UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIA M. KIAKOMBUA, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 19-1872 (KBJ)
CHAD F. WOLF, Acting Secretary of Homeland Security,[1] et al.,	)	
Defendants.	)	

DEFENDANTS' SUPPLEMENTAL BRIEF ON SEVERABILITY

[1] Under Federal Rule of Civil Procedure 25(d), Acting Secretary of Homeland Security Chad F. Wolf is automatically substituted as a defendant for former Acting Secretary Kevin K. McAleenan.

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Defendants submit this brief in response to the Court's three questions posed by its order of January 3, 2020. Essentially, if Plaintiffs can demonstrate entitlement to relief,[2] then the Court should consider a determination, remand without vacatur, and severance as remedies, in that order.

I. Does the traditional severability analysis apply to provisions of the Lesson Plan on Credible Fear of Persecution and Torture Determinations?

No, severability principles do not apply to provisions of the Lesson Plan. However, if the Court concludes that they do, then the "traditional severability analysis" as applied in cases like *North Carolina v. FERC*, 730 F.2d 790, 796 (D.C. Cir. 1984), is the correct body of severability law to apply.

A. Severance Is Not a Remedy for a Violation of 8 U.S.C. § 1252(e)(3).

Severance is a remedy. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 37 (D.C. Cir. 2016), *vacated on other grounds*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). However, severance is not an appropriate remedy in the first instance.

Under 8 U.S.C. § 1252(e)(3), the Court may only determine the Lesson Plan's lawfulness, and lacks statutory authority to enjoin or vacate the Lesson Plan. Section 1252(e)(1) provides that "no court may . . . enter declaratory, injunctive, or other equitable relief in an action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title *except as specifically authorized in a subsequent paragraph of this subsection.*" (Emphasis added.) Section 1252(e)(3)(A) specifically authorizes the court only to make a "determination"

[2] Defendants emphasize that to reach any of these questions, the Court has to find that Plaintiffs have overcome all of Defendants' jurisdictional, reviewability, and merits arguments. *See generally* Memorandum of Law in Support of Def.'s Motion for Summary J. ("Defs.' Summary J. Br.") (ECF No. 31-1); Defs.' Memo. of Law in Opp. to Pls.' Cross-Mot. for Summary J. & Reply in Supp. of Defs.' Mot. for Summary J. Reply at 23 ("Defs.' Summary J. Reply") (ECF No. 49). By providing guidance to the Court on severability principles as a remedy, Defendants do not concede any of the arguments they have previously made to the Court.

regarding the validity of certain regulations and written policies. Such a "determination" is a form of "declaratory" relief specifically authorized by section 1252(e)(3). Therefore, the sole, specifically authorized remedy in a "subsequent paragraph" is a "determination[]" whether any alleged new written policy "is not consistent with applicable provisions of this subchapter or is otherwise in violation of law," *id.* § 1252(e)(3)(A)(ii), and to issue an "order" to that effect, *id.* § 1252(e)(3)(C). Accordingly, the Court has no authority to vacate or enjoin the Lesson Plan in whole or in part. *See* Defs.' Summary J. Br. at 50-55 (developing this argument).

The same result obtains if the Court were to somehow look beyond section 1252(e)(3) and consider Administrative Procedure Act ("APA") remedies (as Plaintiffs ask), which permit the Court to only "hold unlawful and set aside" the invalid agency action. 5 U.S.C. § 706(2). Nothing in section 706(2)'s text specifies whether the rule, if found invalid, should be set aside on its *face* or *as applied* to the challenger. In the absence of a clear statement in the APA that it displaces traditional rules of equity, the court should adopt the narrower reading of the "set aside" language. *See Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001).

Therefore, the only remedy available to the Court is a "determination" or, if the Court determines that an APA remedy is appropriate, then setting aside the decision as applied to Plaintiffs. An injunction is not authorized.

B. The Court Should Consider Remand without Vacatur If It Declines to Limit Its Remedies to "Determinations."

As explained above and in Defendants' earlier briefs, section 1252(e) forecloses relief in the form of injunctions or vacatur. *See* Defs.' Summary J. Br. at 50-55. Nevertheless, if the Court concludes that it has the authority to order an equitable remedy beyond a "determination" in section 1252(e)(3), then it should opt for the remedy of remand without vacatur.

The "decision whether to vacate depends on the seriousness of the [rule'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." *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (alteration in original). A vacatur order has the effect of setting aside an agency's rule and taking it "off the books." *See Heartland Reg'l Ctr. v. Sebelius*, 566 F.3d 193, 198-99 (D.C. Cir. 2009) (discussing the distinction between invalidating and vacating a rule). Here, a vacatur order would "take off the books" a Lesson Plan comprising dozens of single-spaced pages, touching on dozens of discrete issues, and providing hundreds of asylum officers with guidance on a range of issues not even in dispute in this case. It would leave in place the 2017 Lesson Plan, meaning there would be a vacuum on guidance for any new developments in immigration law since 2017, including the *Grace* decision that Plaintiffs focus much of their attention on defending. Given the immediate dire situation a vacatur order would cause, should the Court issue an invalidation order, a temporary stay of vacatur would be appropriate. *See, e.g.*, *Hawaii Longline Ass'n v. Nat'l Marine Fisheries Serv.*, 288 F. Supp. 2d 7 (D.D.C. 2003), *appeal dismissed*, No. 03-5347, 2004 WL 1052989 (D.C. Cir. May. 7, 2004); *U.S. Bancorp. Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) ("As always when federal courts contemplate equitable relief, our holding must also take account of the public interest.").

Thus, rather than setting aside the entire Lesson Plan, Pls.' Combined Memo. of Law in Supp. of Their Cross-Mot. for Summary J. & and in Opp. to Defs.' Mot. for Summary J. at 53 (ECF No. 36-1) ("Pls.' Summary J. Br."), the Court should remand without vacatur the Lesson Plan to the agency for an explanation. *See INS v. Ventura*, 537 U.S. 12, 16 (2002); *see Chiayu Chang v. USCIS*, 289 F. Supp. 3d 177, 188 (D.D.C. 2018) (remanding because "the Court 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry'" and how "'in the field of immigration . . . there

may be sensitive issues lurking that are beyond the ken of the court'"). Remand without vacatur should be the Court's best option if it finds part of the Lesson Plan to be unlawful, and declines to issue only a "determination."

C. If the Court Concludes that Severance Is a Remedy for a Violation of § 1252(e)(3), then the *Alaska Airlines* Analysis, as Modified by Agency Rule-Specific Cases, Would Generally Be Proper.

Only if the Court rejects the remand-without-vacatur option should it proceed to the next best option: declaring invalid discrete parts of the Lesson Plan that the Court finds unlawful. The Court should do so whether or not it labels such a remedy "severing." What the Court should decline to do is to declare the entire Lesson Plan—a document consisting of 37 pages of training guidance on hundreds of discrete issues—unlawful.

The Supreme Court has held that principles of equity prohibit remedies that are "more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 524 (1978) (holding that even where a court holds agency action to be *ultra vires* under the APA, the court cannot "require more than the minimum" and create program requirements or dictate procedures not found within the APA). Similarly, a court should resist the invitation to inject itself into an agency-administered program. *See Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1291 (D.C. Cir. 2007).

When a court finds that part of an alleged agency rule or regulation is invalid and considers severability, then the normal rule is a presumption in favor of severing the invalid portion and retaining the valid portion. *See North Carolina v. FERC*, 730 F.2d 790, 796 (D.C. Cir. 1984) (Scalia, J.) (holding that "partial affirmance is improper" only where there is "substantial doubt that the agency would have adopted the same disposition regarding the unchallenged portion if the challenged portion were subtracted"). Thus, "[w]hether the offending

portion of a regulation is severable depends upon the intent of the agency *and* upon whether the remainder of the regulation could function sensibly without the stricken provision." *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001) ("*MD/DC/DE Broadcasters Ass'n I*") (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988)), *reh'g denied*, 253 F.3d 732 (D.C. Cir. 2001) ("*MD/DC/DE Broadcasters Ass'n II*"); *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 1000 (D.C. Cir. 2013) (vacating agency orders in their entirety because they imposed rules that exceeded the FCC's authority and, absent those rules, the orders could not operate).

Here, the Court asked whether "the traditional severability analysis appl[ies] to provisions of the Lesson Plan on Credible Fear of Persecution and Torture Determinations." Order of Jan. 3, 2020. Assuming "the traditional severability analysis" means the principles in described above in cases like *North Carolina v. FERC*, then yes, such principles would apply to the Lesson Plan if the Court finds that parts of Lesson Plan are invalid and declines to use the remedies of a "determination" or remand without vacatur.[3]

II. Assuming all of Plaintiffs' nine challenges to the Lesson Plan have merit, can and should all nine provisions be severed from the Lesson Plan document?

Yes, assuming the Court concludes severance is an appropriate remedy.

A. USCIS Intended for Each Part of the April 2019 Lesson Plan to Operate Independently, Without Regard to Whether Other Parts Were Invalidated.

The first consideration in the severability of an alleged agency action is "the intent of the

[3] The Court's order cited *Alaska Airlines v. Brock*, 480 U.S. 678 (1987). Order of Jan. 3, 2020. That case held that the severability of a *statutory* provision hinges on the legislation's capability of functioning independently and on congressional intent. *Id.* at 684-85. This standard appears to be materially identical to the standard for *agency action* enunciated above from cases such as *North Carolina v. FERC*. *See* 1730 F.2d at 796; *see also Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508-09 (2010) (so long as the statute remains "fully operative as a law," its other provisions may not be struck down unless it is "evident" that, in light of the court's constitutional holding, Congress "would have preferred" no law at all to a law with the unconstitutional provision severed). That said, the more proper law to apply to this case would be the *North Carolina v. FERC* line of cases and not the *Alaska Airlines* line of cases.

agency." *MD/DC/DE Broadcasters Ass'n I*, 236 F.3d at 22. In evaluating agency intent, "[s]everance and affirmance of a portion of an administrative regulation is improper if there is 'substantial doubt' that the agency would have adopted the severed portion on its own." *Davis Cnty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (per curiam). The court examines the purpose of the agency's action and whether the action "sensibly serve[s] the goals for which it was designed" without the severed portion. *MD/DC/DE Broadcasters Ass'n II*, 253 F.3d at 734. To make this evaluation, a federal court may consider the position of the agency asserted in litigation. *Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014); *see also Davis Cnty.*, 108 F.3d at 1457-59 (finding a rule to be severable after the agency took that position in a rehearing position, even though it took the contrary position earlier in the litigation).

If the Court accepts all nine of Plaintiffs' challenges to the Lesson Plan, each invalid provision should be severed from the Lesson Plan. There is no doubt that USCIS would have issued the Lesson Plan without the nine challenged provisions. Indeed, USCIS has repeatedly revised its Lesson Plan on Credible Fear of Persecution and Torture Determinations, including during every presidential administration of the agency's existence and including twice in the last year: 2006,[4] 2013,[5] 2014,[6] 2017,[7] April 2019,[8] and September 2019.[9]

More specifically, the vast majority of the Lesson Plan under review in this case—the April 2019 version—has been included in several past iterations of the Lesson Plan. This is shown by Plaintiffs' own demonstrative exhibit, a redline of changes between the April 2019

[4] AR at 85.
[5] AR at 135-73.
[6] AR at 88-134.
[7] AR at 38-84.
[8] AR at 1-37.
[9] ECF No. 58-1.

Lesson Plan and the earlier 2017 Lesson Plan. Lesson Plan Redline (ECF No. 36-3 at 4-72). This document contains expanses of black text, which—as opposed to green text or red text—indicate that the Lesson Plan largely did not change from the prior version. *See* Kumalmaz Decl. (ECF No. 36-3 at 114 ¶ 7, 116 ¶ 13.c). A quick comparison of the 2019 Lesson Plan and the 2017 Lesson Plan confirms this as well. *See, e.g.*, AR at 10, 99 (identical sections of the April 2019 and 2014 Lesson Plans defining the credible fear burden of proof as having to "produce sufficiently convincing evidence that establishes the facts of the case, and that those facts must meet the relevant legal standard"); AR at 23, 110-11 (identical sections of the April 2019 and 2014 Lesson Plans concerning evaluation of country of origin information); AR at 25, 121 (identical sections of the April 2019 and 2014 Lesson Plans concerning no need to make a determination of statelessness or what applicant's country of last habitual residence); AR at 25, 121 (identical sections of the April 2019 and 2014 Lesson Plans concerning the screening standard for torture claims); AR at 31, 128 (identical sections of the April 2019 and 2014 Lesson Plans stating that "evidence that the applicant is, or may be, subject to a bar to asylum or withholding of removal does not have an impact on a credible fear finding"). This should satisfy the Court that USCIS "would have adopted the [Lesson Plan] absent the rules [the Court would be] now vacat[ing], which . . . operate independently." *Verizon*, 740 F.3d at 659.

Nor is there any affirmative evidence that the challenged portions are inextricably linked to other parts of the Lesson Plan and that they are intended to fall with the challenged portions.[10]

[10] It is insignificant that the Lesson Plan lacks an explicit severability clause. "[T]he ultimate determination of severability will rarely turn on the presence or absence of such a [severability] clause." *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968). Moreover, as Defendants have explained, they are unaware of a single previous instance of a party challenging asylum training materials. *E.g.*, Defs.' Summary J. Reply at 22 n.9. It is therefore reasonable that USCIS would not assume to include a severability clause in a document that had theretofore never been challenged.

In *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, the Supreme Court held that the invalid removal restriction on members of a regulatory board was severable from the rest of the board's enabling statute. 561 U.S. 477 (2010). Even without a severability clause, the Court held that it was not "'evident'" that Congress "would have preferred no Board at all to a Board whose members are removable at will." *Id.* at 509 (citation omitted). The same result follows *a fortiori* here: there is no indication that USCIS would rather have no current lesson plan at all than one with any unlawful portions excised. USCIS has a statutory and regulatory mandate to provide specialized training to asylum officers, 8 U.S.C. § 1225(b)(1)(E); 8 C.F.R. § 208.1(b), as well as a general administrative interest in training its employees, *see* 8 U.S.C. § 1103(a)(1)-(3).

On the contrary, there is good reason to think that USCIS would have issued the Lesson Plan without the challenged provisions—because that is exactly what it did in 2017 and 2013, depending on the challenged provision at issue. That is all the indication the Court needs that USCIS intended for the balance of the Lesson Plan to remain in force should parts of the document be invalidated. *See Davis Cnty.*, 108 F.3d at 1459 (reviewing courts should ask "whether the [agency] would have adopted the same [result] . . . had the [agency] not erroneously interpreted [the statute in issuing the rule]").

There is no "substantial doubt" that USCIS would have adopted the Lesson Plan on its own without the nine portions challenged here. *See Davis Cnty.*, 108 F.3d at 1459. The agency has therefore made clear its intent to have any unlawful provisions severed.

B. The Remainder of the April 2019 Lesson Plan Would Operate Sensibly Without the Nine Challenged Provisions.

The second consideration is "whether the remainder of the regulation could function sensibly without the stricken provision." *MD/DC/DE Broadcasters Ass'n I*, 236 F.3d at 22. Phrased differently, a court must consider whether the challenged provisions are "intertwined" or

whether "they operate entirely independently of one another." *Davis Cnty.*, 108 F.3d at 1459.

In operation—as well as intent—the remainder of the Lesson Plan could survive and make sense without the nine provisions challenged by Plaintiffs. *First*, the Lesson Plan's structure shows that it comprises multiple independent, discrete topics. The Lesson Plan covers a lot of ground: a statute requires an "asylum officer" to receive "professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of [asylum] applications." 8 U.S.C. § 1225(b)(1)(E)(i). An asylum officer must also work under the supervision of another officer who has not only such training, but also "substantial experience adjudicating asylum applications." *Id.* § 1225(b)(1)(E)(ii). USCIS has gone further than the statute; by regulation, asylum officers receive "special training in international human rights law, nonadversarial interview techniques, and other relevant national and international refugee laws and principles." 8 C.F.R. § 208.1(b).

The April 2019 credible fear Lesson Plan reflects this breadth of subject matter and shows that the document acts to instruct USCIS employees on a diversity of topics. The April 2019 version of the Lesson Plan covers topics ranging from the background of credible fear screenings, to the burdens of proof, to credibility and evidence, to the nexus requirement for asylum claims, to torture claims and issues of proof. In the process, the Lesson Plan cites *eleven* other longstanding USCIS lesson plans and material spanning over 550 pages. AR at 233-794. The numerous headings and numbered sections throughout the Lesson Plan evince this wide range; practically every page has several numbered or lettered paragraphs.

And as the margins suggest, the Lesson Plan complements a wide array of other techniques and materials that USCIS uses to train its asylum officers, including policy memoranda, forms, sister agencies' policies, regulations, directives, case law, statutes, and in-

person training opportunities, which include lectures, practical exercises, and a written test. *Id.* at 801-11, 215-17, 224-28, 218-23, 795-800, 812-21, 2, 5, 9, 1-2. This explicit recognition of the various subjects shows that the Lesson Plan's parts operate independently. *See Davis Cnty.*, 108 F.3d at 1459-60 (finding severability where the agency "has consistently differentiated between" the subject matters at issue, "even before enactment of" the enabling statute).

The Lesson Plan itself does not—and in light of these other longstanding training materials, could not—indicate that it is "comprehensive." *Cf. Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 263 (2d Cir. 2006) (citing a USCIS asylum fact sheet that did state that it was "comprehensive" and "clarif[ied] the regulations"). Plaintiffs are therefore wrong to claim, as they have before, that the Lesson Plan "is supposed to be a comprehensive document setting forth the entire process." Tr. of Oral Argument at 8 (Oct. 22, 2019) (ECF No. 65).

The case law is consistent with a finding of severability, in light of the wide breadth of the Lesson Plan, combined with the fact that its many individual provisions do not cross-reference each other. *Compare Davis Cnty.*, 108 F.3d at 1459 (where EPA standards operated "entirely independently of one another," the provision was found severable) *and Ass'n of Private Colls. & Univs. v. Duncan*, 870 F. Supp. 2d 133, 156-57 (D.D.C. 2012) (holding that when two regulatory requirements had different focuses which were not dependent on the others' existence, they were not intertwined and the invalid requirements could be severed), *with Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 493 (D.C. Cir. 2007) (no severability finding where agency not only did not contend rule was severable, but the disputed provisions were expressly described as related, and some of the disputed provisions were required to define terms used in the others).

As a final note, equitable remedial power has always been characterized by flexibility. *See, e.g.*, *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The Court should elect to avail itself of

the equitable remedy of striking particular unlawful provisions and leaving the rest of the Lesson Plan intact as opposed to the equitable remedy of vacating the Lesson Plan in its entirety. This is because completely vacating the Lesson Plan would leave USCIS without an up-to-date training document reflecting the latest legal developments, and instead force the agency to teach officers on materials that no longer reflect the law. This is anathema to Congress's direction to USCIS to properly train its asylum corps. *See* 8 U.S.C. §§ 1103(a)(1)-(3), 1225(b)(1)(E); *U.S. Bancorp.*, 513 U.S. at 26 ("As always when federal courts contemplate equitable relief, our holding must also take account of the public interest."). It is also anathema to the general presumption in favor of severability. *See North Carolina v. FERC*, 730 F.2d at 796; *see also Davis Cnty.*, 108 F.3d at 1459 (declining to vacate where it was "likely that [vacatur] . . . will result in significantly greater pollution emissions than would occur if these emission standards were not vacated," even though "[t]he practical effect of [vacatur] . . . may not be as great as EPA predicts").

The Court should find that the intent and operations of the Lesson Plan support severing any provisions that the Court finds jurisdiction over and finds unlawful, and leaving the balance of the Lesson Plan intact.

III. Assuming only certain provisions of the Lesson Plan are unlawful, is there any challenged provision that is not severable?

No.

Each of the nine challenged provisions "are not in any way 'intertwined'" with the remainder of the Lesson Plan such that the Lesson Plan makes no sense or cannot operate independently. *Davis Cnty.*, 108 F.3d at 1459. Again, the Lesson Plan *did* operate independently without these provisions, as it undisputedly existed without them as least as far back as 2013. And the 2013 Lesson Plan sans those provisions apparently made plenty sense, as that Lesson Plan was never challenged under 8 U.S.C. § 1252(e)(3)—and neither were the 2006, 2014, or

2017 Lesson Plans.

A review of each challenged provision confirms this rule. *First* and *second*, Plaintiffs argue that the Lesson Plan requires consideration of discretionary factors. Pls.' Summary J. Br. at 29-32 (citing AR at 15, 18 & n.4, 19, 24, 35). Even assuming the justiciability of this claim, *but see* Defs.' Summary J. Reply at 23, the gist of Plaintiffs' argument is that the Lesson Plan imposes a wholly new requirement: the consideration of discretionary factors at the asylum credible fear stage. *Third*, Plaintiffs claim that the April 2019 Lesson Plan improperly requires the asylum seeker to provide evidence going to every element of an asylum claim, thereby allegedly raising the alien's burden of proof. Pls.' Summary J. Br. at 32-33. Even if the challenged provision were unlawful (which it is not), the very same sentence reminds officers that "the applicant does not need to show that the 'preponderance' or majority of the evidence establishes that entitlement"—in other words, that the alien needs to produce evidence showing that she has a significant possibility of qualifying as a refugee, not that she actually *is* a refugee. AR at 12. That part of the sentence is not meaningfully challenged by Plaintiffs.[11] Thus, an undisputedly valid statement on this area of law would remain behind upon severance.

Similarly, *fourth*, Plaintiffs claim that the Lesson Plan improperly requires the alien to provide evidence going to every element of an asylum claim. Pls.' Summary J. Br. at 33-35 & n.17 (citing AR at 10, 18, 19, 21, 24, 25). They allege this is a new requirement as well, that "misstat[es] what must be proven," Pls.' Summary J. Br. at 35, but which is independent from other provisions on the burden of proof, *e.g.*, AR at 12, 19, 24, 26, 29, 34, 36 (all uncontested

[11] To be sure, Plaintiffs argue that the sentence can be stretched to imply that "a 49% certainty or more" is required. Pls.' Reply Memo. of Law in Supp. of Their Cross-Mot. for Summary J. at 20 (ECF No. 60). Even were that a reasonable interpretation of the sentence (and it in no way is), Plaintiffs do not claim that the sentence is incorrect or unlawful. In other words, this sentence is not part of their nine challenged provisions. Pls.' Summary J. Br. at 29-39.

articulations of the alien's burdens). *Fifth*, Plaintiffs claim that the Lesson Plan uses an improper corroboration requirement when it states that the alien "must provide" evidence upon request that corroborates the aliens' testimony. Pls.' Summary J. Br. at 35-36 (citing AR at 11). Again, this requirement is separate from the rest of the Lesson Plan's language on what evidence an alien must provide. Indeed, the Lesson Plan states the corroboration requirement in the phrasing of Plaintiffs' liking just the page before. AR at 10 ("An applicant's testimony must satisfy all three prongs of the "credible, persuasive, and … specific facts" test in order to establish his or her burden of proof without corroboration.").

Sixth, Plaintiffs claim that the Lesson Plan directs officers to apply an erroneous standard to determine whether non-governmental actors have committed persecution, by requiring the alien's home government to "have abdicated its responsibility to control persecution." Pls.' Summary J. Br. at 36 (citing AR at 23). Plaintiffs' chief complaint is that the Lesson Plan allegedly "conflates the two prongs of the relevant standard—that the government be 'unable *or* unwilling to control' the persecutor." *Id.* But multiple times, the Lesson Plan does exactly that: say that the standard is "unable or willing to control." AR at 22, 23, 29. Thus, if the "abdicated its responsibility to control persecution" language challenged by Plaintiffs is vacated, then their favored language would remain. The Court should sever this provision as well if found unlawful.

Seventh, Plaintiffs take issue with the term "well-founded fear" and how the Lesson Plan explicates that concept by discussing *INS v. Cardoza-Fonseca*. Pls.' Summary J. Br. at 37 (citing AR at 19-21). The language they challenge was a new explanation of the concept added to the April 2019 Lesson Plan and not present in the 2017 Lesson Plan. *Compare* AR at 12-21, *with id.* at 65. The underlying, basic explanation of the term "well-founded fear"—"To establish a well-founded fear of persecution on account of a protected characteristic, an applicant must show that

(1) he or she has a subjective fear of persecution, and (2) that such fear has an objective basis," AR at 19—is uncontroverted and would remain if the *Cardoza-Fonseca* explanation disappeared. Thus, this challenged provision is also a mere supplement in the Lesson Plan.

Eighth, Plaintiffs claim that the Lesson Plan improperly directs asylum officers on the use of State Department reports and U.S. Customs and Border Protection ("CBP") encounters. Pls.' Summary J. Br. at 37-38. Plaintiffs claim the Lesson Plan improperly treats those materials as "objective" fact. *Id.* at 37-38 (citing AR at 16, 23, 24, 28, 30, 36). But the 2017 Lesson Plan never made any mention of the State Department reports, highlighting the ability of the Lesson Plan to function if the mentions were severed. And the CBP encounters are just one line in the section on credibly establishing identity. AR at 13, 54, 104 (April 2019, 2017, and 2014 Lesson Plans). The Lesson Plan amply describes the topic without mentions of CBP encounters.

Ninth, Plaintiffs claim that the Lesson Plan enables asylum officers to make negative credible fear determinations without giving the alien the opportunity to address any credibility concerns. Pls.' Summary J. Br. at 38-39 (citing AR at 15, 17, 31). Here, severance would be a simple fix. By the Court striking the purported requirement that the officer may deny the opportunity to address credibility concerns, the Lesson Plan would keep its separate language that asylum officers must follow up on all credibility concerns during the interview and give the interviewee "an opportunity to explain." AR at 15. The Lesson Plan would still reiterate that officers should specify the basis for a negative credible fear determination. *Id.* at 17. Critically, the Lesson Plan would continue to cite to the separate USCIS lesson plan on Credibility. *Id.* at 15. The remaining Lesson Plan would operate independently without this provision.

As these nine challenged provisions are each both allegedly new and are each supplementary (as opposed to being freestanding instructions on a particular topic), and as the

challenged provisions are self-contained in the cites given by Plaintiffs, they are supplementary. As explained, the remainder of the Lesson Plan does not rely on these challenged supplementary provisions. Assuming the Court may review these provisions and bypasses the remedies issues identified *supra* Part I, these nine provisions may each be severed. This is thus not a case where, following severance, "very little will survive remand in anything approaching recognizable form." *North Carolina v. EPA*, 531 F.3d 896, 929 (D.C. Cir. 2008) (per curiam) (cleaned up). To answer the Court's third question, there is not a single challenged provision that is not severable.

As a final note, if the Court disagrees and finds that at least one provision is unlawful and not severable, that does not necessarily mean the entire April 2019 Lesson Plan must be struck down. Rather, the Court may still avail itself of the remand option. *See supra* Part I.B. In *Addison v. Holly Hill Fruit Products*, the Supreme Court followed that exact course when it found that parts of a regulatory scheme were unlawful and could not be severed. 322 U.S. 607, 618-19 (1944). The Court did not invalidate the entire agency action. Rather, *Addison* concluded that the appropriate disposition was to remand the case "to the district court with instructions to hold it until the Administrator, by making a valid determination of the area with all deliberate speed, acts within the authority given him by Congress." *Id.* at 619. The Supreme Court emphasized the flexibility of the remedies available to it there: "[n]either logic nor law dictates an 'either-or' conclusion." *Id.* Whatever flexible remedy the Court chooses if it finds a provision to be unlawful, Defendants ask that the Court enter a temporary stay or other later compliance date to allow for operation issuance of a revised Lesson Plan to conform to the Court's order.

IV. Conclusion

If the Court reaches the merits of this case and finds part of the Lesson Plan unlawful, the remedies are, in order of preference, a determination, remand without vacatur, and severance.

Dated: January 27, 2020

Respectfully submitted,

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