UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

Defendants Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security, and others, respectfully submit this Memorandum of Law in opposition to Plaintiffs' Cross-Motion for Summary Judgment (ECF Nos. 36, 38) and reply in support of Defendants' Motion for Summary Judgment (ECF No. 31).

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INTRODUCTION

This case challenges asylum training materials issued by a Department of Homeland Security component agency, U.S. Citizenship and Immigration Services ("USCIS"). In so doing, Plaintiffs seek to have this Court micromanage the training of immigration asylum officers. The Court should decline the invitation, and either dismiss the Amended Complaint for lack of jurisdiction or else grant judgment to Defendants on the merits on all counts.

ARGUMENT

I. PLAINTIFFS EITHER LACK STANDING OR THEIR CLAIMS ARE MOOT

As previously explained in Defendants' Motion for Summary Judgment (ECF No. 31) ("Defs.' Br."), Plaintiffs have the burden of showing that they have standing to bring this lawsuit. But Plaintiffs fail to show that at least one of them has standing to maintain this case.

A. Plaintiffs Have Not Demonstrated that They Have Standing.

As an initial matter, Plaintiffs' standing theory fails on the traceability prong because they are making nothing more than "bald allegation[s]" that the Lesson Plan is connected to their alleged injury. *Renal Physicians Ass'n v. HHS*, 489 F.3d 1267, 1275 (D.C. Cir. 2007); *see also Humane Soc'y of the U.S. v. Perdue*, 935 F.3d 598, at *3-4 (D.C. Cir. 2019) (no standing because the plaintiff's declaration at summary judgment was too conclusory). Plaintiffs state that "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)." Pls.' Corrected Memo. of Law at 23 (ECF No. 38) ("Pls.' Br."). But they never allege, much less show, that such a causal relationship actually exists because they never describe the chain of causation in any detail whatsoever.

It is not enough, as Plaintiffs' briefing suggests, to simply allege that there is an agency document and to allege injuries. The two components must be linked. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (noting how "a plaintiff must demonstrate standing for each claim he seeks to press" and "for each form of relief" sought (quotations omitted)). That is, Plaintiffs are required to adduce evidence that the Lesson Plan (as opposed to the underlying law) was used in *their* credible fear cases and caused a legally cognizable detriment, and they have made no attempt to satisfy that burden. *See, e.g.*, *Fla. Audubon Soc'y*, 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc).

No "concrete injury" has ever been shown in this case. None of Plaintiffs' allegations or affidavits "explain how [they are] harmed by" the Lesson Plan. *Humane Soc'y*, 935 F.3d 598, at *3 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009)). As Defendants have pointed out, Defs.' Br. at 15-16, Plaintiffs have offered *no* specific evidence that the asylum officers who made their credible fear determinations applied the *Lesson Plan*, as opposed to applying the *underlying* statutes, case law, policies, and so forth. Nor is it obvious that the officers actually did so. In fact, Plaintiffs' conclusory statement is especially tenuous if, as they allege, the totality of the Lesson Plan is "[in]coherent" or "inten[tionally] confus[ing]," as that reduces the likelihood an asylum officer would have applied or relied on the Lesson Plan to complete the interview and adjudication screening process. Pls.' Br. at 44; *see also* Am. Compl. ¶ 86 (ECF No. 6). That is the same "generally available grievance about the government," that the D.C. Circuit rejected in *Humane Society* last month. 935 F.3d 598, at *4.

Even worse, Plaintiffs have not shown that the Lesson Plan affects any applicable procedural rights. The Lesson Plan does not recite universal procedures pertinent to all credible fear claims. For instance, some of the allegedly unlawful parts of the Lesson Plan concern torture

claims, as opposed to persecution claims. *See* AR at 25-31. Other parts concern particular types of particular social groups, which are a subset of persecution claims. *See* AR at 22. Plaintiffs must "show the agency action affects their concrete interests *in a personal way*." *Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014) (emphasis added). Thus, Plaintiffs must show what parts of the Lesson Plan allegedly denied them a fair opportunity to present their particular claims. This they have not done. And because "[o]n summary judgment, [no Plaintiff] filed any standing declarations or affidavits," Plaintiffs have "forfeited any claim that [they] have standing." *Humane Soc'y*, 935 F.3d 598, at *4.

Plaintiffs try to avoid their evidentiary burden by claiming that traceability is not required where procedural rights are involved, but miscite D.C. Circuit law to do so. *Id.* at 23. Plaintiffs quote *Mendoza* for the proposition that the standards for "traceability and redressability are 'relaxed,'" where procedural rights are violated. Pls.' Br. at 23. That is not entirely accurate. Instead, *Mendoza* states that the standards for "*immediacy* and redressability are relaxed" and "assume[d]," referring to the immediacy component of the *injury-in-fact* prong, not the *traceability* prong. *Mendoza*, 754 F.3d at 1018 (emphasis added). *Mendoza* in fact emphasizes that plaintiffs must still "demonstrate a causal relationship between the final agency action and the alleged injuries." *Id.* Plaintiffs here have not done so. Lodging only a "generalized grievance" about USCIS's conduct, *Humane Soc'y*, 935 F.3d 598, at *4, Plaintiffs have failed their burden and the Court should grant Defendants' motion for summary judgment.

B. The Claims of Plaintiffs Kiakombua and Ana Are Moot Because They Have Received Notices to Appear.

Similarly, the challenged Lesson Plan is no longer causing Plaintiffs Maria Kiakombua and Ana any legally cognizable injury. These Plaintiffs sought the alternative relief of "full immigration court removal proceedings pursuant to 8 U.S.C. § 1229a." Am. Compl. at 26. Since

this case was filed, Defendants have placed these Plaintiffs into full § 1229a removal proceedings by filing a "Notice to Appear." *See* Exs. D (Kiakombua Notice to Appear), E (Ana Notice to Appear) (each filed under seal); *see* 8 U.S.C. § 1229(a)(1); 8 C.F.R. § 1239.1(a). Therefore, Plaintiffs Kiakombua and Ana have each received the relief they requested, and the Lesson Plan is no way causing them any injury. In other words, even if these Plaintiffs had standing at the initiation of this lawsuit (which they did not) to challenge the Lesson Plan, they have since lost that standing because their case is moot. *See United States v. Juvenile Male*, 564 U.S. 932, 936 (2011) (standing must persist through the course of the lawsuit).

In response, Plaintiffs argue that *Defendants* purportedly must "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." Pls' Br. at 21-22 (quoting *Am. Bar Ass'n v. FTC*, 636 F.3d 641, 648 (D.C. Cir. 2011)) (alteration in original, internal quotation marks omitted). But that particular burden only applies when the "voluntary cessation" exception is at issue. *Am. Bar Ass'n*, 636 F.3d at 648. Here, there was nothing "voluntary" about the government issuing a Notice to Appear to Plaintiff Ana—an *immigration judge* not subject to the Lesson Plan vacated USCIS's negative credible fear finding. *See* 8 C.F.R. §§ 208.30(g), 1208.30(g), Ex. E. That is how the statutory process was meant to work and places this case in line with *American Bar Association*, where the "voluntary cessation" exception to mootness "ha[d] no play" because the challenged conduct was not voluntarily ceased by the defendant-agency, but rather "simply nullified" by an "intervening" event. *Am. Bar Ass'n*, 636 F.3d at 648. So too here. Defendants have thus satisfied whatever mootness burden they might carry.

As for Plaintiff Kiakombua, although USCIS put her into full § 1229a removal proceedings on its own accord, there is no reasonable expectation that she will be returned to expedited removal proceedings as Plaintiffs speculate. *See* Pls.' Br. at 22. Chiefly, there is no legal mechanism or procedure for USCIS (the agency that issued the Lesson Plan) to unilaterally transfer an alien from § 1229a removal proceedings back into expedited removal proceedings. *See* 8 C.F.R. § 1003.14(a), (b). It is entirely speculative that Plaintiff Kiakombua would again be placed in expedited removal: (1) her current removal proceedings would need to be terminated or she would need to be removed; (2) she then must attempt to illegally enter the country once again; (3) get apprehended; and (4) then get placed into expedited removal. There is thus no reasonable expectation that Plaintiff Kiakombua, who is now in full removal proceedings, will once again be subject to a credible fear interview or, allegedly, to the Lesson Plan. *See Munsell v. Dep't of Agric.*, 509 F.3d 572, 583 (D.C. Cir. 2007) ("speculation [as to future events], without more, does not shield the case from a mootness determination" (internal quotation marks omitted)). Plaintiffs Kiakombua and Ana are simply not suffering a constitutional injury-in-fact.[1]

II. THE COURT LACKS STATUTORY JURISDICTION UNDER 8 U.S.C. § 1252(e)(3).

The Court also lacks jurisdiction to hear this case under the Immigration and Nationality Act ("INA"). The INA authorizes "[j]udicial review of determinations under section 1225(b) of this title and its implementation" in D.C. District Court, "limited to determinations of," as relevant here, whether "a written policy directive, written policy guideline, or written procedure

[1] Relatedly, these Plaintiffs do not satisfy the redressability prong of standing on this point. Because they have been placed in full § 1229a removal proceedings—which is the result of a positive credible fear determination, 8 U.S.C. § 1225(b)(1)(B)(ii)—no judicial order giving them a new credible fear process would redress their injuries. *See Pharmachemie B.V. v. Barr Labs.*, 276 F.3d 627, 631 (D.C. Cir. 2002).

issued by or under the authority of the [Secretary of Homeland Security] to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." 8 U.S.C. § 1252(e)(3)(A). The Court lacks jurisdiction under this provision because the Lesson Plan does not "implement" § 1225(b). *See* Defs.' Br. at 19-20.

Plaintiffs' only response is that because the Lesson Plan frequently *references* § 1225(b) and its regulations, it must *implement* § 1225(b). Pls.' Br. at 13-14 ("The Lesson Plan covers much of the same terrain as § 1225(b)[.]"). But that is irrelevant. Had Congress meant to provide judicial review over any written agency document that merely references or cites § 1225(b), then it could have said so. Indeed, Congress used phrases like "arising from," "relating to," or "[is] under" some 45 times in § 1252 alone. *See, e.g.*, 8 U.S.C. § 1252(a)(2)(A)(i), (a)(5), (b)(9), (e)(5), (g). Had Congress meant for this Court to review a Lesson Plan which simply "relates to" § 1225(b) in lieu of implementing that section, "it knew how to say so." *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n*, 824 F.3d 108, 115 (D.C. Cir. 1987); *see also East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1085, 1090 n.1 (N.D. Cal. 2018). Plaintiffs have failed to meaningfully grapple with Defendants' implementation argument, and the Court should conclude there is no statutory jurisdiction here.

Similarly, the Court may not review just any agency conduct under § 1252(e)(3)—it may review only a statute, regulation, "written policy directive, written policy guideline, or written procedure." 8 U.S.C. § 1252(e)(3)(A)(ii). Plaintiffs do not identify which of those, exactly, the Lesson Plan would be. Pls.' Br. at 14-15 (arguing that the Lesson Plan generally falls somewhere within § 1252(e)(3)(A)(ii)). Understandably so: the Lesson Plan is none of the above. The Lesson Plan is indisputably neither a statute nor a regulation. Nor is it a "policy directive" nor "policy guideline"—it does not ordain or enact any policy that Plaintiffs have identified, be it a

more hortatory "directive" or a more discretionary "guideline."[2] And the Lesson Plan is not a "written procedure," as it informs officers of the law surrounding credible fear processes without dictating the details of how the credible fear process should be operated or done.

Of course, the Lesson Plan may cite or reproduce other, previously announced statutes, regulations, policy directives, policy guidelines, or written procedures. But that does not itself make the Lesson Plan one of those any more than a new judicial decision's incorporation into the Lesson Plan. And as Defendants explained, Congress did not intend for immigration *training materials* to be subject to § 1252(e)(3) review. Defs.' Br. at 20-21. Given Defendants' affirmative arguments—and Plaintiffs' complete failure to acknowledge them, much less rebut them or identify what class of reviewable material the Lesson Plan is—the Court should conclude that the Lesson Plan does not meet the requirements for review under § 1252(e)(3)(A)(ii). *See* Fed. R. Civ. P. 56(a) (placing the burden on the *movants* to demonstrate that they are entitled to judgment as a matter of law).

Relatedly, Plaintiffs have not satisfied § 1252(e)(3)'s requirement that they challenge a reviewable "determination[]" under § 1225(b). 8 U.S.C. § 1252(e)(3)(A). Plaintiffs disclaim that they are seeking "review of any credible fear determination of Plaintiffs or of anyone else." Pls.' Br. at 16. That solves one problem for them, but raises another: Plaintiffs still must show that the Lesson Plan affected them. The D.C. Circuit has already held that "Congress meant to allow litigation challenging the new system by, *and only by, aliens against whom the new procedures*

[2] Plaintiffs claim that Defendants conceded that the Lesson Plan provides "policy guidance," Pls.' Br. at 15, but Defendants' offhand statement at issue does not rise to the level of a concession, as it is fully consistent with Defendants' position that the Lesson Plan reproduces law created elsewhere. And in fact, Defendants' statement proves their point. Section 1252(e)(3) permits judicial review over only certain things: a statute, regulations, written policy directives, written policy guidelines, and written procedures. "Policy guidance" is not on that list.

had been applied." *Am. Immigration Lawyers Ass'n v. Reno* ("*AILA*"), 199 F.3d 1352, 1360 (D.C. Cir. 2000) (emphasis added) (reversing a holding by the district court that organizations purporting to speak on behalf of aliens who *could be* subject to expedited removal may invoke § 1252(e)(3), given the clear "congressional intent" evidenced by § 1252 to bar such claims). For the same reasons Plaintiffs have failed to establish standing, they have failed to show that their credible fear determinations relied on or related to the challenged portions of the Lesson Plan.

These points are important because, as explained extensively below in response to Plaintiffs' specific examples of allegedly objectionable portions of the Lesson Plan, some of Plaintiffs' challenge is time-barred. Congress has imposed a jurisdictional requirement that these challenges be filed "no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure ... is *first* implemented." 8 U.S.C. § 1252(e)(3)(B) (emphasis added). Yet most of the 2019 Lesson Plan has been operative for years, to say nothing of the underlying statutes, regulations, external policies, and other materials cited in the Lesson Plan, much of which has also been operative for years.

Plaintiffs claim that there is "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" Pls.' Br. at 17. But the law is right in front of them: § 1252(e)(3)(B) requires a challenge to be brought within 60 days of when the challenged document "is *first* implemented." 8 U.S.C. § 1252(e)(3)(B) (emphasis added).[3] Even assuming the Lesson Plan "implement[s]" § 1225(b) and is otherwise reviewable under § 1252(e)(3) (which it does not and is not), several

[3] Defendants phrased this § 1252(e)(3)(B) requirement as Congress permitting judicial review only over "new" material. *E.g.*, Defs.' Br. at 22, 24. Plaintiffs complain that the word "new" "does not appear in the statute." Pls.' Br. at 17. Section 1252(b)(3)(B) does not say that certain agency documents must be "new," but it *does* require them to have been "first implemented" within 60 days of suit. There is no distinction between the terms, and Plaintiffs offer none.

parts of the Lesson Plan were "first" introduced well before 2019. The overlap is not mere "words" as Plaintiffs claim; the challenged portions and phrasings in the 2019 Lesson Plan appear nearly verbatim in earlier iterations.

Plaintiffs then say that Defendants have not identified a means for the "Court to determine whether particular language is 'new,' ... especially when its context or presentation has changed." Pls' Br. at 20. But as Defendants previously explained, the Court has at its disposal common judicial sense and ordinary tools of textual interpretation. Defs.' Br. at 38-39. The Court should use those to determine what parts of a reviewable agency document are new or "first implemented," and in so doing credit the agency its presumption of regularity and deference to the extent the Court believes this phrase is ambiguous, *id.* at 39—both concepts that Plaintiffs conceded by failing to object to. *See* General Order and Guidelines Applicable to APA Cases Assigned to Judge Ketanji Brown Jackson ¶ 5.d.v (ECF No. 3) ("General Order").

Plaintiffs' final argument here is that it is "absurd[]" for Defendants to argue that Plaintiffs' ability to challenge parts of the Lesson Plan expired years ago, given that Plaintiffs did not receive a negative credible fear determination until May or June of 2019. Pls.' Br. at 17 n.11; *see also id.* at 18 ("Defendants ignore that 'no law pursues its purposes at all costs.'"). But Plaintiffs ignore that Defendants' position comes not from their own "desire[s]," *id.*, but from Congress and from D.C. Circuit jurisprudence interpreting the precise purpose of § 1252(e)(3)(B)'s 60-day window. *See AILA*, 199 F.3d at 1363 (reversing lower court holding that 60-day limit required allowing actions to be brought by more than just individual aliens subject to expedited removal orders because "this is precisely what Congress intended"). The use of the phrase "60 days after the challenged [document] is first implemented," rather than a phrase like "60 days ... from the date of application of [the challenged procedures] to a particular alien,"

makes clear that the 60-day limitation "is jurisdictional rather than a traditional limitations period" such that when an alien's claims "arise" is irrelevant. *Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 47 (D.D.C. 1998). Indeed, for that reason, Judge Sullivan concluded that aliens who have had a written policy, guideline, or directive applied to them outside the relevant 60-day post-implementation period may not invoke § 1252(e)(3), *id.*—a conclusion the D.C. Circuit affirmed in full. 199 F.3d at 1357; *see also id.* at 1358 (citing other statutes to conclude that a "sixty-day limit is commonplace for judicial review of agency action").[4] Any frustration by Plaintiffs at their inability to get around the long-closed 60-day window is therefore properly directed at Congress.

And, again, that result makes sense here: if Plaintiffs were correct that any lesson plan announcing a new judicial or agency precedent to asylum officers were reviewable under section 1252(e)(3), then the 60-day clock for district-court review would restart any time a new Article III decision or immigration case comes down and the agency takes the prudent course of informing line officers about those developments. Defs.' Br. at 24. The result would be a 60-day limitation that is meaningless—which is not what Congress intended. *See AILA*, 199 F.3d at 1364 ("Congress imposed the 60-day limit on actions in order to cabin judicial review and to have the validity of the new law decided promptly."). Plaintiffs offer no response to these

[4] Judge Cooper likewise has rejected challenges similar to Plaintiffs' that the § 1225(b) statute and regulations are unconstitutional, even though the statute and regulations purportedly "do not allow a recipient of a removal order sufficient opportunity to refute alienage, or extend heightened due process to aliens who have accrued 'meaningful connections' with the United States," because "the 60-day limit on [such] review has long since expired." *Dugdale v. CBP*, 88 F. Supp. 3d 1, 8 (D.D.C. 2015). "[T]he constitutionality of the sixty-day limit" is now settled law. *AILA*, 199 F.3d at 1356; *see Dugdale*, 88 F. Supp. 3d at 8 (rejecting argument that 60-day limit may be circumvented and concluding that the court must "leave it to higher authorities to determine whether grounds exist to depart from these holdings"); *Dugdale v. CBP*, 2015 WL 2124937, at *1 (D.D.C. May 6, 2015) ("*AILA* remains binding precedent"), *aff'd*, *Dugdale v. Lynch*, 672 F. App'x 35 (D.C. Cir. 2016).

arguments other than to say that § 1252(e)(3) is invoked sparingly, and that the Lesson Plan must be unlawful because otherwise Plaintiffs would have no incentive to sue. Pls.' Br. at 18-19. Needless to say, these statements do not establish that Defendants have acted unlawfully or that aliens in the future will not be emboldened by this case to challenge old agency documents bearing on expedited removal.

And although Plaintiffs rely upon the general presumption of judicial review, *see* Pls.' Br. at 11, that presumption is "rebuttable," and "fails when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). Defendants have done so here, and the Court should conclude that it lacks statutory jurisdiction under § 1252(e)(3).

Finally, Plaintiffs claim that if § 1252(e)(3) does not apply, then review may be had under 28 U.S.C. § 1331, the default federal-question jurisdiction statute. Pls.' Br. at 19-20; *see* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). That is wrong. Title 8 U.S.C. § 1252(a)(2)(A) bars jurisdiction in cases involving orders of expedited removal, "notwithstanding any other provision of law," other than as permitted by section 1252(e). Therefore 28 U.S.C. § 1331 cannot, as Plaintiffs allege, separately supply jurisdiction. *See Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (observing that the phrase "notwithstanding any other provision of law" in jurisdictional provision necessarily encompasses 28 U.S.C. § 1331). Accordingly, Judge Sullivan previously rejected the argument that § 1331 supplies jurisdiction over a claim if § 1252(e)(3) does not. *AILA*, 18 F. Supp. 2d at 58 (holding that "based on the clear language" of § 1252(e)(3)(A)(ii), the court cannot resort to 28 U.S.C. § 1331). The Court lacks statutory jurisdiction over this case.

III. PLAINTIFFS HAVE NO CAUSE OF ACTION UNDER THE APA.

If the Court reaches the merits of the Amended Complaint, it should grant summary judgment to Defendants on all counts. Under § 1252(e)(3)(A)(ii), an alien can challenge certain agency documents as being "in violation of law." Plaintiffs claim that the Lesson Plan is in violation of the Administrative Procedure Act ("APA") because: (a) it is "arbitrary or capricious" or contrary to law, Pls.' Br. at 39-44; and (b) it should have undergone notice-and-comment rulemaking, *see id.* at 44-48. Plaintiffs have conceded that the Court cannot hear either claim by conceding that the Lesson Plan is not "agency action." *Id.* at 25. Alternatively, their claims fall on the merits.

A. Plaintiffs Have Conceded that the Lesson Plan Is Not a Rule, Much Less an Agency Action.

The APA "is not so all-encompassing as to authorize us to exercise 'judicial review [over] everything done by an administrative agency.'" *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (Roberts, J.) (quoting *Hearst Radio, Inc. v. FCC*, 167 F.2d 225, 227 (D.C. Cir. 1948)). Specifically, the APA provides judicial review *only* for "agency action"—as the APA's judicial review provisions repeatedly and consistently emphasize. 5 U.S.C. § 704 ("*Agency action* made reviewable by statute and final *agency action* for which there is no other adequate remedy in a court are subject to judicial review." (emphasis added)); *accord id.* §§ 702, 703, 706; *see also* Pls.' Br. at 25-26, 39, 45, 52 (all citing § 704 or 706(2) as the basis for Plaintiffs' APA challenge); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) ("[T]he person claiming a right to sue must identify some 'agency action' that affects him in the specified fashion; it is judicial review 'thereof' to which he is entitled.").

"Agency action," the APA establishes, is a term of art. 5 U.S.C. § 701(b)(2) ("For the purpose of this chapter [that is, §§ 701-706,] 'rule' ... and 'agency action' have the meanings

given them by section 551 of this title.") Specifically, "agency action" includes "an agency rule." *Id.* § 551(13).[5] A "rule," in turn, "means the whole or a part of an agency statement of general or particular applicability and future effect [a] designed to implement, interpret, or prescribe law or policy or [b] describing the organization, procedure, or practice requirements of an agency." *Id.* § 551(4); *accord id.* § 551(5) (defining "rule making").

Defendants described at length why a training material for agency employees about what statutes, case law, and regulations say does not meet this technical definition of an APA "rule," and therefore is not an "agency action" subject to APA judicial review. Defs.' Br. at 25-29, 43. Defendants argued that this classification had consequences both (1) for sovereign immunity reasons, *id.* at 25-29, and (2) because the APA requires an "agency action" for substantive relief, *id.* at 25 (explaining that the APA does not permit the court to exercise judicial review over the Lesson Plan), 29 (noting that "Plaintiffs lack a cause of action under the APA" because the Lesson Plan had to be a *rule* in addition to being a final one), 31 (also noting that the Lesson Plan had to be a "rule" for Plaintiffs to succeed on the merits), 32 (same), 44 (same).

This argument is not only right on its own terms, but Plaintiffs have conceded, in two independent ways, that the Lesson Plan is not an "agency action." First, Plaintiffs explicitly agree that the APA requires "agency action": they acknowledge that 5 U.S.C. § "704 reflects that two kinds of *agency action* are 'subject to judicial review': 'final *agency action*' and "*[a]gency action* made reviewable by statute."" Pls.' Br. at 26 (alteration in original; emphasis altered).

[5] An "agency action" includes other types of agency conduct including agency adjudications, but as Defendants have pointed out, Plaintiffs alleged that the type of "agency action" at issue is a "rule." Defs.' Br. at 25-26. Plaintiffs' cross-motion for summary judgment does not suggest that the Lesson Plan could be any other type of "agency action."

Second, Plaintiffs have constructively conceded the point. "[I]f counsel fails to respond to arguments in opposition papers, the Court may treat those specific arguments as conceded." General Order ¶ 5.d.v. Plaintiffs have done exactly that. Defendants analyzed at length why the Lesson Plan is neither a "rule" nor an "agency action." Defs.' Br. at 25-29, 43. Defendants canvassed the Lesson Plan's text, design, and function, and discussed how the Lesson Plan fits in with the immigration laws. Defendants tied this all in to the APA's definition of "rule" and the APA's legislative history, while analogizing the Lesson Plan to other agency conduct that courts have found did not constitute "rules."[6]

Plaintiffs ignore Defendants' core argument. Instead, Plaintiffs only dispute the first *consequence* of an "agency action" classification, relating to sovereign immunity. Defendants acknowledge that sovereign immunity has been waived on the APA claim. But despite the second, very significant consequence of the Lesson Plan not being an "agency action," Plaintiffs' only treatment of the subject states, "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,' [Defs.' Br.] at 27, which is both incorrect and a merits question—but that does not matter, because Defendants' premise is mistaken." Pls.' Br. at 25.

Plaintiffs' threadbare objections otherwise are either question-begging (that Defendants' classification is "incorrect"), irrelevant (that this "is a merits question"), or misapprehend a

[6] Elsewhere, Plaintiffs dismiss these comparisons by saying that the "Court need only decide whether the Lesson Plan is encompassed by § 1252(e)(3), as that is the only characterization that Congress made relevant." Pls.' Br. at 15 (citing *Calif. Cmtys. Against Toxics v. EPA*, 934 F.3d 627 (D.C. Cir. 2019)). That statement is plainly belied by the APA: in 5 U.S.C. § 701(b)(2) and § 551, Congress *did* make relevant whether agency conduct is characterized as a "rule." Further, *California Communities* nowhere prohibits a court from comparing agency conduct to others in the case law—it simply prohibits courts from succumbing to the "temptation to define the action by comparing it to *superficially* similar actions." *Calif. Cmtys.*, 934 F.3d at 631 (emphasis added).

fundament of APA law (that this "does not matter" or is a "red herring[]"). *See* Pls.' Br. at 25. Plaintiffs therefore fail to meet their burden, as the parties resisting a motion, to "respond to ... specific arguments." General Order ¶ 5.d.v. In short, Plaintiffs cannot on the one hand invoke the APA as the basis for their claim that the Lesson Plan is somehow "not in accordance with law," and then run away from the APA's requirements of challenging a recognized form of agency action. Thus, not only are Defendants entitled to a favorable finding on the independent merits of their argument, but the Court should also treat this point as conceded. *See id.*

As the Lesson Plan is not "agency action," Plaintiffs cannot receive any review or relief under the APA. *See* 5 U.S.C. §§ 702, 703, 704, 706; Pls.' Br. at 25-26. This is doubly so with regard to Plaintiffs' claim that the Lesson Plan should have followed notice-and-comment rulemaking procedures: even if such a claim were reviewable under §§ 702-706, the notice-and-comment procedures apply only to "rules." 5 U.S.C. § 553(b) ("General notice of proposed *rule* making shall be published[.]" (emphasis added)), (c) ("the agency shall give interested persons an opportunity to participate in the *rule* making" (emphasis added)), (d). The Lesson Plan is therefore not "in violation of" the APA at all. *See* 8 U.S.C. § 1252(e)(3)(A)(ii). The Court should grant summary judgment to Defendants on Count I (as it relates to APA arbitrariness or capriciousness) and on Count II (which alleges a violation of the APA's notice-and-comment procedures). *See* Am. Compl. ¶¶ 96, 102.

B. The Lesson Plan Is Not "Final."

The Lesson Plan is also not even reviewable under the APA because it is not "final" agency action. *See* 5 U.S.C. § 704; Defs.' Br. at 29-30. The APA makes reviewable two kinds of agency action: "[a]gency action made reviewable by statute" and "final agency action for which

there is no other adequate remedy in a court." 5 U.S.C. § 704. (Again, either must be an "agency action," which the Lesson Plan is not.)

Plaintiffs claim the Lesson Plan qualifies under the first category, "[a]gency action made reviewable by statute." Pls.' Br. at 26. They assert, without citing a single case to address the issue, that "[a]gency action made reviewable by statute" need not be final. *Id.* But Plaintiffs again misstate the law. The D.C. Circuit has long held that the default requirement for *all* agency action is finality: "While only the second category contains a reference to finality, we conclude ... that Congress also assumed that '[a]gency action made reviewable by statute' would be final action." *Carter/Mondale Presidential Comm., Inc. v. FEC*, 711 F.2d 279, 284 n.9 (D.C. Cir. 1983) (second alteration in original) (canvassing the history of the APA and judicial practice to explain why). Indeed, "courts commonly impose a finality requirement where statutes simply provide for judicial review of agency actions." *Id.* Therefore, a finality requirement applies even if the Lesson Plan is "made reviewable by" 8 U.S.C. § 1252(e)(3).[7]

An exception *might* arguably arise if the statute "delineate[s] a set of 'directly reviewable' actions or include[s] any language that might raise doubts about maintaining the finality requirement." *Carter/Mondale Presidential Comm.*, 711 F.2d at 284 n.9 (citing 5 U.S.C. § 704's use of the term "directly reviewable"). A statute that simply states that agency conduct is

[7] Plaintiffs cite three cases to try to show that "[a]gency action made reviewable by statute" is exempt from finality. Pls.' Br. at 26. However, their cases neither involved "[a]gency action made reviewable by statute," nor stated, or even implied, that such action was exempt from finality—they merely stated that "final agency action" (a distinct category) needs to be final. *Lujan*, 497 U.S. at 882; *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1278 (D.C. Cir. 2005); *Grace v. Whitaker*, 344 F. Supp. 3d 96, 118 (D.D.C. 2018). *Grace*'s point that "[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" is in fact accurate. *Grace*, 344 F. Supp. 3d at 118. But what *Grace* did not reach is that § 1252(e)(3) *also* applies to "[a]gency action made reviewable by statute" (as Plaintiffs acknowledge), which *also* carries a finality requirement, *see Carter/Mondale Presidential Comm.*, 711 F.2d at 284 n.9.

"reviewable" does not "displace[] the finality test." *Id.* Here, § 1252(e)(3) does not rebut the presumption that finality is required. That provision simply specifies that the D.C. District Court may determine the lawfulness of § 1225(b) or certain associated regulations, written policy directives, written policy guidelines, or written procedures. 8 U.S.C. § 1252(e)(3)(A). The provision specifies that such documents are reviewable, but does not make them "'directly reviewable'" as required to avoid finality. *Carter/Mondale Presidential Comm.*, 711 F.2d at 284 n.9. And nowhere does § 1252(e)(3) "raise doubts" that the reviewable documents need to be final.[8] Therefore, the presumption is not rebutted and the baseline requirement of finality applies.

As Defendants have previously explained, the Lesson Plan is not final, as it is only meant to help train officers to apply actual laws and regulations. Defs.' Br. at 34-35. "For there to be 'final' agency action, there must, of course, be 'agency action.'" *Impro Prods., Inc. v. Block*, 722 F.2d 845, 848 (D.C. Cir. 1983). But assuming the Lesson Plan is indeed agency action, it is not final because it imposes no legal consequences. The Lesson Plan is an update to a training module. Its stated purpose is "to explain how to determine whether an alien subject to expedited removal or an arriving stowaway has a credible fear of persecution or torture." AR at 1. The objective of the training is, through lecture and practice exercises, to enable the asylum officer "to correctly make a credible fear determination consistent with the statutory provisions, regulations, policies and procedures that govern whether the applicant has established a credible fear of persecution or a credible fear of torture." *Id.*

[8] Nor does 28 U.S.C. § 1331 help Plaintiffs evade the finality requirement, if that statute supplies the statutory basis of jurisdiction as Plaintiffs claim, *see supra* section II. Section 1331 states, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States," without any express or implied reference to finality.

The Lesson Plan does not, however, relate to any specific credible fear determination. It does not state that it is the source of the rules, policies, and procedures that it reproduces—rather, it cites statutes, regulations, agency and court precedent, and agency memoranda for those rules, policies, and procedures. The Lesson Plan does not contain any new mandatory language or directives outside of those it summarizes from other sources of law. It does not describe itself as guidance or announce that it contains new interpretations of the law, and does not purport to impose new obligations on aliens in the credible fear process. The Lesson Plan merely restates, in an abstract, educational setting, what the law requires of asylum officers. In short, the Lesson Plan lacks the "force and effect of law," and is therefore not final under the second prong of *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

Plaintiffs assert to the contrary, but do so without any citation to the Administrative Record or concrete examples. Instead, they state that "*based on [the Lesson Plan]*, 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)." Pls.' Br. at 27 (emphasis added). But Plaintiffs point to no place in the Lesson Plan that says that credible fear determinations are or can be "based on [the Lesson Plan]." To the contrary, as explained above, the Lesson Plan teaches asylum officers about the state of asylum law; it does not make changes in the law. AR at 2. The only other gesture that Plaintiffs make in the direction of proof is to claim that "Plaintiffs Sofia and Julia already have been" "deported without judicial review based on the unlawful directives in the Lesson Plan." Pls.' Br. at 27-28 (footnote omitted). This bald, unproven (and false) statement is another example of a prime flaw in this case: Plaintiffs never explain or prove that the Lesson Plan (as opposed to the underlying

sources of law, policy, and history) was involved in their credible fear interviews or determinations of their removals. Their unsupported assertion is insufficient to either prove standing, *see supra* section I, or recast the Lesson Plan as a final agency action.

Plaintiffs cite two cases in support, Pls.' Br. at 28, but *O.A.* did not discuss whether an agency action was "final" for APA purposes. 2019 WL 3536334, at *13. Plaintiffs cite *California Communities* for the proposition that "unavailability of judicial review of future applications of the challenged agency action [is] a significant factor in analysis," Pls.' Br. at 28, but that case, which found that the challenged agency action was *not* "final," in no way signifies that judicial review is a "significant" factor, in part because it was not at issue. 934 F.3d at 637-38 (stating that the case was not a circumstance where the availability of judicial review "may" render the action legally consequential). And even if that dicta did relate here, as previously explained, every alien who receives a negative credible fear determination may seek de novo review from an immigration judge whose decision is unrelated to the Lesson Plan. *See* 8 C.F.R. §§ 208.30(g), 1003.42(d), 1208.30(g). Thus, the Lesson Plan is not "final" under the APA.

C. The Lesson Plan Is Neither Arbitrary Nor Capricious.

Once more, the Court does not need to entertain Plaintiffs' claim that the Lesson Plan violates the APA for being arbitrary or capricious, because Plaintiffs have conceded it: the Lesson Plan is not "agency action," and is thus not subject to 5 U.S.C. § 706(2)(A)'s "arbitrary or capricious" review. *See* 5 U.S.C. § 706 (applying only to "agency action"). But even if the Court reaches this argument, the Lesson Plan still passes muster.

First, Plaintiffs claim that the Lesson Plan is arbitrary and capricious because "Defendants failed to provide any reasons at all for their revisions to the Lesson Plan." Pls.' Br. at 40-41. However, the Lesson Plan's prose, citations, and nature all evince its reasoning, as

Defendants demonstrated. Defs.' Br. at 45-46. Plaintiffs fail to respond to these points, instead just emphasizing the rule against post hoc rationalizations and misattributing the Lesson Plan's justifications to "litigation counsel." Pls.' Br. at 41. By failing to respond to Defendants' points except to render the conclusion that they are insufficient, *id.* at 43, Plaintiffs have conceded that the Lesson Plan's reasoning was neither arbitrary nor capricious. *See* General Order ¶ 5.d.v.

Second, Plaintiffs allege that the Lesson Plan made several changes "without so much as an acknowledge[ment] from the agency." Pls.' Br. at 41. That is incorrect. As a matter of common sense, the continuous nature of Lesson Plan updates, and the date stamp indicating that a new version had been released. Defs.' Br. at 44-45. Plaintiffs respond that, "plainly," a "new date stamp provides no indication that Defendants have changed any positions, let alone which positions have changed." Pls.' Br. at 42. But that is for the Court to decide: whether, given the presumption of regularity which Plaintiffs concede Defendants are entitled to, the context of this document illustrates that asylum officers would know that something was different about the April 30, 2019, Lesson Plan compared to the February 13, 2017, Lesson Plan. Considering USCIS has made changes to every Lesson Plan in the record—that is, USCIS has never updated the date of the document without making changes, *see generally* AR at 1-173—the Court should conclude Defendants acknowledged the Lesson Plan's changes.

Third, Plaintiffs allege that Defendants "failed to 'examine the relevant data,'" because it changed language related to *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). Pls.' Br. at 43-44. However, the mere absence of language does not necessarily mean that that case was not considered. *Mogharrabi*'s existence in the record (by definition, the materials the agency considered) demonstrates consideration of that case. *See, e.g.*, AR at 28-30. Plaintiffs may not like how the agency characterizes that case, but that alone does not show a failure to consider.

Fourth, Plaintiffs falsely complain that "the Lesson Plan is simply not a coherent document," and that it "fails to achieve its stated purpose." Pls.' Br. at 44. The only example Plaintiffs give is that the Lesson Plan sets up lengthy contingent instructions in the event the injunction in *Grace* is lifted. Plaintiffs' fears are speculative, as the injunction has not been lifted, and there is nothing concrete suggesting that lifting the injunction would engender the confusion Plaintiffs claim to fear. Moreover, Plaintiffs cite no case to support their claim that it is somehow irrational for an agency to take the prudent step of providing training guidance to asylum officers which includes planning for contingent events. The purpose of a training manual is in part to guide line officers through various potential scenarios they may encounter. To pretend that the *Grace* injunction does not exist would serve that end poorly. In any event, Plaintiffs cite no authority to establish how well-worded a document must be before it passes their muster. *See* Defs.' Br. at 38-39. The Lesson Plan is not incoherent, but even if it were somehow confusing to Plaintiffs, it does not rise to the level of arbitrariness or capriciousness. *Cf. Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1089 (D.C. Cir. 2009) ("In evaluating agency action … [we] even uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."). The Lesson Plan survives arbitrary or capricious review.

D. The Lesson Plan Is, If Any Rule, an Interpretive Rule Not Subject to Notice and Comment Procedures.

Plaintiffs' notice-and-comment APA claim also fails on the merits. These procedures apply only to rules, 5 U.S.C. § 553, which Plaintiffs concede the Lesson is not. Further, the procedures do not apply to an interpretive rule, *id.* § 553(b)(A), which merely "clarifies" a legal term or "reminds" parties of existing statutory or regulatory duties. *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 236-37 (D.C. Cir. 1992).

Defendants have explained that the Lesson Plan, even if it were a "rule," is at most an interpretive rule for at least five reasons: (1) neither Defendants nor the Lesson Plan characterizes the Lesson Plan as any kind of rule; (2) the Lesson Plan was not published in the *Federal Register* or the *Code of Federal Regulations*, which can evince a rule; (3) the effect of the Lesson Plan is to teach officers, not to promulgate changes in the law; (4) the Lesson Plan has no legal effects on individuals seeking asylum; and (5) insofar as the Lesson Plan has any effects, it has no direct effect on aliens seeking asylum, withholding of removal, or protection under the Convention Against Torture. Defs.' Br. at 30-35. These points support the conclusion that the rule is interpretive, *see, e.g.*, *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986), which is consistent with the courts that have found other training materials to be non-binding, *see, e.g.*, *Lumataw v. Holder*, 582 F.3d 78, 89 n.10 (9th Cir. 2009); *Abdirahman v. Ashcroft*, 110 F. App'x 727, 728 (8th Cir. 2004).[9] And as discussed above, the Lesson Plan has no legal consequences. *See supra* section III.B.[10] For many of the reasons discussed above, then, the Lesson Plan is an interpretive rule if a rule at all.

[9] Plaintiffs claim to find "considerable unexplained tension" between the absence of precedent for a party challenging asylum training materials, and the fact that some cases have previously addressed the binding effects of asylum training materials (including the Immigration and Naturalization Service's ("INS") Asylum Basic Manual). Pls.' Br. at 47 n.19. Those cases cause no tension whatsoever. The petitioner in *Abdirahman* was challenging a denial of his application for asylum and withholding of removal. 110 F. App'x at 728. The petitioner assumed the asylum training materials were valid, and argued that the Immigration Judge should have followed those materials. *Id.* To be clear, then, the petitioner was not challenging the training materials themselves. Thus, *Abdirahman* does not conflict with the undersigned's representations that they are unaware of any other case in which agency training materials have ever been challenged, much less USCIS training materials or lesson plans. Plaintiffs are also incorrect to assert that it is "unsubstantiated" or "false" that these cases addressed predecessors to the Lesson Plan. *Abdirahman* addressed INS's asylum-focused "Basic Law Manual (2000)." *See* Br. of Pet'r, *Abdirahman*, 2003 WL 23413442 (8th Cir. filed June 23, 2003). *Lumataw* addressed an INS "Asylum Officer Training Manual." 582 F.3d at 89 n.10.

[10] Plaintiffs claim that because the Lesson Plan details what officers "must" do, it "effectively amends" regulations. Pls.' Br. at 46-47, 48. But that is nonsensical, as that is simply the Lesson

The Court should grant summary judgment to Defendants on Plaintiffs' APA claims.

IV. THE RULE IS CONSISTENT WITH THE INA, FARRA, AND THEIR REGULATIONS.

Plaintiffs contend that the Lesson Plan, under 8 U.S.C. § 1252(e)(3)(A)(ii), is "not consistent with [8 U.S.C. §§ 1151-1382]." Pls.' Br. at 29. Although Plaintiffs had previously failed to identify what, exactly, in the Lesson Plan they believed was unlawful, they have now identified nine such aspects of the Lesson Plan. As explained below, they are wrong.

As an initial matter, Plaintiffs waive any objection to the principles that Defendant laid out regarding how the Court should interpret the Lesson Plan. Pls.' Br. at 29 (focusing only on deference, and then arguing that deference is not due because USCIS allegedly did not explain the Lesson Plan, without providing any authority for the assertion that an agency's explanation (germane only to the APA arbitrary-or-capricious analysis) bears on a straightforward § 1252(e)(3)(A)(ii) "consistent with" analysis); *see* Defs.' Br. at 38-39; General Order ¶ 5.d.v.

Plaintiffs' complaints fail on their merits as well. *First*, Plaintiffs argue that the Lesson Plan requires consideration of discretionary factors. Pls.' Br. at 29-30 (citing AR at 18 & n.4, 35, 15, 19, 24). The materials within the Lesson Plan are substantively correct. But in any event, the consideration of discretion has been part of the credible fear analysis for several iterations of the Lesson Plan, since at least 2013. AR at 156-57 (2013 Lesson Plan), 109, 139 (2014 Lesson Plan), 60, 83 (2017 Lesson Plan). Plaintiffs are trying to litigate this issue well past the 60-day bar, and the Court lacks jurisdiction over this claim. *See* 8 U.S.C. § 1252(e)(3)(B).

Plan repeating the obligations imposed on officers by *other* legal sources, as evidenced by the Lesson Plan's citations. (Plaintiffs do not explain how else the Lesson Plan should phrase these external obligations.)

Second, Plaintiffs find fault with the Lesson Plan's instruction on the interplay between past persecution and a well-founded fear of future persecution. Pls.' Br. at 31-32. First, Plaintiffs claim the Lesson Plan shifts the burden from the government to the alien to demonstrate past persecution based on continuing country conditions. *Id.* at 31 (citing AR at 18, 19, 35). Second, they claim the Lesson Plan improperly requires the individual to "present evidence of a humanitarian basis for asylum even when the presumption of a well-founded fear has not been rebutted." *Id.* at 32 (citing AR at 18, 35). Third, Plaintiffs claim that the Lesson Plan "overlooks" that asylum may still be granted even when the presumption of a well-founded fear is rebutted, if past persecution is shown. *Id.* (citing AR at 15).

Plaintiffs do not fairly read the Lesson Plan. Given the non-adversarial nature of credible fear interviews, despite language in the Lesson Plan referring to the applicant demonstrating past persecution based on continuing country conditions, the Lesson Plan *does* require asylum officers to determine whether conditions that gave rise to the alien's persecution continue to exist in the country and that the applicant could not safely relocate internally. The Lesson Plan's incorporation of factors to rebut the presumption of well-founded fear show that there is a presumption and describe them as findings to be made by the asylum officer. AR at 24-25. Further, that a document "overlooks" a facet of law (if true) does not mean the document is "inconsistent with" that law. Defs.' Br. at 38 ("USCIS has generally unbounded statutory freedom to craft its training programs and materials." (citing sources)).

Third, Plaintiffs argue that the Lesson Plan improperly raises the alien's burden of proof. Pls.' Br. at 32-33. Plaintiffs argue the Lesson Plan, which indicates that the applicant must provide "significant evidence" that she "is a refugee," AR at 12, is inconsistent with the supposedly lower "significant possibility" screening standard, *see* 8 U.S.C. § 1225(b)(1)(B)(v).

Given the deference the Lesson Plan is due and the fact that the Court must consider the language's broader context, the Lesson Plan is consistent with those provisions. *See* Defs.' Br. at 38; *Nken v. Holder*, 556 U.S. 418, 426 (2009). To discern whether the applicant meets the screening standard (which is a function of "refugee" eligibility, *see* 8 U.S.C. §§ 1158(a)(1)(A), 1101(a)(42)(A)), the applicant necessarily needs to adduce evidence that she could be a "refugee." AR at 12. Any ambiguity is eliminated in the very same sentence, where the Lesson Plan 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. *Id.* This context resolves any issues.

And even if it did not, Plaintiffs' claim that the Lesson Plan raises the applicant's evidentiary hurdle is erroneous. Their theory is that: the Lesson Plan requires applicants to "identify more than 'significant evidence,"' AR at 12, while the INA permits applicants to demonstrate a credible fear based only on "statements" and "other facts" known to the officer, 8 U.S.C. § 1225(b)(1)(B)(v). They claim the two are somehow inconsistent, Pls.' Br. at 32-33, but never explain exactly how so; likely because the Lesson Plan is, in fact, consistent with the INA.

Plaintiffs similarly argue that "significant evidence" standard in the Lesson Plan contrasts with the statutory "significant possibility" standard. *Id.* at 33. But the "significant evidence" standard comes from the D.C. Circuit, which placed it below "significant possibility." AR at 12 (citing *Holmes v. Amerex Rent-A-Car*, 180 F.3d 294, 297 (D.C. Cir. 1999) ("[S]ignificant possibility of success ... implies a showing higher than the already recognized standard of 'significant evidence[.]'" (quoting *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 852 (D.C. 1998))). And USCIS has cited *Holmes* for the articulation of "significant possibility" as meaning

"substantial and realistic possibility" since at least the 2013 version of the Lesson Plan. AR at 147-48 (2013 Lesson Plan), 52 (2017 Lesson Plan). The addition of the phrase "significant evidence" in the 2019 version and the articulation of the "significant possibility" standard as higher than the "significant evidence" standard—and therefore as requiring "more than significant evidence"—provides more context for understanding the significant possibility standard from *Holmes*. What it does not do is raise the standard as Plaintiffs insist.

Fourth, Plaintiffs claim that the Lesson Plan improperly requires the alien to provide evidence going to every element of an asylum claim. Pls.' Br. at 33-35. This is not a new requirement; it was included in the 2017 Lesson Plan. AR at 22-33 (2017 CF Lesson Plan referencing the significant possibility standard with respect to distinct eligibility elements). Thus, because Plaintiffs have brought this claim past the expiration of the 60-day bar, the Court lacks jurisdiction over this claim. *See* 8 U.S.C. § 1252(e)(3)(B).

Even on its merits, these aspects of the Lesson Plan are consistent with the immigration laws. Determining whether there is a significant possibility that an individual could establish eligibility for asylum, statutory withholding or removal, or Convention Against Torture protection necessarily requires analysis of each element of eligibility for these forms of protection, applying the significant possibility standard to each. If an applicant fails to meet one element of the eligibility standard, then she is not eligible. *See* 8 U.S.C. §§ 1225(b)(1)(B)(v), 1158(b)(1), 1101(a)(42)(A). Thus, if an applicant lacks a significant possibility of establishing one element, then she lacks a significant possibility of establishing eligibility. *See, e.g.*, 8 C.F.R. § 208.13(a); *Rendon v. Mukasey*, 520 F.3d 967, 973 (9th Cir. 2008) ("As an applicant for … asylum, [petitioner] bears the burden of proving that he is eligible for the discretionary relief he is seeking."); 8 U.S.C. § 1158(b)(1)(B)(i). The statement is a reasonable recitation of the law.

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.' Br. at 35-36 (citing AR at 11). Plaintiffs base their objection on their view that corroboration does not apply at the credible fear stage. *Id.* at 35.

In fact, 8 U.S.C. § 1225(b)(1)(B)(v) *requires* officers making a credible fear determination to "[take] 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." To administer this provision, officers must necessarily make a credibility determination with respect to the applicant's testimony regarding the claim. The Lesson Plan provides information to officers on making that credibility determination under the credibility provisions of the substantive asylum statute, § 1158(b)(1)(B)(ii) (which allows the officer to ask for corroboration), after which, an officer may determine whether there is a significant possibility that the applicant could establish eligibility for asylum. The Lesson Plan makes clear that testimony that is credible, persuasive, and offers specific facts can satisfy the applicant's burden, and that an applicant is only required to present corroborating evidence if it is reasonable to expect her to do so. AR at 10.[11]

Sixth, Plaintiffs claim that the Lesson Plan directs officers to apply an erroneous standard to determine whether non-governmental actors have committed persecution. Pls.' Br. at 36. They claim that the Lesson Plan's phrasing—that the alien's home government "must have abdicated its responsibility to control persecution," AR at 23—is inconsistent with a Board of Immigration Appeals decision stating that the government need only be "unable or unwilling to control" the

[11] Plaintiffs claim that the corroboration components of the Lesson Plan also violate 8 C.F.R. § 208.30(d)(4), which states that an alien in a credible fear interview "may present other evidence, if available." Pls.' Br. at 36. The regulation nowhere says that that is the *only* circumstance under which additional evidence may be presented in the credible fear context. As the regulation does not limit asylum officers' corroboration abilities, this claim is meritless.

persecutor, *see Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985). Pls.' Br. at 36. Not so. *See, e.g., Gonzalez-Veliz v. Barr*, — F.3d —, 2019 WL 4266121, at *9 (5th Cir. Sept. 10, 2019) (holding that the government has not changed the "unable or unwilling to control" standard). Nevertheless, the Lesson Plan does use the verbal formulation Plaintiffs desire: it states that "there must be a significant possibility the applicant can establish that the entity that harmed the applicant (the persecutor) is either an agent of the government or an entity that the government is unable or unwilling to control." AR at 22. The discussion of a government abdicating its responsibility to control a persecutor is simply explanatory, provided as a counterpoint to the explanation that it is not enough to merely show that the government lacks resources. This language does not change the standard, but rather is included as part of USCIS's 8 U.S.C. § 1225(b)(1)(E) obligation to train its asylum officers. The challenged provision, when read in context and with the deference it is due, is consistent with the INA.

Seventh, Plaintiffs claim that the Lesson Plan heightens the standard for demonstrating a "well-founded fear of persecution." Pls.' Br. at 37. Pointing to dicta in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987), Plaintiffs affix the meaning of "well-founded fear" as a one-in-ten chance. The Lesson Plan, in contrast, explains *Cardoza-Fonseca* and presents a nuanced explanation of how there is not a precise 10% standard for "well-founded fear." AR at 19-21.

But the Lesson Plan does not assert that a 10% chance of being persecuted is enough to meet the well-founded fear standard. Rather, the Lesson Plan acknowledges that the 10% example in *Cardoza-Fonseca* is just that: an example, AR at 20 ("*Cardoza-Fonseca* did not, however, hold that 'well-founded fear always equals a ten percent change. Instead, *Cardoza-Fonseca* deemed the term 'ambiguous,' and explicitly declined to set forth guidance on how the well-founded fear test should be applied.")—and an extreme example at that, *id.* The Lesson

Plan goes on to say that whether fear is well-founded does not ultimately rest on a statistical measurement, which is consistent with cases following *Cardoza-Fonseca* that recognize numerical calculations are not always the best way to analyze well-founded fear. *See, e.g.*, *Lim v. INS*, 224 F.3d 929, 934-35 (9th Cir. 2000) (acknowledging that the Supreme Court has only "suggested" 10% as a standard); *Shao v. Mukasey*, 546 F.3d 138, 157 (2d Cir. 2008) (the 10% reference was "example" that did not fully interpret the well-founded fear standard); *Cristobal v. Holder*, 439 F. App'x 538, 542 n.1 (6th Cir. 2011) (rejecting a hard 10% standard as "dicta" in *Cardoza-Fonseca*); *Bellido v. Ashcroft*, 367 F.3d 840, 845 n.7 (8th Cir. 2004) (presuming that 10% is not the standard). In contrast, none of Plaintiffs' cases definitively establishes that one-in-ten is the binding standard. *Cf., e.g.*, *Selim v. Lynch*, 831 F.3d 1133, 1140 (9th Cir. 2016) (noting that a one-in-ten standard "may" suffice, and failing to apply that standard). Given this case law, the Lesson Plan is not "inconsistent with" either § 1101(a)(42)(A) or the *Grace* injunction.

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.' Br. at 37-38. Plaintiffs object to the Lesson Plan's reference to these reports, arguing that they should not be treated as "objective" fact. *Id.* at 37 (citing AR at 23, 24, 28, 30, 36). Plaintiffs argue that under the regulations, asylum officers "'may' consult these reports, ... but the Lesson Plan *requires* asylum officers to do so." *Id.* (citing 8 C.F.R. § 208.12(a)).

Plaintiffs miscite the Lesson Plan and overlook its consistency with the regulation. Section 208.12(a) provides that asylum officers "may *rely* on material provided by the Department of State, other USCIS offices, or other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions." 8 C.F.R. § 208.12(a) (emphasis added). The Lesson Plan, in contrast, states that officers "must

consult all available and salient information, including the objective country conditions set forth in Department of State country reports." AR at 23 (emphasis added). The Lesson Plan is consistent with the regulation: indicating that an officer must "consult" State Department reports is distinct from requiring that they "rely on" the reports. Upon consulting country reports, asylum officers may then rely on such reports in making a credible fear determination, consistent with 8 CFR 208.12(a)—or they may decide not to. The Lesson Plan does not constrain this freedom.[12]

Plaintiffs also claim that the Lesson Plan requires asylum officers to reference records of CBP encounters in assessing an alien's statements. Again, the fact that officers must consider inconsistencies between statements made to CBP and the alien's credible fear interview is not new to the 2019 Lesson Plan. AR at 57 (2017 Lesson Plan). And again, Plaintiffs have missed the 60-day jurisdictional window to challenge this component. *See* 8 U.S.C. § 1252(e)(3)(B). Even if the timing were not an obstacle, the instructions in the 2019 Lesson Plan still advises officers to consider the totality of circumstances and all relevant factors, while also still recognizing the limitations of CBP sworn statements. AR at 13, 14, 15, 16, 35.

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.' Br. at 38-39. As Defendants previously explained, Defs.' Br. at 39-40, the Lesson

[12] Plaintiffs assert that records of encounters with CBP "are not always reliable indicators of credibility," Pls.' Br. at 38, citing *Moab v. Gonzales*, 500 F.3d 656, 660-61 (7th Cir. 2007). Plaintiffs' characterization is beyond the language of the case. The *Moab* court stated specifically that "*airport interviews* ... are not always reliable indicators of credibility." *Id.* (emphasis added). Additionally, the court "favorably [cites] to a list of nonexclusive factors set for by the Second Circuit ... for consideration in determining the reliability of an asylum applicant's preliminary interview." *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 180 (2d Cir. 2004). The *Moab* Court establishes that some records of interview "should be considered less reliable," favoring ones which are verbatim accounts or transcripts. Importantly, the Seventh Circuit did not state that lesser records are *not* reliable or should *never* be considered in assessing credibility; the asylum decision continues to be discretionary and involves a weighing of factors by an asylum officer.

Plan affirmatively suggests that asylum officers follow up on all fraud and credibility concerns during the interview and give the interviewee "an opportunity to explain" those concerns. AR at 15. The Lesson Plan also reiterates that officers should specify the basis for any negative credible fear determination. *Id.* at 17. Plaintiffs do not respond to these concerns, except to cite 8 C.F.R. § 208.30(d)(4), which as previously explained is fully consistent with the Lesson Plan. *See supra* n.9. This requirement is consistent with the immigration laws.

In short, all of the aspects of the Lesson Plan that Plaintiffs identify as being allegedly unlawful either (1) have been in USCIS Lesson Plans long enough that Plaintiffs have long since missed the window to challenge them under § 1252(e)(3)(B), or (2) are fully consistent with the immigration laws. The Court should grant judgment to Defendants on this aspect of Count I.

V. THE LESSON PLAN DOES NOT INFRINGE ON ANY DUE PROCESS RIGHTS OF PLAINTIFFS.

The Court should also grant summary judgment to Defendants on Count III, which alleges that the Lesson Plan violates due process. Defs.' Br. at 47-50. As Plaintiffs agree, Pls.' Br. at 48, the Court need not reach this count, because "Plaintiffs cannot prevail on their due-process claim without also prevailing on their APA ones." *Damus v. Nielsen*, No. 18-cv-758 (JEB), 2019 WL 1003440, at *3 (D.D.C. Feb. 28, 2019). But should the Court reach it, Plaintiffs have failed to point to any due process right of theirs that the Lesson Plan might be violating.

Plaintiffs once again fail to spell out what process, precisely, they believe they are due. Plaintiffs stake their due process claim in *Maldonado-Perez v. INS*, 865 F.2d 328, 332 (D.C. Cir. 1989). Pls.' Br. at 48-49. Plaintiffs fault Defendants for "ignor[ing]" the case and "citing it in passing without explanation," *id.* at 49, but that accusation is curious considering that *Maldonado-Perez* does not help Plaintiffs. *Maldonado-Perez* concerned an alien who was deported *in absentia* while seeking asylum. 865 F.2d at 329. The case stated that as a general

matter, an alien seeking asylum "in this context" must receive "a meaningful or fair evidentiary hearing with a reasonable opportunity to be present," meaning an evidentiary hearing under 8 U.S.C. § 1252(b) (1988). *Id.* at 332-33. The court found that the alien's constitutional rights were not violated by an *in absentia* deportation order. *Id.*

Plaintiffs allege that they "have the constitutionally protected right to apply for asylum under the INA," Pls.' Br. at 50, but *Maldonado-Perez* does not stand for that sweeping claim, much less establish that the Lesson Plan infringes on that right. *First*, the D.C. Circuit did not establish that the Due Process Clause requires, at a minimum, the statutory rights created by the INA. *Contra* Pls.' Br. at 49 (improperly implying that *Maldonado-Perez* identified the Act as the source of a *constitutional* due process right to seek asylum, when the decision explicitly noted that the Act creates "statutory" procedural rights, 865 F.2d at 332, which are distinct). Indeed, *Maldonado-Perez* did not find a constitutional violation. *Id.* at 333. Rather, it stated that the statutory procedures "appear[ed] to meet the minimum constitutional requirement," leaving unresolved how much process must be offered to aliens under the Constitution. *Id.* at 332.

Indeed, the D.C. Circuit later held that the "demands of due process do not require a hearing at the initial stage or at any particular point ... in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." *v. INS*, 954 F.2d 769, 773 (D.C. Cir. 1992) (quoting *Opp Cotton Mills v. Adm'r of the Wage and Hour Div.*, 312 U.S. 126, 152-53 (1941)). That standard is met here. The Lesson Plan applies only to *initial screening* decisions for asylum, withholding of removal, and Convention Against Torture protection, and any negative screening determination is subject to *de novo* review by an immigration judge upon request, who is free to vacate the asylum officer's initial decision (as happened here with some of the Plaintiffs). *See* 8 C.F.R. §§ 208.30(g), 1003.42(d), 1208.30(g).

Second, *Maldonado-Perez* arose in the context of a deportation proceeding, which is a very different "context," 865 F.2d at 333, than expedited removal proceedings. The D.C. Circuit has evinced, beyond *Maldonado-Perez*, its recognition of due process as a flexible concept that depends on the facts of the case. *Gutierrez-Rogue*, 954 F.2d at 773 (citing *Maldonado-Perez*, 865 F.2d at 332-33). Thus, the decision's suggestion that due process rights exist regarding asylum applications spoke with respect to "deportable" aliens within the country, rather than "inadmissible" aliens at the border like Plaintiffs, especially those in expedited removal, a process that did not exist when *Maldonado-Perez* was decided. The distinction is relevant because aliens at the border with no substantial ties to the United States are due fewer procedural rights than aliens in the interior who have developed such connections. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (an alien seeking initial admission "has no constitutional rights regarding his application"); *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). To falsely equate the alien facing deportation in *Maldonado-Perez* with Plaintiffs facing expedited removal at the border would contravene the markers laid down in *Maldonado-Perez* and *Gutierrez-Rogue*. Moreover, asylum itself is a discretionary decision that is not itself within any definable liberty interest protected by due process. *See, e.g., Jean-Louis v. U.S. Att'y Gen.*, 582 F.3d 462, 465-66 n.4 (3d Cir. 2009) ("[A]n alien seeking discretionary relief from removal has no cognizable liberty or property interest."). Thus, Plaintiffs' constitutional rights are even lower than those satisfied in *Maldonado-Perez*.

Moreover, Plaintiffs have not shown how, exactly, the Lesson Plan has violated whatever rights they may have. Crucially, Plaintiffs ignore Defendants' point that the Lesson Plan is not, factually or legally, preventing them from applying for asylum or other protection. Defs.' Br. at 49-50. They therefore concede this point. *See* General Order ¶ 5.d.v.

Plaintiffs have not shown that the Constitution requires the full procedures required by the INA. Due process is flexible, but Plaintiffs have failed to suggest the minimum procedures they were due and how Defendants allegedly violated them. The Court should grant summary judgment to Defendants on Count III.

VI. PLAINTIFFS' PROPOSED REMEDIES ARE OVERBROAD.

Finally, if the Court grants any relief to Plaintiffs, then the remedy is only to declare certain parts of the Lesson Plan as unlawful, and to vacate the individual plaintiffs' negative credible fear determinations. If the Court finds that the Lesson Plan is not sufficiently reasoned, then the Court should remand the Lesson Plan to the agency for an explanation. *See INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) ("'[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'"); *accord 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'" (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) and *Fox v. Clinton*, 684 F.3d 67, 80 (D.C. Cir. 2012), respectively)). Thus, rather than setting aside the entire Lesson Plan, Pls.' Br. at 53, the Court should only strike down the parts of the Lesson Plan that it may find unlawful, *see Neb. Dep't of Health & Human Servs. v. Dep't of Health & Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006).

The Court should also reject Plaintiffs' inclusion of the following request for relief in its proposed order: to "[d]eclare[] that the negative credible fear determinations made from the date the Lesson Plan was first implemented to the present were contrary to law." Proposed Order ¶ 3 (ECF No. 36-4). First, Plaintiffs failed to brief this significant item, in violation of the Court's

order to brief issues of relief. Scheduling Order at 3-4 (ECF No. 22). Second, invalidating *all* negative credible fear determinations—without even determining whether the Lesson Plan ever applied to these absent individuals—is tantamount to class relief, which Congress prohibited. *See* 8 U.S.C. § 1252(e)(1)(B). Finally, the Court should reject Plaintiffs' request to "parole" in Julia and Sofia. Proposed Order ¶ 6. Plaintiffs make no attempt to justify this extraordinary request. *Cf. Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) ("[It] is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."). The Secretary of Homeland Security, "in his discretion" and "under such conditions as may prescribe," enjoys the authority to temporarily parole into the United States certain aliens. 8 U.S.C. § 1182(d)(5); *see also id.* § 1226(a)(2). The statutory language thus makes plain that parole decisions are discretionary and not judicially reviewable. *Id.* § 1252(a)(2)(B)(ii). At the same time, § 1225(b) contemplates that aliens subject to expedited removal—and thus potentially eligible for credible fear screenings—are detained until they are removed or until they are granted asylum. *Id.* § 1225(b)(1)(B)(ii), (iii)(IV). Thus, the Court lacks the authority to override these congressional and executive prerogatives. Nor does the Court need to—if necessary, the Court could order new credible fear interviews and determinations for Julia and Sofia without referencing their detention status.

CONCLUSION

Plaintiffs have failed to meet their burden, as the parties bringing this suit, of showing that the Court can review the Lesson Plan and that the Lesson Plan is in any way unlawful. The Court should dismiss the Amended Complaint for lack of jurisdiction, or alternatively grant summary judgment in favor of Defendants on all counts.

Dated: September 26, 2019

Respectfully submitted,

JESSIE K. LIU, D.C. BAR #472845
United States Attorney

DANIEL F. VAN HORN, D.C. Bar # 924092
Chief, Civil Division

/s/ *Paul Cirino*
PAUL CIRINO
Assistant United States Attorney
Civil Division
U.S. Attorney's Office for the District of Columbia
555 4th Street, N.W.
Washington, D.C. 20530
Phone: (202) 252-2529
Email: paul.cirino@usdoj.gov

JOSEPH H. HUNT
Assistant Attorney General

WILLIAM C. PEACHEY
Director

EREZ REUVENI
Assistant Director

/s/ *Steven A. Platt*
STEVEN A. PLATT
Trial Attorney
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Phone: (202) 532-4074
Fax: (202) 305-7000
Email: steven.a.platt@usdoj.gov

Attorneys for Defendants