IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIA M. KIAKOMBUA, *et al*.,

Plaintiffs,

– versus –

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

Defendants.

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

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In their opening brief,[1] Plaintiffs demonstrated that the Credible Fear Lesson Plan ("Lesson Plan") challenged here diverges markedly from the law and policies it purports to reflect, and that its revision flagrantly disregarded the APA's requirements of reasoned decisionmaking. To rebut the menagerie of reviewability arguments in Defendants' opening brief[2]—all of which depend on the representation, supported only by repetition, that the Lesson Plan is an inconsequential training document that merely reproduces law and policies found elsewhere—Plaintiffs produced evidence and identified portions of the Administrative Record establishing that, to the contrary, the Lesson Plan is a foundational agency document that created and altered agency policy. The union representing the hundreds of asylum officers who use the Lesson Plan daily likewise explained that it is "an authoritative document" on which the credible fear process "depends," emphasizing the importance of it being both clear and correct on the law, and that this revision is neither.[3]

In response, Defendants continue to ignore all evidence (including from their own Administrative Record), and their principal strategy is to try to force the Court to do the same. As explained in the contemporaneously filed Opposition to Defendants' Motion to Strike, ECF No. 59, there is no basis in law for this Court to blind itself to reality, particularly when Defendants have invited the Court to rest its jurisdictional holdings on the baseless factual representations they have proffered. Even as Defendants seek to strike the evidence rebutting their bare factual

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[1] Pls.' Corrected Combined Mem. of Law in Supp. of Cross-Mot. for Summ. J. & in Opp'n to Defs.' Mot. for Summ. J. (hereinafter, "Pls.' Br."), ECF No. 38.

[2] Defs.' Mem. of Law in Supp. of Mot. for Summ. J. ("Defs.' Br."), ECF No. 31-1.

[3] Amicus Br. of Nat'l Citizenship & Immigration Servs. Council 119 ("Council 119") in Supp. of Pls., ECF No. 47. Council 119 is the labor union that represents 13,500 bargaining unit employees of USCIS, including the Asylum Officer Corps, the government employees who use the Lesson Plan to conduct credible fear interviews and to make credible fear determinations. *See id.* at 1; *see also* 8 U.S.C. § 1225(b)(1)(B)(i)-(ii) (requiring asylum officers to conduct the credible fear interviews and to make credible fear determinations).

assertions regarding the Lesson Plan, Defendants' reply brief[4] repeats those representations, because their reviewability arguments still depend on them. Defendants repeat most of their other arguments, too, but they do abandon several and try to introduce a few new ones that fare no better than their predecessors. Defendants go to great lengths to avoid engaging not just with Plaintiffs' evidence, but also the merits of Plaintiffs' arguments, by making multiple groundless charges that Plaintiffs have conceded issues. Where they do respond to Plaintiffs' arguments, Defendants tend either to distort them (and then to respond to the distorted arguments) or to concede them. Indeed, there is no longer genuine dispute that aspects of the Lesson Plan are unlawful.

There likewise appears to be little remaining dispute about the remedy this Court can impose. Defendants no longer contest that this Court can go beyond merely declaring aspects of the Lesson Plan to be unlawful, which they previously argued (erroneously) was prohibited by 8 U.S.C. § 1252(e). Defendants have no argument against the Court's issuance of the mandatory remedy here (vacatur of the Lesson Plan), and no argument that the Lesson Plan's illegalities are severable, either. The Lesson Plan therefore should be vacated in its entirety, regardless of the claim(s) on which this Court enters judgment for Plaintiffs. The few arguments Defendants make against the other forms of requested relief are based either on a plainly erroneous legal interpretation or a misunderstanding of what Plaintiffs requested. And as noted at the end of this brief, those remedies should extend to Defendants' recently-disclosed revision of the Lesson Plan.

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

A. <u>This Court has statutory jurisdiction</u>

Defendants persist in arguing that that this Court does not have statutory jurisdiction under

[4] *See* Defs.' Mem. of Law in Opposition to Plaintiffs' Cross-Motion for Summary Judgment and Reply in Supp. of Defs.' Mot. for Summ. J. ("Defs.' Reply"), ECF No. 49.

8 U.S.C. § 1252(e)(3) either because the Lesson Plan is not an "implementation" of the expedited removal statute or because it is not "a statute, a regulation, written policy directive, written policy guideline, or written procedure."[5] Defs.' Reply at 6-7 (citations omitted). But Defendants' arguments are no different from those that Plaintiffs have already rebutted, *see* Pls.' Br. at 12-14, and they continue to be divorced from what the Lesson Plan actually is or says or how it is used.

Defendants' entire affirmative argument on the first issue is the *ipse dixit* that "the Lesson Plan does not 'implement' § 1225(b)," which is the statute that creates both the expedited removal and credible fear processes. Defs.' Reply at 6. The Lesson Plan not only "*references* § 1225(b) and its regulations," *id.*, it says *on its face* that its purpose is to tell asylum officers how to implement the credible fear process, *see* Pls.' Br. at 13 (quoting AR 1), to say nothing of the other uncontested evidence (that Defendants ignore) about the nature of the Lesson Plan and how it is used in credible fear proceedings. *See* Pls.' Statement of Undisputed Facts ("SUF"), ECF No. 36-2, ¶¶ 23-40; *see also* Amicus Br. of Council 119 at 6-9. If the Lesson Plan does not "implement" § 1225(b) within the meaning of § 1252(e)(3)(A)(ii), it is difficult to imagine what would.

Defendants' contention that the Lesson Plan is not one of the writings made reviewable by § 1252(e)(3) likewise still depends on ignoring the entire record, including the Lesson Plan itself. Defendants assert that the Lesson Plan is not a "policy directive" or a "policy guideline" because, they claim, "it does not ordain or enact any policy that Plaintiffs have identified," and merely "cite[s] or reproduce[s]" law and policy found elsewhere. Defs.' Reply at 6-7 & n.2. Defendants cite nothing in support, and all record evidence is to the contrary. *See, e.g.*, Pls.' Br. at 9-10 (explaining how "Defendants used the revision of the credible fear lesson plan to effectuate

[5] Defendants initially argued that Plaintiffs were not challenging a reviewable "determination," *see* Defs.' Br. at 22-24, but abandoned that argument when Plaintiffs' disclaimed review of their individual credible fear determinations, *see* Defs.' Reply at 7-8 (abandoning the initial argument and then repeating Defendants' traceability argument).

significant unexplained policy changes as to how credible fear interviews are conducted," and citing uncontested evidence in support, including about particular policies); *id.* at 14-15; SUF ¶¶ 27-40; Amicus Br. of Council 119 at 6-7 (describing the Lesson Plan as "the functional guide by which all credible fear screenings are conducted"). Defendants' assertion that the Lesson Plan is not a "written procedure" because it does not "detail[] . . . how the credible fear process should be operated or done," Defs.' Reply at 7, is similarly unsupported by any record citation and contradicted by numerous such citations, at both the macro[6] and micro[7] levels.

Defendants' repetition of their argument that Congress "did not intend for immigration training materials to be subject to § 1252(e)(3) review," remains unsupported. *Id.* (emphasis omitted). In enacting § 1252(e)(3) Congress did not evince clear and convincing intent to insulate from judicial review a document establishing policy and process because it is used in training (among many other uses), much less to permit the Executive to avoid judicial review of a document that implements the expedited removal statute simply by calling it a "Lesson Plan" instead of something else.[8] *See* Pls.' Br. at 14-15. The Lesson Plan is reviewable under § 1252(e)(3).

That conclusion does not change even if the Court were to decide that, rather than being a

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[6] *See, e.g.*, Ex. B (ECF No. 57) ¶ 10 ("[L]esson plans are . . . the only comprehensive material issued by the Asylum Division containing instructions to officers on how to perform their work."); Amicus Br. of Council 119 at 6-9 (describing the Lesson Plan similarly).

[7] *See, e.g.*, AR 10-16 (instructing on how asylum seekers can carry their burden of proof and how testimony and credibility is to be considered); AR 16 (requiring asylum officers to "probe" during the credible fear interview any testimony inconsistent with the noncitizens' "initial statement to the CBP or ICE official" they first encounter); AR 17 (prescribing how asylum officers "must" document their credibility determinations); AR 24 (prescribing a "two-step approach" with regard to assessing the issue of internal relocation); AR 33 (requiring asylum officers to create a statement of material facts for each credible fear interview, to review it with the noncitizen, to provide an opportunity to correct errors, and to contemporaneously record the summary and its review); *see also* AR 23, 24, 28-29, 30, 36 (requiring asylum officers to consult State Department country condition reports with regards to various issues).

[8] Similarly unpersuasive is Defendants' attempt to walk back their prior description of the Lesson Plan as providing policy guidance, including their suggestion that there is a material difference between "policy guidance" and a "policy guideline." *See* Defs.' Reply at 7 n.2. The legislative history confirms the common-sense understanding that those terms mean the same thing, at least in this context. *See* H.R. Rep. No. 104-828, at 220-21 (1996) (Conf. Rep.) (describing what became § 1252(e)(3) as providing review of "a written policy directive, written policy *guidance*, or written procedure" (emphasis added)).

source of jurisdiction or providing a cause of action, § 1252(e)(3) just clarifies that this Court retains jurisdiction granted elsewhere to consider existing legal claims, as this Court preliminarily concluded in *Make the Road New York v. McAleenan* ("*MRNY*"), __ F. Supp. 3d __, No. 19-cv-2369, 2019 WL 4738070, at *15-16, *21-24 (D.D.C. Sept. 27, 2019). As in *MRNY*, Plaintiffs here can rely on 28 U.S.C. § 1331 for subject matter jurisdiction and the APA as a cause of action. *See id.* at *16, *24; Am. Compl. ¶ 11 (alleging § 1331 as a basis of jurisdiction); *id.* ¶ 91 (alleging that the Lesson Plan should be set aside under the APA). Defendants' solitary argument against § 1331 jurisdiction remains the unsupported and exceedingly overbroad interpretation of § 1252(a)(2)(A) that Plaintiffs already rebutted, to which Defendants have no response. *See* Defs.' Reply at 11; Pls.' Br. at 19-21; Defs.' Br. at 18.

Defendants' secondary jurisdictional argument—that "several parts" of the Lesson Plan are not "new" to the April 30, 2019 revision, and therefore this Court lacks jurisdiction to review them because of the statute of limitations contained in § 1252(e)(3)(B), *see* Defs.' Reply at 8-11—continues to defy law and logic. Indeed, Defendants make Plaintiffs' argument for them when they say, accurately, that "§ 1252(e)(3)(B) requires a challenge to be brought within 60 days of when the challenged *document* 'is first implemented.'" *Id.* at 8 (alteration added and omitted).

As Plaintiffs explained, and for which Defendants have no answer, nowhere in the statute can one find the kind of clear and convincing evidence necessary to conclude that Congress intended to immunize from judicial review swaths of a newly issued document that provides policy guidance and directives on the law and process to be applied in the expedited removal process solely because an earlier document contained similar or even the same language. *See* Pls.' Br. at 17. Section 1252(e)(3)(B) certainly cannot bear that weight, and Defendants cite nothing else. Defendants argue vaguely that the "presumption of regularity" supports the piecemeal approach

to ascertaining statutory jurisdiction, *see* Defs.' Reply at 9, but they nowhere explain why a presumption that, absent clear evidence to the contrary, public officials have "properly discharged their official duties," *United States v. Chemical Found.*, 272 U.S. 1, 14-15 (1926), has any bearing what Congress intended in § 1252(e)(3). Similarly, Defendants' nebulous request that this Court defer to their preferred interpretation of the statute, *see* Defs.' Reply at 9, fails to acknowledge that the agency has not proffered an interpretation at all—only its litigation counsel has, and those are not the same thing[9]—and that, even if it had, there is no basis for the Court to defer to the agency's interpretation of the *Court*'s jurisdiction, particular where (as here) the statute is not ambiguous.

Nor would it make sense for Congress to draw jurisdictional lines in the fashion Defendants suggest, considering its inherent practical problems. Defendants imply that determining what is "new" in the Lesson Plan should be an easy task through application of tools of textual interpretation, but are tellingly unwilling themselves to delineate the contours of what is allegedly immune from review in this Lesson Plan. *See id.* Indeed, as Plaintiffs explained, *see* Pls.' Br. at 17, everything Plaintiffs challenge has changed from what came before, so Defendants' argument is irrelevant, besides requiring an implausible interpretation of the statute.

Finally, Defendants again complain that interpreting § 1252(e)(3) as written could result in *too much* judicial review, *see* Defs.' Reply at 10, but the designation of this Court as having exclusive original jurisdiction to hear claims thereunder undermines Defendants' already speculative fears of having to relitigate the "validity" of expedited removal. Defs.' Reply at 10.

By comparison to the plain text interpretation, Defendants' reading of § 1252(e)(3) would hand the Executive breathtaking power to immunize the expedited removal system from judicial

[9] *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("[W]e have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question").

review. Defendants suggest that the Court would lack jurisdiction to consider the legality of what the agency says about a regulation or case in a newly issued guidance document simply because the same regulation or case was already discussed in prior guidance. *See id.* at 23 (so arguing regarding the "consideration of discretion"); *id.* at 25-26 (suggesting same regarding *Holmes v. Amerex Rent-A-Car*, 180 F.3d 294 (D.C. Cir. 1999)). Defendants' interpretation would also shield from review the failure to account for changes in the law, even statutory ones, in issuing guidance.

As the Supreme Court has explained: "[Courts] need not doubt the [agency]'s trustworthiness, or its fidelity to law, to shy away from" a statutory interpretation that would leave the agency's "compliance with the law . . . in [its] hands alone." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1652-53 (2015). Instead, "[courts] need only know—and that Congress knows—that legal lapses and violations occur, and especially so when they have no consequences." *Id.* The Supreme Court has consistently refused to interpret jurisdictional statutes in ways that would leave agencies to police their own conduct,[10] and there is every reason to adhere to that principle here.

B. Plaintiffs have standing

Defendants continue to press two erroneous standing arguments: (1) that the claims of Ms. Kiakombua and Ana are moot because "each received the relief they requested," as they have allegedly been put in full removal proceedings, Defs.' Reply at 3-5; and (2) that traceability is absent because Plaintiffs have not proved it was the Lesson Plan that caused their injuries, "as opposed to the underlying law" on which the Lesson Plan directs and guides, *id.* at 1-3.[11]

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[10] *See Mach Mining*, 135 S. Ct. at 1652-53; *Kucana v. Holder*, 558 U.S. 233, 252-53 (2010) (collecting cases in the immigration context); *O.A. v. Trump*, __ F. Supp. 3d __, Nos. 18-2718 (RDM), 18-2838 (RDM), 2019 WL 3536334, at *19 (D.D.C. Aug. 2, 2019) (rejecting construction of § 1252(e)(3) that would give the government the unilateral ability to avoid judicial review thereunder); Pls.' Br. at 19.

[11] Defendants do not press their prior argument that the checkbox immigration judge ("IJ") review of the negative credible fear determinations was an "independent" cause of Plaintiffs' injuries, nor their argument that IJ review created an obstacle to redressability. *See* Defs.' Br. at 15-17; *see also* Pls.' Br. at 24 (explaining that Defendants "fundamentally misapprehend the nature of IJ review"); Amicus Br. of Council 119 at 6 n.3.

There are at least four independent reasons why the claims of Ana and Ms. Kiakombua are not moot. First, despite taking two shots at it, Defendants still have not carried their burden of proving that either Ana or Ms. Kiakombua is in full removal proceedings. *See Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010) ("The initial 'heavy burden' of establishing mootness lies with the party asserting that a case is moot."). As Plaintiffs noted, *see* Pls.' Br. at 22, and as Defendants agree, *see* Defs.' Reply at 4, full removal proceedings commence when a proper notice to appear ("NTA") is filed in immigration court; yet, the NTAs submitted by Defendants reflect only that they have been served on the Plaintiffs themselves. Second, as the Supreme Court recently held, "[a] putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings,"—which is true of both NTAs Defendants submitted—"is not a 'notice to appear under [8 U.S.C. §] 1229(a),'" because it fails to meet the statutory criteria. *Pereira v. Sessions*, 138 S. Ct. 2105, 2113-14 (2018). The NTAs Defendants submitted were defective, and so it does not even matter if they were filed with the immigration court. Third, Defendants have failed to carry their burden of proving that there is no possibility that the women could be returned to expedited removal, arguing only that, if they were, it would not technically be accomplished by USCIS. *See* Defs.' Reply at 5. Defendants never explain why that matters, particularly given the presence of the other Defendants in this case.[12] Defendants posit that a series of unlikely events would have to happen for Ms. Kiakombua to return to expedited removal, *see id.*, but never disclaim the ability simply to terminate any current proceedings and to place her back into expedited removal, *see O.A.*, 2019 WL 3536334, at *22-23. Fourth, Plaintiffs requested additional relief beyond being placed in full removal proceedings,

[12] For similar reasons, Defendants' contention that the voluntary cessation doctrine does not apply with regard to Ana because her negative credible fear determination was accomplished through a discretionary decision of an IJ—who answers to the Attorney General, a Defendant here—is unsupported. *See* Defs.' Reply at 4.

see Proposed Order, ECF No. 36-4 ¶¶ 3, 7, and Defendants do not contest their standing to pursue those forms of relief.[13] *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." (citation omitted)). Notwithstanding Defendants' efforts, Plaintiffs' claims are not moot.

Defendants' contention that Plaintiffs have not established that the Lesson Plan caused them a concrete injury fares no better. Defendants' argument that, "because '[o]n summary judgment, [no Plaintiff] filed any standing declarations or affidavits,' Plaintiffs have 'forfeited any claim that [they] have standing,'" Defs.' Reply at 3 (citation omitted, alterations in original), is bizarrely counterfactual. Each Plaintiff submitted a declaration attesting to her credible fear proceedings, including the relevant dates post-dating implementation of the Lesson Plan, and additionally submitted an authenticated copy of her Record of Negative Credible Fear Finding, Exs. C-G, ECF No. 57; *see also* AR 224 (blank copy of same form). Plaintiffs also submitted a declaration of a former supervisory asylum officer and IJ, Paul Grussendorf, which explains that the Lesson Plan constitutes "formal, foundational policy guidance" that the Asylum Division "requires its officers to follow," Ex. B (ECF No. 57) ¶ 7.[14] Along with other record evidence, these declarations establish Plaintiffs' standing, and it is telling that Defendants' strategy is to ignore them, and to try to force the Court to do the same on clearly erroneous grounds. *See* Defs.' Mot. to Strike, ECF No. 52 (moving to strike these declarations, among other exhibits, on the conclusory assertion that they are not relevant to jurisdiction).

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[13] For the same reason, Defendants' new redressability argument in footnote 1 on page 5 of their Reply Brief ("no judicial order giving [Ms. Kiakombua and Ana] a new credible fear process would redress their injuries") is irrelevant.

[14] *Accord* Amicus Br. of Council 119 at 7 ("As a matter of practice and fact known to *amicus curiae*, the Government's stated position in this case is wrong: the Lesson Plan is not an 'internal agency training material' intended merely 'to summarize existing legal and policy authorities.' In fact, the Lesson Plan provides the foundational policy guidance to those conducting credible fear interviews. *Amicus curiae* understands that the Asylum Division has always intended for the Lesson Plan to serve as an integral policy document. The Division relies on, and integrates, the Lesson Plan into initial training, continuing education, supervision, and quality assurance review." (citations omitted)).

To be sure, Plaintiffs are required to show that the agency's legal violation affected their "particularized interest[s]," *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc); the mere fact that the Lesson Plan is unlawful does not mean that anyone in the world could challenge it, and so Plaintiffs must have more than a "generally available grievance about the government." *Humane Soc'y v. Perdue*, 935 F.3d 598, 604 (D.C. Cir. 2019). Defendants are therefore correct when they assert that "Plaintiffs must 'show the agency action affects their concrete interests in a personal way.'" Defs.' Reply at 3 (quoting *Mendoza v. Perez*, 754 F.3d 1002, 1013 (D.C. Cir. 2014) (emphasis omitted)). Where Defendants go astray, however, is to suggest that these five Plaintiffs were not affected "in a personal way" when asylum officers, applying and following the Lesson Plan as they are required to do, determined that each of them lacked a credible fear of persecution or torture under an unlawful set of standards.[15] For Plaintiffs, it couldn't have been more personal. *Accord MRNY*, 2019 WL 4738070, at *20 ("Being deprived of the procedural protections that would otherwise be available prior to a consequential determination such as removal from the United States is a recognized harm, so long as the plaintiff 'show[s] that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.'" (citation omitted, alteration in original)).

What is more, Defendants are (again) wrong when they assert that "[t]he Lesson Plan does not recite universal procedures pertinent to all credible fear claims." Defs.' Reply at 2. Although not every single issue covered by the Lesson Plan will be relevant to every asylum seeker,[16] most

[15] This case is thus far afield from *Humane Society*, on which Defendants rely, which held that a pork farmer who objected to the National Pork Board's lobbying activities—which allegedly violated a statutory prohibition on such lobbying—did not have standing because he could not prove that he had suffered an injury-in-fact at all. *See* 935 F.3d at 603-04 (no "indication that the 'price for pork' was 'affected' by" the alleged violation of the lobbying prohibition, and no "expla[nation] how his pork business is harmed by lobbying to promote the pork industry").

[16] For example, since not all asylum seekers have dependents or consultants, those portions of the Lesson Plan, *see* AR 32-33, will not be universally applicable, and the same is true of the Lesson Plan's guidance applicable to asylum seekers who are stateless or who hold multiple citizenship or nationalities, *see* AR 25.

will be, including all of those challenged here, which, among them, define the "significant possibility," past persecution, and "well-founded fear" standards; set out the applicant's burden of production and persuasion; instruct the asylum officer on how to assess credibility; and require the asylum officer to consult the "objective" State Department country condition reports and compare them to the applicant's testimony. Because asylum officers are required to explore all possible bases for relief, 8 C.F.R. § 208.30(d), negative determinations necessarily reflect that torture claims and "subset[s]" of persecution claims, Defs.' Reply at 1-2, are also considered.

As in their opening brief, Defendants' Reply repeatedly asserts that Plaintiffs have to prove that the Lesson Plan was a but-for cause of their injuries, by providing evidence disentangling whether their injuries were caused by the Lesson Plan or the underlying law and policy on which the Lesson Plan guides and directs.[17] Defendants have no support for this argument, and it's wrong. Controlling precedent is clear that in procedural rights cases such as this one, plaintiffs are not required to prove that, had their procedural rights been respected, the substantive outcome would have been different. *See, e.g.*, *Mendoza*, 754 F.3d at 1013 (rejecting that contention as "precisely the argument a defendant *cannot* make in a procedural rights challenge"[18]); *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002) ("A plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to

[17] *See* Defs.' Reply at 2 ("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."); *id.* ("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 . . . ."); *id.* at 18-19 ("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.").

[18] Defendants claim Plaintiffs "misquote" *Mendoza* as supporting the proposition that the causation inquiry is relaxed in a case like this, Defs.' Reply at 3, but they just argue semantics, *see Mendoza*, 754 F.3d at 1012 ("Plaintiffs asserting a procedural rights challenge need not show the agency action would have been different had it been consummated in a procedurally valid manner—*the courts will assume this portion of the causal link*." (emphasis added)).

show that the procedural step was connected to the substantive result."); *accord Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (quoting *Sugar Cane Growers Co-op. of Fla.*, 289 F.3d at 94-95). As the D.C. Circuit has explained, if a party had to show that they would not have been injured absent the procedural violation in order to challenge it, the law "would be a dead letter." *Sugar Cane Growers Co-op. of Fla.*, 289 F.3d at 95. Requiring Plaintiffs to prove that particular unlawful aspects of the Lesson Plan caused their injuries, rather than "the underlying law," as Defendants put it, would be particularly insurmountable in this context, as negative credible fear determination are recorded via a pre-printed checkbox form. *See* Exs. C-G, ECF No. 57; AR 224.

C. The Lesson Plan is reviewable under the APA

Defendants' shifting arguments that the Lesson Plan is not reviewable under the APA because it does not qualify as a "rule" and is not "final agency action" fare no better than their initial reviewability arguments. As Plaintiffs have explained, *see* Pls.' Br. at 25-26, what matters for reviewability purposes is not whether the Lesson Plan is a "rule" within the meaning of 5 U.S.C. § 551(4) or final agency action, but whether it is one of the writings in § 1252(e)(3), because that is where Congress specified the types of reviewable agency actions. Defendants do not respond to this argument except to observe, unremarkably, that the APA defines the word "rule," without attempting to explain why that matters here.[19] Regardless, given that the Lesson Plan meets § 1252(e)(3)'s far more specific requirements, it necessarily also meets the APA's definition of a "rule," which "broadly defines an agency rule to include nearly every statement an agency may make." *Batterton v. Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980); *accord Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (explaining that the word "action" in the APA—as in

[19] *See* Defs.' Reply at 14 n.6 (citing 5 U.S.C. § 551, which defines "rule" and thirteen other words and terms, and 5 U.S.C. § 701(b)(2), which incorporates seven of those definitions for purposes of a different chapter of the APA).

"agency action"—"is meant to cover comprehensively every manner in which an agency may exercise its power"); *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 238 n.7 (1980) (same). Defendants' two arguments that Plaintiffs' "constructively conceded" that the Lesson Plan is not a "rule" are either nonsensical on their face, Defs.' Reply at 13 (bare assertion that Plaintiffs' agreement that the APA requires agency action is tantamount to conceding that the Lesson Plan is not a "rule" under § 551(4)), or embarrassingly revisionist, *id.* at 14 (mischaracterizing the first two briefs to claim Plaintiffs conceded an argument Defendants never made until their reply).

Defendants similarly fail to rehabilitate their argument that the Lesson Plan must be (and is not) "final agency action" to be reviewable under the APA. Defendants initially claimed that the alleged finality requirement comes from the APA, *see* Defs.' Br. at 29 (quoting 5 U.S.C. § 704), but newly argue that it derives from § 1252(e)(3) instead, *see* Defs.' Reply at 16-17. Defendants have no more support for this new requirement, which was also squarely rejected in *Grace v. Whitaker*, 344 F. Supp. 3d 96, 118 (D.D.C. 2018) (rejecting the argument that, "because the [challenged] Policy Memorandum is not a final agency action, it is not reviewable under the APA," and the argument "that Congress limited the application of [§] 1252(e)(3) to only claims involving legislative rules or final agency action"); *contra* Defs.' Reply at 16 n.7. Defendants are not helped by their invocation of *Carter/Mondale Presidential Committee, Inc. v. Federal Election Commission*, 711 F.2d 279, 284 n.9 (D.C. Cir. 1983), even assuming it remains good law after *Lujan*.[20] Unlike § 1252(e)(3), the statute in question there merely provides, broadly, that "[a]ny

[20] *Carter/Mondale*'s holding on which Defendants seek to rely has not been cited by the D.C. Circuit since *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), and the Eighth Circuit expressly declined to follow *Carter/Mondale* because of its inconsistency with *Lujan*. *See Iowa League of Cities v. EPA*, 711 F.3d 844, 863 n.12 (8th Cir. 2013). Defendants' claim that *Lujan* neither stated nor implied that agency action made reviewable by statute need not be final, Defs.' Reply at 16 n.7, cannot be reconciled with what Justice Scalia, writing for the majority, said:

> When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final

agency action" by the Federal Election Commission "shall be subject to review," 26 U.S.C. § 9041(a), and "does not delineate a set of 'directly reviewable' actions." *Carter/Mondale*, 711 F.2d at 284 n.9; *cf. Lujan*, 497 U.S. at 882 ("*specific* authorization" needed to avoid § 704's finality requirement (emphasis added)). Here, by contrast, § 1252(e)(3) identifies the specific agency actions that are reviewable: "a regulation, or a written policy directive, written policy guideline, or written procedure" implementing § 1225(b). Defendants acknowledge that § 1252(e)(3) "specifies that such documents are reviewable," but then assert, with no support or analysis, that the statute does not make them "directly reviewable." Defs.' Reply at 17.

But again, and regardless, the Lesson Plan *is* final agency action. *See* Pls.' Br. at 26-28. Here, too, Defendants principally recycle their arguments, which remain premised on unsubstantiated representations about the Lesson Plan. *See* Defs.' Reply at 17-18. The representations are not aided by the repetition, and they are contradicted by the record (including the Administrative Record). *See* SUF ¶¶ 23-87; *see also* Pls.' Br. at 8-9 & nn.5-6; 13-15; 25-27. As Plaintiffs have shown at some length, the Lesson Plan does not "merely restate[]"the law; it *does* "contain . . . new mandatory language [and] directives"; and it is used beyond "abstract, educational setting[s]." Defs.' Reply at 18.

Defendants' claim that the future unavailability of judicial review of the Lesson Plan (i.e., other than in this lawsuit) is *not* a significant factor in the finality analysis, *see* Defs.' Reply at 19, ignores binding precedent. *See, e.g.*, *Calif. Communities Against Toxics v. EPA* ("*Calif. Toxics*"), 934 F.3d 627, 637 (D.C. Cir. 2019) (holding that an agency action was not final, in part because

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agency action.' *See* 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").

Lujan, 497 U.S. at 882 (emphasis in original); *see also Iowa League of Cities*, 711 F.3d at 863 n.12 (rejecting *Carter/Mondale* in light of *Lujan* and holding that where a statute "makes specified agency actions reviewable," the task "is to determine whether the asserted agency action falls within the statutory terms").

judicial review would be available for any action taken in the future on its basis); *see also* Pls.' Br. at 27 n.15. Defendants suggest that IJ review of negative credible fear determinations means there *will* be judicial review of applications of the unlawful Lesson Plan, *see* Defs.' Reply at 19, but they cite nothing for the remarkable proposition that review solely by another Executive branch employee counts as "judicial" review, *contra* U.S. Const., art. III, § 1.

Nothing is tentative about the Lesson Plan, which is binding and from which legal consequences flow. Even were there a finality requirement, it would be met. *See MRNY*, 2019 WL 4738070, at *29-30; Pls.' Br. at 26-28.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR CLAIMS

The Court should grant Plaintiffs summary judgment. The Lesson Plan is inconsistent with the law that it purports to implement in numerous respects, unlawfully raising the bar for passing credible fear interviews and directing asylum officers to render negative credible fear determinations when the law would otherwise require granting asylum seekers access to the immigration courts to apply for humanitarian relief. *See* Pls.' Br. at 28-39. The Lesson Plan is also, and independently, defective as a procedural matter: even if its construction of the law were permissible, it is not the product of reasoned decisionmaking, *see id.* at 39-44, and did not go through the required notice and comment process, *see id.* at 44-48. Finally, underscoring the gravity of this dispute, the Lesson Plan violates Plaintiffs' due process rights to have their credible fear claims adjudicated according to the standards set out by Congress. *See id.* at 48-50.

Before getting to the merits, Plaintiffs pause to note an important omission from Defendants' defense of the Lesson Plan. Defendants previously argued that the Lesson Plan is not reviewable because every legal interpretation or policy decision it reflects is contained in some

other pre-existing authority.[21] Yet absent from Defendants' Reply, including but not limited to its defense of the Lesson Plan on the merits, are any references to the outside authorities Defendants previously claimed determined the contents of and revisions to the Lesson Plan. *See, e.g.*, Defs.' Reply at 19-34. This omission reinforces the undisputed evidence that the Lesson Plan is a source of agency policy that binds the asylum officers conducting credible fear interviews and the asylum seekers whose claims they decide. *See* SUF ¶¶ 23-40, 43; Amicus Br. of Council 119 at 7-11.

A. <u>The Lesson Plan is not consistent with the law</u>

As Plaintiffs explained in their opening brief, the Lesson Plan is inconsistent with the INA, the Refugee Act, the CAT, and their implementing regulations. *See* Pls.' Br. at 28-39.

Again, Defendants' principal tack here is to avoid grappling with Plaintiffs' challenges on their merits. First, Defendants erroneously assert that Plaintiffs "waive[d] any objection to the principles that Defendant[s] laid out regarding how the Court should interpret the Lesson Plan," and go on to suggest—without any basis—that this decides the issues. Defs.' Reply at 23. As Plaintiffs previously explained, there is no ground for the Court to defer to defense counsel's say-so regarding what the Lesson Plan instructs or whether those instructions are consistent with the law. *See* Pls.' Br. at 29-31 (rejecting among other things, the notions that the Court should defer to post hoc rationalizations of counsel that the Lesson Plan simply restates the law). Second, Defendants argue that Plaintiffs' challenges to many aspects of the Lesson Plan are time-barred because the challenged guidance supposedly appeared in previous iterations of the Lesson Plan.

[21] *See, e.g.*, Defs.' Br. at 10 ("The Lesson Plan is . . . intended to summarize existing legal and policy authorities that are pertinent to a credible fear determination."); *id.* at 26 ("Where the Lesson Plan touches on policy, it is simply to direct the reader to other policy."); *id.* at 32-33 (arguing that the Lesson Plan is merely an interpretative rule because it "derives its content from existing documents whose meaning compels or logically justifies the propositions" (alterations and quotation marks omitted); *id.* at 34 ("[T]he Lesson Plan did not itself change, and did not intend to change, any existing law or official policy"). *Contra* Br. for Appellants at 38-39, 42, *Grace v. Barr*, No. 19-5013 (D.C. Cir. June 5, 2019) (Defendants characterizing lesson plan as source of USCIS policy).

See Defs.' Reply at 23-31. This is incorrect not only as a legal matter, as discussed above, *see* § I.A *supra*, but also as a factual one: as Plaintiffs have explained—and shown through their statement of undisputed facts (to which Defendants did not respond)—the erroneous instructions are not the same as those that came before. *See* Pls.' Br. at 17, 41-42; SUF ¶¶ 47-73.

To the extent Defendants do address the merits, their arguments fail on that front as well. Plaintiffs take Defendants' responses to each of their challenges in turn.

1. The Lesson Plan requires consideration of discretionary factors. Defendants concede that the Lesson Plan requires consideration of discretionary factors, *see* Defs.' Reply at 23, which they previously acknowledged to this Court and Judge Sullivan should not be considered at the credible fear stage, *see* Defs.' Br. at 41; *see also Grace*, 344 F. Supp. 3d at 134. On the merits, then, their only defense is the vague assertion, without any citation, that "[t]he materials within the Lesson Plan are substantively correct." Defs.' Reply at 23. No principle of deference warrants crediting such an unsupported and unspecific legal conclusion by counsel.

Defendants' other argument is that the Court lacks jurisdiction because "consideration of discretion" has appeared in previous Lesson Plans. *See* Defs.' Reply at 23. But the guidance that Plaintiffs challenge sets new policy on the *relevance* of discretionary factors, as a comparison of the Lesson Plan to the 2017 lesson plan illustrates. *Compare* AR 18, 35 *with* AR 60, 83; *see also* Ex. A (Redline) to Pls.' Br. ("Ex. A (Redline)"), ECF No. 57, at 33, 67; SUF ¶¶ 47-49. The 2017 lesson plan explained that "general[ly], a finding that there is a significant possibility . . . [of] past persecution . . . is sufficient to satisfy the credible fear standard," and aptly noted that this is because "the applicant in such a case has shown a significant possibility of establishing that he or she is a refugee under section 208 of the Act and a full asylum hearing provides the appropriate venue to evaluate whether or not the applicant merits a favorable exercise of discretion to grant

asylum." *See* AR 60. It then went on to speculate: "a negative credible fear determination *may be* appropriate" nonetheless if there is "substantial" evidence that asylum would be denied on discretionary grounds at the merits stage. *See id.* (emphasis added).

Whether or not that latter guidance might have been problematic, too, the Lesson Plan's guidance is different. Gone is the instruction that past persecution is "general[ly] . . . sufficient" and the admonition that "a full asylum hearing" is "the appropriate venue" for an analysis of discretionary factors. *Compare* AR 60 *with* AR 18. And the equivocal view that a negative credible fear determination based on discretionary factors "may be appropriate" shifts to a definitive one: a negative determination "is appropriate." *See id.* The result is that under the 2019 directive—unlike under previous guidance—asylum officers *must* consider discretionary factors and *must* make negative credible fear determinations based on them. *See* AR 18, 35; Ex. A (Redline) at 33, 67; *see also* AR 15, 19; Ex. A (Redline) at 26, 36. Even if the Court's jurisdiction were limited to "new" guidance (though it is not), this policy change would fit the bill.

2. Even were those discretionary factors relevant (and they are not), the Lesson Plan misstates the law. Defendants defend their detailed instructions on the discretionary analysis—which should not be included in the Lesson Plan in the first place—by arguing that Plaintiffs' reading of the Lesson Plan, *see* Pls.' Br. at 31-32, is "not fair[]." *See* Defs.' Reply at 24. Notably, they do not contend that Plaintiffs' challenge in this aspect is time-barred,[22] nor do they dispute Plaintiffs' explanation of the law. Defendants merely make inapposite arguments and cite no specific language in the Lesson Plan to support their reading. *See* Defs.' Reply at 24. For the reasons Plaintiffs set out before, *see* Pls.' Br. at 31-32, the Lesson Plan's instructions are materially

[22] That Defendants do not dispute that these details appear for the first time in the April 2019 Lesson Plan reinforces Plaintiffs' argument that the Lesson Plan sets out new policy on discretionary factors generally, *see* § II.A.1 *supra*: detailed instructions regarding how the discretionary analysis should be carried out are necessary only because asylum officers are now required to undertake the discretionary analysis.

incorrect, in addition to being erroneous to include at the credible fear stage in the first place.

3. The Lesson Plan unlawfully raises the asylum seeker's burden of proof. To Plaintiffs' explanation that the Lesson Plan unlawfully raises the asylum seeker's burden of proof by "'requir[ing] the applicant to identify more than "significant evidence" that the applicant is a refugee,'" Pls.' Br. at 32 (quoting AR 12), Defendants contend that the Court should accept this construction as a matter of interpretation and deference, *see* Defs.' Br. at 25.

Agency interpretations of a statute it is charged with administering are "'entitled to respect'" "only to the extent they have the 'power to persuade.'" *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). In weighing an interpretation, courts examine the circumstances under which it was made, including "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

Here, even assuming the statute is ambiguous, the Lesson Plan's construction of the credible fear standard is not due any deference. Rather than engaging carefully with accepted tools of construction—such as examination of the text of the governing statute and regulations and the legislative and regulatory history, *see* Pls.' Br. at 7-8, 33; Amicus Br. of Tahirih Justice Ctr., ECF No. 55, at 3-10—the Lesson Plan simply lifts language from a "non-immigration case" case that construes District of Columbia tort law, AR 12; Pls.' Br. at 33. Nor does the construction reflect a consistent interpretation of the credible fear standard: as recently as the previous iteration of the lesson plan, the agency acknowledged that the "the credible fear 'significant possibility' standard" is "one that sets 'a low threshold of proof of potential entitlement to asylum.'" AR 51 (quoting Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,320 (Mar. 6, 1997)); Ex. A (Redline) at 18. As to formality and relative expertness, the Lesson Plan did not go through formal

notice and comment rulemaking, *see Mead Corp.*, 533 U.S. at 228 & n.9 (citing *Reno v. Koray*, 515 U.S. 50, 61 (1995)), nor is there any indication in the Administrative Record that the revisions were made by subject-matter experts at the agency, *see also* Amicus Br. of Council 119 at 2 ("revisions to the Lesson Plan . . . were made in darkness, rather than through the customary transparent comment and review process involving subject matter experts").

And at bottom, the agency's construction is not persuasive: Under the Lesson Plan, the requirement to "identify more than 'significant evidence'" of refugee status could entail establishing it by a 49% certainty or more. *See* AR 12 (noting that "the applicant does not need to show that the 'preponderance' or majority of the evidence established that entitlement"); *see also* Defs.' Reply at 25 (suggesting that discussion of preponderance standard should assuage concerns). That interpretation does not comport with Congress's evident intent that the credible fear standard serve as "a low screening standard for admission into the usual full asylum process." *See* 142 Cong. Rec. S11,491 (Sept. 27, 1996) (statement of Sen. Hatch); Pls.' Br. at 7-8, 32-34.

4. The Lesson Plan improperly requires the asylum seeker to provide evidence going to every element of an asylum claim. In response to Plaintiffs' related argument that the Lesson Plan imposes on the asylum seeker an unlawful burden of production and persuasion as to each element of the asylum standard, *see* Pls.' Br. at 33-35, Defendants once again argue unreviewability and fail to grapple with Plaintiffs' arguments and the text of the Lesson Plan, *see* Defs.' Reply at 26. Defendants assert that under the credible fear standard, "if an applicant lacks a significant possibility of establishing one element, then she lacks a significant possibility of establishing eligibility," *see* Defs.' Reply at 26; *see also id*. (noting that the 2017 lesson plan "reference[d] the significant possibility standard with respect to distinct eligibility elements"), but this is not what Plaintiffs are challenging. Rather, Plaintiffs challenge the Lesson Plan's

requirement that the asylum seeker *produce evidence* going to every element of their merits claim and—in a distortion of the statute's grammar—establish each merits element (as opposed to the prospect of establishing it) by a "significant possibility." *See* Pls.' Br. at 33-35 & n.17; *see also* Amicus Br. of Tahirih Justice Ctr. at 11-19 (explaining how the Lesson Plan improperly directs asylum officers to apply a heightened standard at the credible fear stage); Amicus Br. of Council 119 at 11-13 (same). Under the credible fear statute, the question should be a prospective one: whether there is a significant possibility that the asylum seeker "could establish eligibility." 8 U.S.C. § 1225(b)(1)(B)(v). The Lesson Plan conflicts with the credible fear statutory definition because, as Plaintiffs explained, the statute permits an asylum officer to conclude that there is a significant possibility that the asylum seeker "could establish eligibility" for asylum at a future hearing even if the asylum seeker cannot produce evidence at the credible fear stage establishing a particular merits element by a significant possibility. *See* Pls.' Br. at 34-35.

Take for example, the Lesson Plan's requirement that "the applicant must establish that there is a significant possibility that the persecutor was or will be motivated to harm him or her on account of his or her race, religion, nationality, membership in a particular social group, or political opinion." AR 21; *compare* AR 61; Ex. A (Redline), at 37 (prior guidance). An asylum seeker suffering from trauma might be unable through their own testimony to offer sufficient evidence of motivation, let alone, for example, that the persecutor was motivated to harm them on account of their membership in a particular social group. *See* Amicus Br. of Tahirih Justice Ctr. at 17-18 (discussing effects of trauma on demeanor and memory); AR 407-08 (same); AR 180 ("more often than not, a person who has been persecuted or who fears persecution must be interviewed many, many times to extract all the relevant details"); AR 10-11 (opinion testimony should be accorded no weight, unlike in prior lesson plan); AR 657 (noting that identifying a particular social group

"can be complicated task"). Yet an asylum officer could reasonably conclude that there is a significant possibility that at a full hearing before an IJ—with the benefit of the rights to counsel and to present lay and expert witness testimony and time to prepare a case, among other things, *see* Pls.' Br. at 4, 7-8—that the asylum seeker *could establish* such motivation in the future. *See* AR 259-68 (discussing the range of evidence that might be considered on the merits). The Lesson Plan expressly precludes asylum officers from engaging in this reasoning. *Compare* AR 14 (barring asylum officers from taking into account "the context and nature of the credible fear screenings") *with* AR 55 (imploring them to consider the same); *see also* Ex. A (Redline) at 23 (showing change). Requiring asylum seekers to produce evidence on every merits element and to prove each merits element by a significant possibility, as the Lesson Plan does, dictates negative credible fear determinations when positive ones would be called for under the governing statute.

5. The Lesson Plan imports an inapplicable corroboration requirement. Defendants contend that the Lesson Plan's unlawful corroboration requirement, *see* Pls.' Br. at 35-36, is a necessary extension of the credible fear statute's requirement that an asylum officer "tak[e] into account the credibility" of the asylum seeker's statements, 8 U.S.C. § 1225(b)(1)(B)(v); *see* Defs.' Reply at 27. In so doing, Defendants ignore the text of the Lesson Plan, which permits an asylum officer to demand corroborating evidence "even where the officer might otherwise find the testimony credible," AR 11, and assume, with no argument or analysis to rebut Plaintiffs' view, that it is lawful for asylum officers to require asylum seekers at the credible fear stage to meet a standard from asylum adjudications on the merits. *See* Defs.' Reply at 27. It is not. The credible fear statute and regulations require the asylum seeker to provide no more than "statements," 8 U.S.C. § 1225(b)(1)(B)(v), making clear that whether to present any additional evidence is within the asylum seeker's discretion, *see* 8 C.F.R. § 208.30(d)(4) (noting that the asylum seeker "may

present other evidence, if available"). It is inconsistent with this law to give an asylum officer power to demand more from the asylum seeker, at the risk of receiving a negative determination. *See* AR 11; *see also* Amicus Br. of Council 119 at 12-13.

6. The Lesson Plan directs asylum officers to apply an erroneous standard regarding persecution by non-governmental actors. Defendants defend the Lesson Plan's unlawful guidance regarding persecution by non-governmental actors, *see* Pls.' Br. at 36, by saying that this guidance is designed to illustrate that in order to pass the credible fear interview "it is not enough [for an asylum-seeker] to merely show that the [their] government lacks resources [to protect them]," Defs.' Reply at 27-28. Defendants again make Plaintiffs' point for them, since this was the view of the law that was rejected in *Grace*. There, Judge Sullivan explained that under the "unable or unwilling" standard, an asylum seeker who receives "ineffective . . . assistance" from their own government can, in fact, demonstrate persecution, and enjoined Defendants from applying *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), at the credible fear stage to the extent it raised that standard. *See* 344 F. Supp. 3d at 129-30, 141, 144. Defendants cite an opinion in which the Fifth Circuit, outside the context of expedited removal, disagreed with Judge Sullivan and interpreted *Matter of A-B-* such that it "did not constitute a change in [agency] policy," including with regard to how the Fifth Circuit had previously construed the "unable or unwilling" standard, in the context of full removal proceedings. *Gonzales-Veliz v. Barr*, 938 F.3d 219, 232-33 (5th Cir. 2019) (cited in Defs.' Reply at 27-28). But that decision does not change that Defendants here remain bound by Judge Sullivan's permanent injunction against applying what he concluded, on the basis of controlling precedent outside of the Fifth Circuit, was *Matter of A-B-*'s heightened formulation of that standard in the credible fear context. If anything, Defendants' citation of this Fifth Circuit opinion acknowledges that the Lesson Plan conflicts with *Grace*.

7. The Lesson Plan improperly raises the standard for whether a fear of persecution is "well founded." To Plaintiffs' argument that the Lesson Plan conflicts with *Cardoza-Fonseca* and BIA and Circuit precedent, *see* Pls.' Br. at 36-37, Defendants simply summarize the Lesson Plan's erroneous guidance and cite cases that supposedly support their position, *see* Defs.' Reply at 28-29, ignoring that, under *Grace*, if there is disagreement among the circuits on an issue, the asylum seeker at the credible fear stage should receive the benefit of the most favorable law, *see* 344 F. Supp. at 139-40. The Court should not credit Defendants' position.

8. The Lesson Plan's instructions regarding State Department reports and Border Patrol encounters are inconsistent with the law. In their opening brief, Plaintiffs demonstrated that the Lesson Plan's guidance on State Department reports—requiring asylum officers to consult them and to treat their contents as "objective" fact—is inconsistent with the governing regulation and controlling court precedent. *See* Pls.' Br. at 37-38; *see also* Amicus Br. of Advocates for Human Rights, ECF No. 46, at 9-18 (explaining how the Lesson Plan's instructions also conflict with the agency's prior policy on the use of country of origin information, as shown by a document in the Administrative Record). Defendants claim that there is no inconsistency between the regulation, which permits asylum officers to "rely" on State Department reports, among other materials, *see* 8 C.F.R. § 208.12(a), and the Lesson Plan, which requires asylum officers to "consult" and privilege State Department reports, *see* Pls.' Br. at 37. *See* Defs.' Reply at 29-30. In their view, the Lesson Plan, which they recognize expressly requires asylum officers to *consult* State Department reports, does not require asylum officers to *rely* on those reports. *See id.* at 30. This is not the case. By characterizing the reports not only as "objective" (a fact Defendants do not address, *see id.*) but also as "salient" and "relevant," and instructing asylum officers to account for them when documenting credibility determinations, the Lesson Plan makes clear that asylum

officers, when considering such reports, must give them weight. *See* AR 17 (requiring officer to note "consistency with . . . country condition reports available" when documenting a credibility determination); AR 23, 24, 28-29, 30 (referring to information in reports as "salient"); AR 36 (referring to such information as "relevant"). The implications of the Lesson Plan's unlawful guidance for the fairness of credible fear screenings are especially concerning because State Department reports are not, in fact, objective, and have become increasingly politicized under the Trump Administration. *See* Amicus Br. of Advocates for Human Rights at 13-19.

To Plaintiffs' argument that the Lesson Plan erroneously requires asylum officers to weigh the asylum seeker's testimony against testimony to CBP officers without cautioning that CBP statements are not always reliable, *see* Pls.' Br. at 38, Defendants assert that Plaintiffs' challenge is time-barred because a prior lesson plan required considering inconsistencies, *see* Defs.' Reply at 30. But in this Lesson Plan Defendants eliminated critical instructions, present in the prior version, that preserved the nonadversarial character of credible fear interviews, *see* 8 C.F.R. § 208.30(d), by cautioning asylum officers against giving weight to CBP records that such records were not due. *Compare* AR 16 *with* AR 57-58; *see also* Ex. A (Redline) at 27-30. The general statements throughout the Lesson Plan that asylum officers should consider the "totality of circumstances," in credibility adjudications generally, *see* Defs.' Reply at 30, in no way serve as the requisite warning regarding CBP records in particular, *see* Pls.' Br. at 38.

9. The Lesson Plan authorizes asylum officers to make negative credible fear determinations without giving the asylum seeker an opportunity to address credibility concerns. Defendants do not meaningfully respond to Plaintiffs' challenge, *see* Pls.' Br. at 38-39, that the Lesson Plan permits asylum officers to make negative credible fear determinations without giving the asylum seeker an opportunity to address credibility concerns. They simply note that the

Lesson Plan "suggests" that asylum officers give such an opportunity, not acknowledging that the Lesson Plan fails—in a departure from prior guidance—to *require* them to do so. *See* Defs.' Reply at 30-31. This distinction matters, because the controlling regulation and precedent does require asylum officers to provide an asylum seeker with an opportunity to respond. *See* Pls.' Br. at 38.

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

In addition to being unlawful as a substantive matter for providing guidance that conflicts with controlling law, *see* § II.A *supra*, the Lesson Plan is unlawful as a procedural matter because it was revised in an "arbitrary [and] capricious" way, 5 U.S.C. § 706(2)(A). In response to Plaintiffs' account of the respects in which the revisions were arbitrary and capricious, *see* Pls.' Br. at 39-44, Defendants again cling to baseless charges of concession and fare no better to the extent they argue on the merits, *see* Defs.' Reply at 19-21.

First, recognizing that "the Lesson Plan did not expressly provide its justification," Defs.' Br. at 46, and unable to point to anything else that explains any of the multitude of changes to the Lesson Plan, *see* Pls.' Br. at 28-39, 42; SUF ¶¶ 47-81, Defendants assert that this deficiency is of no moment because "the Lesson Plan's prose, citations, and nature all evince its reasoning." *See* Defs.' Reply at 19-20. As Plaintiffs previously explained, "[t]o facilitate judicial review, . . . 'an agency has no choice but to provide a reasoned explanation for its action.'" Pls.' Br. at 40 (quoting *Policy & Research, LLC v. U.S. Dep't of Health & Hum. Servs.*, 313 F. Supp. 3d 62, 83 (D.D.C. 2018)). That the agency might have engaged in "reasoning" is insufficient: it must "articulate[]" its reasons such that they "can be scrutinized by courts and the interested public." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569, 2576 (2019).

Even if agencies were permitted to explain their decisions implicitly through their actions, defense counsel's purported interpretation of the "reasoning" implicit in the Lesson Plan does not amount to an explanation. *See* Pls.' Br. at 41 (citing requirement from *Motor Vehicle Mfrs. Ass'n*

v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) that a "satisfactory explanation" include "a rational connection between the facts found and the choice made"). If *any* explanation can be gleaned from the changes to the Lesson Plan, it is that Defendants believed that the credible fear passage rate was too high and that credible fear interviews should therefore be restructured to make them more difficult to pass—precisely what the judicially noticeable evidence establishes. *See* SUF ¶¶ 3-6. This much is apparent from the result, at least, of Defendants' decision to revise the Lesson Plan—without reference to any changes in statutes, regulations, policies, or caselaw—such that asylum officers will make negative credible fear determinations when positive determinations previously would have been warranted. *See* § II.A *supra*; *see also* SUF ¶¶ 47-81. And if this was the agency's reasoning, it would be arbitrary and capricious, since it does not account for the risk that asylum seekers with a credible fear of persecution or torture will be erroneously and unlawfully deported. *See MRNY*, 2019 WL 4738070, at *36 ("the agency . . . must at least acknowledge the potential impact that such dark clouds might actually have on the people and the communities the policy would affect"); *cf.* Pls.' Br. at 18 ("Defendants ignore that 'no law pursues its purpose at all costs.'" (quoting *Kucana*, 558 U.S. at 252)).

Second, in response to Plaintiffs' argument that Defendants have failed to acknowledge and provide good reasons for changes to the Lesson Plan, *see* Pls.' Br. at 41-44, Defendants reiterate their unsupported position that changing the date on the Lesson Plan's cover page was sufficient, *see* Defs.' Reply at 20. But the requirement is not merely to change the date on a document, but to acknowledge what changes were made and the reasons for those changes, to ensure that the agency engaged in reasoned decision making. Were a sign that a document is new sufficient to provide the requisite acknowledgement of and reasons for changed positions reflected in the document, the requirement would be empty, contrary to the well-established case law that it

is a meaningful check on arbitrary agency decision making. *See, e.g.*, *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1066-68 (D.C. Cir. 2018) (new EPA rule revising timeline for implementation of Chemical Disaster Rule was arbitrary and capricious because agency "d[id] not explain its departure from [its] previous conclusions regarding the appropriate and practicable timeline"); *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 922-29 (D.C. Cir. 2017) (new plan for wild horse territory was arbitrary and capricious because the agency "failed to acknowledge and adequately explain its change in policy" regarding management of wild horses). This principle of arbitrary and capricious review enables courts to ensure that the *agency* recognized that it was changing policy and that it made any changes in a reasoned manner—not simply that the public is aware that something about the guidance might be different. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored"); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Third, regarding the requirement that an agency examine the relevant data, Pls.' Br. at 43-44, Defendants do not dispute that it would be arbitrary and capricious for Defendants to remove material regarding *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987), from the Lesson Plan without considering that case, Defs.' Reply at 20. Rather, they appear to contend that the agency did consider *Matter of Mogharrabi*, even though it was not listed in the AR Index, perhaps because it was cited in a previous version of the lesson plan.[23] *See id.* This contention is belied by the Certification of Administrative Record, which states that the index reflects "the whole record . . .

[23] Defendants cite AR 28-30 (corresponding to the Lesson Plan) to support the proposition that *Mogharrabi* "exist[s] in the record," Defs.' Reply at 20, but the Lesson Plan contains no mention of *Mogharrabi* at all, including on those pages. Defendants may have intended to cite pages 28-30 of the 2017 lesson plan (AR 65-57), which contains the discussion of *Mogharrabi* that Defendants deleted in the 2019 revision. *See* Pls.' Br. at 43-44.

including all documents and materials considered directly or indirectly," ECF No. 24-3, at 1, and the Certified Index to Administrative Record, 36 of whose 81 entries are cases, *see* ECF No. 23-1, at 1-2, notwithstanding that all of those cases were cited in a lesson plan, *see* AR 1-37.

Fourth, to Plaintiffs' argument that the Lesson Plan fails to fulfill the purpose of providing clear and accurate guidance on what the law requires because of its confusing instructions on (*inter alia*) *Grace*, *see* Pls.' Br. at 44, Defendants assert that it is not irrational to prepare asylum officers for contingent events, *see* Defs.' Br. at 21. Plaintiffs agree. But having decided to prepare them, what *is* irrational is to instruct asylum officers, as Defendants did, as if the contingent events are binary when they are not, particularly given the obvious confusion that could result. *See* Pls.' Br. at 44; *see also State Farm.*, 463 U.S. at 42-43 (requiring agencies to demonstrate that it considered all relevant factors and to provide "a rational connection between the facts found and the choice made"); *MRNY*, 2019 WL 4738070, at *37 ("grant of discretionary authority" does not permit "exercise[ing] [that] discretion in an *irrational* way"); *Kelly v. United States*, 34 F. Supp. 2d 8, 12 (D.D.C. 1998) (setting aside as arbitrary and capricious a decision "plague[d]" by "[i]nternal tensions" and "incoherent reasoning"); *see also* Amicus Br. of Council 119 at 9-11 (explaining the importance of the Lesson Plan being "unambiguous and lawful").

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

Defendants only briefly rehash their contention that the Lesson Plan is exempt from rulemaking as an interpretive rule. *See* Defs.' Reply at 21-22. They repeat their boilerplate conclusions—the Lesson Plan changes nothing and has no legal effects or consequences, *see id.*—that Plaintiffs have already shown to be wrong. To take just one specific example: as Plaintiffs have explained, the Lesson Plan erroneously instructs asylum officers that they can require asylum seekers to produce corroborating evidence in credible fear proceedings, and then deny their credible fear claims if they cannot (even where the officer would have otherwise found them

credible). *See* § II.A.5 *supra*. Before this Lesson Plan, asylum officers could not require corroborating evidence in the credible fear process, and now they can. *See id.*; Amicus Br. of Council 119 at 12-13. The Lesson Plan changed the law in a meaningful way, as practically experienced by both asylum officers and asylum seekers—the touchstone here—and thus it qualifies as a substantive rule. *See Calif. Toxics*, 934 F.3d at 631-32, 637-38; *Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d 1, 6-7 (D.C. Cir. 2011); *MRNY*, 2019 WL 4738070, at *31-32.

Other provisions of the Lesson Plan, Plaintiffs have explained, similarly constitute legislative rules, either because they supplement the statute or "effectively amend" regulations. *See* Pls.' Br. at 46-47. Defendants' solitary responsive argument is to assert that the Lesson Plan does not "effectively amend" regulations because it "is simply . . . repeating the obligations imposed on officers by *other* legal sources." Defs.' Reply at 22-23 n.10. But once more, Defendants do not even attempt to substantiate their premise.[24] *See id.* Nor does it matter that the agency has not published the Lesson Plan in the *Federal Register* or the *Code of Federal Regulations*, or that the agency has not characterized it as a "rule" or acknowledged that it sets policy. *See id*. at 22. Binding precedent is clear: where, as here, an agency "impose[s] obligations by chicanery—disclaiming legal force and effect but nonetheless 'read[ing] like a ukase,'" *Valero Energy Corp. v. EPA*, 927 F.3d 532, 537 (D.C. Cir. 2019) (citation omitted), the Court treats the agency action for what it is based on what it says and does, not its label. *See id.*; *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020-23, 1028 (D.C. Cir. 2000); *see also Elec. Privacy Info. Ctr.*, 653 F.3d at 6-7 ("'It is enough for the agency's statement to 'purport to bind' those subject to it, that is, to be cast in 'mandatory language'" (citation omitted)); *Nat'l Resources Def. Council*

[24] Defendants fault Plaintiffs for "not explain[ing] how else the Lesson Plan should phrase these external obligations," *id.*, which Plaintiffs thought would have been obvious: if a regulation says only that asylum officers "may" do *X*, then the agency is effectively amending the regulation when it says, as the Lesson Plan does, that under the regulation the officers "must" do *X*. *See* Pls.' Br. at 46-47.

v. EPA, 643 F.3d 311, 406-07 (D.C. Cir. 2011); *MRNY*, 2019 WL 4738070, at *32.

D. The Lesson Plan is not consistent with due process

Under Supreme Court precedent, Plaintiffs have a procedural due process right to have their credible fear claims decided under the procedures enacted by Congress. *See* Pls.' Br. at 49-50; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("procedure authorized by Congress . . . is due process"); *see also Zadvydas v. Davis*, 533 U.S. 678, 721 (2001) (same); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950) ('The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body."). Defendants do not deny this. Rather, they ignore it, claiming only, on a misreading of *Maldonado-Perez v. INS*, 865 F.2d 328 (D.C. Cir. 1989), that the Circuit recognized no such right there. *Compare* Defs.' Reply at 32 (selectively quoting case as providing that "the [INA] creates 'statutory' procedural rights") *with Maldonado-Perez*, 865 F.2d at 332 (describing a "statutory procedural *due process* right" under the INA and Refugee Act (emphasis added)). By requiring asylum officers at the gatekeeping stage to adjudicate credible fear claims in a manner contrary to law, *see* § II.A *supra*; Pls.' Br. at 28-39, the Lesson Plan deprives Plaintiffs of their due process rights to seek asylum, withholding of removal, and CAT protection according to the procedures Congress established. *See* Pls.' Br. at 48-50; *contra* Defs.' Reply at 33 (claiming, without basis, that Plaintiffs conceded the opposite).

The Court nonetheless need not reach this claim (though not for the reason Defendants assert, *compare* Pls.' Br. at 48 & n.20 *with* Defs.' Reply at 31): Defendants' other violations provide sufficient grounds to grant Plaintiffs all the relief they seek, so the Court need not decide the constitutional issue, although it colors the statutory analysis, *see* Pls.' Br. at 48.

III. PLAINTIFFS' REQUESTED RELIEF IS AUTHORIZED AND JUSTIFIED

Under any of Plaintiffs' claims, the appropriate remedy includes vacating and enjoining

the Lesson Plan, providing the specific injunctive relief each individual Plaintiff requested, and a declaration that negative credible fear determinations based on the unlawful Lesson Plan were contrary to law. *See* Pls.' Br. at 50-55; Pls.' Proposed Order, ECF No. 36-4.

Defendants still argue the Court should "declare certain parts of the Lesson Plan as unlawful," Defs.' Reply at 34, rather than vacating and enjoining it entirely, but they have abandoned the argument that § 1252(e) prohibits the Court from going further.[25] Defendants continue to ignore that the mandatory remedy in an APA case is to vacate unlawful agency action, *see* Pls.' Br. at 52-53, and as this Court recently explained, limiting that remedy to just the plaintiffs—or in any other way that would permit the government to continue to apply the unlawful Lesson Plan to others—should not be countenanced, *see MRNY*, 2019 WL 4738070, at *44-49. That said, Plaintiffs agree that, in addition to the other requested relief, it would be appropriate for the Court to declare the Lesson Plan's policies detailed in § II.A, *supra*, to be unlawful, and to enjoin them on that basis, so there is no question that the agency should not use them in the future.

Relatedly, Defendants have never suggested that any parts of the Lesson Plan are severable, and none are, for the reasons previously explained. Pls.' Br. at 53. And while Defendants ask for remand, *see* Defs.' Reply at 34, they do not argue for remand without vacatur, which also would be inappropriate for the reasons previously noted, Pls.' Br. at 53. The cases Defendants cite in support of a "remand," Defs. Reply at 34, do not concern remand without vacatur, or any other issue disputed in this case. *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam) applied

[25] *See* Defs.' Br. at 51-52 (arguing that because of §§ 1252(e)(1) and (3), the sole relief available is declaratory); *but see* Defs.' Reply at 34 (agreeing that the Court can order vacatur of Plaintiffs' negative credible fear determinations). As this Court recently noted, Defendants' abandoned argument depended on an "implausible" statutory interpretation, *MRNY*, 2019 WL 4738070, at *45 n.37, among its other flaws, *see* Pls.' Br. at 51-52.

the *Chenery* doctrine[26] to hold that where an agency has itself not yet considered a possible basis to support its challenged action, the reviewing court should ordinarily decline to decide the issue in the first instance.[27] Plaintiffs have no qualms applying that principle here (which would be relevant only to the arbitrary and capricious claim, and which has nothing to do with whether the agency action is vacated before the remand), but Defendants have not identified any issue the agency has yet to consider. The other two cases are even farther afield. In one, Judge Bates vacated USCIS' denial of particular immigration petitions as arbitrary and capricious and remanded for reconsideration but declined to order the agency to grant the petitions. *See Chiayu Chang v. USCIS*, 289 F. Supp. 3d 177, 188 (D.D.C. 2018). In the other, the D.C. Circuit faulted the district court for enjoining an agency action that the plaintiff did not challenge. *See Neb. Dep't of HHS v. HHS*, 435 F.3d 326, 330 (D.C. Cir. 2006). These cases have no application here.

Defendants attack Plaintiffs' request that the Court declare unlawful the negative credible fear determinations made pursuant to the Lesson Plan, but their arguments are baseless. *See* Defs.' Reply at 34-35. Declaratory relief is the one form of relief that Defendants have always agreed is available under § 1252(e)(3), *see* Defs.' Br. at 51-52, and so their assertion that Plaintiffs violated this Court's instruction to brief the scope of relief available under § 1252(e)(3), ECF No. 22, at 4, is disingenuous. Nor can Defendants claim surprise, since Plaintiffs expressly requested this precise relief in their complaint. Am. Compl. at 26 ¶ 4. Defendants suggest this relief is prohibited

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[26] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." (citing, *inter alia*, *SEC v. Chenery*, 332 U.S. 194, 196 (1947)); *see also* Pls.' Br. at 8-9.

[27] Specifically, in that case the Board of Immigration Appeals (BIA) had entered a final order of removal (affirming the IJ's non-final one) as to an individual asylum seeker after holding that he failed to meet one of the requirements for asylum eligibility; but the BIA did not reach the IJ's alternative basis (changed country conditions) for rejecting the asylum claim. *See Orlando Ventura*, 537 U.S. at 13-14. On review, the court of appeals rejected the BIA's basis for the final order of removal and vacated the final order of removal, but, rather than remanding for the agency to decide the non-exhausted changed country conditions issue (which is what the Supreme Court held it should have done), decided that issue itself, and found that it did not support the removal order either. *See id.*

by § 1252(e)(1)(B) ("no court may . . . certify a class under Rule 23" in a § 1252(e)(3) action), which is self-evidently erroneous, as it neither involves nor requires a class. *See* Pls.' Br. at 54. And Defendants are wrong that the Court, in granting this relief, would be doing so "without even determining whether the Lesson Plan ever applied to these absent individuals." Defs.' Reply at 35. As Plaintiffs have explained, and as substantiated by uncontradicted record evidence, the Lesson Plan sets the agency's policy and process for asylum officer review of credible fear claims, and the agency requires officers to follow it. Defendants can identify no reason why this Court cannot or should not declare that the adverse determinations that resulted from the application of an unlawful standard were not in accordance with the law, as Plaintiffs have demonstrated. *See Grace v. Whitaker*, No. CV 18-1853, 2019 WL 329572, at *2 (D.D.C. Jan. 25, 2019) ("There is no statutory requirement, as the government argues, to declare a policy in violation of the law only as applied to the individual plaintiffs.").

Defendants' final argument, regarding only Plaintiffs Sofia and Julia (who were deported to Cuba and El Salvador, respectively), appears to be based on a misunderstanding. Plaintiffs do not request that the Court order Defendants to parole Sofia and Julia into the United States and out of detention, or otherwise to admit them into the country, as Defendants suggest. *See* Defs.' Reply at 35. Plaintiffs ask only that the Court order Defendants to facilitate their return to the United States for their new credible fear interviews under lawful standards, so that they do not again have to make the dangerous overland journey. This is the precise relief ordered in *Grace*, where Judge Sullivan rejected the argument that this Court lacks the authority to order Defendants to parole in individual plaintiffs for their new credible fear interviews. *See* 344 F. Supp. 3d at 144-45.[28]

* * * * *

[28] This holding was not appealed. *See* Br. for Appellants, *Grace v. Barr*, No. 19-5013 (D.C. Cir. June 5, 2019).

The day before this brief was due, Defendants notified the Court and Plaintiffs that in late September—and two days before Defendants' filed their Reply Brief—USCIS issued a new revision of the Lesson Plan. *See* Defs.' Status Update, ECF No. 58. Defendants correctly note that this new lesson plan has no effect on the issues in this case, *see id.* at 2 ("The issuance of the September 2019 Lesson Plan does not appear to affect the issues in this case"), but err in asserting that the request for vacatur of the April 2019 Lesson Plan "is now moot," *id.* Defendants continue to ignore their "heavy burden" to prove mootness, *see* § I.B *supra*, and that where, as here, the alleged mootness is the result of the voluntary action of the defendant that it remains free to reverse, the request for relief is not moot, *see id.*; Pls.' Br. at 21-22; *O.A.*, 2019 WL 3536334, at *19, *22-23. That USCIS remains free to return to the April 30, 2019 Lesson Plan is reason alone that the request to vacate it is not moot, without considering the ambiguity of whether the September revision should be considered a separate document at all, given that it is stamped "April 30, 2019" in the footer of every page. *See* ECF No. 58-1.

Regardless, and in an abundance of caution, Plaintiffs intend to file a supplemental pleading under Rule 15(d) to allege their same claims against the September 2019 Credible Fear Lesson Plan, which would govern the future credible fear proceedings, including of Plaintiffs Sofia and Julia. As Defendants acknowledge, September 2019 Lesson Plan shares the illegalities of the April 2019 Lesson Plan,[29] and so it should be vacated and enjoined as well.

CONCLUSION

Plaintiffs respectfully request judgment enter in their favor, as asylum seekers, asylum officers, and the American public deserve better than what Defendants have provided.

[29] *See* Defs.' Status Report, ECF No. 58, at 2 ("The new, September 2019 Lesson Plan does not meaningfully address or remove any of the alleged deficiencies Plaintiffs challenge in the April 30, 2019, Lesson Plan.").

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Respectfully submitted,

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