties that Congress ratified decades ago: the Protocol Relating to the Status of Refugees, the Convention Relating to the Status of Refugees, and the Convention Against Torture. A central tenet of these treaties is their signatories' commitment to provide refuge to those fleeing persecution and torture in their homelands.

Since ratification, Congress has passed several laws to align U.S. law and practice with its international commitments. Both the text and legislative history of the Refugee Act of 1980 (the "Refugee Act"), which established the asylum system, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the "IIRIRA"), which established the "credible fear" interview, reflect Congress's commitment to those first principles of protection and refuge. In both laws, Congress included critical provisions to ensure that the executive branch would not summarily return people seeking refuge from persecution and torture back to the very persecution and torture they fled. After considered debate, Congress deliberately established a low threshold "credible fear" standard for screening at the border to determine who will be summarily excluded from the opportunity to seek asylum. While it recognized the importance of preventing abuse of the asylum process, Congress saw a far greater risk in setting up a system that would send individuals with potentially meritorious cases back to a country where they would face persecution and torture.

A. THE "CREDIBLE FEAR" INTERVIEW WAS DESIGNED TO ENSURE THAT NEW EXPEDITED PROCEDURES DID NOT THREATEN ASYLUM SEEKERS WHO HAVE EVEN A "POSSIBILITY" OF BEING ELIGIBLE FOR ASYLUM.

The United States joined the international refugee regime in 1967, when it acceded to the Protocol Relating to the Status of Refugees and, in so doing, bound itself to the 1951 Convention Relating to the Status of Refugees. It was not until 1980 in the Refugee Act, however, that Congress established a formal asylum adjudication system that conformed U.S. refugee law to international legal obligations. Pub. L. No. 96-212, 94 Stat. 102 (Mar. 17, 1980). Declaring that "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands," the Refugee Act provided "a permanent and systematic procedure for admission to this country of refugees of special humanitarian concern to the United States." Act of Mar. 17, 1980, Pub. L. No. 96-212 § 101(a) & (b), 94 Stat. 102, 102 (1980). One of the ways Congress did this was by eliminating "ideological and geographical restrictions on admission of refugees," which throughout the post-World War II and Cold War period had been the approach to asylum in the United States. *INS v. Stevic*, 467 U.S. 407, 422 (1984) (citing committee reports). Instead, the Refugee Act adopted a definition of "refugee" that matched the U.N. Protocol. *Id*. Consistent with the U.N. Protocol, the Refugee Act "broadly" defined "refugee" to eliminate the risk that individual determinations on refugee status would be driven by political motives and executive fiat, as they had in the past. *See* H.R. Rep. No. 96-608, at 1 (1979). Rather, refugee determinations were to reflect universal, non-discriminatory standards for asylum.

Until 1996, anyone who tried to enter the United States without authorization and who sought asylum was subject to full removal proceedings before an immigration judge as a matter of course. In that proceeding, the asylum seeker could raise asylum claims or any other defense

to removal. In 1996, Congress passed the IIRIRA, a law that allowed the "expedited" removal of certain noncitizens, including those who arrive in the United States without valid travel documents. 8 U.S.C. § 1225(b)(1). Under that provision, border authorities could immediately return some noncitizens to their home countries without *any* court proceedings. Nonetheless, even under the IIRIRA, Congress took pains to ensure that this new tool would not prevent any potentially sound asylum claims. Accordingly, noncitizens who are subject to expedited removal and who indicate either "an intention to apply for asylum . . . or a fear of persecution" may *not* be immediately removed, but must be referred to an asylum officer who will conduct a "credible fear interview" to determine whether the individual has a "credible fear" of persecution. 8 U.S.C. § 1225(b)(1)(A) & (B). If the asylum officer determines in this abbreviated procedure that noncitizens have a credible fear of persecution, they may not be removed. Instead, those individuals are referred to an immigration court for full removal proceedings in which they can raise their asylum claim.[2]

"Credible fear" is defined as 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 officer, that the alien *could* establish eligibility for asylum under section 1158 of this title." 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added). If an individual receives a negative credible fear determination, she may seek limited review from an Immigration Judge, whose decision is final. 8 C.F.R. § 1003.42(f).

[2] The discussion here is limited to asylum claims; there are slightly different standards that apply for some other forms of relief such as withholding of removal and relief under the Convention Against Torture.

B. THE LEGISLATIVE HISTORY OF THE "CREDIBLE FEAR" PROVISION SHOWS THAT CONGRESS TIPPED THE BALANCE TO ASYLUM SEEKERS.

The legislative history of the IIRIRA documents disagreement between the House bill and the Senate bill about how to balance deterring asylum abuse with ensuring asylum opportunity. But that history leaves no doubt that, when balancing the risk of frivolous asylum claims against the risk of screening out noncitizens with potentially sound asylum claims, Congress chose to tip the balance in favor of the latter. For these reasons, as Senator Orrin Hatch stated, the credible fear standard was "intended to be a low screening standard for admission into the usual full asylum process." 142 Cong. Rec. S11491-02 (daily ed. September 27, 1996) (statement of Sen. Hatch). Several factors emphasize just how low this threshold is.

First, before Congress enacted the IIRIRA, the Supreme Court had already held that a person has a well-founded fear of persecution, and thus is eligible for asylum if "the applicant only has a 10% chance of being…persecuted." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987). In IIRIRA, however, Congress did *not* require this "10% chance" to satisfy the "credible fear" threshold. Instead, it required an asylum seeker to come forward with far less – only a "significant possibility" that they "could establish eligibility" for asylum. Therefore, as one court has stated, under the IIRIRA, "to prevail at a credible fear interview, the alien need only show a 'significant possibility' of a one in ten chance of persecution, i.e., a fraction of ten percent." *Grace v. Whitaker*, 344 F. Supp. 3d 96, 127 (D.D.C. 2018); *see Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1386 (2015) ("when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute is presumed to incorporate that interpretation" (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645) (1998)).

Second, Congress actually considered and rejected a far higher "credible fear" standard when it passed the IIRIRA. Indeed, Congress passed the "significant possibility" standard only after it considered and *rejected* a far more stringent standard offered in the House version of the bill. That bill would have required summary removal unless a non-citizen could show it was more probable than not that she had a credible fear of persecution. S*ee* H.R. 2202, 104th Cong. § 235(b)(1)(B)(v) (1995).[3] Congress understood that text to impose a standard in which "only applicants with a *likelihood of success* will proceed to the regular asylum process." H. Rep. 104-469, pt. 1, at 158 (1996) (emphasis added). When Congress ultimately enacted the IIRIRA, however, it *rejected* that standard, adopting instead the language found in the IIRIRA today, which requires only a "significant possibility" that a non-citizen "could establish" asylum eligibility. As the Conference Report explained:

> The purpose of these provisions is to expedite the removal from the United States of aliens who *indisputably* have no authorization to be admitted to the United States, while providing an opportunity for such an alien who claims asylum to have the merits of his or her claim promptly assessed….

H.R. Rep. No. 104-828, at 209 (Conf. Rep.) (emphasis added)

This compromise between the Senate version of the bill, which would allow for expedited removal "only in extraordinary migration situations," and the House version, which applied a higher credible fear standard across the board, was intentional. 142 Cong. Rec. S11491-02 (daily ed. September 27, 1996) (statement of Sen. Hatch). Specifically, as Representative Henry Hyde noted, the credible fear standard was redrafted to ensure that the "too restrictive" House language of "more probable than not" did not prevail. 142 Cong. Rec. H11071, H11081 (daily ed. Sept. 25, 1996) (statement of Rep. Hyde). Representative Hyde stated that the conferees "struggled

[3] The "more probable than not" standard also appears in the Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 422(b)(1)(C)(v), 110 Stat. 1214, 1271 (1996), which was enacted while Congress was still considering the IIRIRA. The IIRIRA superseded that standard, replacing it with the simple "significant possibility" standard in the context of asylum cases.

with the issue of how to fairly and expeditiously adjudicate asylum claims of persons arriving without documents," and that, while the Committee sought to prevent abuse of the asylum process, "[a]t the same time, we recommend major safeguards against returning persons who meet the refugee definition to conditions of persecution." *Id*. The revised bill, with the lower-burden credible fear standard, "cure[d] important deficiencies," see 142 Cong. Rec. H11066-67 (daily ed. Sept. 25, 1996) (statement of Rep. Christopher Smith) that "would not have provided adequate protection to asylum claimants." 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch). As Senator Hatch explained, "[t]he standard adopted in the conference report is intended to be a low screening standard for admission into the usual full asylum process." *Id.; see generally, N. Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 529 (1982) ("deletion of a provision by a Conference Committee militates against a judgment that Congress intended a result that it expressly declined to enact" (internal quotation omitted)).

The legislation was designed to provide "major safeguards" to prevent the persons with a significant chance of obtaining asylum from being returned to persecution. *Id.* Recognizing that the asylum officer's "power to send people summarily back to dangerous places" is "extraordinary," Representative Christopher Smith stressed the importance that "the process be fair—and particularly that it not result in sending genuine refugees back to persecution." 142 Cong Rec. H11054, H11066-67 (daily ed. September 25, 1996) (statement of Rep. Smith). And Senator Hatch expressed concern "about the harsh consequences that could result to asylum applicants who do have a valid claim but who may not speak English, may not have the necessary proof of their claim with them," and those in similar situations. 142 Cong. Rec. S4457-91 (daily ed. May 1, 1996) (statement of Sen. Hatch).

The safeguards Congress provided included requiring particular training for those individuals responsible for administering credible fear interviews (and those overseeing their decisions). Senator Hatch emphasized that the credible fear screening would be done "by fully-trained asylum officers supervised by officers who have not only had comparable training but have also had substantial experience adjudicating asylum applications." 142 Cong. Rec. S11491-02 (daily ed. September 27, 1996) (statement of Sen. Hatch). Senator Alan Simpson and Representative Hyde also emphasized that the asylum officers performing the credible fear interviews would be "specially trained." *Id.* 142 Cong. Rec. S4457, S4467 (daily ed. Sept. 25, 1996) (statement of Sen. Simpson); 142 Cong. Rec. H11071, H11081 (daily ed. May 1, 1996) (statement of Rep. Hyde). Congress also required a written summary of any negative decision, provided for an appeal to an immigration judge, required the Attorney General to provide information about the process to potential asylees, and ensured that noncitizens could consult with others before the interview. 8 § USC 1225(b)(1)(B). Moreover, under DHS regulations, a non-citizen in a credible fear interview has a right to an interpreter. 8 C.F.R. 208.30(d).

Although the safeguards built into the credible fear process do not always live up to the standards envisioned by Congress, there is no doubt that the interview was intended as an initial screening mechanism with a low threshold. It was designed to prevent the removal of anyone who can show a significant possibility that they could establish a valid asylum claim. Representative Smith urged that "in a close case, [asylum officers] must give the benefit of the doubt to the applicant." 142 Cong. Rec. H11054, H11067 (daily ed. September 25, 1996) (statement of Rep. Smith).

C. THE PRACTICAL REALITIES OF THE "CREDIBLE FEAR" INTERVIEW MAKE IT IMPOSSIBLE FOR MANY ASYLUM SEEKERS WITH MERITORIOUS CLAIMS TO MEET A HIGHER STANDARD.

In practice, many reasons justify the legislative choice of a low threshold screening standard at the credible fear stage. The regulations provide that the initial screening interviews are to be conducted "in a nonadversarial manner," 8 C.F.R. § 208.30(d), so attorneys are rarely present at this stage. However, refugees who have just arrived from other countries and are not represented by counsel are unlikely to understand American legal standards or processes. In addition to significant language and cultural barriers, refugees who have just fled from persecution in their home countries may be fearful or reluctant to talk about that persecution with U.S. authorities. *See, e.g., Senathirajah v. INS*, 157 F.3d 210, 218 (3d Cir. 1998) ("Given [the alien's] allegations of torture and detention, he may well have been reluctant to disclose the breadth of his suffering in Sri Lanka to a government official upon arriving in the United States even if he could understand the questions he was being asked at the airport."); *Balasubramanrim v. INS*, 143 F.3d 157, 163 (3d Cir. 1998) ("[A]n arriving alien who has suffered abuse during interrogation sessions by government officials in his home country may be reluctant to reveal such information during the first meeting with government officials in this country."); *Singh v. Gonzales*, 134 F. App'x 158, 160 (9th Cir. 2005).

Other problems abound. Language barriers, translation issues, record and document availability while still at the border, fear and anxiety related to detention—especially for parents separated from their children—lack of access to counsel, and inability to communicate with family all are serious obstacles to the ability of applicants to articulate the basis of their fears of return as they first enter the United States. The availability and adequacy of translators, the sufficiency of recordkeeping, and the duty of the asylum officer to elicit information are theoretical "safeguards" against wrongful summary removal; but these safeguards do not always

exist in reality. *See, e.g.*, *Balasubramanrim*, 143 F.3d at 162-63 (noting defects in the arrival interview including lack of proper translation, an inadequate record of the interview, inadequate questioning by INS officer, and the reluctance of applicants to divulge information).

The credible fear interview is, and should be, a low bar for precisely these reasons. As the Second Circuit noted, asylum officers have long been instructed to apply "a low-threshold test" during the credible fear interview, and to "draw all reasonable inferences in favor of the applicant." *Zhang v. Holder*, 585 F.3d 715, 724 n.3 (2d Cir. 2009) (quoting INS, *Asylum Officer Basic Training: Credible Fear*, 2001 WL 36205685, at Pt. V (Nov. 30, 2001)). As discussed below, the changes to the Lesson Plan are in direct conflict with the statutory and regulatory safeguards provided for noncitizens in the initial screening interviews and are contrary to the legislative intent of the IIRIRA.

II. THE LESSON PLAN IMPROPERLY DIRECTS ASYLUM OFFICERS TO APPLY A NEW HEIGHTENED STANDARD TO CREDIBLE FEAR INTERVIEWS.

Where Congress intentionally set a low threshold, Defendants may not instruct asylum officers to apply a heightened standard. Unfortunately, that is precisely what Defendants have done here.

A. THE LESSON PLAN ESSENTIALLY CHANGES THE STATUTORY STANDARD FROM "COULD BE ELIGIBLE" TO "IS ELIGIBLE."

As discussed above, Congress set the credible fear standard as a significant possibility that a non-citizen "could establish eligibility for asylum." The Lesson Plan effectively changes that standard to "is a refugee eligible for asylum."[4] But the choice of verbs matters. Where

[4] For example, in Section V(B), the Lesson Plan directs: "The [credible fear significant possibility standard] requires the applicant to identify more than "significant evidence' that the applicant *is a refugee entitled to asylum*, withholding or removal or deferral of removal." Exhibit A to Plaintiffs' Combined Memorandum of Law in Support of Their Cross-Motion for Summary Judgment & in Opposition to Defendants' Motion for Summary Judgment, ECF No. 36-3 at 19 (emphasis added). Likewise, Section V(A) instructs asylum officers that the applicant's

Congress chooses to use the subjunctive form, courts must "ascribe to Congress an understanding of 'ordinary English grammar,'" *Klein v. Comm'r of Internal Revenue*, 149 T.C. 341, 354 (2017) (quoting *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009). Here, the use of the word "could," as the subjunctive, can only reasonably be read to refer to something that is possible, doubtful, or not certain. *See State v. Billings,* 338 P.3d 23 (Table), 2014 WL 6772484 (Kan. Ct. App. 2014) (unpublished) ("The operative phrase is 'could ... constitute.' In that context, "could," as the subjunctive form of "can," reasonably would be understood to convey possibility rather than certainty.") For just this reason, the Third Circuit, in *Yusupov v. Attorney General of U.S.*, 518 F.3d 185, 201 (3d Cir. 2008), set aside a Board of Immigration Appeals decision that interpreted "is" as "could be." The court held:

> This interpretation accords with neither the plain wording nor the ordinary meaning of the statutory text, which does not refer to belief in a mere possibility. In other words, "is"—and its subjunctive form "would"—connote a more certain determination than that "the alien 'might' or 'could' be" a danger for the national security exception to apply.

Id.

When Defendants instruct asylum officers that "could be eligible" essentially means "is eligible," they raise the statutory standard for non-citizens who seek refuge. In other words, they try to accomplish by agency guidance what they cannot even do by regulation.

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testimony can meet the burden of proof "if it is 'credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant *is a refugee*.'" Exhibit A to Plaintiffs' Combined Memorandum of Law in Support of Their Cross-Motion for Summary Judgment & in Opposition to Defendants' Motion for Summary Judgment, ECF No. 36-3 at 15 (emphasis added).

B. THE LESSON PLAN IMPERMISSIBLY REQUIRES NON-CITIZENS TO MEET A HEIGHTENED STANDARD OF CREDIBILITY AND ELIMINATES PREVIOUS INSTRUCTION TO TAKE THE EFFECTS OF TRAUMA INTO ACCOUNT.

The Lesson Plan repeatedly conflates the credible fear interview proceeding with a full-blown asylum proceeding despite the dramatically different nature and purpose of those different proceedings. As Plaintiffs have documented in their briefing, the Lesson Plan suffers multiple deficiencies that justify the relief Plaintiffs seek, including improperly raising the burden of proof, wrongly importing asylum corroboration requirements, and requiring factual proof of every element at the credible fear stage. *See* Plaintiffs' Combined Corrected Memorandum of Law In Support of their Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment. ECF No. 38 at 32-39. Underlying all of these issues is the Lesson Plan's undercutting of factors that have long been related to credibility. And as an organization that represents immigrant women and girls fleeing violence, Tahirih is especially concerned that the Lesson Plan has severely undermined, and even eliminated, the agency's long-standing directives requiring asylum officers to consider the effects of trauma and cross-cultural factors that may affect testimony and whether the applicant has met her burden of proof, particularly in the abbreviated and summary proceedings at the credible fear stage.

Tahirih clients are survivors of violence in countries and cultures around the world. They have survived rape, severe and routine beatings, female genital mutilation or cutting, and attempted murder. They have been trafficked for profit, subjected to slavery, and coerced into relationships with men who use violence—sexual, verbal, emotional, and physical abuse—to establish power over them, effectively forcing them into the submissive role they are expected to fill in their societies as women in a domestic relationship. They have been subject to acid attacks and attempted murder as a matter of family "honor." Finding the courage to escape that violence

does not mean escaping the associated trauma. Like survivors of other traumatic events—war, hurricanes, criminal attacks—immigrant survivors of gender-based violence are marked by that trauma in ways both visible and invisible. For those who successfully make their way to the U.S. border to seek asylum based on such persecution, that trauma is likely to be, if anything, sharpened by a dangerous journey, fear of the asylum process, fear of being returned to their conditions of persecution, and—especially now—fear of border officials. Any survivor interview at the border is affected by this trauma.

1. The Current Lesson Plan Deletes Every Reference to The Effect of Trauma On the Credible Fear Interview.

Although USCIS formerly included substantial instruction to asylum officers about trauma and how it affects testimony at the credible fear stage, the new Lesson Plan removes all of that instruction. As the red-line chart submitted by plaintiffs vividly illustrates, the challenged Lesson Plan eliminates every reference to trauma. *See* Exhibit A to Plaintiffs' Combined Memorandum of Law in Support of Their Cross-Motion for Summary Judgment & in Opposition to Defendants' Motion for Summary Judgment, ECF No. 36-3. Whereas the previous Lesson Plan included three separate discussions of trauma and its likely effect on asylum-seekers at the credible fear stage, the current Lesson Plan includes no such discussion. Indeed, a word search of the current version yields not a single reference to trauma.

First, the previous Lesson Plan instructed asylum officers conducting credible fear interviews to take trauma into account when making credibility determinations:

> While demeanor, candor, responsiveness, and detail provided are to be taken into account in the credible fear context when making a credibility determination, an asylum officer must also take into account cross-cultural factors, effects of trauma, and the nature of expedited removal and the credible fear interview

> process—including detention, relatively brief and often telephonic interviews, etc.— when evaluating these factors in the credible fear context.[5]

But the current Lesson Plan completely removes this language, with no substitute language to take its place.[6]

Second, the previous Lesson Plan directed asylum officers to consider the totality of the circumstances when making credibility determinations, and even included a list of those circumstances that "must be considered:"

> When considering the totality of the circumstances in determining whether the assertions underlying the applicant's claim are credible, the following factors must be considered as they may impact an applicant's ability to present his or her claim:
>
> *(i)* trauma the applicant has endured;
> *(ii)* passage of a significant amount of time since the described events occurred;
> *(iii)* certain cultural factors, and the challenges inherent in cross-cultural communication;
> *(iv)* detention of the applicant;
> *(v)* problems between the interpreter and the applicant, including problems resulting from differences in dialect or accent, ethnic or class differences, or other differences that may affect the objectivity of the interpreter or the applicant's comfort level; and
> *(vi)* unfamiliarity with speakerphone technology, the use of an interpreter the applicant cannot see, or the use of an interpreter that the applicant does not know personally.[7]

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[5] Exhibit A to Plaintiffs' Combined Memorandum of Law in Support of Their Cross-Motion for Summary Judgment & in Opposition to Defendants' Motion for Summary Judgment, ECF No. 36-3 at 24.

[6] *Id.* While there may be some limited references to similar information contained in other lesson plans, those cannot remedy the erasures here. For example, Defendants may point to the RAIO Module on Credibility, listed in the Government's Administrative Record, ECF No. 23-1 at 0366. However, that Module noticeably *does not* list "credible fear interviews" in its listing of interviews in which the Module will apply – instead, it refers only to interviews in connection with applications for asylum and refugee status, asylee/refugee following-to-join, naturalization, orphan, and certain relative petitions. *Id.* at 0375. Credible fear interviews take place under wholly different circumstances and involve different guidance. Indeed, this is presumably why the information relating to trauma and its effect on statements made in the credible fear interview were, until now, included in the Module on credible fear that most asylum officers would use as a reference during the process.

[7] Exhibit A to Plaintiffs' Combined Memorandum of Law in Support of Their Cross-Motion for Summary Judgment & in Opposition to Defendants' Motion for Summary Judgment, ECF No. 36-3 at 26.

The current Lesson Plan, however, excises this *entire section* and replaces it with language that focuses exclusively on country conditions, the ability to internally relocate, and that the use of "boilerplate" language "might" indicate fraud.[8] *Id.*

Finally, the previous Lesson Plans taught asylum officers about the element of persecution by discussing the severity of harm needed, and by including examples of many harms that were sufficient to rise to the level of persecution, including rape or other severe sexual harm, prolonged detention, deliberately imposed severe economic harm, and so forth. The former Lesson Plan also included this excerpt:

> Psychological harm alone may rise to the level of persecution. Evidence of the applicant's psychological and emotional characteristics, such as the applicant's age or trauma suffered as a result of past harm, are relevant to determining whether psychological harm amounts to persecution.[9]

Again, the current Lesson Plan deletes this the entire section offering examples of what might constitute persecution, including the excerpt referencing trauma. No equivalent language replaces it.[10]

Given these changes, an asylum officer relying on the Lesson Plan to conduct her credible fear interview is unlikely to consider trauma or its effects on the statements she hears or the demeanor she evaluates. To the contrary, the Lesson Plan eliminates those concerns, instead improperly directing the focus on the asylum requirements of documentary and corroborating evidence, and assessing credibility without taking the effects of trauma into account.

2. The Erasure of Trauma From the Credible Fear Interview Process Is Contrary to Evidence and Law.

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[8] *Id.*
[9] *Id.* at 34-35.
[10] *Id.*

The new Lesson Plan is contrary to both science and law. The effects of trauma on a credible fear interview and on a claim of credible fear of persecution are real and indisputable. Decades of research confirm that trauma affects demeanor in ways that could easily affect credibility: nervousness, passivity, inability to make eye contact, reluctance to speak, speaking too fast, giving too much detail or not enough.[11] Trauma may also result in vague or evasive testimony due to the victim's desire to avoid or stop a flood of memories of the abuse. It might result in a withdrawn or detached witness if a victim tries to dissociate from the memory or event.

Trauma can also severely affect memory, resulting in fragmented memories, inconsistencies, out-of-order sequences, inaccurate dates, and the like.[12] Indeed, the experience of simply testifying about sexual abuse can be traumatic, because it forces the victim to "relive the crime mentally and emotionally, leading some to feel as though the sexual assault is recurring." Meg Garvin et al., *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, Nat'l Crime Victim Law Institute, Violence Against Women Bulletin at 1-2 (Sept. 2011) (internal quotation marks and brackets omitted). Research supports similar conclusions about the trauma of human trafficking: "[t]he stresses of the trafficking situation is almost guaranteed to create dissonance between thoughts, feelings, and behavior that can greatly reduce flexible coping and rational decisions that could be expected of people in free

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[11] *See, e.g.,* Dept of Health and Human Services, SAMSA, *A Treatment Protocol: Trauma-Informed Care in Behavioral Health Services* (2014) ," (available at *https://www.ncbi.nlm.nih.gov/books/NBK207201/pdf/Bookshelf_NBK207201.pdfat*) at 61 (common effects of trauma include "exhaustion, confusion, sadness, anxiety, agitation, numbness, dissociation, confusion, physical arousal, and blunted affect.") *See also id.* at 62 (listing of potential effects of trauma); *id.* at 69, (noting that signs of dissociation include fixed or "glazed" eyes, sudden flattening of affect, long periods of silence, monotone, responses that are not congruent with the present context or situation).

[12] *See, e.g.,* Payne, J. D., Nadel, L., Britton, W. B., & Jacobs, W. J. (2004). *The Biopsychology of Trauma and Memory*. In D. Reisberg & P. Hertel (Eds.), *Series in affective science. Memory and emotion*. New York, NY, US: Oxford University Press pp. 76-128 (biophysical effects of trauma through effect on hippocampus causes stressful events to be recorded in a "fragmented" manner, with the elements of the event not woven into a coherent remembered episode). Abstract available at *http://dx.doi.org/10.1093/acprof:oso/9780195158564.003.0003*.

conditions." T. K. Logan et al., *Understanding Human Trafficking in the United States*, 10 Trauma, Violence, & Abuse 3, 16 (January 2009).

Any of these factors could adversely affect a credibility finding and are especially important at the credible fear interview at the border when trauma is likely to be freshest and the non-citizen at her most vulnerable. They are also highly relevant here because Defendants require that credibility findings at the credible fear stage be based on "internal and external consistency; plausibility; demeanor; candor; and responsiveness" as well as the "amount of detail." *See* Exhibit A to Plaintiffs' Combined Memorandum of Law in Support of Their Cross-Motion for Summary Judgment & in Opposition to Defendants' Motion for Summary Judgment, ECF No. 36-3 at 15. Indeed, concerns about the effects of trauma and culture have long informed asylum officer training:

> The demeanor of traumatized applicants can vary. They may appear numb or show emotional passivity when recounting past events of mistreatment. Some applicants may give matter-of-fact recitations of serious instances of mistreatment[.] Trauma may also cause memory loss or distortion, and may cause other applicants to block certain experiences from their minds in order not to relive their horror by the retelling.
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> It bears reiteration that the foregoing considerations of demeanor can be products of trauma or culture, not credibility. Poor interview techniques/cross-cultural skills may cause faulty negative credibility findings.

U.S. Dep't of State, Guidelines, *Office of International Affairs, Immigration and Naturalization Service, regarding adjudicating asylum cases on the basis of gender* (May 26, 1996) available at *https://2009-2017.state.gov/s/l/65633.htm* (archived documents from United States Department of State).

Courts across the country have likewise recognized the effects of trauma on survivor interviews and testimony. Calling it "unsettling" that the BIA simply dismissed the "potential

impact" of torture on an applicant's testimony, in *Ilunga v. Holder*, 777 F.3d 199, 212 (4th Cir. 2015), the Fourth Circuit vacated the BIA's decision. "In the context of a credibility determination," the Court explained, "one should expect moderate P.T.S.D. to influence the content of testimony at times, in addition to testimonial demeanor…. The agency's totality of the circumstances analysis should take into account the inherent instability of memories that are naturally misshapen by time and disfigured by trauma." *Id*.

Similarly, the Third Circuit has recognized the "numerous factors that might make it difficult for an alien to articulate his/her circumstances with the degree of consistency one might expect from someone who is neither burdened with the language difficulties, nor haunted by the traumatic memories, that may hamper communication between a government agent in an asylum interview and an asylum seeker." *Zubeda v. Ashcroft*, 333 F.3d 463, 476 (3d. Cir. 2003), (vacating a BIA decision based in part on inconsistencies between the asylum testimony and the credible fear interview). And, the Ninth Circuit has noted that:

> Victims of repeated physical or sexual abuse, for example, remember the gist of their experiences. However, they often confuse the details of particular incidents, including the time or dates of particular assaults and which specific actions occurred on which specific occasion. As events recur, it can become difficult to remember exactly when specific actions occurred even though memory for what happened is clear.

Singh v. Gonzales, 403 F.3d 1081, 1091 (9th Cir. 2005) (citing Deborah Davis & William C. Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. Air L. & Com. 1421, 1514-15 (2001)); *see also Marouf v. Lynch*, 811 F.3d 174, 185 (6th Cir. 2016) ("An inability to accurately recall the date when a traumatic event occurred is not particularly probative of a witness's credibility when alleging traumatic persecution, because such traumatic persecution itself may cause the witness difficulty in recalling details of the incident."); *Longwe v. Keisler*, 251 F. App'x 718, 720 (2d Cir. 2007) (nothing in the record to support the

immigration judge's speculation that "one normally doesn't forget" the date of such a "traumatic event" as a rape); *Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 154 (3d Cir. 2005) ("Women who have been subject to domestic or sexual abuse may be psychologically traumatized. Trauma … may have a significant impact on the ability to present testimony," and holding that INS Guidelines entitled "Consideration for Asylum Officers in Adjudicating Asylum Claims from Women" are as applicable to an immigration judge's credibility determinations as they are to an asylum officer's credibility determination).

In erasing all previous references to trauma from the new asylum officer's Lesson Plan for credible fear interviews, the Defendants seek to erase decades of research, government findings, and jurisprudence. And they do so as one of many steps that add up to an improper attempt to impose a higher credible fear standard on those seeking safety. This action lacks rational basis and is contrary to the standards Congress articulated. For this reason, this Court must set it aside.

CONCLUSION

For the foregoing reasons, this court should grant the Plaintiffs' motion for summary judgment.

Respectfully submitted,

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September 19, 2019

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2019, the foregoing was served by filing a copy using the Court's ECF filing system, which will send notice of the filing to all counsel of record.

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