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12 P R O C E E D I N G S

13 THE COURTROOM DEPUTY: Your Honor, calling Civil  
14 Action 19-1872, Marie Kiakombua, et al. vs. Kevin K. McAleenan,  
15 et al.

16 If I can have the attorneys approach the podium and  
17 identify yourselves for the record.

18 MR. COX: Good morning, Your Honor. Justin Cox for  
19 the International Refugee Assistance Project for the  
20 plaintiffs.

21 THE COURT: Good morning, Mr. Cox.

22 MS. ALAGESAN: Good morning, Your Honor. Deepa  
23 Alagesan from the International Refugee Assistance Project for  
24 plaintiffs.

25 THE COURT: Good morning.

MS. AUSTIN: Good morning, Your Honor.  
Kathryn Austin also from the International Refugee Assistance  
Project for the plaintiffs.

1 THE COURT: Ms. Austin.

2 MS. HIROSE: Good morning. Mariko Hirose also from  
3 the International Refugee Assistance Project for the  
4 plaintiffs.

5 THE COURT: Good morning.

6 MS. OSORNIO: Good morning, Your Honor. Marie  
7 Osornio from RAICES.

8 THE COURT: Good morning to all of you.

9 MR. PLATT: Good morning, Your Honor. Steven Platt  
10 from the Department of Justice for the defendants.

11 THE COURT: Mr. Platt.

12 MR. CIRINO: Good morning, Your Honor. Paul Cirino,  
13 United States Attorney's Office, for the defendant.

14 THE COURT: Mr. Cirino.

15 Good morning to everyone. The Court has scheduled  
16 this hearing in order to give the parties in this matter the  
17 opportunity to provide argument and, hopefully, insight with  
18 respect to the pending dispositive motions which are the  
19 parties' cross-motions for summary judgment in this immigration  
20 law matter.

21 As with many matters of this nature, this is a  
22 complex set of issues, and so I appreciate you going over what  
23 you have put forward in your briefs. I am familiar with your  
24 arguments, but you should certainly feel free to restate them,  
25 as you deem necessary, to illuminate the issues. And, of

1 course, because the purpose of this hearing is for the Court to  
2 have its questions answered so that it can rule on these  
3 motions, I will be asking you questions, but I will try not to  
4 interrupt you too much because I do want to hear your  
5 presentations.

6 As for the procedure that we will follow, let me,  
7 first of all, just clarify with plaintiffs that you'll just  
8 have one counsel arguing; is that correct?

9 Mr. Cox, is it going to be you.

10 MR. COX: Well, Your Honor, I'm prepared to address  
11 the majority of the issues.

12 THE COURT: Okay.

13 MR. COX: But we were hoping that Ms. Austin could  
14 address our -- our first claim regarding the -- the ways in  
15 which the Lesson Plan is inconsistent with the law and -- and  
16 the second claim, the arbitrary and capricious claim.

17 THE COURT: Okay. That's fine. I just want to make  
18 sure I know what the scope of things is.

19 And for defendant we'll have Mr. Platt?

20 MR. PLATT: Yes, Your Honor. It should just be me.

21 THE COURT: Okay. Great.

22 What I tend to do in cases of this nature when I have  
23 a motion hearing is that I allow plaintiffs to go first, even  
24 when we don't have cross-motions, because I like to sort of get  
25 a lay of the land, explain the case, and the claims that have

1       been brought, and I may have some clarifying questions as to  
2       exactly what you're claiming. And then I'll let counsel for  
3       the defendants provide the government's argument for why it's  
4       entitled to summary judgment on those claims, and then I'll  
5       give the plaintiffs the opportunity to respond and present its  
6       own case for summary judgment, and then we'll go back and  
7       forth.

8               I try not to have any time limits. I find them  
9       distracting. I just want to have a conversation and get to the  
10      bottom of this. So I don't know whether that means, Mr. Cox,  
11      that you'll be first or whether Ms. -- is it Ms. Austin? --  
12      which -- whoever would like to provide the overview, please  
13      come forward.

14             MR. COX: Certainly, Your Honor. I am happy to  
15      start, and then I'll turn it over to Ms. Austin in a few  
16      minutes. Again, my name is Justin Cox, and good morning and  
17      may it please the Court.

18             Plaintiffs here are five women who were found under  
19      the challenged Lesson Plan not to have a credible fear of  
20      persecution or torture. The Lesson Plan that we challenge sets  
21      out the process to be used and the law to be applied by asylum  
22      officers in the credible fear process.

23             THE COURT: Are you -- I just want to be clear. You  
24      mean it is not establishing the law, it is describing the law,  
25      or are you saying the former?

1           MR. COX: It is instructing and directing the asylum  
2 officers on the process that they are to use and the law that  
3 they are to apply. It, in many respects, purports to be  
4 interpreting case law or statutes or regulations, but  
5 there's -- and we'll get to this when we get to our merits.  
6 There's a significant gap between what the law actually is and  
7 what the Lesson Plan instructs the asylum officers that the law  
8 is.

9           But the -- and the credible fear process, just to  
10 give a little more of the overview, is itself part of the  
11 expedited removal process. Now, that process was created in  
12 1996; and, essentially, as Your Honor is well aware,  
13 noncitizens subject to the expedited removal process can be  
14 summarily deported on the say-so of a single immigration  
15 officer, but at the same time that Congress created the  
16 expedited removal process, it also created the credible fear  
17 process.

18           And the purpose of the credible fear process is to  
19 ensure that the United States is not deporting individuals back  
20 to persecution which would violate our domestic and  
21 international law obligations. And so the credible fear  
22 process sets a -- it's a very low bar, intentionally quite low,  
23 and it's a screening device to ensure that there's no chance  
24 that we deport those individuals.

25           Now, as we've established through our briefing, the

1 Lesson Plan unlawfully deprived the plaintiffs of the fair  
2 consideration of their credible fear claims to which they're  
3 entitled under the process that Congress created.

4 THE COURT: All right. So let me -- help me with  
5 understanding the relationship between your claims in this  
6 regard and the particular areas that you point out. You have,  
7 through the summary judgment briefing -- and this may be better  
8 directed to Ms. Austin. I don't know. You have identified, I  
9 think, nine conflicts or nine areas in which you think the  
10 Lesson Plan is deficient in the way that you've described.

11 What is interesting to me is that we don't have nine  
12 claims in the complaint, and so I'm trying to understand the  
13 relationship between what it is that I think you hope I find,  
14 which is that each one of these inconsistencies exist, and the  
15 conclusion that the entire Lesson Plan needs to be invalidated.

16 MR. COX: So -- so as Your Honor knows, we have four  
17 claims. The first claim is that the Lesson Plan is  
18 inconsistent with the law that it purports to be instructing  
19 on. There are a variety of ways in which it is inconsistent  
20 with the law. We've identified the nine particular ones, but  
21 the claim is just that it's inconsistent with law, contrary to  
22 law, not in accordance with law. It's -- it conflicts with the  
23 statutes and the regs.

24 THE COURT: But not as whole; right? I mean, there's  
25 nothing about your argument -- and, again, I'll talk to

1 Ms. Austin about this -- that says there can't be such a thing.  
2 And, by the way, it's not -- it's sort of a misnomer. It's not  
3 a Lesson Plan in the way that one normally thinks of it, but,  
4 in any event, your argument is not that the government is not  
5 entitled to make this document --

6 MR. COX: No.

7 THE COURT: -- correct?

8 MR. COX: Absolutely not, Your Honor.

9 THE COURT: All right. So it's the fact that there  
10 are provisions of this document that you say are inconsistent  
11 with the statute that matters, and I guess what I'm trying to  
12 understand is is it 95 percent, 100 percent? What if I find --  
13 what if I disagree with some of your contentions about the  
14 purported conflicts? Why does that mean that the entire thing  
15 is, quote, "inconsistent with the law"?

16 MR. COX: So jumping ahead to remedy, I think if  
17 you -- if Your Honor were to hold that particular aspects of  
18 the Lesson Plan are inconsistent with the law under our first  
19 claim, then the -- I think the Court would do your -- the sort  
20 of typical severability analysis. And here we think that it  
21 points in one direction, which is nothing in this Lesson Plan  
22 is severable. It doesn't -- the agency certainly hasn't  
23 indicated a preference for severability. Because this is  
24 supposed to be a comprehensive document setting forth the  
25 entire process, it doesn't make a lot of sense, in our view, to



1 try to strike particular portions of it because then it  
2 wouldn't -- it wouldn't even be clear what should replace it.

3 You know, as defendants have pointed out, it's not  
4 this Court's job to rewrite the Lesson Plan, and -- and, of  
5 course -- and part of the problem too with trying to strike  
6 portions of it is that the -- the Lesson Plan that preceded the  
7 April 2019 Lesson Plan had sections, entire sections, that were  
8 removed when the April 2019 Lesson Plan was issued. And so  
9 it's not a simple matter of swapping in and out sections.

10 THE COURT: But I wouldn't have to put anything in.  
11 I would just say that the ones that you've identified are  
12 unlawful, and then it would be up to the agency to determine  
13 what to do with that; right?

14 MR. COX: Well, we think, Your Honor, that the -- the  
15 better course is to simply say that this Lesson Plan -- if --  
16 if it is unlawful, as we think it is, would be to set aside the  
17 Lesson Plan in its entirety.

18 The agency, as they've already demonstrated in the  
19 past couple of weeks, is, of course, free to revise the  
20 Lesson Plan whenever they want. And so we think -- and, of  
21 course, the *Chenery* doctrine says that this Court is supposed  
22 to evaluate what the agency has put forward and only that. And  
23 the issue with trying to swap in and out sections is that  
24 you'll result -- what will result is a Frankenstein Lesson Plan  
25 that was not the comprehensive document that the agency

1 intended at any point.

2 And the -- and, moreover, it would -- because the --  
3 the instruction and the Lesson Plan are interrelated, like the  
4 issue of what the legal standard is, it permeates the entire  
5 Lesson Plan, and so it's not even -- like it -- of course, it  
6 would vary section -- you know, legal issue, deficiency by  
7 legal deficiency, but most of these issues are interrelated and  
8 there's cross-references --

9 THE COURT: All right. So you say the standard  
10 severability analysis would lead the Court to conclude that the  
11 allegedly -- or if at that point I found unlawful provisions,  
12 can't just be stricken.

13 MR. COX: That's right, Your Honor, and defendants  
14 have never, in fact, argued that anything in here is severable.  
15 They've never argued for that at all. They've also, similarly,  
16 never argued that this Court should simply remand without  
17 vacatur. They've encouraged remand, but that's kind of --  
18 that's basically irrelevant at this point because, essentially,  
19 after final judgment, the -- the agency is going to be free to  
20 revise it anyway. And so there's no need for this Court to --  
21 to remand in the sense that there is in, for example, the other  
22 immigration cases.

23 THE COURT: All right. So I'm sorry. I interrupted  
24 you. You said that you had four claims?

25 MR. COX: Yes, Your Honor. So the first one is the

1 sort of substantive -- you know, is inconsistent with the  
2 substantive law. The second issue -- the second claim, rather,  
3 is that the -- that the Lesson Plan was revised in an arbitrary  
4 and capricious manner, and this -- and this is, of course,  
5 totally independent from whether or not its sort of substantive  
6 recitation of the law is accurate. Even if entirely accurate,  
7 it's still arbitrary and capricious because of the manner in  
8 which the agency revised it.

9 THE COURT: Now, let me ask you, can you really have  
10 both of those operating in the same case? In other words, the  
11 APA is a doctrine that the District -- the D.C. Circuit has  
12 said only applies in a situation in which there is no adequate  
13 remedy under the initial statute. So help me to understand why  
14 you would think the APA still is operable in this contention.

15 MR. COX: Certainly, Your Honor. So I think you can  
16 look at it in one of two ways. If this Court were to conclude,  
17 as it originally did in *Make the Road New York*, that  
18 1252(e)(3) -- 8 U.S.C. 1252(e)(3) is not jurisdiction  
19 conferring, it's not a cause of action, but merely preserves  
20 jurisdiction that is provided elsewhere, then there's no  
21 problem as this Court concluded in *Make the Road New York*  
22 because the cause of action is being provided by the APA.

23 THE COURT: I do see a distinction, but we can talk  
24 about that later.

25 MR. COX: Sure. I think the -- the other way we can

1 look at this, Your Honor, is, you know, 5 U.S.C. 704, which is  
2 where the -- the requirement -- or where the language about  
3 having another adequate remedy of law, that's where it comes  
4 from. And so 5 U.S.C. 704 says, "Agency action made reviewable  
5 by statute and final agency action for which there is no other  
6 adequate remedy in a court are subject to judicial review."

7 So as we've briefed extensively, we're in the first  
8 half of 704. This is agency action made reviewable by statute,  
9 and so it doesn't matter whether or not there is another  
10 adequate remedy in a court.

11 THE COURT: So you believe that the adequate remedy  
12 provision applies only to the second part of that statute, the  
13 D.C. --

14 MR. COX: That's --

15 THE COURT: I know that the D.C. Circuit has said  
16 that the finality requirement, for example, applies to both.  
17 And so your suggestion is that the adequate remedy at law only  
18 applies to the second and not the first?

19 MR. COX: Well, I -- I disagree on -- on the premise  
20 about what the D.C. Circuit has held about the finality  
21 requirement.

22 THE COURT: Okay.

23 MR. COX: If Your Honor may be referring to the  
24 *Carter-Mondale* decision --

25 THE COURT: Yes.

1 MR. COX: -- which predates *Lujan*, in which  
2 Justice Scalia said in no uncertain terms that agency action  
3 made reviewable by statute does not have to be final. Because  
4 the whole point is that Congress is saying even a potentially  
5 nonfinal agency action is reviewable in certain circumstances,  
6 and so -- so I'll end -- and the D.C. Circuit has not cited --

7 THE COURT: All right. That's fine, but I guess I'm  
8 still trying to understand why even if by the terms of the  
9 statute the other adequate remedy language applies only to the  
10 second prong, if you're in the first prong and the agency  
11 action is made reviewable by statute, what work is the APA  
12 doing under those circumstances? In other words, why do you  
13 need the APA if it's made reviewable by statute and a remedy  
14 exists in the -- under the statute?

15 MR. COX: Well, the APA expressly contemplates that  
16 the Court would be -- would evaluate the agency action under  
17 the APA even in circumstances when the agency action is made  
18 reviewable by statute. 704 -- 5 U.S.C. 704 is entitled  
19 "Actions reviewable." And it says, "Agency action made  
20 reviewable by statute and final agency action for which there  
21 is no adequate remedy in a court . . ." And then you have the  
22 "Scope of review" provision of the APA, 5 U.S.C. 706, which  
23 says agency action that's arbitrary, capricious, et cetera,  
24 shall be set aside. And so it's -- the APA is -- is setting  
25 out the scope of review in 706.

1 THE COURT: Right.

2 MR. PLATT: 704 specifies the section itself is  
3 reviewable.

4 THE COURT: I don't have the APA in front of me. Let  
5 me ask you about notice and comment under those circumstances.  
6 Does it fall away, or is it in the arbitrary and capricious  
7 bucket as well?

8 MR. COX: So --

9 THE COURT: In other words, is this part of this  
10 analysis, the notice-and-comment provision?

11 MR. COX: So the notice-and-comment analysis is the  
12 only circumstance under which we have to show that there is  
13 final agency action.

14 THE COURT: All right.

15 MR. COX: And -- but that's -- so --

16 THE COURT: That's under the second piece that you  
17 say may or may not apply, but --

18 MR. COX: Well, the -- I think the substantive law  
19 being applied, whether or not it's a legislative rule, requires  
20 it to be -- a legislative rule, I think, by definition has to  
21 be final agency action. And so I think -- but that's a merits  
22 question as opposed to sort of a reviewability or  
23 jurisdictional question.

24 THE COURT: All right. I mean, I think I understand  
25 where you're going. So the second claim is arbitrary and

1 capricious action, which you say is reviewable under the first  
2 provision of the APA -- under the APA.

3 MR. COX: Yes, Your Honor.

4 THE COURT: All right. And the standards that apply  
5 to the arbitrariness are the substantive arbitrariness  
6 standards?

7 MR. COX: Yeah, the same 706 analysis.

8 THE COURT: *State Farm*.

9 MR. COX: Yes, Your Honor.

10 THE COURT: All right. Third claim.

11 MR. COX: The third claim is our notice-and-comment  
12 claim. So here there are a variety of statements within the  
13 Lesson Plan that are inconsistent with the -- the regulations  
14 on which they -- the regulations that they sort of purport to  
15 be implementing, as well as the statute. And then our fourth  
16 claim is our --

17 THE COURT: Wait, wait, wait. Sorry.

18 MR. COX: Yes, Your Honor.

19 THE COURT: So I'm looking at your complaint. I see  
20 only three claims. So two and three, as you've just  
21 articulated them, are under the second claim for relief in your  
22 complaint?

23 MR. COX: Grab our -- our complaint here, Your Honor.  
24 So we alleged in -- so our first claim for relief is that it's  
25 inconsistent with law.

1 THE COURT: Yes.

2 MR. COX: The second claim we set forth in  
3 paragraph 100 and 101, 102, 103. It sets out our  
4 notice-and-comment claim.

5 THE COURT: So is this arbitrariness too? I guess  
6 I'm trying --

7 MR. COX: Right. So the -- pardon.

8 THE COURT: Yes.

9 MR. COX: So the first claim for relief sets out our  
10 substantive claim as well as the arbitrary and capricious  
11 claim.

12 THE COURT: Okay.

13 MR. COX: Second claim for relief sets out  
14 specifically our notice-and-comment claim. The third claim for  
15 relief sets out our due process claim.

16 THE COURT: All right. So if you want to say  
17 something about due process, you can.

18 MR. COX: The due process claim, as we've explained  
19 in our briefing, the Court -- in light of the other -- in light  
20 of the statutory claims, the Court need not reach the due  
21 process claim because the relief would not be broader than the  
22 relief that the plaintiffs are entitled to under the statutory  
23 claims. Nonetheless, constitutional rights are at stake here  
24 which colors the statutory analysis, and I'm happy to talk more  
25 about the due process claim if the Court --



1 THE COURT: But I don't need it. You don't need it  
2 if --

3 MR. COX: Correct, Your Honor.

4 THE COURT: -- the Court agrees with you on the first  
5 two claims.

6 MR. COX: That's right, Your Honor.

7 THE COURT: All right.

8 MR. COX: And the first three claims, to be clear,  
9 are completely independent of each other. They -- first one is  
10 about substantive law. The second is the manner of the  
11 revision, and then in particular, you know, the redline that we  
12 put in, which is Exhibit A in ECF No. 57, demonstrates the  
13 extensive revisions that were done in this Lesson Plan  
14 including --

15 THE COURT: But they're all related. I mean, I  
16 understand that --

17 MR. COX: Yes.

18 THE COURT: -- you're setting them out, if you can  
19 reach them, to be separate, but I don't take it that you would  
20 begrudge a government agency their right to revise their  
21 training materials any way they wanted to so long as it wasn't  
22 a rule or didn't implicate the rights of the plaintiffs or  
23 whatever; right?

24 MR. COX: If they -- of course. Federal agencies  
25 are -- are required by statute to provide training and --

1 absolutely. Like they -- and they do have considerable  
2 discretion in the way that they -- they want to set forth their  
3 training materials, their policy documents, the processes they  
4 create, but, of course, they don't have discretion to violate  
5 the law. And they can't tell asylum officers that the law is X  
6 when the law is Y, because it means that people are going to  
7 get hurt.

8 THE COURT: But why isn't that -- why isn't that  
9 Claim 1 -- what I call Claim 1? Why isn't that just the  
10 inconsistent with the law provision? I don't understand really  
11 how your arbitrariness claim is any different, your substantive  
12 arbitrariness in this sense.

13 MR. COX: I think our arbitrary and capricious claim  
14 is different because it doesn't depend at all on the Court  
15 deciding that the -- that the government got it right or wrong  
16 on the merits; like, that the substantive law that they're  
17 instructing, it doesn't require the Court -- they could be  
18 completely right on what the law requires and still have a  
19 revised Lesson Plan in an arbitrary and capricious manner,  
20 because they changed policies, they reversed policies with no  
21 explanation, not -- I'll --

22 THE COURT: But that means they're wrong on what the  
23 law requires as it is articulated in the Lesson Plan. So it's  
24 possible that I have a different view of this than -- than  
25 most, but to me arbitrariness, the hallmark is a lack of

1 planning, thinking, you know, sort of making it up, you haven't  
2 considered the relevant factors, not that you are inaccurate  
3 with respect to your determination.

4 If you as the agency see the law as being X and  
5 you're wrong about that and you incorporate X into your  
6 statements of policy, what you have done is acted contrary to  
7 the law, not in an arbitrary fashion. You're just wrong. You  
8 very carefully wrote down each thing. You had people look at  
9 it. You were not being arbitrary. You were trying to be as  
10 diligent as possible, but what you did was actually  
11 inconsistent with the law. I don't see that as an  
12 arbitrariness problem. I see that as an  
13 inconsistent-with-the-law problem.

14 MR. COX: I agree with that, actually.

15 THE COURT: All right.

16 MR. COX: But I'm going to reserve those two issues  
17 for Ms. Austin.

18 THE COURT: Yes. Yes. She has a preview now of what  
19 I'm thinking about.

20 MR. COX: So -- so those were our claims. They -- do  
21 believe that they're -- that they are distinct.

22 THE COURT: Yes.

23 MR. COX: And that -- you know, that they are, of  
24 course, related because sort of the problems are common.

25 THE COURT: All right. Well, let me have defense --

1 MR. COX: Sure.

2 THE COURT: -- come forward and tell me why you're  
3 wrong and the government is entitled to summary judgment.

4 MR. PLATT: Good morning, Your Honor. May it please  
5 the Court.

6 THE COURT: Good morning.

7 MR. PLATT: U.S. Citizenship and Immigration  
8 Services, or USCIS, trains its employees, and it does so as a  
9 matter of good governance and to discharge its statutory  
10 authority to control, direct, and supervise its employees. So  
11 its training programs extend to one facet of its refugee,  
12 asylum, and protection programs, the credible fear  
13 determinations that we've been talking about here today.

14 And training is especially important here because by  
15 statute an officer cannot conduct credible fear determinations  
16 unless he or she has received specialized training in this area  
17 of law.

18 THE COURT: All right. So this is important. The  
19 statute says you must train your officers.

20 MR. PLATT: Statute and by USCIS regulation; correct.

21 THE COURT: Okay. Continue.

22 MR. PLATT: So as the administrative record shows,  
23 USCIS has been doing these trainings for a long time. It has a  
24 wide variety of materials that train officers on things that  
25 they need to know to conduct these determinations.

1           And so as part of this history, on April 30th of 2019  
2           USCIS issued a new Lesson Plan, which is the document that's at  
3           issue in this case. And this Lesson Plan largely did not  
4           change from the old version. It changed some language, and it  
5           included references to new case law and reflected new legal  
6           developments.

7           THE COURT: All right. Let me ask you: Does the  
8           agency have a duty when it develops its materials for training  
9           to be consistent with the law in terms of what criteria  
10          requirements, et cetera, the law sets forward? By "law," I  
11          mean both the statutes and regulations; right? There are  
12          statutes and regulations that govern -- that not only say you  
13          have to train but also tell what the factors are, how one goes  
14          about making these determinations; correct?

15          MR. PLATT: So the agency generally does have an  
16          obligation to instruct officers or to give officers information  
17          that's consistent with the law, but the law does not require  
18          perfection in the way that they do that and also does not  
19          require any particular level of, say, comprehensiveness.

20          THE COURT: All right. But it does require a lack of  
21          inconsistency. In other words, it requires -- if the  
22          regulations say here are the criteria that you -- that one is  
23          to use for making this determination -- A, B, C -- the training  
24          materials cannot say in making this determination, look at D,  
25          E, F; correct?

1 MR. PLATT: I respectfully disagree, Your Honor.

2 THE COURT: I see.

3 MR. PLATT: I mean, I think what -- well, first of  
4 all, the reviewability of training materials is -- I'm putting  
5 that off to the side.

6 THE COURT: Yes. Yes.

7 MR. PLATT: But as far as just what the -- you know,  
8 what the law requires an agency to do, I think that an agency  
9 just cannot say you cannot do A, you cannot do B, or cannot do  
10 C. To have a training material that focuses on some sort of D,  
11 E, F, that's my point about being comprehensive. I mean,  
12 there's no minimum standard for how comprehensive -- no  
13 training material needs to talk about A, B, C, D, E, and F. It  
14 may be the easiest way to present material, but --

15 THE COURT: Is that -- is that because the training  
16 material is not disseminated to everybody; it's not relied on?  
17 Why would you -- if the law has certain criteria that it says  
18 an officer is to apply and these materials purport to be  
19 training materials to these officers regarding that  
20 determination, I'm having a hard time with your suggestion that  
21 the training materials can leave out crucial criteria that the  
22 law specifically states or underplay them or misstate them or  
23 put them -- right? I mean, it seems a little odd that you  
24 would suggest that an agency acting in good faith to describe  
25 to these folks what they're supposed to be doing cannot include

1 important aspects that are in the statute or in the  
2 regulations.

3 MR. PLATT: So I think that the answer to that is --  
4 well, training materials might -- and they are in this case, as  
5 the administrative record shows -- only one small piece of all  
6 the training that a USCIS asylum officer receives. I mean, it  
7 says on page 1 of the administrative record that even when  
8 being taught this material, officers receive a lecture and they  
9 receive practical exercises.

10 THE COURT: But how would you possibly have written  
11 materials, written materials that go to these people, that to  
12 be used in making these determinations that don't capture the  
13 statutory criteria and that, in fact, possibly -- and we can  
14 talk about it in more detail. But even in my hypothetical --  
15 right -- if the statute says A, B, and C are the critical  
16 factors to take into account when you're doing this review, the  
17 fact that the written materials might focus on D, E, F and you  
18 say, Oh, but that's not all they get, seems to me not to be  
19 consistent with the law.

20 MR. PLATT: Well, these materials don't -- the  
21 Lesson Plan specifically does not hold itself out as a  
22 comprehensive treatise on asylum law or protection laws. So, I  
23 mean, there's all sorts of policies, policy memoranda, for  
24 example, that the agency will issue that will touch on this  
25 topic.

1           THE COURT: Do I have that in this -- I mean, we're  
2 at summary judgment.

3           MR. PLATT: Uh-huh.

4           THE COURT: We have declarations from the plaintiffs,  
5 at least one officer who talks about using this manual in a  
6 way -- it is the quote -- not -- he doesn't say the word bible,  
7 but that's the way I viewed it -- in the declaration for how  
8 officers go about making this determination. Do you have  
9 evidence that suggests that they don't, that they use other  
10 things, that they rely on the lectures more than they do this  
11 Lesson Plan?

12           MR. PLATT: So -- I mean, first of all, we point out  
13 that we still have pending a motion to strike this evidence as  
14 being outside the administrative record.

15           THE COURT: I understand, but it could be used in  
16 certain circumstances if we're not talking about the APA  
17 determination. It can be used in other ways. So I just want  
18 to know, do you have the evidence that suggests something  
19 different than what they say about how it's used and how people  
20 rely on it?

21           MR. PLATT: So -- no, I would point out that that  
22 affidavit -- I mean, it does not present an official -- you  
23 know, the agency's position on the document.

24           THE COURT: Right. That's why I'm asking you as the  
25 agency. What is your position as to how this document is used?



1           MR. PLATT: Our position is that consistent with --  
2           with the Lesson Plan itself and pages 1 through 37 of the  
3           administrative record, that it is a -- it's guidance. It's  
4           materials that the agency gives out that explains what the  
5           cases, statutes, regulations, et cetera, say, but it does not  
6           say that it is, you know, the only reference or the primary  
7           reference. It doesn't --

8           THE COURT: Or apparently, according to you in your  
9           first statement, it doesn't say this is all the law says.

10          MR. PLATT: Exactly. I mean, we -- including in  
11          the -- in the record there are other Lesson Plans on other  
12          topics that may come into play when an officer is doing a  
13          credible fear determination. In fact, the credible fear  
14          Lesson Plan cites in the margin several other Lesson Plans that  
15          the officer should go and read. So that's what I mean --

16          THE COURT: So your position is that no matter how  
17          inconsistent, no matter how cursory, even if critical factors  
18          in the statute are not incorporated in this document, it's okay  
19          because the document references other places that a person  
20          could go or there's a lecture that a person can use or  
21          whatever? The document itself doesn't have to be complete or  
22          thorough in its explanation of the law?

23          MR. PLATT: That's correct. And -- especially  
24          considering -- I think that's true. If you also consider that  
25          the broad discretion that the agency has to train its employees

1 and --

2 THE COURT: Right. That's why I asked you at the  
3 beginning whether the agency has a duty to train its employees  
4 consistently with the law. I think you said yes, but then you  
5 suggested that even if this document isn't consistent, somehow  
6 that duty is fulfilled with respect to -- with the amalgamation  
7 of this document, plus some other things that haven't really  
8 been defined because you haven't provided me with evidence  
9 regarding all of the information that asylum officers receive.

10 MR. PLATT: So what I would say, Your Honor, is that  
11 it's -- you have to look at it holistically. I mean, you can't  
12 just --

13 THE COURT: I'm trying. Where's the evidence?  
14 Holistically, yes, I see this document. I'm trying to  
15 evaluate, whether or not this document is consistent with the  
16 law because that's what their claim calls on me to do. You  
17 seem to be suggesting that that doesn't really matter because  
18 there's some other ways in which these officers are getting  
19 their information, in addition to this document, and so I'm  
20 asking you what are the other ways? Where's the evidence  
21 regarding the holistic picture of the training that goes to  
22 these people?

23 MR. PLATT: The -- the evidence is in the  
24 administrative record with -- and I apologize if I'm  
25 misunderstanding, Your Honor, but there's the Lesson Plans that

1 are in there, the policy memoranda. It says there's the  
2 lecture, the practical exercises, all of the -- and these  
3 materials are never going to be 100 percent up to the minute  
4 updated, you know. There's always new cases or administrative  
5 decisions coming out, but it's through all of those different  
6 sources of information that an officer receives the -- you  
7 know, learns of the information that he or she needs to know to  
8 perform their job. So, you know --

9 THE COURT: So what do I do with the plaintiffs'  
10 contention -- we can just start with Claim 1 -- that there are  
11 aspects of this particular document that are inconsistent with  
12 the law?

13 MR. PLATT: I -- well, there's a number of threshold  
14 issues that, Your Honor --

15 THE COURT: All right. Why don't we start with the  
16 thresholds.

17 MR. PLATT: Okay.

18 THE COURT: Let's go back to the thresholds.

19 MR. PLATT: Great.

20 THE COURT: All right.

21 MR. PLATT: I'd first start with standing and  
22 specifically traceability. We have not seen anything in the  
23 affidavits, for example, that says that these challenged  
24 provisions of the Lesson Plan were actually applied to the  
25 plaintiffs. They are right that they do not need to establish

1 a but for, but what they have not done is shown that any of  
2 these challenged provisions would -- were applied to them and  
3 whether -- I mean, again, putting aside what affect that had on  
4 them.

5 THE COURT: I guess I don't understand this argument,  
6 because I perceived the plaintiff to be making a claim that is  
7 a procedural injury for standing purposes; right? Our status  
8 as to whether or not we get -- we have a credible fear or not,  
9 they say, was evaluated pursuant to defective -- a defective  
10 document. And as you heard plaintiffs' counsel point out,  
11 unlike you, and perhaps even me, in looking at this, their  
12 claim goes beyond the nine separate individual things. They  
13 say the Lesson Plan as a whole, because these  
14 misrepresentations permeate because the standards are all  
15 twisted, the Lesson Plan as a whole is defective, they say,  
16 because it's inconsistent with the statute.

17 Help me to understand what more the plaintiffs have  
18 to say than the Lesson Plan was in effect at the time that we  
19 went through the process and presumably, because everybody is  
20 supposed to use it, was used when our determination was made.  
21 Why isn't that traceable to the claims that they have made --  
22 that plaintiffs have made in this case? Are you suggesting  
23 they have to show that the particular provisions that the  
24 plaintiffs have pointed out as illustrative of the problem had  
25 to be applied to these plaintiffs?

1           MR. PLATT: Yes, Your Honor. We think that there  
2           should be some evidence that those issues were at play. I  
3           mean, counsel -- you know, at most he said they were mostly  
4           interrelated, all these provisions, but -- and in the briefs we  
5           talk about how there's some provisions that have nothing to do  
6           with this case.

7           THE COURT: Yeah, but they're not discrete; right?  
8           The nine -- some of the nine are, like, the improper  
9           importation of a corroboration requirement that -- that, you  
10          know, you have to -- let me see here -- that the Lesson Plan  
11          requires the asylum seeker to present evidence going to every  
12          element of the claim. Are you suggesting that in order to have  
13          standing at this point plaintiffs have to show that this  
14          particular defect was applied to them; that someone said to  
15          them, Do you have evidence that goes to each one of these  
16          claims? Is that -- is that what you're saying?

17          MR. PLATT: Your Honor, no, I don't think that they  
18          need to say it in those terms, but we believe that they -- that  
19          they have to produce evidence, at least making a gesture in  
20          that direction. Like, for example, Your Honor brought up the  
21          corroboration requirement. There's been no allegation or  
22          anything in an affidavit that says I was asked, you know -- I'm  
23          sorry. We -- being one of the plaintiffs -- was asked to  
24          produce evidence to corroborate my story. So we haven't seen  
25          anywhere in that evidence where they have brought up any --

1           THE COURT: But that's assuming, of course, to the  
2 extent you're talking about traceability or redressability,  
3 that's assuming that the courts -- that the remedy that the  
4 plaintiffs are seeking is the excision of that one provision;  
5 right? Because then it wouldn't be traceable to the  
6 plaintiffs' injury. If the only thing they're asking for is to  
7 strike that one provision, then maybe you're right. We have to  
8 make sure that that one provision was at play, but they're  
9 actually, as I heard plaintiffs' counsel here today, making the  
10 argument that the entire Lesson Plan is invalid. Here are some  
11 examples of where that occurs. You suggest that only if the  
12 plaintiffs can point to the application of those particular  
13 examples in the context of their own determination do they even  
14 have standing to go forward. Do you have case law that  
15 suggests that it has to be sliced that thin in terms of the  
16 injury in order to support standing?

17           MR. PLATT: We do not, and I think part of the reason  
18 for that may be just the extreme rarity with which agency  
19 training materials are challenged. I mean, even -- and in most  
20 of the other cases that involve procedural injuries, there  
21 seems to be at least -- you know, those documents tend to not  
22 be as -- what's the word I'm looking for? -- cover as much  
23 ground as, say, this --

24           THE COURT: No, I understand. But even if we did  
25 this in rule world -- right -- agency rules are challenged all

1 the time, and you might say an entire rule is invalid for some  
2 reason, its -- because its certain provisions are inconsistent.  
3 Do you have a case that suggests that for standing, threshold  
4 standing purposes -- where, of course, I have to take the  
5 merits of the plaintiffs' claims as true; right?

6 So you begin in standing world by agreeing  
7 presumptively with the plaintiffs that there are these  
8 inconsistencies, that there are these problems, and so the  
9 plaintiff says the entire rule has to go because woven  
10 throughout are inconsistent statements of the law. That's  
11 their claim.

12 Do you have a case that suggests that unless the  
13 plaintiff can point to a particular inconsistent provision and  
14 allege plausibly that that particular provision was applied to  
15 them that they don't have standing when the entirety of the  
16 document or the rule was applied to them?

17 MR. PLATT: So we don't have a case, you know, on all  
18 fours with this situation. I mean, we would just go to, say,  
19 *Florida Audubon Society* which says that, you know -- and the  
20 other cases that we cite in our brief, which say that basically  
21 the challenged agency conduct must affect you in some personal  
22 way. And so, for example, if the plaintiffs --

23 THE COURT: Two of these people are -- are already  
24 gone.

25 MR. PLATT: Right. And that -- this is a

1 traceability. I mean, we're -- I mean --

2 THE COURT: No. They've all been affected in a  
3 personal way, haven't they? All of the plaintiffs, all five of  
4 them, at some point -- setting aside the two who were reversed  
5 for a second, all of them were found not to have a credible  
6 fear at some point. So your argument can't be that they  
7 weren't -- that -- like they're, like, the guy sitting on the  
8 couch to whom none of this applies; right? I mean, they have  
9 been the recipient of a negative credible fear determination;  
10 right?

11 MR. PLATT: They have been recipients of the negative  
12 credible fear determinations, and, yes, I would agree in a  
13 vacuum they have obviously been affected in a very personal  
14 way.

15 THE COURT: Okay.

16 MR. PLATT: But at traceability, there has to be some  
17 sort of connection between what they're challenging in this  
18 lawsuit, you know, the -- the nine things that they say are  
19 inconsistent with the Immigration and Nationality Act or other  
20 law, and the injury that they have received, which is the --  
21 you know, for the two plaintiffs that have been removed, for  
22 their negative credible fear determinations.

23 THE COURT: Okay. I understand your argument.

24 MR. PLATT: And if I -- just one final thing on that  
25 too.



1 THE COURT: Yes.

2 MR. PLATT: I would point out that it's not even just  
3 that they must allege that they have met all of the standing  
4 requirements. At this stage, because we're at summary  
5 judgment, they actually have to have some sort of evidence  
6 to -- on that score.

7 The second thing I'll move to as far as threshold  
8 issues is the fact of jurisdiction under 8 U.S.C. 1252(e)(3).

9 THE COURT: Yes.

10 MR. PLATT: So -- in fact, I'm going to grab mine.

11 THE COURT: So -- I'm sorry. I know that there's,  
12 like, a going-on in the law, and I just recently issued an  
13 opinion in this area generally in which I looked at 1252 and  
14 challenges that had been brought in that case related to it and  
15 concluded that jurisdiction was available under 1331. So  
16 what -- why is that same analysis inapplicable here?

17 MR. PLATT: Well, Your Honor, I think that you would  
18 have to look at -- you would have to compare the agency conduct  
19 at issue in *Make the Road New York* and the agency conduct here.  
20 Your Honor would have to conclude that this is an  
21 implementation of something in 8 U.S.C. 1225(b). You would  
22 have to conclude that it is, indeed, a statute, regulation,  
23 directive, guideline, or -- what's the final one? Is that  
24 policy? Whatever the --

25 THE COURT: All right. So let's talk about those two

1 things.

2 MR. PLATT: Procedure.

3 THE COURT: That's good. 1225(b), why is this not  
4 implementation of that?

5 MR. PLATT: Well, I'd say because we have pointed out  
6 what the word "implement" means. Implement cannot simply mean  
7 to cite or to make reference to.

8 THE COURT: But you told me that training was in the  
9 statute; right? That's why I said at the beginning this is  
10 very important. Because to the extent that the agency is  
11 required by law, by statute to train its officers with respect  
12 to credible fear determinations -- and credible fear  
13 determinations appear at 1225(b) -- then why isn't training  
14 materials concerning that an implementation of the statute?

15 MR. PLATT: Well, the authority to train them comes  
16 from 1103(a)(1) -- (1) through (3), and so we believe that  
17 the --

18 THE COURT: Right. But you're training them on  
19 credible fear determinations, which is 1225(b); right?

20 MR. PLATT: That's correct, but the mere fact that  
21 they're being -- receiving training related to 1225(b) does not  
22 necessarily mean that it's implementing 1225. And so, you  
23 know, just because it covers, you know, much of the same  
24 terrain as 1225 does not necessarily mean that it implements  
25 it. It could also implement -- and I think, you know, to the

1 extent it implements anything, it does implement the  
2 substantive asylum statute at 8 U.S.C. 1158(a), the statutory  
3 withholding of removal.

4 THE COURT: What implement 11- -- I'm sorry. What?

5 MR. PLATT: To the extent that the Lesson Plan  
6 implements anything substantive, it is those -- it's the asylum  
7 statutory withholding of removal and protection under the  
8 Convention Against Torture as it's --

9 THE COURT: Okay. Now I'm totally lost. I thought  
10 you were saying training materials don't implement. Period.  
11 Full stop. Now you're suggesting that they might implement  
12 certain provision of the statute but not others, and that  
13 doesn't make any sense because, to the extent you're talking  
14 about the credible fear determination, that's in the whole  
15 expedited removal process.

16 So if it implemented anything, it would clearly be  
17 that and not the underlying overall asylum process. That is,  
18 in fact, plaintiffs' argument; that the Lesson Plan itself  
19 continues to conflate those things, the criteria that exists in  
20 the regular asylum process and the criteria that are supposed  
21 to apply at the expedited process. So either training  
22 materials by their nature implement nothing, is the  
23 government's argument, right, or they implement something. And  
24 to the extent they implement something, it would have to be the  
25 expedited process. I don't understand your suggestion that

1 they implement the full asylum procedures.

2 MR. PLATT: Sure. So -- and we're not making any  
3 argument about categorically what happens with training  
4 materials or Lesson Plans, but on, you know, the Lesson Plan at  
5 issue in this case, we believe it implements the training  
6 authority in 1103. And to the extent -- you know, I guess in  
7 the alternative, if Your Honor believes that it's implementing  
8 anything substantive, it is from the substantive procedure --  
9 or sorry -- the substantive law on asylum, the substance law  
10 and statutory withholding of removal, and the law on Convention  
11 Against Torture protection.

12 THE COURT: But not the expedited process that it's  
13 purporting to explain people how to execute.

14 MR. PLATT: I mean, we haven't seen -- I haven't seen  
15 any argument from plaintiffs on, yeah, what implementation  
16 means in that context.

17 THE COURT: Okay. So no implementation. That's why  
18 you think 1252(e)(3) doesn't go there.

19 What about this being written policy directive,  
20 policy guideline or procedure?

21 MR. PLATT: Yeah. I -- I have not seen in  
22 plaintiffs' brief where they categorize this. And, tellingly,  
23 I don't see whether -- that it is a directive, guideline, or  
24 procedure. I would point to what Judge Tigar said in *East Bay*  
25 *Sanctuary Covenant* in the Northern District of California which

1 is that he rejected, quote, ". . . the proposition that any  
2 rule of asylum eligibility that may be applied in the expedited  
3 removal proceedings is swallowed up by Section 1252(e)(3)'s  
4 limitations," end quote.

5 THE COURT: All right. I'll have to go back and read  
6 Tigar. I have not. He's a nice guy, but I haven't read his  
7 opinion.

8 But I guess I don't -- I don't really understand.  
9 This Lesson Plan -- and I don't like that name, but it is what  
10 it is -- at the very least, it seems to me, directs officers as  
11 to the procedures they should follow when they're making this  
12 determination. Why doesn't -- isn't that captured by  
13 1252(e)(3)(A)(ii), which is really broad; right?

14 MR. PLATT: It may be broad, but it doesn't capture  
15 everything that an agency does. I -- I -- what it does -- if  
16 you were to go and look through the Lesson Plan, it nowhere  
17 says that officers are required to follow that. So the fact  
18 that it talks about the, you know, asylum cases, regulations,  
19 policy memoranda, et cetera, I mean, it's simply making the  
20 officers aware of those. And nowhere does it direct them that  
21 they have to follow that. And so for that reason, we don't  
22 believe that it would fall under the --

23 THE COURT: Do you have a competing declaration that  
24 says officers don't -- and, again, we're in jurisdiction now;  
25 right? So I can look at extra administrative record materials.

1 We're not in APA. You've raised a jurisdictional argument.  
2 Now is the time to bring forward your evidence. The plaintiff  
3 has evidence that contradicts what you just said.

4 MR. PLATT: So, I mean, I would disagree that  
5 extra -- extra record evidence could be brought in for the  
6 purposes of statutory jurisdiction. That is their heavy burden  
7 to show that you can bring in evidence for that purpose, and we  
8 haven't seen that showing from them, much less on the timetable  
9 that Your Honor set up back in July for early August.

10 But I -- our evidence is, I think, the Lesson Plan.  
11 If you look at the Lesson Plan, it does not say that it is --  
12 you know, for what I just said, those -- those representations  
13 that I -- you know, these arguments that I'm making come from  
14 the Lesson Plan where it doesn't say it's binding on an officer  
15 or that it's establishing an official way of doing something or  
16 establishing it as an authoritative instruction to officers on  
17 what they can and cannot do.

18 THE COURT: So when it says -- and I'm looking at the  
19 very first page -- "The purpose of this lesson is to explain  
20 how to determine whether an alien subject to expedited removal  
21 or an arriving stowaway has a credible fear of persecution or  
22 torture." This is the agency explaining how to determine that,  
23 and so your argument is that that doesn't count as a written  
24 procedure. I mean, there's nothing in the statute that says  
25 that this thing has to be binding on anybody or on a particular

1 anything.

2 It just says ". . . a regulation, or a written policy  
3 directive, written policy guideline, or written procedure  
4 issued by . . . the authority of the [agency] to implement such  
5 section . . ." of the statute. So I get that you think this is  
6 not implementation. Setting that aside, assuming for a second  
7 that it is, why would this not be a written at least procedure  
8 that purports to explain how to determine?

9 MR. PLATT: I think Your Honor seizes on the key  
10 language here, which is to explain. It's not directing  
11 officers on how to make these determinations. It's simply  
12 explaining them. To the extent that an officer has an  
13 authoritative rule, principal, or some sort of direction on  
14 what law or procedure to apply when conducting credible fear  
15 determinations, that comes from the underlying law or policy or  
16 regulations that are, you know, summarized in this plan or set  
17 out in the margins. So I think that the word explain is -- is  
18 key in this --

19 THE COURT: So the word explain allows the agency to  
20 launder the statutory provisions, say whatever they want to  
21 about them, and causes the Court not to view them as written  
22 policies or procedures of the agency?

23 MR. PLATT: That is not our position, Your Honor.

24 THE COURT: Okay.

25 MR. PLATT: I -- I, you know, do not think that

1 there's any sort of magic words that an agency could put on  
2 this to hide it from judicial review, although, as we explain  
3 in our briefs, there are several points at which how an agency  
4 characterizes its guidance is something that the Court should  
5 consider, but I think just the way that it sets it out, I mean,  
6 it says -- it's just explaining it, and then it doesn't  
7 elsewhere say that, you know, this is creating new policy, that  
8 this is something, you know, the officer must take this  
9 Lesson Plan as gospel or anything like that.

10 THE COURT: All right.

11 MR. PLATT: The other threshold argument that I want  
12 to bring up -- and this also plays a role later on when we're  
13 talking about the plaintiffs' nine things that they believe are  
14 inconsistent with INA and other sources of law -- is the 60-day  
15 jurisdictional bar.

16 THE COURT: Yeah.

17 MR. PLATT: And that's -- you know, it says what it  
18 says, which is that these challenges have to be brought  
19 ". . . no later than 60 days after the date the challenged  
20 section, regulation, directive, guideline, or procedure . . .  
21 is first implemented."

22 THE COURT: And so the government views this to mean  
23 what? I mean, do you concede that they are bringing the  
24 challenge within 60 days of the updated language -- of the  
25 language that they purport to be challenging in this -- in this



1 action?

2 MR. PLATT: I mean, we -- we disagree on a lot of  
3 language as to whether it's new or not, but -- I mean, we -- we  
4 agree that this challenge was brought within 60 days of the  
5 April 30th Lesson Plan being sent out.

6 THE COURT: Right. And the nine -- yes, and the nine  
7 places that they say are inconsistent, they have provided a  
8 redline that shows that substantive changes, meaning lines  
9 stricken, words added occur in each of those nine places;  
10 right?

11 MR. PLATT: They do suggest -- yeah, they -- they  
12 show that the Lesson Plan -- like words have been changed --

13 THE COURT: Okay.

14 MR. PLATT: -- in several places, and they take issue  
15 with nine of some of those places, but some of them -- some of  
16 these provisions are not new. I mean, they --

17 THE COURT: I understand, but I don't -- I guess what  
18 I don't understand is the government's overarching position  
19 with respect to this. How could a plaintiff possibly challenge  
20 within 60 days a section that doesn't look today like it did  
21 within 60 days of its initial enactment?

22 MR. PLATT: Well, that's where I think Your Honor  
23 would have to make a determination as to whether it is, in  
24 fact, new or whether, you know, some language on the margins  
25 has been changed regarding it.

1           THE COURT:  So you're asking me to drill down  
2           substantively -- even if the government actually makes changes,  
3           strikes, adds -- you know, maybe they're just doing it for  
4           typos; all right?  You're saying if they're doing it for typos,  
5           I have to say not within the 60 days.

6           MR. PLATT:  I mean, I think it's a little more than  
7           typos.  I think the agency has more discretion to reword, you  
8           know, any -- to the extent -- and keep in mind if we're down at  
9           this point where Your Honor is comparing it, then you've  
10          necessarily found that it is -- it passes all these thresholds.

11          THE COURT:  Yes, no.  We're setting -- we're past the  
12          original threshold.  We're at this threshold, which is some  
13          sort of a statute of limitations, and I'm trying to test your  
14          proposition.

15          MR. PLATT:  Sure.

16          THE COURT:  I hear you if the plaintiff has pointed  
17          to entire sections of the Lesson Plan that have no strikes or  
18          changes or additions or anything.  I hear the argument that the  
19          60 days have passed with regard to these sections, they haven't  
20          been touched.

21          MR. PLATT:  Right.

22          THE COURT:  But now we know they have been touched.  
23          You concede, to some degree, that each of the nine sections  
24          they're pointing to or provisions they're pointing to have  
25          words stricken, words added.  So now I'm trying to figure out

1 whether that should just be enough to say they satisfy the 60  
2 days because the words were struck and added less than 60 days  
3 before they brought the complaint or whether this is requiring  
4 the Court to drill down and compare what it looked like before  
5 versus what it looks like now and the changes that have been  
6 made in order to determine whether this provision prevents the  
7 lawsuit.

8 MR. PLATT: Our position is the latter. We think  
9 that Your Honor would have to compare them and determine  
10 whether consistent with the Statute 1252(e)(3)(B) that it has  
11 been first implemented in the document that they are now  
12 challenging.

13 THE COURT: So you're suggesting that the first  
14 implementation could be that I have to figure out some degree  
15 of deviance from the first implementation in order to determine  
16 whether they get to proceed under this provision?

17 MR. PLATT: Yes, that is our position.

18 THE COURT: All right.

19 MR. PLATT: And I -- one final note on that would  
20 just be that I -- I understand that -- you know, they call it  
21 absurd, that position. They, you know, take issue with the  
22 fact that the plaintiffs in this case could not have challenged  
23 some of these provisions because they were not in expedited  
24 removal proceedings or not, you know, making a credible fear  
25 claim back in 2013, '14, or '17 at times when previous

1 Lesson Plans were first issued, but that is what the  
2 D.C. Circuit has said in *AILA*, which is just that that is what  
3 Congress has put into the statute and Congress expressed a  
4 desire to hear these claims and to hear quickly --

5 THE COURT: But I guess the question is to what  
6 extent did Congress expect that these documents -- that the  
7 written policy, provisions, or whatever -- that it allowed the  
8 lawsuit to proceed with respect to would-be living, moving  
9 documents. Did Congress really intend that the government  
10 could essentially promulgate something -- and I use that term  
11 loosely -- put it out there implementing this statute, and then  
12 essentially strike different portions on a rolling basis over  
13 the next 20 years and say, Too bad. You did this -- you know,  
14 you didn't do it within 60 days of our first promulgation.

15 The most absurd scenario, right, would be the  
16 government to have a document with just the headings standard  
17 of review or whatever and every year they totally revise the  
18 content, but they say, Because there was a standard of review  
19 section originally, too bad. Not within the 60 days. You're  
20 not going there because you're suggesting that I can look at  
21 the substance of the change, but I don't know that that's  
22 really what Congress wanted this 60-day provision to be about;  
23 that in addition to the substance of the merits of their claim,  
24 now the Court has to go and evaluate the degree of deviance for  
25 the purpose of this provision.

1           MR. PLATT: I mean, we would point to the  
2           congressional intent expressed in the words "first  
3           implemented," and we think that is why the Court has to go and  
4           do that. I mean, the alternative then, if an agency -- an  
5           agency would have to have a Lesson Plan and then never touch it  
6           but only have new Lesson Plans after it and say, Well, going  
7           back to the first one, you know, no longer follow that line.  
8           And it would just be these -- this very iter of things where  
9           they're not able to completely reissue a new document every  
10          time, and so we think that would be as equally absurd.

11          THE COURT: All right. So moving beyond the  
12          threshold -- is that all of our threshold arguments?

13          MR. PLATT: I think that just about covers it.

14          THE COURT: Okay. So now we're into the substance.  
15          Why don't you tell me briefly, maybe going through their actual  
16          contentions of conflict, why you don't discern a conflict  
17          between these provisions and the law, the INA.

18          MR. PLATT: Sure. I'll -- I'll start with the APA  
19          claims. We do not believe that they can receive review or  
20          relief on those claims because the APA requires that there be  
21          an agency action which under the statute means a copy of  
22          different things, but pretty much here we're talking about a  
23          rule. They're saying if it's anything, it's a rule. And we  
24          believe that they have not made any showing that this is an  
25          agency action or rule. They have not responded to any of our

1 arguments on the briefs on that point. And that is something  
2 under 5 U.S.C., you know, 702, 703, 704, 706 is a requirement.

3 THE COURT: Of course, you did hear opposing  
4 counsel's discussion of the APA and the extent to which final  
5 agency action is only in one portion and not the other. I  
6 don't have the statute here, but in any event --

7 MR. PLATT: And that's a separate issue, Your Honor.  
8 I mean --

9 THE COURT: Why?

10 MR. PLATT: Because -- I mean, finality is one thing,  
11 and we can -- and, you know, I do hope to talk about that, but  
12 just narrowly looking at whether it's an agency action at all,  
13 whether, you know, you look at that in 704 where it says final  
14 agency action or agency action otherwise reviewable by statute,  
15 the commonality between those two --

16 THE COURT: Is agency action. So you're saying this  
17 is not an action of the agency?

18 MR. PLATT: I -- not under the, you know, precise  
19 definition that the APA has provided. I mean, that's a term of  
20 art.

21 THE COURT: What do you mean, "precise definition"  
22 for rules? Those are two different things; right? Isn't  
23 agency action bigger than rule?

24 MR. PLATT: An agency action is bigger than rule, but  
25 as we point out in our briefs -- we haven't heard anything from

1 plaintiffs in opposition to this -- is that the only type of  
2 agency action at issue here is a rule. If it's anything, it's  
3 a rule. There's been no allegation, some sort of adjudication  
4 that it's a sanction, that it's an order, you know, the other  
5 things that are in 5 U.S.C. 551(13).

6 So I think rule is where we're looking here, and if I  
7 use those two interchangeably, it's just because rule is the  
8 only type of agency action that could even plausibly be at  
9 issue here.

10 THE COURT: And where are you looking at the -- give  
11 me the statutory cite again for the universe of agency actions  
12 that are possibly triggered.

13 MR. PLATT: That's 5 U.S.C. 551(13).

14 THE COURT: And that's not the rule definition?

15 MR. PLATT: That is the agency action definition.  
16 The rule definition is at 551(4).

17 THE COURT: All right.

18 MR. PLATT: It's both in the same statutory section.  
19 And as the Supreme Court said in *Lujan* and as the APA itself  
20 says in, you know, those -- the 700 provisions that I listed  
21 off, that is, agency action is required to move forward on an  
22 APA claim.

23 And so, you know, there's been -- we haven't heard  
24 any response to our arguments that the -- this is an agency  
25 action, that it was designed. They haven't talked about how it

1 was designed within the definition of 551(4) about its effect  
2 as used in that provision and so forth. So we believe that  
3 this argument has been conceded.

4 The -- they do bring up the fact that they say that  
5 *Grace* somehow forecloses this argument. But, one, if  
6 Your Honor finds jurisdiction under 28 U.S.C. 1331, then this  
7 is absolutely at play, and then something like *Grace*, which  
8 only focused on the INA, would not apply, but we also believe  
9 that case should not be followed on this point because it was  
10 a -- not a reasoned paragraph on there and the -- the Court was  
11 primarily speaking about the legislative rule requirement. And  
12 I believe a court didn't even cite 5 U.S.C. 704 in this  
13 section -- or any of the other sections under the APA which  
14 require that there be agency action.

15 Separately --

16 THE COURT: All right. So I will -- I will drill  
17 down on this. I mean, I'm looking at my notes with respect to  
18 551(13), and it suggests that it qualifies as agency action if  
19 it's designed to implement, interpret, or prescribe law,  
20 policy, procedure, or practice requirements. And so it's  
21 bigger than just a rule; right? If the agency does something  
22 that even interprets or prescribes, describes procedure or  
23 practice requirements, it could qualify as agency action;  
24 right?

25 MR. PLATT: I --



1           THE COURT: I mean, I guess it's conceptually weird  
2 to think of the agency putting out a manual that says, Hello,  
3 everybody, all of you asylum officers out there that are making  
4 that -- this very important statutory determination, here's how  
5 you do it and not have that qualify as agency action. Now, it  
6 may not be a rule. That's something I'll talk to them about;  
7 right? There's some -- there are -- a legislative rule that  
8 triggers notice and comment or whatever, but it seems odd to  
9 make the -- to make the argument that that is not even agency  
10 action in terms of being even remotely in the orbit of the APA.

11           MR. PLATT: Well, if the Lesson Plan is not a rule in  
12 this case, it is not agency action.

13           THE COURT: No. I understand. I understand what you  
14 mean. There's a lot of terminology going around, but --

15           MR. PLATT: Yeah, and it's --

16           THE COURT: -- a rule is described very broadly in  
17 the statute as not just something that is necessarily a binding  
18 statement of new policy with respect to the actions of the  
19 individuals to whom it is directed, but it can interpret, it  
20 can implement, it can prescribe, it can relate to law, policy,  
21 procedure, or practice. It's pretty broad.

22           MR. PLATT: I would agree that it is -- it appears  
23 too broad, but it is not so broad as to encompass every sort of  
24 thing that an agency does, and we have cases for that in our  
25 brief as well.

1           THE COURT: Let me turn you to -- because -- and I'll  
2 get into this with plaintiff. I am most interested in trying  
3 to understand whether they are right or wrong about the alleged  
4 conflicts with respect to the particular provisions of the  
5 Lesson Plan and the law. And whether or not that's  
6 characterized as an APA claim or an INA claim or whatever,  
7 let's set aside for a second and just focus on are they right  
8 when they say, for example, that the Lesson Plan directs asylum  
9 officers to make negative credible fear determinations based on  
10 discretionary factors only relevant during full asylum  
11 proceedings.

12           There's a theme to some of what they say that maybe I  
13 can get your reaction to, which is there are aspects of this  
14 Lesson Plan that appear to explain, as you say, that a credible  
15 fear determination is to be made based on factors that under  
16 the law apply at later stages of the process and not the  
17 initial credible fear determination. Are they wrong about  
18 that?

19           MR. PLATT: I mean, this is -- and I think that  
20 you're referring to the -- the first one of their nine  
21 complaints.

22           THE COURT: There are a couple of them. There's the  
23 first one. There's the third one. There are a few.

24           MR. PLATT: Yeah. And so that is one that is barred  
25 by the 60-day window. We believe it's --

1 THE COURT: No, no. I don't want to hear 60-day  
2 window.

3 MR. PLATT: Sure.

4 THE COURT: Sixty-day window was threshold; right?  
5 At this point in the discussion I am assuming certain things.  
6 You may be right about all of this and then when I write the  
7 opinion I don't even get there, but right now I'm assuming that  
8 they have met all of the threshold requirements and we're in  
9 merits world; all right?

10 So now they say, We've identified several provisions  
11 that tell the asylum officers to do things or to evaluate  
12 things that under the statute only come up during the full  
13 asylum proceeding and not credible fear. Are they misreading  
14 the Lesson Plan? Does it really not tell them that? Are they  
15 wrong about that being inconsistent? I'm just trying to  
16 understand.

17 MR. PLATT: I -- you know, I think that if you read  
18 this provision in context -- I mean, this says that -- it  
19 doesn't say that a negative credible fear determination is  
20 required in that instance. I don't see that in here that says  
21 that it's merely appropriate, which, again, does not tell an  
22 officer one way or the other what they must find on that score.

23 And the Lesson Plan does cite all the regulations  
24 that apply in this -- with regard to this particular issue and  
25 subject matter.

1           THE COURT: Can it apply and does it apply or cite  
2 regulations that relate to the full proceeding? What I'm  
3 concerned about is the collapsing of what's supposed to be  
4 happening under the expedited removal process, right, which  
5 conceivably is the person is just arriving, crossing the  
6 border. There he is or she is, and they are confronted by an  
7 immigration officer who is suppose to make a decision about  
8 whether or not to put this person into expedited removal, go  
9 right back, or give them the full panoply of proceedings.

10           And we know under the statute that one of -- if  
11 not -- the only ways that they get to go on to the full panoply  
12 is if they have demonstrated to the satisfaction of the asylum  
13 officer that they have a credible fear of persecution from  
14 being returned to their home country. And the statute is  
15 definitions, and the regulations further explain what it means  
16 to have a credible fear.

17           But it appears that in the Lesson Plan, the agency  
18 doesn't stop there when it describes what a credible fear is.  
19 The agency appears to cite regulations that talk about the full  
20 proceeding, all the evidence that you're supposed to have. You  
21 know, you have to fulfill each one of these. You have to have  
22 evidence with respect to every element -- and even though they  
23 might suggest in clever ways that, you know, wow, this kind of  
24 may not be required or it's not mandatory or whatever, they  
25 still cite to the full panoply, to the full proceeding

1 requirements. Why aren't the plaintiffs correct on the merits  
2 that that's a problem?

3 MR. PLATT: I -- what I would say to that is, again,  
4 USCIS has discretion to formulate its Lesson Plan and its  
5 training materials. Maybe this is not the -- an ideal way or  
6 perfect way to describe the relationship between --

7 THE COURT: But is it a wrong way? Is it a  
8 misleading way, and do they have a duty to be accurate in their  
9 statements of what -- what the law is?

10 MR. PLATT: I mean, we -- they do -- I mean, as we've  
11 discussed earlier, they do -- the agency has an obligation to  
12 render, you know, correct statements, but in so doing, you look  
13 at, you know, all the materials as we've been talking about.  
14 And so I think that when you look at all of the materials and  
15 you look at the regulations and statutes, et cetera, that  
16 officers are directed to look at and the fact this is not told  
17 to officers to be binding -- and, in fact, it doesn't say that  
18 they're required to reach that determination -- that --

19 THE COURT: So your position is no one will be misled  
20 if they put together everything that they're told?

21 MR. PLATT: I mean, we don't believe that misled is  
22 the standard. I mean, the agency has discretion to word its  
23 materials in various ways, and we don't think that --

24 THE COURT: But they have to be accurate ways. This  
25 is Question No. 1 that I asked you when you first got up here:

1 Does the agency have a duty to follow the law or to put out  
2 materials that are consistent with the statement of what the  
3 law requires, and I guess you're saying they don't.

4 MR. PLATT: I think -- when viewed in the totality of  
5 the circumstances. So with -- that is how we think this is  
6 defensible.

7 THE COURT: Okay.

8 MR. PLATT: But, again, it's more than 60 days past  
9 when this first appeared.

10 THE COURT: All right. Let me ask -- I'm going to  
11 let plaintiffs come back. Are there particular ones that you  
12 wanted to bring to my attention? You'll have another chance,  
13 or maybe you want to respond to her recitation of why each of  
14 these is inaccurate.

15 MR. PLATT: No. We're happy to sit down and then,  
16 yeah, maybe just see how the conversation unfolds and if  
17 there's other of the nine that Your Honor wishes to hear more  
18 about.

19 THE COURT: Great.

20 MR. PLATT: Thank you.

21 THE COURT: Ms. Austin. Oh. No. You're coming  
22 back.

23 MR. COX: I'm happy to defer to Ms. Austin to talk  
24 about the substance. If Your Honor wanted to talk about any of  
25 the threshold issues, I'm happy to do that.

1 THE COURT: Why don't you wrap up the threshold  
2 issues quickly, and then I'll turn to her.

3 MR. COX: Okay. I had three quick things I wanted to  
4 address.

5 THE COURT: Yes.

6 MR. COX: One, the Lesson Plan absolutely is the  
7 bible, and we know that certainly from the Grussendorf  
8 declaration, but if it would be useful, I'm happy to point to  
9 the places in the administrative record that establish the same  
10 proposition.

11 THE COURT: That would be useful.

12 MR. COX: So, you know, one place -- so No. 28 in the  
13 administrative record index -- this is AR 801 to 811. It's a  
14 two thousand -- December 2008 memo from the chief of the asylum  
15 division, and it -- it -- it says that the -- talking about  
16 quality assurance. So the agency does essentially a quality  
17 control check over a certain percentage of the credible fear  
18 determinations, and this memo says that that quality assurance  
19 check is done -- the baseline is set by the Lesson Plan. And  
20 so if you -- that's -- that's how you know that it is  
21 establishing the baseline and that officers are expected to  
22 follow it.

23 Additionally, you see in the AR index Item 3 and 7.  
24 They both relate to the 2014 revision of the Lesson Plan. Both  
25 of them demonstrate conclusively that the Lesson Plan is a

1 primary document in which agency policy is made and adjusted,  
2 because both of them -- both of those documents demonstrate  
3 that in 2014, bowing to some political pressure, the agency  
4 raised the standard for credible fear.

5 As well, you see there's Item No. 6 in the AR index,  
6 AR 174 to -89. It's a 16-page memo pointing out -- explaining  
7 the use of the -- of the Lesson Plan and why the particular  
8 revision was problematic. And then the -- the Lesson Plan  
9 itself actually, in no uncertain terms, tells officers what  
10 they are to do. It says they must do things like -- more than  
11 20 times in a 37-page document it says you must do this or  
12 that.

13 THE COURT: But defense counsel says that at the  
14 beginning it purports to explain what the law is.

15 MR. COX: Right. And it explains that they must do  
16 certain things, but the -- and if -- if they were -- if the  
17 Lesson Plan was simply reciting an obligation that existed  
18 elsewhere, that would be different, but that's not the case.  
19 For example, the Lesson Plan says in numerous places that  
20 asylum officers must consult the State Department reports.  
21 There's no source of law that requires -- other than this  
22 Lesson Plan -- that requires asylum officers to do that. And  
23 so if it says "must," it says "should," it's telling the  
24 officers, again, this is what you're required to do.

25 So even setting aside the Grussendorf declaration --



1 THE COURT: All right.

2 MR. COX: -- the second thing I wanted to mention is  
3 just the 60-day statute of limitation and just make it clear,  
4 everything that we're challenging is new, even on its own  
5 terms. Defendants only proffer this defense as to, I think,  
6 three of the nine things that we've identified as substantively  
7 inconsistent, and, of course, it's wholly inapplicable to the  
8 arbitrary and capricious and notice-and-comment claims.

9 THE COURT: Do you agree with their legal proposition  
10 that what's happening with this section is that the Court has  
11 to compare the degree of variance with respect to the  
12 amendments that are being made?

13 MR. COX: No, Your Honor. The presumption -- the  
14 background presumption here is judicial review. In order to  
15 find that judicial review has been eliminated, there must be  
16 clear and convincing evidence of congressional intent to do  
17 precisely that. You -- their piecemeal sort of approach that  
18 they are advising is -- you can't find that anywhere in the  
19 statute, and certainly not in clear and convincing.

20 And in particular, you know, there are a number of  
21 cases recently, instances where the Supreme Court has refused  
22 to read statutes in a way that would give the agencies the kind  
23 of unreviewable discretion and authority that the defendants  
24 are claiming for themselves here. So that's *Kucana*, for  
25 example, a 2011 case. *Mach Mining* in 2015. And, again, it

1 just reinforces the idea that Congress intended there to be  
2 broadly available judicial review. And its judicial review is  
3 not some kind of sin to be avoided, and so it's, you know,  
4 certainly not up to this Court to try to --

5 THE COURT: In fairness, I mean, this statute does  
6 have the character of a jurisdiction-stripping statute in some  
7 ways, but it preserves the jurisdiction of the United States  
8 District Court for the District of Columbia with respect to the  
9 categories that are presented here, and I guess the question is  
10 just what is the work of the approximate 60-day statute in  
11 terms of the expectation that this Court will review and  
12 monitor the changes in the policies in the way that the  
13 defendant is suggesting.

14 MR. COX: I think the context here is very important.  
15 As Your Honor knows, many aspects of the expedited removal  
16 process are, as a statutory matter, not subject to judicial  
17 review, but in (e) (3) Congress gave clear intent that the  
18 generally applicable policies and procedures that are used in  
19 this process would be subject to judicial review, of course  
20 only in this Court, which also undermines as a suggestion that  
21 the defendants will have to relitigate issues that are settled,  
22 because this is the only Court where anyone could bring a case.

23 And, you know, the point about Judge Tigar's decision  
24 and the scope of (e) (3), the thing that defendants don't seem  
25 to appreciate is that if this is not within the scope of (e) (3)

1 and -- then it's not -- there's no other -- there's no  
2 provision out there that strips this Court's jurisdiction.  
3 1252(a)(2)(A) strips jurisdiction of a variety of things, but  
4 if it doesn't fit in (a)(2)(A), it doesn't in (e)(3) either.

5 THE COURT: Fair point. So then, again, everything  
6 comes flooding back in; right?

7 MR. COX: Right.

8 THE COURT: Because then 1252(a) -- (e)(3) is not  
9 doing any work and (a)(2) is not doing any work.

10 MR. COX: Precisely, Your Honor. And I think the  
11 last thing I wanted to raise before turning it over to  
12 Ms. Austin is this agency action issue.

13 THE COURT: Yes.

14 MR. COX: This is entirely a red herring. They --  
15 the agency action at issue here is the Lesson Plan. It's a  
16 written policy, procedure. It's a document described in  
17 (e)(3). That's -- that counts as an agency action. It's a  
18 very specific definition of the kind of agency action.

19 THE COURT: But this sort of raises my -- and I want  
20 to give Ms. Austin a chance --

21 MR. COX: Yes. As do I.

22 THE COURT: But this raises my initial sort of  
23 thought process and concern about the reliance -- plaintiffs'  
24 reliance on the APA, because it becomes a red herring to the  
25 extent that plaintiff is making an APA challenge, because then

1 the defendant gets the opportunity, as it has done, to talk  
2 about finality, to talk about is it a rule, to bring in these  
3 provisions that they cite with respect to what qualifies as  
4 agency action.

5 And so I'm -- I guess I'm just trying to understand  
6 why it is that the plaintiffs are relying on the APA and feel  
7 that they can rely on the APA in light of a set of statutory  
8 provisions that address what it is the plaintiffs seem to be  
9 seeking here with respect to policy guidelines. You are  
10 correct to the extent that you've at least identified  
11 1252(e)(3) as a basis for bringing the action you're talking  
12 about. So what is -- why are we caring about the APA in this  
13 case?

14 MR. COX: So I think to be clear, we would be  
15 perfectly happy with the Lesson Plan being vacated in its  
16 entirety on the basis of our first claim. We do, nonetheless,  
17 think it's important that the agency not believe that it can,  
18 for example, issue something they call a Lesson Plan, put a  
19 bunch of legislative rules in it, and, you know, stick it in a  
20 drawer for 61 days and, voilà, they've totally sidestepped the  
21 notice-and-comment requirements of the APA.

22 There are other constraints on the agency here, and  
23 it's just the basic APA requirements of engaging in reasoned  
24 decision-making. And there's certainly nothing -- and in *Grace*  
25 as well, Judge Sullivan applied the APA, held that certain of

1 the policies challenged there were unexplained departures from  
2 prior policies and so --

3 THE COURT: I know. I worry -- I wonder and worry  
4 that because we are so generally well versed in the APA,  
5 because agency action is ordinarily -- given the fact that  
6 there are very few statutes that have a 1252(e)(2) kind of  
7 authorization to bring claims against any written policy,  
8 directive that implements the statutory provisions; right?  
9 That's relatively unusual.

10 So most of the time you are in APA world, and we have  
11 to deal with all of those other things. Here we have one of  
12 those, and it seems to me that the APA brings in all of these  
13 other issues. I am concerned, and maybe Ms. Austin answers  
14 this question. I don't know that this is a rule. I think I  
15 agree with the defendants, at least from the standpoint of  
16 thinking about what agencies do that count as rules for the  
17 purpose of the APA. This feels like training materials, and as  
18 I read 1252(e)(3), that might be fine in terms of being  
19 challenged under the statute, but perhaps not fine under the  
20 APA.

21 MR. COX: So -- so to be clear, we think that this  
22 absolutely does constitute both agency action and a rule. It's  
23 also final agency action. We don't think that those things  
24 actually matter except with regard to the notice-and-comment  
25 claim, but it absolutely is both agency action and a rule as,

1 you know, the Supreme Court said in *Whitman v. American*  
2 *Trucking Association* (2001). The term -- the word action in  
3 agency action is -- is meant to cover comprehensively every  
4 manner in which an agency may exercise its power. And  
5 similarly --

6 THE COURT: The word "action"?

7 MR. COX: Yes. And similarly --

8 THE COURT: What about "rule"?

9 MR. COX: Sure.

10 THE COURT: Doesn't rule have a more --

11 MR. COX: In the D.C. Circuit 1980 case of  
12 *Batterton v. Marshall* -- both of these are cited in our  
13 reply -- notes that the APA broadly defines an agency rule to  
14 include nearly every statement an agency can make. The only  
15 circumstance under which this is not a rule is if, as  
16 defendants claim, the Lesson Plan does nothing and means  
17 nothing; right? It just merely restates the law as it exists,  
18 law and policy as it exists somewhere else, and does no work  
19 whatsoever, has no legal significance.

20 If they were right about that, maybe it's not a rule,  
21 but as we've demonstrated, not just with the Grussendorf  
22 declaration but through the -- the materials in the  
23 administrative record as well, it sets the baseline. It's the  
24 bible. It's -- and if it's the bible, then it's a rule. And  
25 the -- and in our complaint, defendants globbed onto the fact

1 that in our complaint, solely for purposes of our  
2 notice-and-comment claim we alleged that it's a rule because it  
3 has to be a rule for a notice-and-comment claim, but it's  
4 otherwise the -- the relevant question under (e)(3) and 704 is  
5 whether or not it's the agency action that Congress has made  
6 reviewable.

7 THE COURT: I understand, but what do you do with the  
8 fact that you can't have both a cause of action under this  
9 statute and the APA?

10 MR. COX: So I think this comes back to our earlier  
11 discussion, and I think that if -- so under 5 U.S.C. 704, if  
12 Congress has said that a particular agency action is directly  
13 reviewable, then it's -- then it's reviewable under the APA  
14 even if there is some other alternative cause of action --

15 THE COURT: But hasn't the D.C. Circuit not said -- I  
16 thought the D.C. -- I need to go back and look, but I know that  
17 at least in FOIA, for example, they're very clear that you  
18 cannot bring an action under the APA if FOIA gives you the  
19 relief that you are requesting.

20 MR. COX: I'm familiar with that case law, and there  
21 it's because you're -- because the claim is being -- if there  
22 is a claim apart from FOIA, it would be brought under the sort  
23 of general APA cause of action for final agency action for  
24 which there is no other remedy in a court. But that's the  
25 second half of 5 U.S.C. 704.

1           We're in the first half, and, admittedly, there are  
2           exceedingly few cases that arise under the first part. Very,  
3           very few. In *Carter-Mondale*, the argument there was that  
4           the -- the committee that deals with financing of presidential  
5           campaigns, there's a statute that said that any action by that  
6           agency was reviewable. And they said in *Carter-Mondale* that's  
7           not specific enough. It -- it's not a specific authorization.

8           THE COURT: To make it a statute that fits under the  
9           first part.

10          MR. COX: Exactly.

11          THE COURT: Do you have cases in which the  
12          D.C. Circuit has concluded that there's a statute that fits  
13          under the first part and you can bring your claims both under  
14          the statute and under the APA? That's the situation we have  
15          here, and that's what I'm worried about in light of what  
16          they've said with respect to -- admittedly with respect to the  
17          second part.

18                 It seems to me not intuitive -- and, in fact,  
19          counterintuitive -- to suggest that given the body of case law  
20          that indicates that you can pick one lane or the other and you  
21          can only pick the APA when the first lane is not available,  
22          that under the first part, the Court would be happy with you  
23          choosing both in the way that you have in this case.

24          MR. COX: I think the best case here, Your Honor, is  
25          *Lujan*. *Lujan* talks about how if you have a specific



1 authorization, even nonfinal agency actions can be reviewed by  
2 a Court under 5 U.S.C. 704. If you -- if it's -- if you don't  
3 have specific authorization from Congress, then you're in the  
4 second half of 704; you have to prove finality.

5 THE COURT: All right. I'll look -- I'll look at  
6 *Lujan*.

7 MR. COX: Okay. Those were -- right. So I think  
8 that that --

9 THE COURT: That covers the threshold.

10 MR. COX: The issues that I wanted to discuss and --

11 THE COURT: All right. Ms. Austin. I apologize it's  
12 taken so long to get to you.

13 MS. AUSTIN: Can I confer with him for a minute?

14 THE COURT: Yes.

15 MS. AUSTIN: Good morning.

16 THE COURT: Good morning. I think it's still  
17 morning. Yes.

18 MS. AUSTIN: So as Mr. Cox alluded, I'll be  
19 discussing the merits of our claims that the Lesson Plan isn't  
20 consistent with law --

21 THE COURT: Yes.

22 MS. AUSTIN: -- and that it's arbitrary and  
23 capricious.

24 As to our inconsistency with law claim, Congress  
25 crafted the credible fear standard as a low screening standard

1 to ensure that notwithstanding the abbreviated procedures of  
2 expedited removal, no person would be wrongly deported to a  
3 country where they might face persecution or torture. It  
4 accomplished this purpose by making the standard  
5 forward-looking, an assessment of potential eligibility, by  
6 deferring the resolution of complicated factual and legal  
7 issues to full removal proceedings and by requiring no more of  
8 the asylum seeker than that they tell their story.

9 The Lesson Plan disrupts the balance that Congress  
10 created in the statute between allowing for expeditious removal  
11 and fulfilling our humanitarian obligations by raising the  
12 credible fear standard and directing asylum officers to make  
13 negative determinations when positive ones would be warranted.

14 THE COURT: All right. I see that in some places.  
15 Not sure I see it in others. So maybe you can help me. I  
16 don't know if you're ready to talk about each one of the nine  
17 that you have put forward.

18 Tell me about Challenge No. 2 --

19 MS. AUSTIN: Okay.

20 THE COURT: -- which is what I review -- view as the  
21 Lesson Plan ignoring the government's burden to rebut the  
22 asylum seekers showing a past persecution.

23 MS. AUSTIN: Okay. So perhaps it makes sense to step  
24 back a little bit and just to talk about what this regulation  
25 that the Lesson Plan purports to instruct on deals with.

1 THE COURT: Yes.

2 MS. AUSTIN: Which is that the -- you know, the  
3 regulation states that a person can be a refugee, such that  
4 they're eligible for asylum, for one of two reasons; either  
5 because they suffered past persecution or because they have a  
6 well-founded fear of persecution that would happen in the  
7 future. So that's sort of the baseline rule.

8 THE COURT: And the well-founded fear does not have  
9 to be based on prior persecution?

10 MS. AUSTIN: No, it does not.

11 THE COURT: Okay.

12 MS. AUSTIN: But what -- what this provision does is  
13 it sets up a sort of complicated analysis for when a person who  
14 has suffered persecution in the past, even though they meet the  
15 definition of a refugee, shouldn't be granted asylum, because,  
16 as we know, although withholding removal and protection under  
17 the Convention against Torture, our mandatory forms of  
18 protection, asylum, once someone satisfies the eligibility  
19 criteria, is still within the matter -- within the discretion  
20 of the government to grant or deny.

21 So under the regulation, the -- a person who has  
22 suffered past persecution is presumed to have a well-founded  
23 fear of persecution as well.

24 THE COURT: Under the terms of the regulation?

25 MS. AUSTIN: Yes.

1 THE COURT: If they can say, Look at my scars.  
2 Here's the pictures. Terrible, terrible.

3 MS. AUSTIN: Uh-huh.

4 THE COURT: This is what happened to me in my home  
5 country, that should be enough?

6 MS. AUSTIN: Right. That should be -- that -- that  
7 satisfies the -- the eligibility standards. So that should be  
8 enough for credible fear for sure, and then, you know, this --  
9 this second box, I should make clear, are problems with the  
10 ways in which the Lesson Plan instructs asylum officers on a  
11 topic that it shouldn't even be dealing with at all.

12 THE COURT: The second box? Tell me what you mean on  
13 page --

14 MS. AUSTIN: Sorry. When I say "box," I mean our  
15 second set of concerns with the Lesson Plan.

16 THE COURT: I see. So it's not really a burden  
17 shifting. It's more of you're suddenly requiring or you're  
18 suddenly -- the Lesson Plan instructs the officers to ask more  
19 questions, to go beyond that initial establishing of past  
20 persecution?

21 MS. AUSTIN: Right. Which is what we are -- what we  
22 have labeled number one. That -- that Section 208.13 is a  
23 complicated analysis that on the merits the immigration judge  
24 will go through to decide should this person be granted asylum  
25 as a matter of discretion, and that's just not appropriate at

1 the credible fear stage, because at the credible fear stage  
2 what's at issue is potential eligibility.

3 THE COURT: Okay. So that's number one.

4 MS. AUSTIN: So that's --

5 THE COURT: What about number two?

6 MS. AUSTIN: So number two -- just to be clear, this  
7 goes to the Lesson Plan's instructions on the discretionary  
8 factors, which we don't think, you know, should be there in the  
9 first place, but to the extent that defendants insist on  
10 including these instructions and Your Honor disagrees with us  
11 that it's improper to include them in the first place, they're  
12 not even accurate in and of themselves.

13 THE COURT: I see. So two only happens if one is  
14 okay?

15 MS. AUSTIN: Sure. And I -- but I also think that  
16 two illustrates kind of the inadvisability of attempting to  
17 instruct asylum officers on something.

18 THE COURT: Well, tell me what's -- explain to me  
19 exactly --

20 MS. AUSTIN: What's wrong with --

21 THE COURT: -- what you see happening --

22 MS. AUSTIN: Yeah.

23 THE COURT: -- in two.

24 MS. AUSTIN: So I think -- do you have the redline  
25 in -- at --

1 THE COURT: I do, yes.

2 MS. AUSTIN: So I think the place that it's easiest  
3 to see this happening or -- is page 33 of the redline.

4 THE COURT: Yes.

5 MS. AUSTIN: Or at least to start there. And if you  
6 happen to have Section 208.13, it can be helpful to compare.

7 THE COURT: Yes, I have it.

8 MS. AUSTIN: So looking first at the regulations,  
9 Section 208.13, if you go to 208.13(b)(1)(i) --

10 THE COURT: Yes.

11 MS. AUSTIN: -- "Discretionary referral or denial."  
12 And it describes the two things that the government, you know,  
13 in full removal proceedings, in adversarial proceedings, can  
14 show in order to rebut the presumption that somebody has a  
15 well-founded fear of persecution based on persecution they  
16 suffered in the past.

17 And here it notes that if the government shows that  
18 there has been a fundamental change in circumstances that could  
19 rebut the well-founded fear or if the government can show that  
20 the asylum seeker could avoid persecution by relocating and  
21 that it would be reasonable to expect the asylum seeker to do  
22 so, that's another way to rebut the presumption of a  
23 well-founded fear.

24 THE COURT: Okay.

25 MS. AUSTIN: But if you look at the Lesson Plan, it

1 frames these things as the asylum seeker's burden. It asks --  
2 it makes the factual issue the inverse. So instead of  
3 requiring a finding of a fundamental change in circumstances or  
4 no fundamental change in circumstances, it says, Oh, that there  
5 are continuing country conditions or rather than showing that  
6 there -- let's see. No.

7 THE COURT: Doesn't it do so -- are you talking about  
8 paragraph 2 on 33 or 1?

9 MS. AUSTIN: I'm looking at 1.

10 THE COURT: Okay. So you're looking at 1 and sub 2  
11 and 3. Is that what's happening?

12 MS. AUSTIN: Right. So the -- the -- one of the  
13 findings -- and there's another respect in which this is, I  
14 think, substantively incorrect, but I'm just focusing on the  
15 burden right now. The -- in addition to -- rather than framing  
16 this as a question of whether country conditions have changed,  
17 this is framed as whether country conditions continue, and if  
18 you look to page 36 of the redline, similarly, at (d), it says  
19 it also suggests that this is the applicant's burden to show  
20 that country conditions are continuing rather than the  
21 government's burden to show the opposite. The applicant  
22 satisfies the objective element if he or she demonstrates past  
23 persecution based on continuing country conditions.

24 THE COURT: So this sort of, in your view, heightens  
25 what is necessary for the applicants; whereas he or she

1 previously could have just said past persecution and it was  
2 later on up to the government to demonstrate that those  
3 conditions no longer existed in the context of the full  
4 hearing. Now, upfront this suggests that the credible fear --  
5 initial credible fear determination can be based not only on a  
6 demonstration of the past persecution, but also a showing by  
7 the applicant that those conditions --

8 MS. AUSTIN: Right.

9 THE COURT: -- continue to exist.

10 MS. AUSTIN: Yeah. There's two things --

11 THE COURT: Or don't continue to exist.

12 MS. AUSTIN: So not only is it improper to go beyond  
13 the first question -- you know, is there a significant  
14 possibility that they could establish their eligibility based  
15 on past prosecution -- now there's --

16 THE COURT: Right.

17 MS. AUSTIN: Now there's an additional question. So  
18 that's improper in the first place, but it's also improper to  
19 suggest that it's the applicant's burden to show this even on  
20 the merits.

21 THE COURT: Right.

22 MS. AUSTIN: It's the government's burden.

23 THE COURT: The applicant has to do the additional  
24 factors that later on in the test belong to the government, is  
25 what you're saying?



1 MS. AUSTIN: Yeah. Yeah.

2 THE COURT: All right. Fine.

3 MS. AUSTIN: You know, the --

4 THE COURT: Let me just -- let me -- I'm mindful of  
5 the time. So I want to spend most of the time on the ones that  
6 I don't quite understand.

7 MS. AUSTIN: Yeah. For sure.

8 THE COURT: Number six --

9 MS. AUSTIN: Yep.

10 THE COURT: -- which is the Lesson Plan improperly  
11 changes the unable or unwilling standard. This is page 41, I  
12 think.

13 MS. AUSTIN: Uh-huh.

14 THE COURT: Why does this --

15 MS. AUSTIN: So this has to do with the long -- the  
16 well-established construction of the word persecution and the  
17 well -- in the asylum standard. Persecution has been construed  
18 to mean either persecution by the government itself or by a  
19 private actor who the government is unable or willing --  
20 unwilling to control. So that's the baseline rule, and that's  
21 set out in *Matter of Acosta*.

22 What the Lesson Plan does is conflate these  
23 principles of un- -- inability and unwillingness by requiring a  
24 showing that -- let me see if I can find it -- the govern- --  
25 that the government have abdicated its responsibility to

1 control persecution.

2 THE COURT: And you're saying that wasn't the case  
3 before?

4 MS. AUSTIN: Well, the standard is inability or  
5 unwillingness, and the word "abdicated" suggests the government  
6 must have intention to sort of disclaim responsibility for, you  
7 know, controlling persecution.

8 THE COURT: So abdicated is more than unwilling?

9 MS. AUSTIN: Yes.

10 THE COURT: Or unable?

11 MS. AUSTIN: It's -- yes, because it's an "or" and  
12 it's sufficient for the government to be unable to control  
13 persecution.

14 THE COURT: Okay.

15 MS. AUSTIN: And the *Grace* opinion also has some  
16 stuff to say about that, if you're interested.

17 THE COURT: What about number eight?

18 MS. AUSTIN: Sure. This encompasses two aspects of  
19 the guidance that sort of direct asylum officers to measure the  
20 asylum seeker's testimony against sort of other documents and  
21 determine, you know, whether the asylum seeker's testimony is  
22 consistent with those documents. So the first part of eight  
23 has to do with country-conditioned reports by the -- from the  
24 Department of State, and the second has to do with how the  
25 asylum officers should use records of encounters with CBP.

1           THE COURT: But doesn't the regulatory provisions say  
2 that they can rely on those sorts of things?

3           MS. AUSTIN: Yes.

4           THE COURT: So why is this inconsistent with that?

5           MS. AUSTIN: So two things. One is the regulatory  
6 provision provides that asylum officers may rely on, among  
7 other things, country reports of the Department of State. What  
8 the Lesson Plan does is require asylum officers to consult such  
9 documents and, two, directs asylum officers that these  
10 materials are objective, which we know from the case law and  
11 just from sort of observation is not true and that, you know,  
12 even other materials that defendants have produced in the past  
13 warn asylum officers against placing undue weight even on  
14 official documents --

15           THE COURT: But this may not be inconsistent. I  
16 mean, this could support your argument that there's  
17 policymaking going on here; right? Because we're going from  
18 "may" to "must." And so that suggests that this document is  
19 doing more than just describing what the law is, but they could  
20 be describing the law in a way that's consistent with what the  
21 statute says, insofar as the statute does direct people to  
22 those materials.

23           MS. AUSTIN: Well, if -- to the extent Your Honor is  
24 sort of comparing, like, does it -- does it really change the  
25 standard, I think it's helpful to think about cases in which

1 maybe the outcome will be different depending on whether you  
2 applied this policy change or not. So if an asylum officer  
3 was --

4 THE COURT: Tell me -- let me tell you why it doesn't  
5 quite get you there, as far as I can tell, and I'll have to  
6 think about this more. I hope no one is expecting a conclusion  
7 today because there's a lot to think about.

8 But, yes, it may be different depending upon whether  
9 or not you apply it, but if under the original regulation you  
10 have the option to apply it, then it doesn't seem to me that  
11 the rule is really inconsistent. Because under the original,  
12 you had the option but you very well could have applied it, in  
13 which case the outcome is the same. So I'm not sure that  
14 making you apply it is really the problem. Do you understand  
15 what I'm saying?

16 MS. AUSTIN: I see what you're saying. I do think  
17 that the Lesson Plan removes some discretion from the asylum  
18 officer. It also -- you know, the asylum officer should be the  
19 fact-finder. The asylum officer is the person who is, you  
20 know, entrusted with the obligation of looking at the materials  
21 and saying is this reliable, does it have biases. And what the  
22 Lesson Plan does is not only direct asylum officers to consider  
23 these materials but to treat the information within them as  
24 objective. It used the word objective country conditions  
25 information with --

1           THE COURT: All right. I understand, and those were  
2 the ones that I sort of at least was worried that I didn't  
3 understand them. The rest of them I understand. I'll have to  
4 decide whether or not I agree with you.

5           But let me turn your direction to arbitrary and  
6 capriciousness, which I think you're also prepared to discuss.  
7 This level of care and concern by the agency in its line by  
8 line looking at the regulation deviating slightly, trying to  
9 add in words that they hope nobody will ferret out does not  
10 suggest to me arbitrariness. It suggests to me intentional,  
11 deliberate deviation -- to the extent there is a deviation --  
12 from the statutory requirements. And so I'm wondering why  
13 plaintiffs are characterizing this as arbitrary and capricious.  
14 I -- let me just -- you know, do you understand what I'm  
15 saying?

16           MS. AUSTIN: I understand your question.

17           THE COURT: The agency may act unlawfully but not  
18 arbitrarily. Not every unlawful action is an arbitrary one.  
19 There can, in fact, be intentional, deliberate  
20 misrepresentation or deviation from statutory requirements  
21 which would not, I think, trigger the APA's arbitrariness  
22 requirements or arbitrariness prohibition. You would have the  
23 ability to raise the claim directly under the statute, which  
24 apparently you do here.

25           MS. AUSTIN: Your Honor, I'm not sure that we can

1 really say based on the text of the Lesson Plan why the agency  
2 made the specific changes that it did.

3 THE COURT: I don't think I'm relying on motivation.  
4 I'm looking at the plain text. I'm looking at the plain text.  
5 So you say things like, Oh, well, they didn't explain why they  
6 have a Lesson Plan. Well, the statute says they have to have  
7 training materials. I mean, it's not rocket science in terms  
8 of them putting together a Lesson Plan, and it doesn't seem  
9 arbitrary to me that they decided to commit to writing what  
10 they understood the -- their people should be trained in.  
11 They -- so that's not an arbitrariness.

12 You say things like -- I pulled up your document for  
13 a moment in terms of the discussion of arbitrariness. It  
14 just -- it struck me that what you were arguing was a  
15 substantive assailing of the actual substance of their  
16 determination as opposed to the manner in which they reached  
17 it.

18 MS. AUSTIN: Well, we -- we are concerned about the  
19 manner in which they reached it, because to the extent they  
20 claim that there is a certain range of possible interpretations  
21 of the statute, you know, we disagree that there -- you know,  
22 the instructions that we challenge fall within a range of  
23 permissible interpretations, but to the extent they say there's  
24 a range and they should have discretion in terms of how they  
25 instruct their officers, they, at the very least, need to

1 decide, you know --

2 THE COURT: But I think they're just wrong about  
3 that. I mean, we have -- defense counsel and I had that  
4 conversation. Do you have the discretion -- I've asked it now  
5 in, like --

6 MS. AUSTIN: Uh-huh.

7 THE COURT: -- a thousand different ways -- to  
8 deviate from the law in your instructions with respect to this  
9 or anything else. I think the answer is no.

10 MS. AUSTIN: Right.

11 THE COURT: You know, so they don't have discretion  
12 to state things that are inconsistent with the law. So isn't  
13 your only argument really that what they've done in this  
14 document is make directives to their officers that are  
15 inconsistent with the law?

16 MS. AUSTIN: That's not only our argument. That  
17 would, you know -- that argument would suffice for us, I think,  
18 to get the relief we're asking for, but to the extent  
19 Your Honor disagrees that the Lesson Plan isn't consistent with  
20 the law, we think that it's -- the Lesson Plan reflects changes  
21 from previous versions that are just not explained. So --

22 THE COURT: They don't have to explain it. It all --  
23 this is why I mean it's all connected; right? They -- if it's  
24 not a rule, for example, they don't have to explain it. If  
25 it's pure training materials, every update to a training manual

1 doesn't have to come with a -- you know, a detailed listing of  
2 the why as to what they did with respect to each change.

3 MS. AUSTIN: It's --

4 THE COURT: Nor does the rule, by the way. I mean,  
5 if it's evident on the face of the rule as to what the update  
6 is about and why it's there, then you don't need to have an  
7 explanation.

8 MS. AUSTIN: Well, if there's change guidance, for  
9 instance, on discretionary factors, if the Lesson Plan now  
10 directs asylum officers that they're required to consider these  
11 and make negative determinations based on them and, you know,  
12 if Your Honor disagrees that that's wrong, it is certainly a  
13 new policy that the agency has.

14 THE COURT: Except the agency would say it's not a  
15 new -- the agency says, as they've said from the beginning,  
16 we're just trying to summarize the law; right? So if you see a  
17 change here, it's only because we are trying to be more  
18 accurate with respect to what we view the law to be than we  
19 were before. So, again, the question reduces to whether  
20 they're right about that. Have they accurately captured what  
21 the law says or not? They're not going to agree that there's  
22 actually a change, and you're not going to agree that what  
23 they've done is consistent; right?

24 MS. AUSTIN: Right. I mean, I -- I think, you know,  
25 we've pointed to other things that are not necessarily



1 inconsistent with the law that are changes, substantive  
2 changes.

3 THE COURT: Give me one.

4 MS. AUSTIN: If you look to our statement of  
5 undisputed facts. You know, for instance, the Lesson Plan no  
6 longer includes any instructions on the *Matter of Mogharrabi*,  
7 which is a case that deals with how to apply the well-founded  
8 fear standard. That is a substantive change. It's a decision  
9 that they've made to remove guidance on -- guidance to their  
10 asylum officers on sort of the analysis that the asylum  
11 officers should go through, but they didn't explain why.

12 The Lesson Plan used to say that novel and unique  
13 issues, that would be sort of better -- it used to suggest that  
14 cases that raised novel or unique issues should be deferred for  
15 full removal proceedings, sort of as a general matter. That  
16 guidance is no longer in there. It says a similar thing with  
17 respect to credible fear of torture.

18 THE COURT: So your position is that to the extent  
19 that the agency shows -- you're not suggesting that the law  
20 requires them to put in that kind of discussion, but to the  
21 extent they've chosen to take it out, the law requires them to  
22 say why with respect to every change in this manual that they  
23 make that is substantive in nature.

24 MS. AUSTIN: Yeah. We identified a handful, in  
25 addition to the ones that we thought -- the changes that we

1 thought reflected inconsistencies with the law, and we  
2 haven't -- you know, we're not asking for them to provide,  
3 like, a detailed explanation, but they haven't provided any  
4 explanation, not -- neither in the Lesson Plan itself or  
5 anywhere else in the administrative record.

6 THE COURT: Let me ask you: Is -- so the remedy for  
7 that, what if I -- hypothetically, what if I disagree with you  
8 with respect to any inconsistency? The agency's manual is  
9 perfect. They just don't have explanations. Am I striking  
10 down the whole thing? Am I going through and just saying  
11 provide explanations with respect to each of these or what?

12 MS. AUSTIN: No. I mean, I think the defendants  
13 themselves when we moved to compel and raised our concern that  
14 there was -- there were no explanations for the revisions  
15 within the administrative record -- and we suggested that maybe  
16 more discovery was warranted -- they said no. They said this  
17 is a merits issue and the remedy is for the judge to hold  
18 unlawful and set aside.

19 THE COURT: But it's unlawful because they haven't  
20 explained each strike and add in their Lesson Plan?

21 MS. AUSTIN: We're not talking each strike and add.  
22 We've identified things that are policy changes that they fail  
23 to explain. We're not complaining about the changes from U.S.  
24 to United States or --

25 THE COURT: But if it's a policy change that is

1 consistent with the law, what difference does it make? You're  
2 just saying doesn't matter, this used to be in there, and  
3 substantively now it's different. They've taken out standards  
4 that used to be there or we don't say that those standards are  
5 required to be there, but we think this deserves an  
6 explanation.

7 MS. AUSTIN: Right. There's policy changes that  
8 could have meaningful, you know, effects for people like our  
9 clients. You know, policy changes that could cause an asylum  
10 officer to make a different decision, the decision to take out  
11 guidance that would suggest that a person deserves to be in  
12 full removal proceedings.

13 THE COURT: Would I have to go through and evaluate  
14 which ones are those?

15 MS. AUSTIN: We've -- we've done so in our statement  
16 of understanding.

17 THE COURT: Yeah. That's assuming I agree with you.  
18 We're in a litigated process. So they're going to say these  
19 aren't policy changes, they're not important, they don't make a  
20 difference. So I have to litigate each one of those.

21 MS. AUSTIN: Right. And I wish that they would have  
22 responded to our statement and sort of said whether they agreed  
23 or disagreed, but they didn't.

24 THE COURT: Okay. All right. Any other -- anything  
25 else on our arbitrariness?

1 MS. AUSTIN: No, Your Honor. Thank you.

2 THE COURT: Thank you.

3 Mr. Platt. I am mindful of the time. Sometimes  
4 these discussions go longer than any anticipated, but this one  
5 has been interesting. So --

6 Do you need a break?

7 THE REPORTER: (Nods head.)

8 THE COURT: All right. So why don't we do this:  
9 Let's break for five minutes just so I can give my court  
10 reporter a little relief here. And we'll come back with you,  
11 Mr. Platt.

12 (Recess taken.)

13 THE COURT: All right. Mr. Platt. Yes. Good  
14 afternoon. You can respond --

15 MR. PLATT: Sure.

16 THE COURT: -- as you would.

17 MR. PLATT: Thank you, Your Honor.

18 I believe we -- to start with the nine things in the  
19 Lesson Plan that plaintiffs believe is unlawful, going to  
20 number two --

21 THE COURT: Yes.

22 MR. PLATT: -- which is that the Lesson Plan  
23 misstates the law of discretion and creates a presumption of  
24 well-founded fear, rebuttable only with the U.S. government  
25 showing changed circumstances. On this, I -- I don't see here

1 where it says that the burden is on the alien. It says that it  
2 doesn't -- it doesn't say it's the applicant's burden. It's --  
3 you know, simply says the presumption may be overcome if  
4 a preponderance of the evidence shows dot, dot, dot. And I'm  
5 looking on page 24 of the administrative record, and then it  
6 cites, you know, three times on one page 8 U.S. -- or  
7 8 C.F.R. 208.13(b) (3), which is, you know -- that's a provision  
8 of law that --

9 THE COURT: I think she's talking about the operation  
10 of the provision, that it may not be -- I don't know if I'm  
11 looking at the same thing as you, but it may not be that it  
12 says the burden shifts, but suddenly when you are -- if the  
13 effect of this is to make it -- let me find the right  
14 provision.

15 So that past prosecution does not suffice and that  
16 suddenly the alien has to demonstrate, in addition to the  
17 experience of past prosecution, that the conditions that gave  
18 rise to such persecution continue to exist in the applicant's  
19 home country and the applicant cannot avoid such persecution by  
20 relocating within his or her home country.

21 First, they say with respect to problem number one is  
22 that those two additional things come from the later full  
23 asylum process and that there's nothing in the statute that  
24 indicates that with respect to expedited removal those factors  
25 are even at play. Whether it's the applicant's burden or the

1 government's burden, nobody has the burden on those things,  
2 they say, until later. What's your thought on that as a  
3 precursor here?

4 MR. PLATT: As a precursor, Your Honor, I think that  
5 just goes back to our conversation in the morning about whether  
6 that was -- whether it's unlawful for the agency to have that  
7 language in there on -- on the role of internal relocation and  
8 about past persecution.

9 THE COURT: And if the statutes and regs have those  
10 factors as considerations during the full process, your  
11 position is that there's nothing unlawful for the agency in the  
12 context of this Lesson Plan to explain -- and I'm using your  
13 term -- explain to asylum officers that they should be looking  
14 at those things as a part of the expedited removal process?

15 MR. PLATT: I -- I think it's lawful when you look at  
16 the totality of all the materials that are cited, including the  
17 actual regs, which are cited in here --

18 THE COURT: But let me -- can I just go back to that  
19 totality argument, because I don't understand what you mean.  
20 It would only be lawful, I would think, if there's some other  
21 record that says disregard what we say in the Lesson Plan about  
22 looking at these extra things. What do you mean "totality"?  
23 If the statute says at the full asylum process here are the  
24 factors that are to be looked at and there's no suggestion that  
25 those factors are in play at all at the expedited removal

1 stage, why is it that the Lesson Plan can suggest that those  
2 factors should be considered?

3 MR. PLATT: I think --

4 THE COURT: And are there other specific -- you keep  
5 saying totality. Are there other specific documents that  
6 somehow negate the suggestion in the Lesson Plan that those  
7 factors are to be considered at the early stage?

8 MR. PLATT: I think that the underlying statutes and  
9 regulations, which talk about this, set it out and --

10 THE COURT: But you can't do that, Mr. Platt; right?  
11 Because this document is -- purports to be a description of the  
12 underlying regulation. So the agency cannot possibly have the  
13 position we can describe them any way we want, completely  
14 inconsistently, totally inaccurately, but point to the  
15 underlying statute to suggest that that's enough for the person  
16 to not be misled; right?

17 MR. PLATT: I mean, I think to that I would just  
18 point to the fact that the agency does not have to be perfect  
19 in the way that it crafts its materials. As far as the -- when  
20 it actually discusses the internal relocation parts, as I said,  
21 that there's nowhere in there that specifically says now that  
22 the applicant has the burden to rebut that presumption at that  
23 point.

24 THE COURT: Right. So we're moving to number two.  
25 So first they say those two factors aren't in this expedited

1 removal process at all regardless of whose burden it is, but  
2 then when we look at the Lesson Plan with respect to their  
3 concern number two, it appears to suggest that the asylum  
4 officer's determination regarding credible fear -- an asylum  
5 officer has to make a finding that there's a significant  
6 possibility -- that is, a substantial and realistic  
7 possibility -- based on more than significant evidence that the  
8 applicant experienced past persecution, that the conditions  
9 give no rise to -- sorry. That the conditions gave rise to --  
10 that gave rise to such persecution continue to exist,  
11 et cetera.

12           They say that that language suggests that these are  
13 the findings made by the officer based on substantial and  
14 realistic possibility that there is significant evidence and  
15 the significant evidence comes from the applicant. So it's an  
16 implicit suggestion that the asylum officer needs to make a  
17 finding based on more than significant evidence provided by the  
18 applicant and that that actually shifts the burden when you  
19 consider what the actual law is, which is that the applicant  
20 only needs to bring forward evidence of the past persecution  
21 part of this and that at later stages in the proceeding, to the  
22 extent these other factors come in at all, it's the burden of  
23 the government to establish those other factors.

24           MR. PLATT: So it does not come out and say that  
25 there is a heightened burden on the applicant or that it's



1 the -- the applicant's burden at this stage. I mean, the  
2 officer has the ability under the statutes and the regulations  
3 to elicit, you know, all useful and relevant information and to  
4 consider --

5 THE COURT: But that's the -- that is the -- that is  
6 at later stages. The -- do you concede that when the person is  
7 coming across the border and the initial cut is made about  
8 expedited removal or not, there is not an obligation on the  
9 part of the applicant to put forward all of the evidence  
10 related to their status; yes or no?

11 MR. PLATT: We do not concede that. I mean, I would  
12 push back on the -- I would just maybe make one clarification.  
13 I mean, if the officer asks for this information and, you know,  
14 the applicant, you know, has to provide it or provides some  
15 explanation as to why they -- they wouldn't have the  
16 information and so --

17 THE COURT: Under the Lesson Plan. And that's  
18 precisely the problem. In other words, I don't -- I don't read  
19 the law or the regulations to permit the asylum officer to ask  
20 for all of the information in evidence that would be required  
21 at the later part. If that were the case, we don't need the  
22 later stage. What's the point of the bifurcation if the asylum  
23 officer on the border standing there as they watch the person  
24 cross over has the ability to say, Please provide all of the  
25 notarized statements of your eligibility right now.

1           So if that is what the Lesson Plan is trying to do,  
2           which is what plaintiffs are suggesting, and what it appears  
3           from some of these provisions, then doesn't the agency have a  
4           problem? Because what they've really done is ignore the  
5           bifurcation that exists in the statute, whether we're talking  
6           about one little provision here or there, the overarching theme  
7           is that you're trying to make the expedited review process in  
8           terms of the burdens on the applicant be what is required later  
9           once the applicant has a lawyer and the ability to get their  
10          information; right? And Congress has clearly set out two  
11          separate schemes; is that not -- has Congress not set out two  
12          separate schemes?

13                 MR. PLATT: That's -- that's correct.

14                 THE COURT: All right. So you concede that there's  
15          something called expedited review?

16                 MR. PLATT: We would concede that.

17                 THE COURT: Okay. And at least as the plaintiffs  
18          read the statute, expedited review requires less in terms of  
19          proof, et cetera, findings. It's, you know, on the applicant,  
20          and that, in fact, the applicant is not admitted into the  
21          United States as a result of this cursory initial process.  
22          They go on to the full review process, and plaintiffs read this  
23          Lesson Plan as taking many of the salient criteria from the  
24          full process and putting them in the, quote/unquote,  
25          "discretion" of the asylum officer standing on the border.

1           Why are they wrong about that in terms of actually  
2           the substance of this? Am I wrong about what the theme is in  
3           terms of what they see happening, and isn't that inconsistent  
4           with the law?

5           MR. PLATT: So, I mean -- and perhaps I'm  
6           misunderstanding their argument, but the statute and the  
7           regulation allows the officer to elicit relevant information.  
8           I don't see anything in the Lesson Plan that says that, you  
9           know, when an officer must render a negative credible fear  
10          determination based on some, you know, criterion that is not  
11          permissible at that stage.

12          THE COURT: No, but it doesn't have to say that to be  
13          inconsistent. You're suggesting that the only way it can be  
14          inconsistent is if the statute says here's what you're to do at  
15          expedited removal and the Lesson Plan says don't do that. And  
16          I'm suggesting that it can be inconsistent, yes, in that way,  
17          but it can also be inconsistent insofar as expedited removal is  
18          a truncated smaller process where all you have to do is  
19          determine that -- let me find the actual language --  
20          ". . . there is a significant possibility" -- right -- "taking  
21          into account the credibility of the statements made by the  
22          alien in support of the alien's claims and such other facts as  
23          are known to the immigration judge, that the alien could  
24          establish eligibility for asylum"; right? That's in the  
25          regulations. That's the standard.

1                   Now --

2                   MR. PLATT: I agree.

3                   THE COURT: -- it can be inconsistent if the agency  
4 reads that language and says, Oh, it says such other facts that  
5 are known to the officer. Let's instruct the officers to ask  
6 for all the information that they could ordinarily get later on  
7 in the process. Let's instruct them to use their discretion to  
8 essentially heighten the standard here. We're not just looking  
9 for a significant possibility. We're looking for the evidence,  
10 says the officer standing on the border. I'm suggesting that  
11 there's an inconsistency there with both the term but also the  
12 spirit of the dichotomy between expedited and full.

13                  MR. PLATT: I mean, I would say to that that the  
14 Lesson Plan does not require the officer to take that into  
15 account. I mean, we may disagree -- agree to disagree on what  
16 inconsistency means, you know. We don't believe that it's part  
17 of 8 U.S.C. 1252(e)(3); that is, something is unlawful because  
18 it's inconsistent with the spirit of that law.

19                  THE COURT: So inconsistent with the spirit is okay?

20                  MR. PLATT: No, we would disagree with that. We  
21 would say that it has to be inconsistent with the text of the  
22 other law. So in, you know, this case, the fact that it  
23 doesn't -- isn't instructing negative credible fear  
24 determinations based on evidence that the officer is  
25 gathering -- you know, if the officer determines that there's

1 nothing he's requesting -- he or she is requesting that is  
2 relevant or bears on the ultimate determination that he or she  
3 has to make, then --

4 THE COURT: So only if they ask about totally  
5 irrelevant stuff that never had anything to do with this, would  
6 that be -- only if the Lesson Plan said ask about all kinds of  
7 things, how many, you know, family members you have back home,  
8 just random stuff, that would be inconsistent, but as long as  
9 they're being instructed to ask for things that are ultimately  
10 relevant to the process, that's okay?

11 MR. PLATT: I -- I would -- in the first scenario, I  
12 think completely irrelevant stuff, that would be, you know,  
13 further afield from what we have here, but I think that if --  
14 if it's relevant to the credible fear determination that  
15 they're making -- and it could be relevant. You know, the  
16 officer has broad abilities to request further information.  
17 Whether he or she can actually use those in making the  
18 determination, maybe they'll be discovered to be irrelevant,  
19 that's going to be something different. And that's not what  
20 the Lesson Plan instructs officers to do.

21 THE COURT: It's very interesting. I think your  
22 argument is interesting. No, I have to think about it. No,  
23 because I haven't really focused on it in this way.

24 So you're saying not inconsistent because this is  
25 relevant to the ultimate determination, and, in fact, look at

1 these regulations that later say here's all the stuff. And so  
2 to the extent that you can find or that you have to find or  
3 that you must do -- and since there's discretion given to the  
4 officer standing on the border -- if we tell them to  
5 essentially ask for all that stuff at the early stage, it's  
6 fine?

7 MR. PLATT: Well, possibly, but also if the request  
8 for more information brings back something that is relevant at  
9 the credible fear stage -- so putting aside what may ultimately  
10 be at issue in the ultimate asylum determination in a full  
11 removal proceeding --

12 THE COURT: Yeah, but the credible fear stage is a  
13 species. It's a subset. It is a first cut. So presumably  
14 everything that you get at the credible fear stage will be  
15 relevant to the ultimate determination because it is -- it's  
16 like -- it's like a preliminary injunction versus the full, you  
17 know -- fully litigated thing; right? The Court at the  
18 preliminary injunction stage is making a general determination,  
19 sort of looked at everything and kind of say -- or we looked at  
20 some things and we think you might have enough to go on.

21 MR. PLATT: And that may also be relevant to the  
22 credible fear determination, is my point. So if some of the  
23 information comes back and it has facts that are relevant to  
24 the officer such that he or she can tell whether the applicant  
25 has a positive or negative credible fear of persecution or

1 torture, that would be directly relevant to these credible fear  
2 proceedings.

3 The way that we're looking at this is similar to --  
4 to go to the eighth point, the one on State Department reports.

5 THE COURT: Yes.

6 MR. PLATT: So what the distinction there between  
7 having to consult these reports and then the separate issue of  
8 relying on them. So the fact --

9 THE COURT: Well, what about the "must consult"?  
10 Must consult. Before this species of the Lesson Plan came out,  
11 the officer might, could, was -- could be something they looked  
12 at. Now it's something they must consult, and they're being  
13 told, says plaintiffs' counsel, qualitatively that these things  
14 are important, significant, objective, et cetera.

15 MR. PLATT: Right. But it doesn't narrow their  
16 ultimate discretion as to reject them. I mean, the -- the  
17 administrative record in the Lesson Plan, it's -- emphasizes  
18 that the officer has to consider the totality of the  
19 circumstances. It doesn't say actually what kind of weight or  
20 what level of weight must be given to these reports. It says  
21 they're objective, salient, and relevant, but it doesn't, you  
22 know, prohibit an officer from saying, Well, no, this is  
23 inconsistent with what I'm -- what testimonial evidence I'm  
24 receiving here and the officer is -- is free to reject them.

25 Also, the Lesson Plan doesn't refer to any one

1 specific type of, you know, for example, State Department  
2 report, but talks more generally about them. And the  
3 regulation -- and I hate to go back to the statute, but the  
4 statute says, you know, other such facts that the applicant --  
5 or sorry -- that the officer has gives the officer a broad  
6 range of materials that he or she can look at. And I think  
7 at -- at bottom, this is not inconsistent with how the statute  
8 and the regulations require officers to treat State Department  
9 reports and other such reports.

10 THE COURT: All right. So talk to me about the  
11 remedy. Do you have other things you want to say about what  
12 plaintiffs' counsel said previously?

13 And if not, tell me how I'm supposed to proceed.  
14 Plaintiffs' counsel at the outset said that you-all are not  
15 pressing severability, and I'm confused as to why not.

16 MR. PLATT: So we are asking the Court to remand it  
17 back to us. So "we" being, I guess, the USCIS. If Your Honor  
18 were to identify something objectionable, unlawful in the  
19 Lesson Plan, I think that that would be the -- the least  
20 disruptive way to bring the Lesson Plan back into conformity.  
21 So, for example, if the issue is that everything in there is  
22 lawful but the agency did not provide a sufficient explanation  
23 of it, to then give the agency a chance to, you know,  
24 consider --

25 THE COURT: Setting aside that --



1 MR. PLATT: Yeah.

2 THE COURT: -- right? That's an APA arbitrary and  
3 capricious, potentially facially defective kind of analysis.  
4 In the world in which I've gone through the nine and four of  
5 the -- or five of the nine I say, yes, inconsistent, I guess I  
6 don't really understand what the government's position is.

7 Plaintiffs say those inconsistencies are so  
8 interwoven with this Lesson Plan in terms of the instruction  
9 that is being given to these officers that the Court on that  
10 basis of their finding, of the finding that there are  
11 inconsistencies in it, should vacate the entire document, can't  
12 use this Lesson Plan. In effect, that sends it back to the  
13 agency, because -- if you would like to instruct your people,  
14 can't use this document. So I guess you've got to write  
15 another one, I guess.

16 Why -- what's your position on that? Why aren't they  
17 right, and why wouldn't you be saying in response, No, no,  
18 don't vacate the entire document. Just strike those particular  
19 portions.

20 MR. PLATT: So that is what we're asking for. I  
21 mean, I'd have to go back and check to see exactly what we said  
22 in our briefs, but, yes, that would be a permissible remedy. I  
23 think that would be the easiest way going forward as far as  
24 trying to then determine what the agency can include in a  
25 Lesson Plan, and especially since --

1 THE COURT: By that, you mean the striking --

2 MR. PLATT: The striking, yes.

3 THE COURT: -- of the particular -- so four of the  
4 nine I say no-go?

5 MR. PLATT: Right.

6 THE COURT: Just invalidate those four. And then if  
7 the agency wants to apply it, they would have to rewrite them  
8 or bring them into conformity or not.

9 MR. PLATT: Exactly. And to reduce -- I don't  
10 know -- the possibility that we'll be back here on some sort of  
11 motion to compel when the agency releases a new document and if  
12 plaintiffs believe that that does not sufficiently cure the  
13 things that the Court found unlawful, and so for that reason --

14 THE COURT: I'm sorry. Why would that reduce that  
15 possibility? Wouldn't that open the door to that possibility?

16 MR. PLATT: I don't think so. If Your Honor were to  
17 pick at -- or to identify what exactly is unlawful in this  
18 document, if anything, instead of simply striking the entire  
19 thing, that would then make it a lot clearer as to what the  
20 agency should go back and change if it wants to continue  
21 addressing that topic or if the agency has to -- or, you know,  
22 a certain formulation is completely verboten, off the table.

23 THE COURT: All right. Well, we may still be back;  
24 right? Because then the agency would try to cure it. The  
25 plaintiffs would say what they've done -- because the

1 plaintiffs' position is this is all interwoven, it's too hard  
2 to pick apart. They'll still say that it's not a cure; that  
3 there's more in here that needs to be addressed; right?

4 MR. PLATT: Perhaps, and, you know, that could also  
5 be a new lawsuit. I mean, we'd have to see exactly what's --  
6 what's going on.

7 THE COURT: Hopefully not assigned to me. Goes in  
8 the wheel. Goes in the wheel.

9 All right. Are there other things that you wanted to  
10 address?

11 MR. PLATT: No. Maybe just briefly hit on the -- the  
12 remedies. You know, our position remains that under 1252(e) --  
13 (e) in general, that subsection -- the Court is only able to  
14 issue declaratory --

15 THE COURT: Why do you say that? I think I addressed  
16 that in *Make the Road*.

17 MR. PLATT: You -- you did issue a preliminary ruling  
18 on that issue, but, you know, looking at (e)(1)(A) in the  
19 statute, as we read it -- we believe it's the most sensible  
20 reading of the statute -- that the Court can only enter  
21 declaratory, injunctive, or equitable relief and --

22 THE COURT: Sorry, (e)(1) -- hold on.

23 MR. PLATT: Yeah. Sure.

24 THE COURT: (e)(1)(A), uh-huh. Okay.

25 MR. PLATT: So as we read this provision, as we've

1 briefed, the Court has no ability to enter declaratory,  
2 injunctive, or other equitable relief except as a subsequent  
3 paragraph authorizes that relief. And under (e)(3), which is,  
4 you know, the basis for statutory jurisdiction here as  
5 plaintiffs have argued, that would be -- that limits the Court  
6 to making determinations. So we do not believe that any sort  
7 of injunction is a permissible form of relief that the Court  
8 could order.

9 Further, we do not believe that the Court has the  
10 ability to vacate the tens of thousands of credible fear  
11 determinations that have been issued to persons not before the  
12 Court.

13 THE COURT: Are plaintiffs asking for that?

14 MR. PLATT: They are asking for that. That's in  
15 their proposed order.

16 THE COURT: Oh. I thought it was just the five  
17 people that were here today.

18 MR. PLATT: I mean, they can explain what they're  
19 asking for, but -- you know, perhaps better than I could, but  
20 in that proposed order, as worded, it implies that the Court  
21 would be vacating every credible fear determination that has  
22 been issued since the Lesson Plan came out, now almost six  
23 months ago.

24 THE COURT: All right.

25 MR. PLATT: And then as -- you know, I think that's

1 pretty much the only major points that I wanted to make. So  
2 I'll sit down.

3 THE COURT: Can I just ask you --

4 MR. PLATT: Please.

5 THE COURT: -- what is the -- what is the  
6 government's position with respect to the effect of a Court  
7 determination that a written procedure, policy guideline,  
8 et cetera, of the agency is not consistent with the law?

9 What I'm worried about is the suggestion that under  
10 this statute the Court can only declare that this is invalid  
11 but not enjoin the agency from continuing to apply that, and I  
12 just wonder if that's -- you know, is it your suggestion that  
13 Congress intended for agencies to act in good faith such that  
14 when there was a declaration by a Court that there was an  
15 unlawful provision in its regulations or rules or policies or  
16 procedures that the government would actually act not to  
17 imply -- to apply that?

18 We have seen from the current administration that  
19 that's not what occurs. So I'm trying to understand whether  
20 your suggestion is that if the Court were to merely determine  
21 that this is unlawful, the government would then no longer  
22 apply that provision.

23 MR. PLATT: I mean, we would have to see what the  
24 Court's order looks like and exactly what the issues with the  
25 Lesson Plan are. But, I mean, yes, the -- I mean, the agencies

1 would comply with that, and that's what Judge Moss found in  
2 O.A. in his order. He -- I believe that he, you know, only  
3 declared the provision at issue to be unlawful without  
4 separately entering an injunction. He found that it was not  
5 necessary in that case. So we would urge the Court to take the  
6 same path.

7 THE COURT: All right.

8 MR. PLATT: Thank you.

9 THE COURT: Let me have plaintiffs' counsel -- first,  
10 can I just get you to answer whether you're asking for a  
11 vacatur of every credible fear determination that's occurred  
12 under this new Lesson Plan.

13 MR. COX: No, Your Honor, we are not.

14 THE COURT: All right.

15 MR. COX: We ask for a declaration that credible fear  
16 proceedings undertaken pursuant to the unlawful Lesson Plan  
17 were not consistent with the law, but that is not -- that's not  
18 vacatur.

19 THE COURT: Okay.

20 MR. COX: On remedy -- just sort of working  
21 backwards -- Judge Moss did nothing like that. Judge Moss  
22 actually vacated the rule in its entirety. He did decline to  
23 separately enjoin it, but he vacated the rule in its entirety.

24 THE COURT: Consistent with the APA that says you  
25 hold unlawful and set aside agency actions.

1 MR. COX: Yes, Your Honor.

2 THE COURT: All right.

3 MR. COX: The -- I think more generally, the --  
4 the -- we agree that there would be some benefit to the Court  
5 specific -- enjoining specific policies so that the -- the  
6 agency does not continue to rely on them. It's clear with this  
7 most recent September Lesson Plan that even when illegalities  
8 are brought to the government's attention, they continue to  
9 seek to implement them. And so we do think that a specific  
10 injunction about particular policies would be useful.

11 THE COURT: So you're suggesting that I go beyond  
12 what Moss did?

13 MR. COX: We do think that the Court should vacate  
14 the Lesson Plan in its entirety. Judge Moss indicated that  
15 there was a clear, unequivocal statement from counsel that the  
16 agency would abide by vacatur. We actually noted in our  
17 opening brief, ECF 38, that if -- if the defendants were to say  
18 unequivocally that they would abide by such a vacatur, that  
19 perhaps no additional injunctive relief would be necessary.  
20 That statement was entirely ignored by defendants.

21 THE COURT: Although you heard counsel here today  
22 suggest that they would.

23 MR. COX: Depending on what it said, I think was the  
24 statement. Regardless, we feel like they were invited. They  
25 said nothing.

1 More generally, the -- the -- on the remedy issue,  
2 it's -- in their open brief, the defendants did argue that this  
3 Court could only provide declaratory relief. We pointed out in  
4 our opening brief that they had told Judge Sullivan that he  
5 could vacate individual expedited removal orders, which, of  
6 course, is injunctive relief, and in their reply defendants  
7 agree that this Court could vacate the negative credible fear  
8 determinations and --

9 THE COURT: In Sullivan's case or both -- our case?

10 MR. COX: They've now said it in both cases.

11 THE COURT: Okay.

12 MR. COX: That -- so we noted in -- on page 16,  
13 note 10 of our opening brief that the government had told  
14 Judge Sullivan that in a case under (e) (3) that vacating  
15 individual orders of expedited removal of individual plaintiffs  
16 was appropriate. That, of course, is injunctive relief.

17 So -- and then in their reply, the defendants stated  
18 that this Court -- that the remedy is declaratory relief and  
19 vacatur of our individual plaintiffs' negative credible fear  
20 determinations. That's injunctive relief. So -- and they've  
21 never -- and we pointed out, no reply. They've never tried to  
22 reconcile their suggestion that 1252(e) limits this Court to  
23 declaratory relief and the concession that the Court can  
24 provide injunctive relief in the form of vacating individual  
25 negative fear -- individual negative credible fear



1 determinations.

2 THE COURT: All right.

3 MR. COX: I think that's what we wanted to say about  
4 remedy. I think the only other thing we wanted to say is that  
5 we do believe that the remedy should go to the  
6 September Lesson Plan. We have a pending motion for leave to  
7 file supplemental pleading to state our same claims as to the  
8 September Lesson Plan, but defendants --

9 THE COURT: Sorry. So you're suggesting that the --  
10 say again. I know there's a pending motion. There was a  
11 Lesson Plan change between the one that is operable in your  
12 current complaint. The September Lesson Plan is the new one.

13 MR. COX: Yes, Your Honor.

14 THE COURT: You're seeking to have your complaint  
15 amended to add the September Lesson Plan. I think the parties  
16 are in agreement that none of the language that you are  
17 challenging in the nine at least has changed.

18 MR. COX: I believe that's correct, Your Honor, yes.

19 THE COURT: All right.

20 MR. COX: Just to clarify. It's a -- we want to  
21 supplement our complaint rather than amend simply -- and it  
22 just matters for standing purposes.

23 THE COURT: Okay. So you'd like to supplement your  
24 complaint to add the September Lesson Plan, and none of it  
25 changes the substance of any of your arguments because the

1 inconsistencies that you've identified continue to exist in the  
2 September.

3 MR. COX: It doesn't change anything with regards to  
4 the -- our claim that the Lesson Plan is inconsistent with the  
5 law. It also doesn't just change anything with regards to our  
6 notice and comment and due process.

7 THE COURT: But how does it -- how can these  
8 plaintiffs be the ones to press the September Lesson Plan since  
9 their credible fear determinations were not made under it?

10 MR. COX: Plaintiffs Sophia and Julia, are two  
11 deported plaintiffs, are entitled under the present action to  
12 new credible fear proceedings under lawful standards. That --  
13 absent further action from this Court, that would mean that  
14 those future credible fear proceedings that they're entitled to  
15 would be governed by the September Lesson Plan. So they most  
16 plainly have standing, because that's what's going to be  
17 applied to them. So the other plaintiffs are essentially in  
18 the same position that they were in with regards to the  
19 September Lesson Plan as they are to the April ones, but those  
20 two in particular --

21 THE COURT: And that's because Sophia and Julia have  
22 not yet had their credible fear or they have?

23 MR. COX: They had credible fear proceedings under  
24 the April Lesson Plan.

25 THE COURT: Yeah.

1           MR. COX: And then they were deported. Under --  
2           under our cross-motion for summary judgment, they -- if this  
3           Court were to vacate their expedited orders of removal and  
4           their negative credible fear determinations, as we believe it  
5           should, and order the government to provide them with new  
6           credible fear proceedings, those future credible fear  
7           proceedings are going to be governed by the September  
8           Lesson Plan.

9           THE COURT: And why are they distinguished? Just  
10          because of their deportation? Aren't there other of your five  
11          who've already had -- who've had credible fear determinations  
12          under the prior Lesson Plan who would, if you win --

13          MR. COX: Yes. I want to be clear. They are  
14          essentially in the same position as vis-a-vis the September  
15          Lesson Plan as they are the April Lesson Plan. The government  
16          has never proven that they -- that their claims are moot. And  
17          so any future credible fear proceedings would be governed by  
18          the September one with regards to them as well.

19          And as Your Honor is aware, the government is  
20          attempting to expand the law to permit them to apply expedited  
21          removal to anyone who's been here for -- or who can't prove  
22          that they've been here for more than two years.

23          THE COURT: Yes. I guess -- this is helpful because  
24          I wanted to talk about Ms. Kiakombua and the other person who  
25          had their -- who have already had their negative credible fear

1 determinations for expedited removal purposes reversed. Why  
2 aren't their claims moot?

3 MR. COX: Well, Your Honor, it's the government's  
4 burden -- as the party is suggesting mootness -- to prove that  
5 they actually are moot. The government argues, asserts that  
6 they have been placed in full removal proceedings, but they  
7 have not provided any evidence of that. They've provided  
8 the -- the notices to appear that they provided were -- one of  
9 them is Ms. Kiakombua. There's no evidence that it was served  
10 on the immigration court, and as the regulations provide, the  
11 full removal proceedings do not commence until a proper notice  
12 to appear is served on the immigration court, not merely on the  
13 respondent.

14 THE COURT: All right. So this is an argument about  
15 evidence and not necessarily the law. If they have such  
16 evidence and they present it, then do you concede that their  
17 claims are moot?

18 MR. COX: There are four independent reasons why  
19 they're not moot. One is there's no evidence that it's been --  
20 that the notices to appear have been filed with the immigration  
21 court. Even the notices to appear that they gave to this Court  
22 are defective because they don't say a date or time, and the  
23 Supreme Court recently held that if you don't have a date or  
24 time of the hearing, it's defective. The third one is that  
25 they could be -- the government has never disclaimed the

1 ability to return them to expedited removal, and that  
2 possibility alone, it's -- it's classic voluntary association  
3 essentially.

4 THE COURT: Maybe. Maybe. I mean, it -- to the  
5 extent that -- if the government were to prove sufficiently  
6 that they had vacated the expedited removal, then they --  
7 they're no different than anybody else who could be picked up  
8 and subjected to expedited removal; right? I mean, if the  
9 government were to establish that these folks are not in  
10 expedited removal right now, whether it be because they're in  
11 full removal or the government has just disclaimed any  
12 responsibility for their deportation status right now, that  
13 would seem to me to rob them of the standing that would be  
14 necessary to proceed as plaintiffs in this case.

15 MR. COX: I think that it would be -- if we hadn't  
16 already filed the case, I think that it would be tough for  
17 individuals in that circumstance to prove that they have  
18 standing, but there is a twilight zone where the -- the facts  
19 are such that plaintiffs may not be able to establish standing  
20 in the first instance, were they to file a case tomorrow, but  
21 the government, nonetheless, cannot carry its burden of proving  
22 that there is no possibility that they will be injured again by  
23 the offending conduct, and so we -- I think in that situation,  
24 we would be in that -- in that twilight zone where, you know,  
25 if it happened -- if the government had done all this before we

1 filed suit, it'd be a different story, but --

2 THE COURT: I see. So based on the fact that they've  
3 already previously been, you say, erroneously or illegally  
4 subjected to expedited removal, then you file the lawsuit, then  
5 the government changes its mind, it's not enough to moot the  
6 case -- although that's really when mootness usually happens,  
7 after you have filed your lawsuit, but you say unless the  
8 government then goes on to establish that it could not happen  
9 again --

10 MR. COX: Right. Yes. Mootness requires the -- when  
11 it's a voluntary act of the defendant, that defendant has to  
12 prove that there's no possibility that the offending conduct  
13 could recur. And typically that's -- you know, if the law was  
14 changed or if the conditions under which they could -- that led  
15 to the violation simply no longer exists -- the factual  
16 predicates are gone -- that'd be one thing. But the government  
17 here has never disclaimed that they could simply return them to  
18 expedited removal, and that --

19 And then, of course, the fourth reason, to be clear,  
20 is that they seek relief other than being kept out of expedited  
21 removal. That's the fourth reason, and because they ask, for  
22 example, for an injunction from this Court that they not be  
23 returned to expedited removal and also declaration that the  
24 negative credible fear determination that they previously  
25 received was not in accordance with law. Because as we -- as

1 we've explained, the fact that someone had a negative credible  
2 fear determination, the record that's produced in that  
3 proceeding follows the individual into their full removal  
4 proceedings.

5 THE COURT: Well, tell me how I get there; right?  
6 Aren't there all kinds of statutory provisions that take care  
7 to remove from jurisdiction the Court's ability to address  
8 credible fear determinations in particular cases? The thing  
9 that sort of gives me comfort about acting in this area at all  
10 is the notion that you're proceeding under 1253 -- 1252(e)(3);  
11 that this is a challenge to the system. Because it seems to me  
12 the statute is pretty clear about the limitations on operating  
13 with respect to the application of such section, meaning  
14 1225(b)(1) to individual aliens, including the determinations  
15 made under 1225(b)(1)(B), and I'm reading there from  
16 1252(a)(2)(A)(iii), which doesn't have an except as provided by  
17 1252 --

18 MR. COX: We're not asking for --

19 THE COURT: -- (e)(3).

20 MR. COX: -- this Court to say that the -- that with  
21 regard to Ms. Kiakombua, for example, that the asylum officer  
22 erred in finding that she lacked credible fear. We're not  
23 asking the Court to say that substantively the government was  
24 wrong. We're asking the Court to simply say that the process  
25 by which they reached whatever conclusion they reached was not

1 in accordance with law because it was undertaken pursuant to  
2 these unlawful procedures and set out in the Lesson Plan.

3 THE COURT: So you think that's not  
4 1252(a)(2)(A)(iii)?

5 MR. COX: No, Your Honor. We -- and this is an issue  
6 we briefed in our opening brief, but it's not -- it's -- it's  
7 an attack on the -- on the system; right? The Lesson Plan sets  
8 forth a generally applicable policy and procedures, and so it's  
9 about the Lesson Plan. It's saying that the Lesson Plan sets  
10 forth something is unlawful and so the -- and it was applied in  
11 Ms. Kiakombua's case and -- as well as the other plaintiffs.  
12 And so it's simply a declaration that the -- when the  
13 Lesson Plan was governing these proceedings -- because the  
14 Lesson Plan wasn't consistent with the law -- then the  
15 proceedings were not consistent with the law.

16 THE COURT: And why wouldn't that be the case with  
17 respect to every single person who was -- whose credible fear  
18 determination was considered under this Lesson Plan?

19 MR. COX: I think it was. It was.

20 THE COURT: But you wouldn't be asking for a court  
21 order that broad?

22 MR. COX: We're not asking for the Court to vacate  
23 anyone -- anyone other than the individual plaintiffs' negative  
24 credible fear determinations. We're not asking the Court to  
25 order the government to parole in anyone else who -- as unfair



1 as it is, frankly. We're not asking for any sort of class  
2 treatment in that regard. We're simply asking the Court to say  
3 that this process that the government created was an unlawful  
4 one, and that's the -- because we don't want to run afoul of  
5 these things. We don't think it's particularly fair, to be  
6 clear, but we think that that's -- that the Court can go that  
7 far without running afoul of 1252(a)(2)(A).

8 THE COURT: All right. Anything else?

9 MR. COX: I don't believe so, Your Honor.

10 THE COURT: Mr. Platt, if you have anything else,  
11 I'll give you the last word.

12 MR. PLATT: Thank you, Your Honor.

13 Just a few closing thoughts. The first of which is  
14 as far as declaring the -- you know, the tens of thousands of  
15 credible fear determinations that have been rendered since the  
16 April 2019 Lesson Plan was issued, declaring those unlawful if  
17 the -- or invalid, if the Court determines that the Lesson Plan  
18 was unlawful -- you know, we're not aware of any Court in the  
19 1252(e)(3) setting which has given that sort of retrospective  
20 relief to parties that are not before the Court. And, in fact,  
21 I believe that did not even happen in *Grace*.

22 As far as vacating the 20 -- September 2019  
23 Lesson Plan, we would ask Your Honor to not do that. The  
24 September 2019 Lesson Plan is a separate -- you know, that's  
25 separate conduct by the agency, separate alleged agency action,

1 and as such --

2 THE COURT: Well, the plaintiffs are asking to  
3 supplement their amended complaint so that it's not separate;  
4 right?

5 MR. PLATT: Sure, but as a separate alleged agency  
6 action, then it would -- you know, likely has a separate  
7 administrative record. It's -- you know, it might have  
8 different characters or -- characteristics or qualities to it,  
9 which at the very least the Court should not just alongside  
10 vacating or setting aside or whatever relief is granted as  
11 regards to the April Lesson Plan. The Court should not just --

12 THE COURT: Do you concede or agree with the  
13 plaintiff -- I don't know if you've looked at them side by  
14 side, but they say everything we're challenging in April  
15 appears in September. And what we don't want, says the  
16 plaintiffs, is for the Court to vacate the determinations that  
17 were made with respect to our five clients and then either  
18 enjoin or the agency voluntarily undertakes to redo the  
19 credible fear determinations of those five people using  
20 September, which is substantively identical. Why aren't they  
21 right about that? I mean, to the extent that what they were  
22 concerned about with respect to April still exists, then why  
23 aren't they entitled to ask for the Court to address September  
24 as well?

25 MR. PLATT: So they are not because, one, the -- like

1 I said, the administrative record could look different. You  
2 know, if Your Honor --

3 THE COURT: But it doesn't look different relevant to  
4 this decision because this decision carries over.

5 MR. PLATT: Well, it would, but if Your Honor  
6 concludes for example that the April 2019 Lesson Plan should  
7 have undergone or -- you know, is invalid because it was  
8 insufficiently reasoned --

9 THE COURT: Fair point. Let me talk about pure  
10 inconsistencies, the nine.

11 MR. PLATT: Sure. I mean, in that case, there is --  
12 I mean, there's also the prong that these plaintiffs -- I mean,  
13 we would want to see standing arguments here. We would also  
14 want to -- I mean, if Your Honor -- let's put it this way: If  
15 Your Honor were to issue a declaration that, you know, certain  
16 parts of the April 2019 Lesson Plan are invalid and those parts  
17 also appear in the September 2019 version or any other future  
18 version, I mean, then, you know, the government would, you  
19 know, comply with that and would issue -- you know, would  
20 reform --

21 THE COURT: Here's what I'm concerned about --

22 MR. PLATT: Sure. What's that?

23 THE COURT: -- Mr. Platt. There was a time in which  
24 we could assume that if the Court declared agency action  
25 unlawful, the agency would consider that to be a definitive

1 statement of the law and govern itself accordingly.

2 It's very clear from statements made by the -- no  
3 less than authority than the attorney general that agencies  
4 today do not -- "do not" -- agencies today are being counseled  
5 that a statement of the law made by a district judge should  
6 apply only to the parties who are before the Court, only in the  
7 circumstances that exist right there, and that the agency is  
8 free to continue to apply whatever provision of law it prefers,  
9 no matter the courts having determined it unlawful in other  
10 circumstances.

11 So I find it hard in -- against that backdrop to  
12 accept that if this Court says April is invalid and  
13 September is substantively identical, the agency will consider  
14 my statement with respect to April to apply to September and  
15 not apply September to these plaintiffs.

16 MR. PLATT: I just maybe have two responses to that.  
17 One of which is, you know, the September 30 Lesson Plan is  
18 still open to challenge. The 60-day window has not closed on  
19 that.

20 THE COURT: Which is why they want to add it to their  
21 complaint. Why can't they challenge it today?

22 MR. PLATT: Because -- I mean, I -- I think that  
23 the -- another reason why Your Honor should decline to provide  
24 that relief is because the new Lesson Plan has material in it  
25 that is, you know, as far as I can tell, unrelated to this case

1 but would also -- you know, a baby thrown at it with bad bath  
2 water or at least a baby that no one has challenged yet as  
3 being unlawful in some way under 1252.

4 The primary reason, as far as I can tell -- and,  
5 again, I haven't seen the administrative record -- for the  
6 September 2019 revision was to discuss a new administrative  
7 decision called *Matter of L-E-A-*, and so the new guidance to  
8 the field, either where the officers are told, Hey, this  
9 decision exists, you know, here's a little squib about it, that  
10 wouldn't be able to be given out to the officers. So for that  
11 reason we would ask, Your Honor --

12 THE COURT: I guess I just have one other thought on  
13 this, and I'm worried about it. I don't understand why we  
14 wouldn't be setting up a circumstance in which the agency is  
15 constantly mooted existing claims with respect to this sort of  
16 thing. Because all that would be necessary, I would think --  
17 since there's no time frame, there's no notice and comment,  
18 says the agency, at any moment we can suddenly whip out a new  
19 Lesson Plan; right?

20 Why wouldn't this be sort of a "capable of  
21 repetition, not yet evading review" kind of analysis if every  
22 time we get close to a judgment with respect to one version of  
23 this thing, the agency can issue another one? And even if the  
24 provisions that are being challenged are substantively  
25 identical, you're arguing the plaintiffs can't amend their

1 complaint to include this new one; the agency can just keep  
2 rolling them out.

3 MR. PLATT: I think that we would just want to see  
4 that claim fully fleshed out. I mean, if these -- in all  
5 respects or material, you know -- material documents, then I  
6 know I probably have less objection to that than if, say --

7 THE COURT: So you may not object to their motion to  
8 amend to allow the -- you want to see it, I'm sure. I think  
9 they may have even provided -- have you provided?

10 MR. COX: (Nods head.)

11 THE COURT: Yes, they've provided. So we know what  
12 it is they want to amend their complaint to look like today.

13 MR. PLATT: Yeah. I would, frankly, have to -- to  
14 think about that more. I mean, that's --

15 THE COURT: Okay.

16 MR. PLATT: -- that's sort of -- I think we can all  
17 agree that what is in the April 2019 Lesson Plan is -- is still  
18 at issue. We're not arguing that the issuance of a new  
19 document somehow means they can't talk about these issues at  
20 all or we have to go back to square one on this. So --

21 THE COURT: No, but you do appreciate that they don't  
22 want the -- to win in this case, to the extent they win, and  
23 then have the exact same provisions applied to them such that  
24 they need to bring another lawsuit potentially down the line?

25 MR. PLATT: I -- I do, yes. Absolutely.

1 THE COURT: All right.

2 MR. PLATT: If there's no further questions.

3 THE COURT: There's no further questions.

4 Thank you-all for your patience. I will take these  
5 motions under advisement.

6 (The proceedings were concluded.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Nancy J. Meyer, Registered Merit Reporter,  
Certified Realtime Reporter, do hereby certify that the above  
and foregoing constitutes a true and accurate transcript of my  
stenograph notes and is a full, true, and complete transcript  
of the proceedings to the best of my ability.

Dated this 15th day of November, 2019.

/s/ Nancy J. Meyer  
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