IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

SUNNY KUMAR
Plymouth County Correctional Facility
26 Long Pond Road
Plymouth, MA 02360;

Plaintiff,

– versus –

CHAD F. WOLF, in his official capacities as Acting Secretary of Homeland Security & Commissioner of United States Customs and Border Protection, c/o United States Department of Homeland Security 3801 Nebraska Ave, NW Washington, DC 20016;
WILLIAM P. BARR, in his official capacity as Attorney General of the United States, c/o United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530;
KENNETH T. CUCCINELLI, in his official capacity as Acting Director of United States Citizenship and Immigration Services, c/o United States Department of Homeland Security 3801 Nebraska Ave, NW Washington, DC 20016; and
JENNIFER HIGGINS, in her official capacity as Associate

Case No. 1:19-cv-3501

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Director of the Refugee,
Asylum & International
Operations Directorate,
c/o United States Department
of Homeland Security 3801
Nebraska Ave, NW
Washington, DC 20016;

Defendants

INTRODUCTION

1. Plaintiff, Sunny Kumar, brings this action in order to hold Defendants to the American commitment to treat the asylum claims of everyone fairly. In yet another attempt to circumvent this codified and consistently reified commitment, on April 30, 2019 the Trump Administration issued a new set of instructions (the "April 2019 Lesson Plan") to the hundreds of asylum officers who have the life-and-death responsibility of screening out those baseless claims for humanitarian protection from the rest. Then on September 24, 2019, the administration followed up and issued "Amended" the Lesson Plan and issued a "new version" titled, "Credible Fear of Persecution and Torture Determinations," dated September 24, 2019, and issued on September 30, 2019 (the "September 2019 Lesson Plan")

2. Rather than making a good-faith effort to administer the system Congress designed, the Administration issued biased, error-filled set of instructions designed to turn back as many asylum seekers as possible, in violation of the Immigration and Nationality Act ("INA"), the Refugee Act, the Convention Against Torture ("CAT"), the Administrative Procedure Act ("APA"), and the Constitution. Plaintiffs therefore seek to have it vacated and enjoined.

3. The United States has long been committed to providing refuge to those fleeing violence and persecution, and Congress codified that commitment in the Refugee Act of 1980, which declares it to be "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands."

Refugee Act of 1980, § 101(a), Pub. L. No. 96-212, 94 Stat. 102.

4. Even in amending the INA in 1996 to permit immigration officers to summarily expel certain noncitizens from the United States on an expedited basis, Congress was careful to honor our country's historic commitment to those seeking safe harbor by creating a screening process to ensure that anyone who might be eligible for asylum or related forms of humanitarian protection would avoid expedited removal and have full access to the immigration and federal court systems to make their claims. This "credible fear" assessment was deliberately designed to be a permissive standard to safeguard against the United States returning displaced people to dangerous conditions they fled, because doing so contravenes international and domestic law obligations.

5. Since taking office, however, President Trump and his Administration have pursued an explicitly nativist agenda of closing the borders to asylum seekers without regard to our national commitments, including those enshrined in law.

6. Most relevant to this case, the Administration has expressly adopted the goal of dramatically reducing the rate at which asylum seekers pass the initial, threshold "credible fear" screening step—the *only* avenue through which they can apply for humanitarian protection—so as to facilitate their expeditious return to the violence and persecution they fled.

7. In furtherance of the Administration's goal of turning away more asylum seekers, Defendants issued the Lesson Plans to the hundreds of asylum officers

who conduct these screenings. The Lesson Plans instructs the officers in a manner that is contrary to the governing statutes and regulations and substantially—and unlawfully—narrows access to the immigration and federal court systems.

8. Among other things, the Lesson Plans improperly raise the asylum seeker's evidentiary burden; shift to asylum seekers burdens actually borne by the government; and convert what is supposed to be a non-adversarial, threshold screening into a biased and adversarial hearing through which asylum officers are to apply erroneous legal standards to decide ultimate issues that are supposed to await adjudication by the immigration courts.

9. Plaintiff is an asylum seeker who has been expeditiously ordered removed and is at imminent risk of physical removal because of the Lesson Plans issued in April 2019 and September 2019, respectively. Fleeing death threats, beatings, and persecution for refusing to join a terrorist group, Plaintiff reached the U.S. border and sought asylum. However, Plaintiff faces imminent removal because Plaintiff was denied the opportunity to apply for protection when asylum officers found he lacked a "credible fear" under the Lesson Plans.

10. Plaintiff seeks a declaration that the Lesson Plans violate the INA, the Refugee Act, the CAT, the APA, and the Due Process Clause; an order enjoining this unlawful directive so that he may have a fair opportunity to present his claim for humanitarian relief through the system Congress created; and an order vacating Plaintiff's expedited removal order and requiring that he be provided, at a minimum,

with new credible fear screening under the proper legal standard. Plaintiff additionally seeks a stay of his expedited removal.

11. Absent relief from this Court, Plaintiff will be unlawfully deported and condemned to his country of origin to face beatings and other forms of persecution and torture, including death.

JURISDICTION AND VENUE

12. This court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1361 (jurisdiction over actions for mandamus to compel an officer of the United States to perform his or her duty). No other petitions, appeals, or motions have been filed with any other court.

13. This court has jurisdiction to review Credible Fear Review determinations made by an Immigration Judge under the Suspension Clause, U.S. Const. art. I, § 9, cl. 2. *Thuraissigiam v. U.S. Department of Homeland Security, et. al*, 917 F.3d 1097 (9th Cir. 2019).

14. This court also has jurisdiction over the present action pursuant to 28 U.S.C. §2201, the Declaratory Judgment Act; and 5 U.S.C. § 702, the Administrative Procedures Act.

15. This Court has subject matter jurisdiction under 8 U.S.C. § 1252(e)(3), which permits review in the United States District Court for the District of Columbia of "a written policy directive, written policy guideline, or written procedure" implementing the expedited removal statute. The Lesson Plans issued on April 30, 2019

and September 24, 2019, are "a written policy directive, written policy guideline, or written procedure" implementing the expedited removal statute. This Court also has subject matter jurisdiction under 28 U.S.C. § 1331.

16. Venue is proper in this District because 8 U.S.C. § 1252(e)(3) requires actions brought thereunder to be filed in the United States District Court for the District of Columbia. *See also* 5 U.S.C. § 703. Venue is also proper pursuant to 28 U.S.C. § 1391(e)(1) because, on information and belief, a substantial part of the events or omissions giving rise to the Complaint occurred within the District of Columbia, and Respondents are stationed in, have offices in, and/or operate in this district

THE PARTIES

17. Plaintiff Sunny Kumar is a native of Jammu and Kashmir and a citizen of India detained in the custody of the Department of Homeland Security at the Plymouth County Detention Facility in Plymouth, Massachusetts. Plaintiff, a Hindu young male of fighting age from Jammu and Kashmir, was forced to flee India because of harm he faced and feared would continue at the hands of members of unknow Muslim terrorist group due to Plaintiff's refusal to join them and for expressing his political opinion in opposition to such group. Plaintiff was followed to his home, attacked and beaten by members of the unknown terrorist group. Plaintiff was residing at his parents' home and the perpetrators had forced their way home and had forced Plaintiff's mother to feed them and then attempt to recruit Plaintiff to join their group. Plaintiff's persecutors returned on another occasion

looking for Plaintiff but Plaintiff was able to escape by jumping a back wall and running away. Fearing for his life, Plaintiff fled India.

18. Plaintiff report the incident and requested help from the Indian police. The police not only refused to help Plaintiff and his family, but accused them of providing material support to a terrorist organization because Plaintiff's mother had been forced by a pointed loaded gun to feed the "terrorists." The police further threatened the family that if they return, they would be jailed.[1]

19. On May 15, 2019, an asylum officer (AO) determined—pursuant to a credible fear process governed by the unlawful standards and procedures contained in the April 2019 Lesson Plan, and after a very brief interview, including interpretation—that Plaintiff lacked a credible fear of persecution or torture. Without writing down any sort of explanation or articulating the basis for his decision as has been common practice for decades, the asylum officer simply checked the applicable boxes that indicated, "You have not established a credible fear of persecution in your country of nationality, country of last habitual residence, or country to which you have been ordered removed because: .. There is no significant possibility that you could establish in a full hearing that the harm you experienced or fear was/is sufficiently serious to amount to persecution." The asylum officer went on to check the box that indicated, "You have not established a credible fear of torture in a

[1] Ironically, Plaintiff was subjected to the same inquiry by the Asylum Officer, who asks Plaintiff, "If those people are terrorist and you gave them food that would eb material support to a terrorist. Why didn't they arrest you based on that?" The Asylum Officer goes on to check the Possible Bar to Asylum, apparently based solely on this ground (although the possible bar finding does not by itself constitute a negative CFI finding).

country to which have been ordered removed because you have not established that there is a significant possibility that: .. You would suffer severe physical or mental pain or suffering." An immigration judge (IJ) subsequently agreed.

20. Indeed, the Plaintiff has established a well-founded fear of future persecution despite the IJ's and AO's contrary determinations. Again, as Plaintiff asserts that he was credible and thus he did indeed suffer past persecution, he thus has a presumption of a well-founded fear of future persecution. *See, e.g.,* 8 C. F. R. Sec. 208.13 (b) (1) (i), 1208.13 (b)(l)(i). The government may rebut that presumption by showing:(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear; (B) The applicant could avoid persecution by relocating to another part of the applicant's country of nationality. 8 C.F.R. Sec. 208.13(b) (1) (i)(A)&(B), 1208.13(b)(l)(i)(A)&(B).

21. Country conditions have not changed. A 43-page report by the Office of the UN High Commissioner for Human Rights (OHCHR), released on July 8, 2019,[2] raises serious concerns about abuses by state security forces and armed groups in both Indian and Pakistan-held parts of Kashmir. The Indian government dismissed the report as a "false and motivated narrative" that ignored "the core issue of cross-border terrorism."

22. The UN human rights office said that armed groups were responsible for human rights abuses including kidnappings, killings of civilians, sexual violence,

[2] found at https://www.ohchr.org/Documents/Countries/IN/KashmirUpdateReport_8July2019.pdf)

recruitment of children for armed combat, and attacks on people affiliated or associated with political organizations in Jammu and Kashmir. It cited the Financial Action Task Force (FATF), an inter-governmental organization that monitors money laundering and terrorist financing, which has called on Pakistan to address its "strategic deficiencies." India has long accused Pakistan of providing material support, arms, and training to the militant groups. Attacks in Kashmir have resulted in more than 50,000 deaths since 1989. Id.

23. The OHCHR said both India and Pakistan had failed to take any clear steps to address and implement the recommendations made in its June 2018 report, the office's first-ever on human rights in Kashmir. The latest report comes after a deadly attack in February by a Pakistan-based armed group, Jaish-e-Mohammad, that targeted a security forces convoy in Kashmir, killing 40 Indian soldiers. Military escalation between India and Pakistan ensued, including cross-border shelling at the Line of Control (LoC), the de-facto international border in disputed Kashmir. The Srinagar-based Jammu and Kashmir Coalition of Civil Society reported that conflict-related casualties were the highest in 2018 since 2008, with 586 people killed, including 267 members of armed groups, 159 security forces personnel, and 160 civilians. The Indian government asserted that 238 militants, 86 security forces personnel, and 37 civilians were killed. Id.

24. Also, the burden is on the government to demonstrate by a preponderance of the evidence that the applicant can reasonably relocate internally

to an area of safety once there has been a finding of past persecution-and, as pointed out above, again, the petitioner contends that he did indeed suffer (past) persecution. *Melkonian v. Ashcroft*, 320 F.3d 1061, 1070 (9th Cir. 2003); *see also Mashiri v. Ashcroft*, 383 F.3d 1112, 112223 (9th Cir. 2004) (finding the IJ erred by placing the burden of proof on ethnic Afghan to show "that the German government was unable or unwilling to control anti-foreigner violence on a countrywide basis."). The reasonableness of internal relocation is determined by considering whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife; administrative, economic, or judicial infrastructure; geographical limitations; and social .and cultural constraints, such as age, gender, health, and social and family ties. *Knezevic v. Ashcroft*, 367 F.3d 1206, 1214-15 (9th Cir. 2004) (citing 8 C.F.R. § 1208.13(b)(3)).

25. Plaintiff also go nowhere else in India, practically speaking. Not only, does Plaintiff have no friends or family in other parts of India, when Plaintiff attempted to relocate to New Delhi, he was met with hostility, suspicion and discrimination simply because of the region of Indian Jammu Kashmir he came from. The Department of Homeland Security (DHS) must be able to show not just that is possible for Plaintiff to internally relocate, but that it would be reasonable under the circumstances for Plaintiff to do so. *Melkonian v. Ashcroft*, 320 F.3d 1061, 1069 (9th Cir. 2003); *see also Boer-Sedano v. Gonzalez*, 418 F.3d 1082, 1091 (9th Cir. 2005). Courts may consider "any ongoing civil strife within the country;

administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." Id.

26. Furthermore, under *Matter of Mogharrabi*, 19 I&N Dec. 439, 445(BIA 1987), Plaintiff has also established a well-founded fear-which, of course, requires that he show that he has only a one-in-ten chance of being persecuted by the Indian government, and, again, the BJP is the main governmental party-should he be forced to return to India. *See also INS v. Cardoza*, 480 U. S. 421,441(1987). The well-founded fear test requires both a subjective component (fear) and an objective component (a reasonable possibility of persecution). Plaintiff, of course, definitely fears returning to India. He thus has the subjective fear. He also has met the objective component. Sufficient evidence for the objective component is established by showing that "the alien possesses a characteristic a persecutor seeks to overcome by punishing the individuals who possess this characteristic, that a persecutor has the capability of punishing the alien, and that a persecutor has the inclination to punish the alien." *Matter of Mogharrabi, supra* at 446. Plaintiff, who is a young, male, Jammu and Kashmiri Hindu Indian, was targeted for recruitment into a Muslim terrorist group and was punished because he refused to join them and because he expressed his opinion in opposition to them. Furthermore, the government not only refused to help him, but the government is able to punish him, and the government is inclined to punish him-and, in fact, has already threatened to punish him, simply

on the accusation that Plaintiff and his family provided food and shelter to their persecutors.

27. Defendant CHAD F. WOLF is sued in his official capacities as Acting Secretary of Homeland Security and Commissioner of Customs and Border Protection. In his capacity as Acting Secretary, Defendant CHAD F. WOLF is charged with the administration and enforcement of the immigration laws and leads the Department of Homeland Security ("DHS") and its component agencies. These components include USCIS, which employs asylum officers, and Customs and Border Protection ("CBP"). In his capacity as CBP Commissioner, he oversees the work of CBP officers, including Border Patrol agents, who, on information and belief, are or soon will be conducting credible fear screenings.

28. Defendant William P. Barr is sued in his official capacity as Attorney General of the United States. In this capacity, Defendant Barr is charged with the administration and enforcement of the immigration laws and leads the Department of Justice, which oversees the immigration courts. The immigration courts have jurisdiction to review credible fear determinations by asylum officers.

29. Defendant Kenneth T. Cuccinelli is sued in his official capacity as Acting Director of USCIS. In this capacity, he oversees the work and training of asylum officers who conduct credible fear screenings.

30. Defendant Jennifer Higgins is sued in her official capacity as Associate Director of the Refugee, Asylum and International Operations ("RAIO") Directorate for

USCIS. RAIO is responsible for supervising and training asylum officers, including through policy documents such as the Lesson Plan.

BACKGROUND

Rights of Asylum Seekers and Limits on the Executive's Removal Authority

31. Congress has enshrined in U.S. law special protections for individuals fleeing persecution or torture, consistent with the humanitarian commitments of the United States under treaties including the 1967 Protocol Relating to the Status of Refugees and the Convention Against Torture.

32. In enacting the Refugee Act in 1980, Congress "declare[d]" that the Act's purpose was to codify "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." § 101(a), 94 Stat. 102.

33. Consistent with that historic commitment, *all* noncitizens at or within U.S. borders generally have a right to apply for asylum—a form of protection available to individuals who can prove that they are "refugee[s]" within the meaning of the INA for having suffered persecution in the past or having a "well-founded fear" of persecution in the future.

34. Other provisions of U.S. law prohibit the government from removing noncitizens to countries where they face persecution or torture, even if they are not granted asylum. *See* 8 U.S.C. § 1231(b)(3); Convention Against Torture, Art. 3; 8

C.F.R. § 208.16(c), (d). Rather, when appropriate, the government must grant the noncitizens protection in the form of withholding of removal under the INA, *see* 8 U.S.C. § 1231(b)(3), or withholding or deferral of removal under the CAT, *see* 8 C.F.R. § 208.16(c)(4).

35. The principle of *non-refoulement* reflected in these Executive and legislative commitments, moreover, is also a part of customary international law, which likewise provides for the right to seek and receive asylum, mandates a fair process for determination of protection claims, and prohibits torture and cruel, inhumane, and degrading treatment.

Expedited Removal and the Credible Fear Screening Safeguard

36. Before 1997, any noncitizen that the federal government wished to remove from the United States generally was entitled to a full hearing before an immigration judge, with opportunities to challenge the alleged grounds for her removal and to apply for relief from removal, including asylum.

37. With the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which went into effect in 1997, Congress created an expedited removal system through which immigration officers outside the judicial system may order removed certain noncitizens without providing them an opportunity to apply for relief from removal, and "without further hearing or review." 8 U.S.C. § 1225(b)(1)(A)(i); *see also id.* § 1225(b)(1)(B)(iii)(I).

38. Reflecting our country's commitment to asylum seekers, however, and

to avoid the possibility of unlawfully and inhumanely sending individuals back to persecution, Congress took care to ensure that any noncitizen who "indicate[d] either an intention to apply for asylum under [8 U.S.C. § 1158] or a fear of persecution" would be accorded some process before they could be removed—including, potentially, a full hearing before an immigration judge and subsequent review by the Board of Immigration Appeals and federal appellate courts. 8 U.S.C. § 1225(b)(1)(A)(i); 8 C.F.R. § 208.30(f).

39. Thus, if noncitizens in the expedited removal system indicate that they intend to apply for asylum or fear persecution, immigration officers are required to refer them for interviews before asylum officers to determine if they have a "credible fear of persecution." 8 U.S.C. § 1225(b)(1)(B)(ii); *see also id.* § 1225(b)(1)(A)(ii). Throughout the credible fear screening process, the asylum seekers are subject to mandatory detention. *Id.* § 1225(b)(1)(B)(iii)(IV). Asylum seekers have a right to consultation, but not representation, during credible fear interviews. *Id.* § 1225(b)(2)(B)(iv).

40. If an asylum officer determines that an asylum seeker has a "credible fear of persecution," the officer must refer the case to immigration court for a full hearing on whether the individual is subject to removal in the first place and, if so, whether the asylum seeker is eligible for protection such as asylum. If, after the hearing and any appeals, the asylum seeker is found to be removable and ineligible for protection, he or she is ordered removed. *See* 8 U.S.C. §1225(b)(1)(B)(ii); 8 U.S.C. §

1229a; 8 C.F.R. § 208.30(f).

41. Since the adoption in 1999 of regulations implementing the Convention Against Torture—which bars the government from removing noncitizens to countries where they will be tortured—the credible fear safeguard has applied also to those who indicate a fear of torture and are deemed to have a "credible fear of torture." 8 C.F.R. § 208.30(e), (f).

42. When asylum officers determine that asylum seekers do not have a credible fear of persecution or torture, they are ordered removed "without further hearing or review." 8 U.S.C.§ 1225(b)(1)(B)(iii)(I).

43. At this stage, asylum seekers may request review by an immigration judge, but the judge's review is limited to assessing the credible fear determination and is based on the record developed and relied on by the asylum officer. *See* 8 C.F.R. § 1208.30(g)(2). If the immigration judge affirms—which is typically done through a checkbox form, with no explanation—the individuals are removed. With few exceptions, there is no statutory or regulatory right to further review of this crucial gatekeeping function. *See* 8 U.S.C. § 1225(b)(1)(B)(iii); 8 C.F.R. § 1208.30(g)(2)(iv)(A), (B).

Conduct of Credible Fear Screenings

44. Congress designed the credible fear standard to enable asylum officers to quickly screen out frivolous asylum claims while permitting those that are potentially meritorious to be adjudicated by immigration judges.

45. In doing so, Congress created what the Department of Justice has recognized as a "low threshold of proof of potential entitlement to asylum," 62 Fed. Reg. 10,312, 10,320 (Mar. 6, 1997). As provided in the governing statute, "the term 'credible fear of persecution' means that there is a significant *possibility*, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien *could establish* eligibility for asylum under [8 U.S.C. § 1158]." 8 U.S.C. § 1225(b)(1)(B)(v) (emphases added); *see also* 8 C.F.R. § 208.30(e) (same).

46. Reflecting its purpose and the circumstances of those who have just arrived at our borders fleeing violence and other forms of persecution, the interview must be conducted "in a non-adversarial manner," with the asylum officer required "to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d).

47. Asylum officers must receive special training in "international human rights law, non-adversarial interview techniques, and other relevant national and international refugee laws and principles." 8 C.F.R. § 208.1(b).

48. At the credible fear stage, the asylum officer's mandate is not to adjudicate the claim (or any part thereof) on the merits, but rather to determine—on information that is circumscribed both by statute and by practical considerations—whether the asylum seeker *might* establish eligibility for asylum if given that opportunity through formal removal proceedings.

49. There is no statutory or regulatory requirement that asylum seekers produce any evidence beyond their own testimony at the credible fear stage.

50. Nor is the credible fear stage suited to complex factfinding. Asylum seekers typically are recent arrivals with little to no knowledge of U.S. immigration law, scant opportunity to marshal relevant evidence and even to identify pertinent information, and limited access, if any, to counsel. Many are struggling with the trauma associated with persecution in their home countries and their flight to the United States, as well as trauma and stress associated with their detention by U.S. immigration officials. The screening, furthermore, is required by law to be non-adversarial. The asylum officer who makes the determination as to credible fear need not be an attorney.

51. As a formal matter, the credible fear screening is not considered to be part of the application for asylum, which can be filed as late as a year after the asylum seeker's arrival (or even later in certain circumstances).

52. Negative credible fear determinations nonetheless remain a part of the procedural histories of the cases in which they are issued.

53. Even if later vacated, a negative credible fear determination by an asylum officer can make it more difficult for the asylum seeker to ultimately be found eligible for or be granted relief from removal.

54. Even after an asylum seeker has been served a notice to appear and placed in formal removal proceedings under 8 U.S.C. § 1229a, the government can return the asylum seeker to the expedited removal process.

Defendants' Policy to Drive Down the Credible Fear Passage Rate

55. As a candidate, President Trump ran an explicitly nativist campaign that demonized immigrants and refugees, particularly those who are not (or are not perceived as) white.

56. Since taking office, President Trump has acted on his nativist promises, making unprecedented policy changes to advance his agenda without any regard for the law or the devastating impact that they would have on the lives of those who come to the United States seeking refuge.

57. For example, almost immediately upon taking office, President Trump ended the Central American Minors ("CAM") program. Under that program, minor children in the Northern Triangle countries of El Salvador, Guatemala, and Honduras with parents lawfully present in the United States could apply in their home country to be considered for refugee status, which otherwise required them to make the perilous overland journey to the United States' southern border. When President Trump took office, approximately 2,700 children had been conditionally approved for humanitarian parole through the program, and were set to be safely reunited with their parents lawfully present here. Following the shutdown of the program—which was first done in secret, and then publicly announced some eight months later—those conditional approvals were rescinded, *en masse*, in a decision that was later held unlawful and enjoined. *S.A. v. Trump*, No. 18-cv-03539-LB, 2019 WL 990680 (N.D. Cal. Mar. 1, 2019) (preliminary injunction decision); *see also S.A. v. Trump*, No. 18-cv-03539-LB,

2019 WL 1593229 (N.D. Cal. Apr. 12, 2019) (agreement regarding permanent injunction).

58. The next summer, the Trump Administration implemented a widely criticized policy of forcibly separating migrant parents from their children. Administration officials have admitted that the goal of the separation was to discourage Central American families from traveling to the border and applying for asylum. The separation policy was challenged as unlawful, and a federal judge granted a classwide preliminary injunction. *Ms. L v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018). The Trump Administration estimates it could take it two more years just to identify thousands of migrant families that it forcibly separated, and even longer to reunify them.

59. Likewise, in November 2018, the Trump Administration sought to render ineligible for asylum noncitizens who entered the United States outside of a port of entry, in defiance of statutory language explicitly making such individuals eligible. That policy, too, has been preliminarily enjoined. *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (N.D. Cal. 2018), *stay pending appeal denied*, 909 F.3d 1219 (9th Cir. 2018), 139 S. Ct. 782 (2018).

60. Most relevant to this case, the Trump Administration has also sought to make it more difficult for those from Central America to pass credible fear screenings and to apply for asylum. These changes were enjoined by a court in this district in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal docketed*, No. 19-5013 (D.C.

Cir.).

61. As well as through these policies that have already been enjoined by courts, President Trump has made clear through his words—including materially false and misleading statements about the immigration system—his intent to destroy the asylum system and the credible fear process that Congress mandated.

62. The President has personally directed blatantly illegal actions targeting asylum seekers.

63. In March 2019, President Trump ordered then-Secretary of Homeland Security Kirstjen Nielsen to close the El Paso port of entry and at the very least to deny entry to asylum seekers; Secretary Nielsen refused, and shortly thereafter was forced to resign.

64. Similarly, in a visit to the United States' southern border in April 2019, President Trump personally directed Border Patrol agents to turn asylum seekers away and to explain to any judge finding fault with that action, "Sorry, judge, I can't do it. We don't have the room."

65. By then, the Administration had already, in fact, adopted policies that have the purpose and effect of turning away asylum seekers, including through its "metering" program, under which the only way many asylum seekers can exercise their statutory right to request asylum is to cross the border illegally, between ports of entry, and to surrender themselves to the first Border Patrol agent they can find.

66. In recent months, a number of asylum seekers, including children, have

died attempting to apply for asylum by crossing between ports of entry, as the conditions are frequently treacherous. Several asylum seekers have died attempting to cross rivers. Others have died trying to cross the desert.

67. Members of the Administration have shown little remorse when confronted with the awful consequences of their policies. The President has attempted to shift blame to the victims, repeatedly denigrating asylum seekers without any factual basis, suggesting that they are lying, "invading" fraudsters who are "not afraid of anything," and dehumanizing them to the point of comparing them to animals. In May 2018, President Trump said of people crossing the Mexican border into the United States: "You wouldn't believe how bad these people are. These aren't people. These are animals."

68. The President has repeatedly opined that the entire asylum system is fraudulent, ignoring that it is a system created by Congress in compliance with the United States' international obligations. In April 2019, President Trump repeatedly called the asylum system "a big, fat con job." Furthermore, just before filing of this suit, President Trump threatened massive immigration raids across the country targeting women and children if Democrats did not work together with Republicans to find a solution to the "loophole" of migrants fleeing persecution having the right to ask for asylum in this country.

69. The Executive agencies under the President have also participated in disseminating false information about the asylum system. This spring, the Executive

Office for Immigration Review issued a "fact" sheet that, among other things, dismissed as a "myth" the notion that "[m]ost aliens who claim a credible fear of persecution have meritorious asylum claims." In response to the "fact" sheet, the National Association of Immigration Judges issued a press release declaring the document to be "filled with errors and misinformation."

70. Similarly, a group of retired immigration judges and retired members of the Board of Immigration Appeals wrote an open letter to the Director of the Executive Office for Immigration Review that condemned the "fact" sheet as "political pandering, at the expense of public faith in the immigration courts," for presenting "imagined 'myths' and wildly inaccurate and misleading information labeled as 'fact.'" True "American courts," they cautioned, "do not issue propaganda implying that those whose cases [they] rule[] on for the most part have invalid claims[,] . . . or that those unable to surmount the government-created obstacles to filing asylum applications are somehow guilty of deceit." "Such statements," they continued, "indicate a bias which is absolutely unacceptable and, frankly, shocking."

71. With recent changes in Administration staff, Defendants have renewed their focus on credible fear screenings, making it a priority to drive down the rate at which asylum seekers pass the screenings and avoid summary deportation.

72. Indeed, Defendant Wolf and Defendant Cuccinelli were recently tapped to lead DHS and USCIS, respectively, for their willingness to take more aggressive stances than their predecessors to restrict applications for humanitarian relief.

73. Shortly after assuming his role, Defendant Cuccinelli admonished USCIS staff to do "[their] part to help stem the crisis and better secure the homeland" when conducting credible fear screenings. His message was considered by many who received it to be a thinly veiled threat that asylum officers would be blamed for the Administration's failings if the credible fear passage rate did not materially drop.

74. In a further effort to lower the credible fear passage rate, Defendants have also begun recruiting CBP officers, who are expected to be more "aggressive" with asylum seekers at the border, to conduct credible fear screenings.

75. On April 9, 2019, a senior Administration official reported that the Administration would be implementing policy changes to make it more difficult for those asserting a fear of persecution or torture to access the U.S. immigration and federal court systems. Regarding credible fear screenings, the official said that asylum officers would "apply greater rigor and scrutiny to . . . [asylum] claims," and suggested that DHS might mobilize assistance from the Department of State in order to further drive down the credible fear passage rate.

The Lesson Plans

76. On April 30, 2019, the USCIS RAIO Directorate issued a final written "Lesson Plan" on "Credible Fear of Persecution and Torture Determinations." Shortly thereafter, Reuters published the Lesson Plan, a true and accurate copy of which is attached as Exhibit A. ("April 2019 Lesson Plan")

77. On September 30, 2019 USCIS amended the Lesson Plan and issued a

new version titled, "Credible Fear of Case Persecution and Torture Determinations," dated September 24, 2019, and issued on September 30, 2019. a true and accurate copy of which is attached as Exhibit A ("September 2019 Lesson Plan")

78. The Lesson Plans are policy documents that control the conduct of asylum officers in the credible fear process.

79. When promulgating regulations on the expedited removal process, the Department of Justice declined to elaborate on the credible fear standard, reasoning that asylum officer training—founded on documents like the Lesson Plans—would be "extensive" in order to control how the credible fear standard was "applied to particular cases" and to "ensure that the standard [wa]s implemented in a way which w[ould] encourage flexibility and a broad application of the statutory standard," consistent with Congress' aim. 62 Fed. Reg. 10,312, 10,317 (Mar. 6, 1997).

80. Here, however, the Lesson Plans execute Defendants' policy to drive down the credible fear passage rate by directing asylum officers to conduct interviews in a manner that is contrary to the statutory scheme, binding regulations, judicial precedent, and longstanding practice. It does so in myriad ways.

81. For example, the Lesson Plans effectively convert the credible fear determination from an inquiry into whether an asylum seeker *could* establish eligibility for relief in the future into an adjudication on whether the asylum seeker actually *has* established eligibility.

82. Throughout the Lesson Plans, Defendants suggest that the asylum

seeker's ability to succeed on a credible fear determination will hinge on her ability to fully establish eligibility for relief in all of its intricacies. Among other things, the Lesson Plan:

a. requires the asylum seeker to identify specific facts sufficient to establish eligibility for asylum in order to be found to have a credible fear, even if such facts are not and would not be expected to be within the asylum seeker's knowledge;

b. requires the asylum seeker to establish "a significant possibility of future persecution," when the credible fear standard merely requires a significant possibility of establishing eligibility, and even the substantive asylum standard requires only a "*well-founded fear* of persecution," for which the Supreme Court has held a 1 in 10 chance of future persecution is sufficient; and

c. otherwise misrepresents the relevant asylum standards by failing to present them according to the controlling question of whether the asylum seeker has a significant *possibility* of meeting those standards in the future.

83. The Lesson Plans also increase the evidentiary burden the asylum seeker must carry to pass a credible fear screening by, among other things, imposing an unlawful corroboration requirement; requiring the asylum seeker to present "more than 'significant evidence'" of eligibility, contrary to the applicable standard; unlawfully prohibiting asylum officers from making allowances for special circumstances—such as trauma, the passage of time, or cultural considerations—that may make it difficult for the asylum seeker to present her story in the setting of the credible fear screening; and placing the onus on the asylum seeker to produce testimony that is in fact the officer's duty to elicit.

84. Relatedly, the Lesson Plans turn what the law requires to be a non-

adversarial interview into an adversarial process that is biased against the asylum seeker, with the asylum officer functioning at once as opponent and arbiter. Among other things, the Lesson Plans:

a. require—in contravention of binding regulations—asylum officers to measure the asylum seeker's statements against information in Department of State-issued reports that the current Administration recently revised to remove accurate information helpful to asylum seekers, and to treat the reports as "objective" fact;

b. instruct asylum officers—in contravention of law—that they need not provide the asylum seeker with an opportunity to address concerns that might lead to a negative credibility determination; and

c. encourage asylum officers to find ways to use prior statements to Border Patrol to impeach the asylum seeker.

85. In addition, the Lesson Plans misrepresent the substantive law to be considered by the asylum officer to evaluate potential eligibility for asylum or other humanitarian protection, and in ways that prejudice applicants. For example, the Lesson Plans:

a. double down on an erroneous construction of private actor persecution that was enjoined by *Grace v. Whitaker*, 344 F. Supp. 3d 96, 107 (D.D.C. 2018), by instructing that "the government [in the asylum seeker's country of origin] must have abdicated its responsibility to control persecution" for harm due to actions of a private actor to constitute persecution;

b. mischaracterize controlling Supreme Court and other case law so that asylum officers will determine that no credible fear exists, when a faithful application of the law would (or at the very least could) lead to the opposite result;

c. direct asylum officers to make negative credible fear determinations based on what are actually *discretionary* factors, not *eligibility* criteria, such as when there is a significant possibility that the asylum seeker

could establish past persecution; and

d. as to discretionary factors related to past persecution and so-called "humanitarian asylum" that are improper to consider at the credible fear stage in the first place, mischaracterize the respective burdens on the government and the asylum seeker.

86. In still other ways, the Lesson Plans are simply irrational. For example, they require asylum officers to specify the bases for a positive credibility finding, but not for a negative one. And in a series of footnotes, they create a complicated set of conditional instructions that are triggered "[i]f the order in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), is lifted," without explaining what would qualify as that order being "lifted," and with seemingly no regard for the likelihood that these instructions would cause confusion if they were ever even arguably triggered.

87. The Lesson Plans are problematic as well for what it omits from previous guidance, without explanation or even acknowledgment. For example, the Lesson Plans omit the regulation- based instruction that "novel or unique issues . . . merit consideration in a full hearing before an immigration judge" even if a negative credible fear determination might otherwise seem warranted, 8 C.F.R. § 208.30(e)(4); omit instruction in other applicable law and procedure that is helpful to the asylum officer and favorable to the asylum seeker; and otherwise modifies longstanding guidance to artificially and unlawfully achieve the Administration's aim of decreasing the number of individuals who pass credible fear screenings.

88. In their sum and parts, the Lesson Plans are not consistent—in letter,

spirit, or purpose—with the statutes, regulations, or caselaw on which it purports to instruct and guide.

FIRST CLAIM FOR RELIEF
(Refugee Act, Immigration and Nationality Act, Convention Against Torture, & Administrative Procedure Act)

89. All the foregoing allegations are repeated and realleged as though fully set forth herein.

90. Pursuant to 8 U.S.C. § 1252(e)(3), this Court's review is available to determine whether the Lesson Plans are "consistent with applicable provisions of [Subchapter II of the INA] or is otherwise in violation of law."

91. The APA provides that a Court "shall hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2).

92. The Refugee Act provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien's status, may apply for asylum." 8 U.S.C. § 1158(a).

93. Defendants are prohibited from removing individuals to a country where they will be persecuted, *see* INA, 8 U.S.C. § 1231(b)(3); or tortured, *see* Convention Against Torture, Art. 3; 8 C.F.R. § 208.16(c), (d).

94. The INA, the Refugee Act, and the CAT must be interpreted consistently with the American commitment to the principle of *non-refoulement* and the right to seek asylum as set forth in treaty obligations and in customary international law.

95. The credible fear policies contained in the Lesson Plan violate and are not in accordance with the INA, the Refugee Act, the CAT, or customary international law.

96. The credible fear policies contained in the Lesson Plan are arbitrary and capricious, both substantively and procedurally.

97. Among other reasons, the credible fear policies contained in the Lesson Plans conflict with the statutory credible fear standard and process; conflict with various regulatory provisions governing the credible fear standard and process, including as it relates to the CAT; represent departures from longstanding agency policy without so much as an acknowledgment of those departures, much less reasoned explanations therefor; are illogical, irrational, legally erroneous, and fail to adequately take into account all relevant factors; and deprive credible fear applicants of a meaningful opportunity to establish their eligibility for asylum and other forms of humanitarian relief.

98. The Lesson Plans must therefore be held unlawful, set aside, or otherwise vacated, as well as the asylum officer's negative credible fear finding against Plaintiff which was conducted pursuant to said Plan.

SECOND CLAIM FOR RELIEF
(Administrative Procedure Act)

99. All the foregoing allegations are repeated and realleged as though fully set forth herein.

100. The APA requires agency action that is substantive (or "legislative") in nature to follow notice-and-comment procedures. 5 U.S.C. § 706(2)(D).

101. The Lesson Plans reflect one or more substantive rules, including because it has the force and effect of law and because it conflicts with various regulatory provisions, effectively amending them.

102. Defendants did not follow notice-and-comment rulemaking procedures related to the Lesson Plans.

103. The Lesson Plans therefore must be held unlawful and set aside for Defendants' failure to observe the procedure required by the APA. 5 U.S.C. § 706(2)(D), or otherwise vacated, as well as the asylum officer's negative credible fear finding against Plaintiff which was conducted pursuant to said Plans.

THIRD CLAIM FOR RELIEF
(Due Process Clause of the Fifth Amendment to the U.S. Constitution)

104. All the foregoing allegations are repeated and incorporated as though fully set forth herein.

105. Plaintiff has a protected interest in applying for asylum, withholding of removal, relief under the CAT, and in not being removed to countries where he faces

serious danger, persecution, and potential loss of life.

106. Plaintiff is entitled under the Due Process Clause of the Fifth Amendment to a fair hearing of their claims, and a meaningful opportunity to establish his potential eligibility for asylum and other forms of relief from removal.

107. The credible fear policies contained in the Lesson Plans violated Plaintiff's right to due process in numerous ways, including by subjecting his claim to unlawful, more burdensome legal standards, and by depriving him of a meaningful opportunity to establish his eligibility for asylum and other forms of humanitarian relief.

108. The Lesson Plan must therefore be enjoined as violative of the Fifth Amendment's guarantee of due process.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

109. Plaintiff has exhausted all administrative remedies. There are no administrative appeals of the Immigration Judge's affirmance of the DHS Credible Fear Determination and return for removal order, and no other relief is otherwise available.

IRREPARABLE INJURY

110. The removal and deportation of Plaintiff from the United States will cause irreparable injury to Plaintiff. If Plaintiff is removed and deported from the United States to India, it is likely that he will face persecution, severe threats to his life and safety, or will be murdered or tortured. Additionally, Plaintiff's physical detention has caused him irreparable injury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. "[A]dvance on the docket and . . . expedite to the greatest possible extent the disposition" of this case, 8 U.S.C. § 1252(e)(3)(D);

2. Enter an order staying the expedited removal of Plaintiff while this case is pending;

3. Enter an order vacating the expedited removal order issued to Plaintiff;

4. Declare the Lesson Plans and all related credible fear guidance issued by Defendants on or around April 30, 2019 and September 30, 2019, and the credible fear proceedings conducted thereunder, inconsistent with and/or not in accordance with law;

5. Enter an order vacating the Lesson Plans and all related credible fear guidance issued by Defendants on or around April 30, 2019 and September 30, 2019;

6. Enter an order enjoining Defendants from continuing to apply the Lesson Plans and any related credible fear guidance issued by Defendants on or around April 30, 2019 and September 30, 2019;

7. Enter an order enjoining Defendants from removing Plaintiff without first providing him with new credible fear screening under correct legal standards or, in the alternative, full immigration court removal proceedings pursuant to 8 U.S.C. § 1229a;

8. Award Plaintiff's counsel attorneys' fees and costs pursuant to 28

U.S.C. § 2412, and any other applicable statute or regulation; and

9. Award such other and further relief that the Court may deem just, equitable, and proper.

Respectfully submitted this 20th day of November, 2019.

Dated: November 20, 2019

By: /s/Bashir Ghazialam

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