IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

A.B.-B.; S.B.-B, a minor.; M.A.G.-M.; D.G.M.-G., a minor; L.E.-L.; I.I.E.-L., a minor; A.P.-S.; E.L.R.-S., a minor; A.A.R.-S., a minor; B.J.R.-S., a minor; and W.G.L.-S., a minor,

Plaintiffs,

[Physical address for all detained Plaintiffs:
South Texas Family Residential Center
300 El Rancho Way, Dilley, TX 78017]

v.

MARK A. MORGAN, Acting Commissioner, United States Customs and Border Protection; CHAD F. WOLF, Putative Acting Secretary, United States Department of Homeland Security; KENNETH T. CUCCINELLI, Senior Official Performing the Duties of the Director, United States Citizenship and Immigration Services; ANDREW J. DAVIDSON, Acting Division Chief of United States Citizenship and Immigration Services Asylum Division,

[Physical address for Defendants Morgan, Wolf, Cuccinelli, and Davidson:
c/o Office of the General Counsel
U.S. Department of Homeland Security
Washington, D.C. 20528[1]]

WILLIAM P. BARR, Attorney General of the United States

[Physical address for Defendant Barr:
c/o Office of the Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 90530-0001],

Defendants.

Case: 1:20-cv-00846 JURY DEMAND
Assigned To : Jackson, Amy Berman
Assign. Date : 3/27/2020
Description: Gen. Civ. (E-DECK)

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**JURY TRIAL DEMAND**

[1] Per 6 C.F.R. § 5.42(a).

## INTRODUCTION

1. On January 30, 2020, United States Customs and Border Protection ("CBP") entered into a Memorandum of Agreement ("MOA") with United States Citizenship and Immigration Services ("USCIS").

2. USCIS is the administrative agency within the Department of Homeland Security ("DHS") that is responsible for the adjudication of immigration benefits to noncitizens in the United States, including all functions of the Asylum Office. USCIS is staffed with, among others, career Asylum Officers who are educated in the law governing asylum and trained at interviewing victims of violence, predation, and persecution (including women and children). The tasks of USCIS Asylum Officers include conducting credible fear interviews with arriving asylum seekers, and making credible fear determinations on the basis of those interviews, as part of the expedited removal process.

3. CBP is the police agency within DHS that, in its own words, constitutes "one of the world's largest law enforcement organizations and is charged with keeping terrorists and their weapons out of the U.S."[2] According to CBP, its mission is to "safeguard America's borders thereby protecting the public from dangerous people."[3]

4. CBP and USCIS have historically kept to these designated roles: CBP operates as a police force at the border, and USCIS evaluates claims for asylum. The MOA, however, purports to authorize and assign CBP law enforcement officers (*i.e.*, Border Patrol agents[4]) to, *inter alia*,

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[2] *About CBP*, U.S. Customs and Border Protection (last updated Sept. 18, 2019), https://www.cbp.gov/about.

[3] *Id.*

[4] As used herein, "Border Patrol" refers to law enforcement officers within the purview of Customs and Border Protection, including within its Office of Field Operations.

conduct credible fear interviews of asylum seekers and issue fear determinations in the place of trained, professional USCIS Asylum Officers.

5. Plaintiffs are families seeking protection in the United States from persecution and torture. Each Plaintiff has been subject to credible fear interviews and fear determinations improperly and unlawfully conducted by CBP agents under the directions and supervision of Defendants. The Plaintiffs are currently being held at the South Texas Family Residential Facility in Dilley, Texas ("Dilley"), which is a prison in all but name.

6. The CBP agents conducting credible fear interviews and issuing fear determinations under the MOA do not receive the training required by law to permit them to serve as asylum officers and conduct such screening. CBP law enforcement officers also cannot, and do not, conduct interviews of detained migrants in the non-adversarial manner required by law. Defendants have illegally chosen to replace trained career USCIS Asylum Officers with Border Patrol to screen migrants' asylum claims, eliminating procedural safeguards, expediting removal of individuals entitled to greater protections under the law, and driving down the number of migrants who can assert asylum claims, blocking legitimate claims.

7. Plaintiffs bring suit to end these practices, which were entered into without authority and which prejudice the asylum process and Plaintiffs' credible fear interviews. The MOA, and the use of CBP agents to conduct credible fear interviews, violates the Homeland Security Act of 2002, which grants USCIS the sole authority to establish policies for, and to perform, asylum adjudications. In addition, the MOA—and credible fear interviews purportedly conducted under that agreement—are void, because the officials who signed the MOA lacked authority to do so. And the use of CBP law enforcement officers to conduct credible fear

interviews also violates the statutory requirements that those interviews be non-adversarial and conducted by properly trained asylum officers.

8. Plaintiffs seek declaratory and injunctive relief from the continued, unlawful use of inadequately trained and unqualified CBP agents to interview and issue fear determinations to asylum seekers. Plaintiffs also seek relief from the determinations issued under this unlawful and inadequate process.

## JURISDICTION

9. This case arises under the United States Constitution, the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, the Homeland Security Act of 2002 ("HSA"), 6 U.S.C. § 101 *et seq.*, the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345 *et seq.*, the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.* and its implementing regulations, and the Convention Against Torture ("CAT"), *see* Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681, 2681–822 (1998) (codified as Note to 8 U.S.C. § 1231).

10. This court has jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction with a waiver of sovereign immunity under the APA, 5 U.S.C. § 701 *et seq.*). To the extent any claims fall within the limits stated in 8 U.S.C. § 1252(a)(2)(A), they may be heard under 8 U.S.C. § 1252(e)(3)(A).[5] Jurisdiction lies to grant declaratory relief under 28 U.S.C. §§ 2201–2202 (Declaratory Judgment Act).

[5] 8 U.S.C. § 1252(e)(3) does not impose jurisdictional time bars to suit or apply to conduct that is not properly and legally authorized under duly delegated authority. But regardless, this Complaint was filed within 60 days of the MOA. It is thus timely, and the Court has jurisdiction over its claims under any reading of 8 U.S.C. § 1252.

## VENUE

11. Venue in the District of Columbia is proper under 28 U.S.C. § 1391(e)(1) as the location where the government Defendants reside and where a substantial part of the events giving rise to the claims occurred.

12. To the extent applicable, venue is also proper in this District for claims under 8 U.S.C. § 1252(e)(3)(A), which requires certain claims to be brought in the United States District Court for the District of Columbia.

## PARTIES

13. Plaintiffs are mothers and children detained at the South Texas Family Residential Center in Dilley, Texas whose asylum screenings were illegally conducted by Border Patrol law enforcement officers instead of trained, duly authorized Asylum Officers, and in derogation of required procedural protections. These Border Patrol agents issued negative credible fear determinations to each Plaintiff. Upon information and belief, each of these Border Patrol agents acted without proper training, failed to conduct non-adversarial interviews, and failed to fully elicit and/or memorialize facts relevant to and supporting Plaintiffs' claims for asylum and/or protection from removal. Each of these negative determinations was affirmed by an immigration judge. Each Plaintiff faces irreparable harm, including risk of violence, persecution, sexual predation, or death if removed from the United States and returned to their native countries.

14. Plaintiff A.B.-B. is an Honduran national who seeks protection in the United States from persecution, along with her minor child Plaintiff S.B.-B.. Plaintiffs A.B.-B and S.B.-B. were placed in credible fear proceedings, a CBP agent conducted their initial credible fear interview on February 4, 2020, and they were issued a negative credible fear determination on February 7, 2020.

That negative credible fear determination was affirmed by an immigration on February 2, 2020. They are detained at the South Texas Family Residential Center in Dilley, Texas.

15. Plaintiff M.A.G.-M. is an Ecuadorian national who seeks protection in the United States from persecution, along with her minor child Plaintiff D.G.M.-G.. Plaintiffs M.A.G.-M. and D.G.M.-G. were placed in credible fear proceedings, a CBP agent conducted their initial credible fear interview on January 30, 2020, and they were issued a negative credible fear determination on January 31, 2020. That negative credible fear determination was affirmed by an immigration judge on February 7, 2020. They are detained at the South Texas Family Residential Center in Dilley, Texas.

16. Plaintiff L.E.-L. is a Mexican national who seeks protection in the United States from persecution, along with her minor child Plaintiff I.I.E.-L. Plaintiffs L.E.-L. and I.I.E.-L. were placed in credible fear proceedings, a CBP agent conducted their initial credible fear interview on February 20, 2020. They were issued a negative credible fear determination on March 2, 2020. That negative credible fear determination was affirmed by an immigration judge on March 10, 2020. They are detained at the South Texas Family Residential Center in Dilley, Texas.

17. Plaintiff A.P.S. is a Mexican national who seeks protection in the United States from persecution, along with her minor children E.L.R.-S., A.A.R.-S., B.J.R.-S., and W.G.L.-S. Plaintiffs A.P.S., E.L.R.-S., A.A.R.-S., B.I.R.-S., and W.G.L.-S. were placed in credible fear proceedings, a CBP agent conducted their credible fear interviews on February 24, 2020, and they were issued a negative credible fear determination on February 27, 2020. That negative credible fear determination was affirmed by an immigration judge on March 3, 2020. They are detained at the South Texas Family Residential Center in Dilley, Texas.

18. Defendant Mark A. Morgan purportedly serves as Acting Commissioner of CBP, the agency within DHS that is responsible for the initial processing and detention of noncitizens apprehended near the U.S. border. In that capacity, Defendant Morgan purports to exercise direct authority over all CBP policies, procedures, and practices relating to the apprehension of asylum seekers. Defendant Morgan was not confirmed by the Senate, nor is he eligible to serve as Acting Commissioner of CBP under the Federal Vacancies Reform Act ("FVRA"). He is sued in his purported official capacity.

19. Defendant Chad F. Wolf purports to serve as the Acting Secretary of DHS, which oversees the component agencies responsible for enforcing U.S. immigration laws. Its component agencies include U.S. Immigration and Customs Enforcement ("ICE"), CBP, and USCIS. Defendant Wolf was not confirmed by the Senate, nor is he eligible to serve as Acting Secretary of DHS under the HSA and Appointments Clause of the United States Constitution.[6] Defendant Wolf is sued in his purported official capacity.

20. Defendant Kenneth T. Cuccinelli presently purports to be the "Senior Official Performing the Duties of the Deputy Secretary for the Department of Homeland Security" and the "Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services."[7] Previously, on November 13, 2019, Cuccinelli was also named Acting Deputy Secretary of Homeland Security by newly sworn-in purported Acting Secretary of Homeland

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[6] *See infra* 87–91.

[7] *See* https://www.uscis.gov/about-us/leadership/kenneth-t-ken-cuccinelli-senior-official-performing-duties-director-us-citizenship-and-immigration-services-director-vacant; Maria Sacchetti, *Ken Cuccinelli Said Goodbye to USCIS, Taking on a Bigger Homeland Security Role. But He's Back.*, Washington Post (Dec. 13, 2019), https://www.washingtonpost.com/immigration/ken-cuccinelli-said-goodbye-to-uscis-taking-on-a-bigger-homeland-security-role-but-hes-back/2019/12/13/06b401da-1d01-11ea-8d58-5ac3600967a1_story.html.

Security Chad Wolf.[8] On June 10, 2019, Mr. Wolf's predecessor, then purported Acting DHS Secretary Kevin McAleenan, also designated Defendant Cuccinelli as the first assistant to the Director of USCIS, and Defendant Cuccinelli thereafter represented himself as the purported Acting Director of USCIS. In his supposed "official" capacity, Defendant Cuccinelli has purported to exercise authority over all USCIS policies, procedures and practices relating to benefits adjudication. On March 1, 2020, however, Defendant Cuccinelli's appointment and actions as Acting Director of USCIS were held to violate the FVRA.[9] Defendant Cuccinelli is sued in his purported official capacity.

21. Defendant Andrew J. Davidson is the Acting Chief of USCIS Asylum Division, the division within USCIS that is responsible for conducting credible fear interviews, reasonable fear interviews ("RFIs"), and asylum interviews for affirmative asylum applicants. In that capacity, Defendant Davidson has direct authority over USCIS policies, procedures, and practices relating to fear and asylum screening procedures for persons seeking protection from persecution or torture. He is sued in his official capacity.

22. Defendant William P. Barr is the Attorney General of the United States and the head of the United States Department of Justice ("DOJ"). Defendant Barr is responsible for advising the Defendants on the lawful administration and enforcement of the immigration laws

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[8] *See* Bill Chappell, *Chad Wolf Becomes Acting Head of Homeland Security, Names Ken Cuccinelli His Deputy*, NPR (Nov. 14, 2019), https://www.npr.org/2019/11/14/779264900/chad-wolf-becomes-homeland-securitys-acting-secretary-and-names-cuccinelli-as-no.

[9] *See* Memorandum Opinion and Order in *L.M.-M. v. Cuccinelli*, ___ F. Supp. 3d ___, 2020 WL 985376, 2020 U.S. Dist. LEXIS 35897, at *63 (D.D.C. Mar. 1, 2020) ("[T]he Court concludes that Cuccinelli was designated to serve as the acting Director of USCIS in violation of the FVRA.").

and policies, including the execution of policies or procedures for asylum seekers, under 8 U.S.C. § 1103. He is sued in his official capacity.

## FACTS

### A. U.S. Obligations to Provide Safe Harbor to Persons Fearing Persecution or Torture

23. The INA governs the admission of migrants into the United States and sets forth the requirements for asylum screening.

24. The Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102, sought to bring U.S. law into conformity with its obligations under the 1951 United Nations Convention Relating to the Status of Refugees ("Refugee Convention") and the 1967 United Nations Protocol Relating to the Status of Refugees. Among other changes, it defined "refugee" under the INA as follows:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42).

25. Under the INA, individuals may be granted asylum if they arrive in the United States and meet the definition of a refugee. 8 U.S.C. § 1158(a)(1) & (b)(1).

26. Consistent with international law, the definition of "refugee" does not require a showing of *certain* harm. Instead, individuals can establish eligibility for asylum based on a "well-founded fear of persecution." The Supreme Court has established that a showing of a 1 in 10 chance of persecution is sufficient to satisfy that standard. *See INS v. Cardozo-Fonseca*, 480 U.S. 421, 430, 440 (1987).

27. Individuals seeking asylum in the United States may also apply for withholding of removal and relief under the Convention Against Torture ("CAT"). These types of relief

implement the United States' non-*refoulement* obligations, which are articulated in Article 33 of the Refugee Convention:

> No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.

28. Defendants' non-*refoulement* obligations are found in Article 33 of the Refugee Convention,[10] Article 3 of the Convention Against Torture, and the domestic statutes that implement these two treaties.

29. As part of the Refugee Act of 1980, Congress amended the INA to enact the withholding of removal statute, codified at 8 U.S.C. § 1231(b)(3), to "implement the principles agreed to" in the Refugee Convention with the specific intent to ensure that the United States does not "expel or return" noncitizens to any place where they face a likelihood of persecution. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). And as part of FARRA, Congress codified Article 3 of CAT, making explicit the prohibition against *refoulement*:

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture . . . .

FARRA § 2242(a), Pub. L. No. 105-207, Div. G. Title XXI, 112 Stat. 2681 (codified at 8 U.S.C. § 1231).

30. As adopted and statutorily codified, the non-*refoulement* guarantees in both the Refugee Convention and CAT provide procedural safeguards that prohibit removal or return of

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[10] The United States adopted the 1967 Protocol Relating to the Status of Refugees, which incorporates the Refugee Convention's prohibition on *refoulement*, though it is not a party to the Refugee Convention itself. *See* 1967 Protocol Relating to the Status of Refugees, art. 1(1) & 7(1) (stating that signatories "undertake to apply articles 2 to 34 inclusive of the [Refugee] Convention" without reservation).

non-citizens to countries where their life or liberty may be threatened. *See generally Montcrieffe v. Holder*, 569 U.S. 184, 187 n.1 (2013) ("[T]he Attorney General has no discretion to deny relief to a noncitizen who establishes his [CAT] eligibility."); *I.N.S. v. Stevic*, 467 U.S. 408 (1984) (recognizing non-citizens' statutory "entitlement" to withholding under § 1231(b)(3)); *Khouzam v. Attorney General*, 549 F.3d 235, 256–57 (3d Cir. 2008) ("[T]he basic dictates of due process must be met . . . where, as here, mandatory statutory relief [is] at issue.").

**B. The Expedited Removal and Credible Fear Screening Process**

31. Prior to 1996, to ensure that the government complied with, among other things, its non-*refoulement* obligations, noncitizens were generally entitled under the INA to a full hearing in immigration court before they could be removed, whether they sought admission at the border or had already entered the country. They were also entitled to both administrative appellate review before the Board of Immigration Appeals ("BIA") and judicial review in federal court.

32. In 1996, Congress amended the INA to establish a highly truncated "expedited removal" mechanism under which certain noncitizens seeking admission may be ordered removed by an immigration officer "without further hearing or review." 8 U.S.C. § 1225(b)(1)(A)(i).

33. But Congress carefully excepted from this mechanism individuals who express a credible fear of returning to their home countries. *See* 8 U.S.C. § 1225(b)(1)(B); 8 C.F.R. § 208.30(f). Congress intended this threshold credible fear determination "to be a low screening standard for admission into the full asylum process." 142 Cong. Rec. S11,491 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch).

34. If an individual subject to expedited removal indicates a fear of returning to his or her home country or an intention to apply for asylum, the immigration officer *must* refer the individual for an interview with an asylum officer. 8 U.S.C. § 1225(b)(1)(A)(ii) & (b)(1)(B); 8 C.F.R. 235.3(b)(4); *see also* 8 C.F.R. § 208.30. In the credible fear review process, asylum

officers also screen for claims for protection in the form of withholding of removal and protection under the Convention Against Torture. *See* 8 C.F.R. § 208.30(e)(2), (e)(3).

35. Congress requires that the asylum officers conducting these interviews have "professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators" of asylum applications. 8 U.S.C. § 1225(b)(1)(E). They must also be "supervised by an officer" who has like training and "substantial experience adjudicating asylum applications." *Id.*; *see also* 8 C.F.R. § 208.1 (promulgating specific training directives for asylum officers).

36. 8 C.F.R. § 208.2(a) specifically vests jurisdiction over asylum applications in the Refugee, Asylum, and International Operation ("RAIO") Directorate of USCIS. Congress established USCIS itself in 2002 to perform all immigration adjudications, including those relating to asylum claims. *See* 6 U.S.C. § 271(b)(3), (5).[11] For nearly two decades since, USCIS's highly trained corps of asylum officers within RAIO have been solely responsible for conducting credible fear interviews and making credible fear determinations. There exists no legal authority that permits CBP agents to second to the role of or replace RAIO Asylum Officers.

37. When a noncitizen is referred to an asylum officer, the officer conducts (with the assistance of an interpreter if needed) a "credible fear interview." The purpose of the credible fear interview is 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) (emphasis added).

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[11] In the Homeland Security Act of 2002 ("HSA"), Pub. L. No. 107–296, 116 Stat. 2135, 2192, 2193, 2205 (Nov. 25, 2002), Congress eliminated the former Immigration and Naturalization Service and transferred its adjudicative functions to what is now USCIS (initially named the Bureau of Citizenship and Immigration Services) and its law enforcement to what are now CBP and ICE. *See* 6 U.S.C. §§ 251, 252(a)(3), 271(b), 291.

38. To that end, credible fear interviews include procedural protections. The asylum officer must "conduct the interview in a nonadversarial manner" and provide an interpreter when the asylum officer "is unable to proceed competently in the language chosen" by the interviewee. 8 C.F.R. § 208.30(d) & 208.30(d)(5). Further, in determining whether credible fear is satisfied, the officer must "consider whether the alien's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge." 8 C.F.R. § 208.30(e)(4). That is, the officer must be sufficiently be experienced and trained to recognize these issues. The interviewee is also entitled to "information concerning the asylum interview" (*i.e.*, what process and standards apply) and to "consult with a person or persons of the alien's choosing prior to the interview or any review." 8 U.S.C. § 1225(b)(1)(B)(iv). By law, interviewees cannot be kept in the dark about the process or standards applied in their interview nor can they be denied the opportunity to reasonable consult with counsel or an advocate concerning their interview. *Id.*; *see also* 8 C.F.R. § 235.3(b)(4)(ii).

39. At the end of the interview, the asylum officer shall determine whether the interviewee has a credible fear of persecution and create a written record of his or her determination. 8 C.F.R. § 208.30(e)(1). A credible fear is defined by law as "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[.]" 8 U.S.C. §1225(b)(1)(B)(v). To ultimately prevail on an asylum claim itself, the applicant need only establish that there is a 10% chance that he or she will be persecuted on account of one of the five protected grounds for asylum. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439–40 (1987); *Grace v. Whitaker*, 344 F. Supp. 3d 96, 127 (D.D.C. 2018). Thus, to prevail at a credible fear interview, the applicant need only show a "significant possibility" of asylum

eligibility—*i.e.*, a "significant possibility" of a 1 in 10 chance of persecution, or a *fraction* of a 10% chance of persecution. *See* 8 U.S.C. §1225(b)(1)(B)(v).

40. If a noncitizen is found by the asylum officer to have a "credible fear," the individual is taken out of the expedited removal process and referred for a regular removal hearing before an immigration judge. At that hearing, the individual has the opportunity to develop a full record before the judge and may appeal an adverse decision to the BIA and the relevant federal court of appeals. 8 C.F.R. § 208.30(f); *see also* 8 U.S.C. § 1225(b)(1)(B)(ii).

41. An asylum officer who makes a negative credible fear determination must provide a written record of the determination that "shall include a summary of [all] material facts stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in light of [the] facts, the alien has not established a credible fear of persecution." 8 U.S.C. § 1225(b)(1)(B)(iii)(II). "A copy of the officer's interview notes shall be attached to the written summary." *Id.* Supervisory asylum officers then review and approve the negative credible fear determination. *See* 8 C.F.R. 208.30(e)(8); *cf.* 8 U.S.C. § 1225(b)(1)(E)(ii).

42. Upon the individual's request, the agency must provide for prompt review of the asylum officer's negative credible fear determination by an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); *see also* 8 C.F.R. § 208.30(g)(1). In conducting that review, the immigration judge has access to "[t]he record of the negative credible fear determination." 8 C.F.R. § 208.30(g)(2). Thus, the integrity of the record developed by the asylum interviewer is critical to the exercise of not only the right to apply for asylum, but also the right of review, as it has been here for Plaintiffs. The immigration judge's decision reviewing the record prepared by the interviewer is "final and may not be appealed." 8 C.F.R. § 1208.30(g)(2)(iv)(A). Moreover, that same record is reviewed by asylum officers if a later asylum application is ever made. Given

the above, asylum seekers, including Plaintiffs, are irreparably harmed by an inaccurate or incomplete credible fear interview record.

43. Noncitizens who receive a negative credible fear determination, however, are issued an expedited removal order. Noncitizens who are removed pursuant to expedited removal orders are also subject to a five-year bar on admission to the United States. 8 U.S.C. § 1182(a)(9)(A)(i). Thus, improper and erroneous negative fear determinations made at the hands of untrained or adversarial interviewers also severely harm asylum seekers by barring them from later admission and by materially prejudicing their opportunity to apply for asylum.

44. The low threshold at the credible fear stage is intended to ensure that no legitimate asylum seekers are subject to expedited, summary removal and that all potentially valid asylum claims can be developed properly in subsequent proceedings. In the expedited removal system, abbreviated credible fear proceedings occur within days of arrival, with little or no preparation or assistance by counsel, little to no knowledge of asylum law by the applicant, and no opportunity to examine witnesses or gather evidence while the individual is detained. It is highly unrealistic to expect applicants in the expedited removal system to present a fully developed asylum claim.

45. Accordingly, Congress intentionally established a low threshold at the credible fear stage to ensure that all potentially valid asylum claims could be developed properly in a full trial-type hearing before an immigration judge. Full review of an asylum claim before an immigration judge is highly fact-specific, may require extensive evidence about country conditions, and takes significant time, resources, and expertise to develop. Asylum claims may also involve complex legal questions. Congress viewed the credible fear process as an essential safeguard to ensure that bona fide asylum seekers would not be summarily removed and could receive full review of their claim.

46. As a result of the January 30, 2020, MOA, threshold safeguards for applicants seeking protection from persecution or torture are disregarded, with CBP agents conducting credible fear interviews with insufficient training, in an adversarial manner, and in violation of the procedural safeguards established through extensive regulations. This MOA denied Plaintiffs' the procedures and protections to which they were entitled in seeking asylum.

### C. The Homeland Security Act of 2002 Delegated Authority over Asylum Determinations to USCIS and Only USCIS

47. The former Immigration and Naturalization Service ("INS") created an independent asylum corps by rule in 1990. *See* INS, *Aliens and Nationality; Asylum and Withholding of Deportation Procedures*, 55 Fed. Reg. 30,674 (July 27, 1990). That action was guided by "[a] fundamental belief that asylum is inherently a humanitarian act distinct from the normal operation and administration of the immigration system." *Id.* The 1990 rule therefore deliberately created a corps of Asylum Officers that stood "separate" and independent of "INS enforcement functions" and who would "deal only with asylum cases." *Id.* Asylum Officers were also expressly intended to "receive specialized training," *id.*, and "to develop experience over time, with the expected result of greater uniformity in asylum adjudications." Congressional Research Service, *Immigration: U.S. Asylum Policy* 11 (Feb. 19, 2019) (citing INS, *Aliens and Nationality; Asylum and Withholding of Deportation Procedures*, 53 Fed. Reg. 11,300, 11,301 (Apr. 6, 1988)).[12]

[12] The MOA assigning CBP law enforcement officers to conduct credible fear interviews provides that such officers shall not perform credible fear work for more than 180 days, which directly conflicts with and thwarts the stated policy that asylum officers "develop experience over time." Ex. A at 3; Congressional Research Service, Immigration: U.S. Asylum Policy 11 (Feb. 19, 2019) (citing INS, Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 53 Fed. Reg. 11,300, 11,301 (Apr. 6, 1988).

48. The Homeland Security Act of 2002 separated the INS into three components within the Department of Homeland Security—USCIS, CBP, and ICE. The HSA preserved the sharp, preexisting distinction between Asylum Officers and enforcement officials. Under the HSA, USCIS assumed responsibility for the immigration service functions of the federal government.[13] Specifically, the HSA provides that the Director of USCIS shall establish the policies for performing and administering transferred functions and national immigration service policies and priorities. 6 U.S.C. § 271(a)(3). Congress more specifically gave the Director authority over "[a]djudications of asylum and refugee applications." *Id.* § 271(b)(3).

49. In contrast, the HSA gives CBP no responsibilities whatsoever pertaining to the adjudication of asylum claims. *See* 6 U.S.C. § 211. And although Congress gave the CBP Commissioner the joint authority with USCIS and ICE to "enforce and administer" the immigration laws, it made clear that CBP's role is to be confined to tasks that traditionally have been performed by law-enforcement agents, such as primary and secondary screening at the border, detention, interdiction, and removal. *Id.* § 211(c)(8).

50. Ashley Caudill-Mirillo, Deputy Chief of the Asylum Division at USCIS has stated: "[T]he United States has carefully implemented procedures and policies that foster a hospitable environment in which asylum seekers are unencumbered in their effort to exercise the right to seek protection from persecution."[14]

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[13] *See, e.g.*, Our History, U.S. Citizenship & Immigration Servs. (last updated Jan. 8, 2020), https://www.uscis.gov/about-us/our-history.

[14] Ashley Caudill-Mirillo, *Laws of Hospitality: Asylum and Refugee Law Panel* 2 (May 2011), https://villagillet.files.wordpress.com/2011/05/caudill-mirillo_ashley_en.pdf.

51. The United States historically met its obligations by maintaining a highly-trained and professional Asylum Corps within USCIS that was able to "respond[] to the unique needs of asylum-seekers."[15]

52. Professional USCIS Asylum Officers are to serve as "neutral decision-maker[s]" who ensure that "interviews are non-adversarial." *Id.* at 4. Extra care and safeguards are offered to protect asylum seekers and those seeking withholding of removal and relief under the Convention Against Torture who are "vulnerable as a result of their fear of being returned" to their native country. *Id.*

53. Congress thus requires that such screenings be conducted by Asylum Officers with "professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators" of asylum applications, and under supervision of officers with "substantial experience adjudicating asylum applications." 8 U.S.C. § 1225(b)(1)(B) & (E); *see also* 8 C.F.R. § 208.1(b) (providing additional training requirements).

54. Ms. Caudill-Mirillo has confirmed that USCIS Asylum Officers undergo "two six-week residential training programs" plus additional further training. *See* Ashley Caudill-Mirillo, *Laws of Hospitality: Asylum and Refugee Law Panel*, at 3 (May 2011), *available at* https://villagillet.files.wordpress.com/2011/05/caudill-mirillo_ashley_en.pdf. These courses provide extensive instruction on the immigration laws, policies, procedures and extensive instruction on the laws, policies, and procedures relating to U.S. asylum law. *Id.*

55. USCIS Asylum Officers also receive specialized trauma training from mental health professionals who are experienced in working with survivors of torture as well as "extensive training in intercultural communication to ensure that the interview is conducted in a way that is

[15] *Id.* at 3.

sensitive to any cross-cultural issues that may create a communication barrier during the asylum interview." *Id.* These Asylum Officers further receive extensive child interviewing and development training and continuing training to ensure that they can appropriately interview applicants who have experienced trauma. *Id.* at 4, 7.

56. Finally, USCIS Asylum Officers also receive continual weekly trainings after the completion of their initial training. *Id.* at 3; *see also, e.g.*, *Asylum Division Training Programs*, U.S. Citizenship & Immigration Servs. (last modified Dec. 19, 2016), https://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs.

## D. Defendants Improperly Replaced USCIS Asylum Officers with Border Patrol Agents

57. On January 30, 2020, CBP and USCIS entered into a MOA that assigns law enforcement officers from CBP's Border Patrol to replace trained USCIS Asylum Officers and to conduct credible fear interviews in their stead. *See generally* Memorandum of Agreement, Exhibit A.[16] Under this MOA, Border Patrol agents are directed to conduct credible fear interviews, prepare reports of materials facts, make credible fear determinations, and perform the tasks historically performed by professional, career Asylum Officers within USCIS. *Id.* at 1.

58. These Border Patrol agents receive less training than real asylum officers and have received insufficient training to qualify to serve as asylum officers per the statutory requirements. On information and belief, these Border Patrol agents lack sufficient knowledge of asylum laws, procedures, country conditions, or facts relevant to fear determinations, and lack competency to interview asylum seeks and make fear determinations.

[16] This MOA was filed in *MMV v. Barr*, 19-cv-92773-ABJ, Supplemental Declaration of Ashley Caudill-Mirillo, Dkt. 72-2 (D.D.C.).

59. Border Patrol agents have nevertheless proceeded to conduct unlawful, adversarial interrogations of families fleeing persecution and torture instead of the neutral, non-adversarial interviews required by law. This also violates USCIS guidelines, which require non-adversarial proceedings with "a neutral decision-maker, not an advocate for either side." USCIS Policy Manual, *Appendix 15-2 Non-Adversarial Interview Techniques*, https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-26573/0-0-0-28729.html.

60. Furthermore, Border Patrol agents are categorically unable to conduct non-adversarial interviews because their work as law enforcement officers inherently places them in an adversarial role to those in detention. In sum, "[l]aw enforcement officers function as adversaries" to those they detain. *New Jersey v. T.L.O.*, 469 U.S. 325, 349 (1985) (Powell, J., concurring).

61. Defendants have apparently chosen to deploy Border Patrol agents to conduct interviews to make it more difficult for migrants to even have the opportunity to file for asylum because Border Patrol agents will be more adversarial. Border Patrol agents appear to have been chosen to conduct credible fear interviews precisely because they would *not* act neutrally, but "would be tougher critics of asylum seekers" than Asylum Officers, whom Defendants view as "soft." Jay Willis, *Stephen Miller Is Trying to Break the Asylum Process*, GQ (July 30, 2019), https://www.gq.com/story/asylum-border-patrol-interviews.

62. The Border Patrol's animus for migrants is well-documented—Border Patrol agents have been reported to record false information in arrest reports, fail to refer migrants who

express fear to asylum officers, fail to ask critical questions of those seeking asylum, fail to record statements of the asylum seekers, and utilize coercive or abusive tactics overall.[17]

63. Not only do Border Patrol agents fail to appropriately process asylum seekers in a professional capacity, many openly express personal antipathy towards migrants online. A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, ProPublica (July 1, 2019) (describing an online group in which Border Patrol agents joked about dead migrants). That animus extends to women, as reflected in postings of sexually explicit illustrations demeaning women lawmakers, and in comments referring to women as "bitches" and "hoes." *Id.*; *see also* Ryan Devereaux, *Border Patrol Agents Tried to Delete Racist and Obscene Facebook Posts. We Archived Them.*, Intercept (July 5, 2019, 10:16 AM), https://theintercept.com/2019/07/05/border-patrol-facebook-group. Many Border Patrol agents have reportedly expressed such hostility towards women, including one agent who conducted interviews of women and girls at Dilley and who reportedly posted on his public social media page a picture of a mix-CD labeled "Songs I'll Choke You out to While Wrecking Your

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[17] *See, e.g.*, John Washington, *Bad Information: Border Patrol Arrest Reports Are Full of Lies that Can Sabotage Asylum Claims*, Intercept (Aug. 11, 2019), https://theintercept.com/2019/08/11/border-patrol-asylum-claim; Human Rights First, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers*, 5–8 (2017), *available at* https://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-line-report.pdf; A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, ProPublica (July 1, 2019), https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes; Guillermo Cantor & Walter Ewing, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered*, American Immigration Council 9 (Aug. 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/still_no_action_taken_complaints_against_border_patrol_agents_continue_to_go_unanswered.pdf; U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* 19 (2016), https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf.

Uterus."[18] Such agents are not suited to interview asylum seekers, given that many of the detained women and children who seek asylum are survivors of rape, domestic violence, and other gender-based violence.

**E. The MOA Is Neither Legal nor Legally Authorized**

64. The challenged MOA was signed by Mark Koumans on behalf of USCIS on January 27, 2020, and by Mark Morgan on behalf of CBP on January 30, 2020. Exhibit A at 5. The MOA became effective on January 30. *Id.* at 4.

65. Border Patrol agents operating under this MOA have since interviewed asylum seekers at Dilley, including Plaintiffs, in violation of the above legal requirements. In addition, neither Defendant Morgan nor Koumans had the authority to sign the MOA for their respective agencies.

**1. Defendant Morgan Was Appointed in Violation of the Appointments Clause and the FVRA**

66. The Commissioner of CBP is an "Officer of the United States" who is subject to the Appointments Clause.[19] 6 U.S.C. § 113(a)(1)(C).

67. The Appointments Clause requires high-level federal officials to undergo confirmation by the Senate. U.S. Const. art. II, § 2, cl. 2. That Clause reflects the Founders' view that the abuse of appointment powers was "the most insidious and powerful weapon of eighteenth century despotism." *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991) (internal quotation marks omitted).

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[18] *MMV v. Barr*, 19-cv-92773-ABJ, Plaintiff's Opposition to Defendants' Partial Motion to Dismiss, Dkt. 73 at 4–5 (D.D.C.).

[19] *See also Policy and Supporting Positions*, Committee on Homeland Security and Governmental Affairs at v, 77 (Dec. 1, 2016) (showing that the Commissioner of CBP must be appointed by the president and confirmed by the Senate).

68. The FVRA implements the check on executive power found in the Appointments Clause by specifying rules of succession when a Senate-confirmed office becomes vacant. Among other things, the FVRA limits who may serve as an acting official and the length of time an office may be filled by an acting official. 5 U.S.C. §§ 3345, 3346.

69. Under the FVRA, when a position subject to Senate confirmation becomes vacant (1) the "first assistant," (2) another Senate-confirmed federal official, or (3) a federal employee of the executive agency paid at the level of GS-15 or higher who has been in their position for at least 90 days can serve in an acting capacity. 5 U.S.C. § 3345(a).

70. Actions taken by officials appointed in violation of the FVRA "have no force or effect." 5 U.S.C. § 3348(d)(1).

71. Defendant Morgan has purported to serve as Acting Commissioner and "Chief Operating Officer" of CBP since July 7, 2019.[20] He previously served as purported Acting Director of Immigration and Customs Enforcement for approximately 39 days, from May 28, 2019 until he was installed at CBP on July 7, 2019.[21] He was never formally nominated to his role at ICE.[22]

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[20] *Acting Commissioner Mark A. Morgan*, US Customs & Border Protection (last modified July 24, 2019), https://www.cbp.gov/about/leadership-organization/acting-commissioner; *Leadership*, Homeland Security (last published Mar. 17, 2020), https://www.dhs.gov/leadership.

[21] *Id.*; Geneva Sands & Caroline Kelly, *Mark Morgan Takes Over as Acting Director of ICE*, CNN (May 28, 2019 6:36 PM), https://www.cnn.com/2019/05/28/politics/mark-morgan-ice-acting-director/index.html.

[22] Geneva Sands & Caroline Kelly, *Mark Morgan Takes Over as Acting Director of ICE*, CNN (May 28, 2019 6:36 PM), https://www.cnn.com/2019/05/28/politics/mark-morgan-ice-acting-director/index.html.

72. Prior to being installed as purported Acting Director of ICE, Morgan last served in federal government as the Chief of the U.S. Border Patrol between October 2016 and January 2017.[23]

73. Morgan was preceded at CBP by Kevin McAleenan and John Sanders. McAleenan served as Commissioner of CBP from March 20, 2018 and vacated the office on or around April 10, 2019.[24]

74. On April 15, 2019, McAleenan designated John Sanders, then Chief Operating Officer of CBP, to serve as "Senior Official Performing the Functions and Duties of the Commissioner of CBP."[25] Sanders resigned from this position effective July 5, 2019. Morgan subsequently began serving as purported "Acting Commissioner" of CBP on July 7, 2019.

75. When he was appointed as Acting Commissioner of CBP, Morgan was not the "first assistant" to that position, a Senate-confirmed federal official, or a federal employee in his position for at least 90 days.

76. Morgan's appointment was invalid under the FVRA, and the MOA that he signed has no force of effect. *E.g.*, 5 U.S.C. § 3348(d)(1).

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[23] Ron Nixon, *Border Patrol Chief, an Agency Outsider, Is Stepping Down*, NY Times (Jan. 26, 2017), https://www.nytimes.com/2017/01/26/us/politics/border-patrol-mark-morgan.html.

[24] McAleenan was selected to serve as Acting Secretary of the Department of Homeland Security and issued a statement signed in his new capacity on April 10, 2019. Kevin K. McAleenan, *Message from Acting Secretary Kevin K. McAleenan*, Homeland Security (Apr. 10, 2019), https://www.dhs.gov/news/2019/04/10/message-acting-secretary-kevin-k-mcaleenan.

[25] *Acting Secretary McAleenan Statement on the Designation of U.S. Customs and Border Protection Chief Operating Officer John Sanders to Serve as Senior Official Performing the Functions and Duties of the Commissioner of CBP*, Homeland Security (Apr. 15, 2019), https://www.dhs.gov/news/2019/04/15/acting-secretary-mcaleenan-statement-designation-cbp-chief-operating-officer-john.

**2. At the Time Defendant Morgan Signed the MOA, Neither He Nor Anyone Else Could Lawfully Serve as Acting CBP Commissioner**

77. Under the FVRA, a person may serve as an acting officer "for no longer than 210 days beginning on the date the vacancy occurs." 5 U.S.C. § 3346. The submission to the Senate of a nomination for the office may extend this time period. 5 U.S.C. § 3346(a)(2) & (b).

78. As shown above (*see* ¶¶ 73–74), the office of the Commissioner of CBP became vacant at the latest on April 15, 2019, when Kevin McAleenan designated John Sanders as Acting Commissioner of CBP.

79. As a result, the 210-day rule in the FVRA means that no person could serve as the Acting Commissioner past (at the latest) November 11, 2019 absent the submission of a nomination to the Senate for confirmation.

80. The President has not submitted a nomination for CBP Commissioner to the Senate since April 10, 2019.

81. Any actions taken after November 11, 2019, by any purported "Acting Commissioner," including the signing of the MOA, are therefore void. *See id.*

**3. Mark Koumans Lacked Authority to Sign the MOA on Behalf of USCIS**

82. Mark Koumans was the other signatory to the MOA, purporting to act on behalf of USCIS. Koumans was selected to serve as the Deputy Director of USCIS beginning on May 13, 2019. Koumans has since transferred out of this role, and is currently serving as deputy director of operations within USCIS management office.[26]

[26] *See* Geneva Sands, *Latest Immigration Appointment Signals Shakeup Pushed by White House*, CNN (Feb. 19, 2020), https://www.cnn.com/2020/02/19/politics/immigration-appointment-signals-shakeup-dhs-white-house/index.html.

83. Under the HSA, only the *Director* of USCIS may "establish the policies for performing" USCIS functions including asylum adjudications. 6 U.S.C. § 271(a)(3)(A), (a)(3)(D) & (b)(3).

84. Koumans is not (and was not) the Director of USCIS and therefore cannot establish the policies for performing USCIS functions.

85. Moreover, all functions of DHS are vested in its Secretary, who may delegate functions to an officer, employee, or organizational unit of the Department. 6 U.S.C. § 112(a)(3) & (b)(1).

86. On information and belief, the DHS Secretary never duly delegated authority to Mark Koumans to enter this MOA or bind USCIS to the agreement.

87. Even if there were such a delegation, neither purported Acting Secretary McAleenan nor purported Acting Secretary Wolf were appointed consistent with governing law, and thus neither had authority to authorize the MOA or to delegate its authorization.

88. The Secretary of DHS is an officer of the United States whose appointment requires presidential nomination and Senate confirmation. In the event of a vacancy, the HSA provides that the Deputy Secretary is the "first assistant" for FVRA purposes. 6 U.S.C. § 113(a)(1)(A).

89. The HSA further clarifies that, "[n]otwithstanding chapter 33 of Title 5"—*i.e.*, the FVRA—"the Under Secretary for Management shall serve as Acting Secretary if by reason of absence, disability, or vacancy in office, neither the Secretary nor Deputy Secretary is available to exercise the duties of the Office of Secretary." 6 U.S.C. § 113(g)(1). The HSA also permits the Secretary of DHS to designate other officers of the Department in further order of succession to serve as Acting Secretary notwithstanding the normal succession procedures in the FVRA. 6 U.S.C. § 113(g)(2).

90. When Secretary of Homeland Security Kirstjen Nielsen resigned, the order of succession to the office of Secretary was governed by Executive Order ("EO") 13753.[27]

91. Defendant McAleenan was not next in the order of succession under that EO, making his subsequent appointment to Acting Secretary of DHS unlawful and any actions taken in this purported capacity void. *E.g.*, 5 U.S.C. § 3348(d)(1); Exec. Order No. 13753, 81 Fed. Reg. 90667.

92. Because Defendant McAleenan's appointment to Acting Secretary was unlawful, his appointment of Defendant Wolf to fill the role of Acting Secretary on November 8, 2019, is void and without force and effect under the FVRA. *See, e.g.*, Letter from H.R. Committee on Homeland Security and Committee on Oversight and Reform to Comptroller General of the United States (Nov. 15, 2019), available at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/191115%20T%20Dodaro%20re%20Letter%20to%20GAO%20on%20Wolf-Cuccinelli%20Appointment.pdf.

93. Any delegation of authority by either Acting Secretary McAleenan or Acting Secretary Wolf that could allow Koumans to sign the MOA for USCIS would therefore be illegal and void.

94. Any delegation of authority by Acting Director McAleenan or Acting Secretary Wolf to CBP to conduct credible fear interviews would also be illegal, unconstitutional, and void.

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[27] Letter from the Committee on Homeland Security to Gene Dodaro, Comptroller General of the United States (Nov. 15, 2019), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/191115%20T%20Dodaro%20re%20Letter%20to%20GAO%20on%20Wolf-Cuccinelli%20Appointment.pdf.

**COUNT ONE—ACTIONS CONTRARY TO THE APPOINTMENTS CLAUSE AND THE FVRA**
**(Violation of the FVRA, the Appointments Clause, and the Administrative Procedure Act)**

95. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

96. The Appointments Clause of the Constitution requires the U.S. Senate to advise and consent (*i.e.*, confirm) the appointment of certain public officials (*i.e.*, Officers of the United States). Absent that confirmation, the FVRA (5 U.S.C. § 3345 *et seq.*) limits who may serve as an acting official and for how long. 5 U.S.C. §§ 3345, 3346. Actions taken by officials appointed in violation of the FVRA "have no force or effect." 5 U.S.C. § 3348(d)(1).

97. The APA, 5 U.S.C. § 706(2), further provides that a court "shall hold unlawful and set aside agency action, findings, and conclusions found to be—(A) . . . an abuse of discretion, or otherwise not in accordance with law; . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law."

98. Here, Defendant Morgan is invalidly and illegally purporting to serve as Acting Commissioner of the United States Customs and Border Protection. As a result, all actions he took in this purported capacity, including executing and agreeing to the MOA, are invalid and void.

99. The Commissioner of United States Customs and Border Protection is an officer of the United States whose appointment requires presidential nomination with Senate confirmation.

100. Defendant Morgan purports to perform the functions and duties of CBP Commissioner even though he has not been confirmed by the Senate to hold that office or any other position requiring the Senate's advice and consent.

101. Defendant Morgan was ineligible for appointment as "Acting Commissioner" of CBP because he did not meet the requirements set forth in the FVRA. 5 U.S.C. § 3345.

102. Even if Defendant Morgan validly served as Acting Commissioner of CBP, which he did not, the FVRA provides that an acting officer may not serve for "longer than 210 days beginning on the date the vacancy occurs." 5 U.S.C. § 3346(a)(1). Once that time period elapses without the nomination or Senate confirmation of a permanent appointee, the office in question "shall remain vacant."[28] *Id.* § 3348(b)(1).

103. The office of the Commissioner of CBP was vacated on April 15, 2019 at the latest, and thus any actions would be void if taken more than 210 days from that date (*i.e.*, November 11, 2019 at the latest) by any person purporting to exercise authority as Acting Commissioner. Defendant Morgan signed the MOA on January 30, 2020, more than 210 days from the initial vacancy. There is thus no colorable legal basis for Defendant Morgan to continue exercising the functions and duties of the office of Commissioner as of that date, absent the nomination of new, permanent Commissioner.

104. For both of these reasons, Defendant Morgan's signing of the MOA, and any direction or authorization he provided for CBP agents to conduct asylum or CAT screening, are void as violating FVRA, the Appointments Clause, U.S. Const., Art. 2, Sec. 2, and the APA, 5 U.S.C. § 706(2)(A), (C), (D).[29]

105. Plaintiffs are thus entitled to and seek (i) a declaration that the MOA and Defendants' actions authorizing or directing CBP agents to conduct asylum or CAT screening are

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[28] The FVRA is the "exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office," unless another statute expressly provides otherwise or the President makes a valid recess appointment (neither of which is the case here). *Id.* § 3347(a).

[29] Nor can Defendant Morgan's lack of capacity be cured by suggesting that he acted on behalf of, or under authority or direction of, the Secretary of Homeland Security. Per above, both the purported Acting Director at the time, Defendant Wolf, and his predecessor, Kevin McAleenan were also serving in violation of the Homeland Security Act and the Appointments Clause.

contrary to law and void, (ii) a preliminary and permanent injunction barring CBP agents from conducting asylum or CAT screenings, and (iii) an order that the MOA and CBP action conducting asylum or CAT screenings are unlawful, set aside, or vacated, with new screenings ordered to be conducted by USCIS Asylum Officers for each Plaintiff and all other individuals previously screened by CBP agents.

**COUNT TWO—ACTIONS CONTRARY TO HOMELAND SECURITY ACT**
**(Violation of the Homeland Security Act and the Administrative Procedure Act)**

106. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

107. Both Defendant Morgan and Mark Koumans lacked authority under the Homeland Security Act to enter, execute, or authorize the MOA or screening of asylum or CAT claims by CBP agents.

108. With respect to Defendant Morgan, under the Homeland Security Act of 2002, CBP and its Commissioner have no authority to enter into agreements to participate in the adjudication of asylum claims. *See* 6 U.S.C. §§ 211(c)(8)(A), 271(b)(3). The Homeland Security Act makes clear that *USCIS*, not CBP, has authority to adjudicate asylum claims. *Id.*; *see also* 8 C.F.R. § 208.2(a). This alone is independently sufficient to render the MOA and its application void and illegal.[30]

109. With respect to Mark Koumans, he also lacked authority to enter the MOA or to authorize or direct CBP agents to conduct asylum or CAT screening. The Homeland Security Act gives only USCIS *Director* the authority to "establish the policies for performing" functions

[30] As noted in Claim 1, Defendant Morgan was not validly appointed and all actions taken during his purported role as "Acting Commissioner" have no force or effect. Nevertheless, per Claim 2, even if Defendant Morgan was lawfully appointed (which he was), CBP has no authority to enter into the MOA or to direct its employees to conduct asylum screening.

transferred to USCIS (including asylum adjudications). 6 USC § 271(a)(3)(A); *see also id.* § 271(a)(3)(D) (authority to establish national immigration policies and priorities).

110. Mark Koumans was the *Deputy* Director of USCIS, yet he signed and entered the MOA with CBP. Because Koumans was not the Director of USCIS, he lacked the authority to establish such policies for performing the functions transferred to USCIS. Nor could Koumans be operating under the direction or authority of either the purported Acting Secretary of Homeland Security or Defendant Cuccinelli who was purporting to function at the time as, *inter alia*, the Acting Director of USCIS, as none of those individuals were lawfully appointed to those positions and thus could not delegate such authority.

111. Regardless, even if the Acting Secretary of DHS had been validly appointed (which he was not), all functions of DHS are vested in the DHS Secretary absent a valid delegation. 6 U.S.C. § 112(a)(3) & (b)(1). On information and belief, the DHS Secretary never duly delegated authority to either Mark Koumans (much less to Defendant Morgan) to enter this MOA, to bind CBP or USCIS to the agreement, or to authorize or direct CBP agents to conduct credible fear interview, RFI, or CAT screening. A contract entered into by an official without authority is not binding, *see ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988), further rendering the MOA invalid and without force.

112. In sum, Defendant Morgan and Mark Koumans both lacked authority under the Homeland Security Act to execute the MOA, to bind CBP or USCIS to the MOA, or to direct or authorize CBP agents to conduct asylum or CAT screening in place of USCIS Asylum Officers. The MOA and these actions are thus unlawful, *ultra vires*, and void as violating the Homeland Security Act and APA, 5 U.S.C. § 706(2)(A), (C), (D).

113. Plaintiffs are thus entitled to and seek (i) a declaration that the MOA and Defendants' actions authorizing or directing CBP agents to conduct asylum or CAT screening are contrary to law and void, (ii) a preliminary and permanent injunction barring CBP agents from conducting asylum or CAT screenings, and (iii) an order that the MOA and CBP action conducting asylum or CAT screenings are unlawful, set aside, or vacated, with new screenings ordered to be conducted by USCIS Asylum Officers for each Plaintiff and all other individuals previously screened by CBP agents.

**COUNT THREE—ACTIONS CONTRARY TO IMMIGRATION LAW**
**(Violation of the Refugee Act, the Immigration and Nationality Act, and the Administrative Procedure Act)**

114. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

115. CBP and USCIS are federal agencies, the actions of which are subject to judicial review under the APA. 5 U.S.C. § 551(1). If those actions fail to comply with the law, they must be held unlawful under the APA. 5 U.S.C. § 706(2).

116. In addition, the agency's own policies and procedures are binding upon the agency. The APA thus also grants Plaintiffs the right to challenge the failure of an agency to comply with its own rules, regulations, directives, guidance, initiatives, actions and/or procedures. *See, e.g., Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018) ("It has long been settled that a federal agency must adhere firmly to self-adopted rules by which the interests of others are to be regulated[.]" (citing *Mass. Fair Share v. Law Enf't Assistance Admin.*, 758 F.2d 708 (D.C. Cir. 1985))). That doctrine is enforced via 5 U.S.C. § 706(2).

117. Here, Defendants' MOA and resulting use of CBP agents to conduct asylum and CAT screening in lieu of USCIS Asylum Officers violate the INA and Refugee Act, as well as related regulations, policies and procedures, by ignoring the requirements for an Asylum Officer

to conduct and memorialize interviews under 8 C.F.R. § 208.30(d) & (e)(1),[31] including by failing to have appropriately trained Asylum Officers apply the required procedures and standards, further depriving applicants of a meaningful opportunity to establish their potential eligibility for asylum, withholding of removal, and CAT relief pursuant to 8 U.S.C. §§ 1158(b)(1), 1225(b)(1)(B) & (b)(1)(E), and 1231(b)(3); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (explaining that an agency may not simply disregard its own rules).

118. As a result, the above MOA and its implementation are contrary to law under 5 U.S.C. § 706(2)(A) & (C).

119. Plaintiffs are thus entitled to and seek (i) a declaration that the MOA and Defendants' actions authorizing or directing CBP agents to conduct asylum and CAT screening are contrary to law and void, (ii) a preliminary and permanent injunction barring CBP agents from conducting asylum and CAT screenings, and (iii) an order that the MOA and CBP actions conducting asylum and CAT screenings are unlawful, set aside, or vacated, with new screenings ordered to be conducted by USCIS Asylum Officers for each Plaintiff and all other individuals previously screened by CBP agents.

**COUNT FOUR—ACTIONS ARE ARBITRARY AND CAPRICIOUS**
**(Violation of the Refugee Act, the Immigration and Nationality Act, and the Administrative Procedure Act)**

120. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

[31] *See also, e.g.*, 8 C.F.R. §§ 208.1 (training), 208.2(a) (jurisdiction), 208.13(b) (asylum standard), 208.16 (standard for withholding removal per Convention Against Torture), 208.18(a) (defining torture), 208.30(d) (right to consult attorney or advocate, right to non-adversarial interview, right to record memorializing all material facts), 208.30(e) (right to complete factual record, supervisory review, and determination by legal standard).

121. Section 706 of the APA also provides that a court "shall hold unlawful and set aside agency action, findings, and conclusion found to be—(A) arbitrary, capricious, [or] an abuse of discretionary." 5 U.S.C. § 706(2).

122. The MOA is illogical, irrational and interferes with the purpose and goals of the Refugee Act and the INA by deploying law enforcement officers to conduct credible fear interviews, the proverbial wrong tool for the job. The MOA inhibits legitimate applicants for asylum, withholding of removal, and CAT protection from being able to seek asylum or protection from withholding, and places migrants, including Plaintiffs, at increased risk of wrongful removal, persecution, and torture, which contravenes the objectives and purpose of underlying immigration law and policy.

123. The Administration's apparent rationale for using CBP agents to review asylum and CAT claims is to drive down the number migrants able to enter and remain in the United States, without regard as to the merits of their underlying claims. This further thwarts the objectives of the Refugee Act, the INA, and the United States obligations to follow CAT.

124. The MOA and its direction to use CBP agents to conduct asylum and CAT screening are thus arbitrary and capricious and/or constitute an abuse of discretion in violation of the APA, 5 U.S.C. § 706(2)(A).

125. Plaintiffs are thus entitled to and seek (i) a declaration that the MOA and Defendants' actions authorizing or directing CBP agents to conduct asylum and CAT screening are arbitrary and capricious and/or constitute an abuse of discretion, and thus unlawful, (ii) a preliminary and permanent injunction barring CBP agents from conducting asylum or CAT screenings, and (iii) an order that the MOA and CBP action conducting asylum or CAT screenings

are unlawful, set aside, or vacated, with new screenings ordered to be conducted by USCIS Asylum Officers for each Plaintiff and all other individuals previously screened by CBP agents.

**COUNT FIVE—CONSTITUTIONAL VIOLATION**
**(Violation of the Due Process Clause of the Fifth Amendment to the United States Constitution and the Administrative Procedure Act)**

126. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

127. Plaintiffs have protected interests in applying for asylum, withholding of removal, and Convention Against Torture relief under procedures that meet the applicable standards set by law, and in not being removed to a country where they face serious danger and potential loss of life. Accordingly, migrants, including Plaintiffs, have a right to due process under "the procedure authorized by Congress." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

128. Plaintiffs are thus entitled under the Due Process Clause of the Fifth Amendment to asylum-related interviews that conform with the law and applicable regulations, including fair, accurate, unbiased, and complete development and memorializing of supporting facts for the record pursuant to non-adversarial interviews conducted by trained asylum officers as required by law, so as to provide a meaningful opportunity to migrants, including Plaintiffs, to establish their eligibility for asylum and related relief from removal, and release or parole as allowed by law.

129. The MOA and its implementation have violated migrants' and Plaintiffs' due process rights by failing to provide appropriately trained, neutral asylum officers as described above, and by depriving Plaintiffs of the required procedures and standards for asylum officer interviews under 8 U.S.C. § 1225(b)(1)(B) & (E) and 8 C.F.R. 208.3(d)–(e).[32] Plaintiffs' due

[32] *See also, e.g.*, 8 C.F.R. §§ 208.1 (training), 208.2(a) (jurisdiction), 208.13(b) (asylum standard), 208.16 (standard for withholding removal per Convention Against Torture),

process right to apply for asylum has thus been impaired by inadequately trained and adversarial CBP interviewers, depriving them of the opportunity for release or parole as allowed by law.

130. As a result, the above MOA and its implementation violate Plaintiffs' due process rights under the Fifth Amendment and thus also violate 5 U.S.C. § 706(2)(B).

131. Plaintiffs are thus entitled to and seek (i) a declaration that the MOA and Defendants' actions authorizing or directing CBP agents to conduct asylum and CAT screening are unconstitutional, (ii) a preliminary and permanent injunction barring CBP agents from conducting asylum and CAT screenings, and (iii) an order that the MOA and CBP action conducting asylum and CAT screenings are unconstitutional, set aside, and vacated, with new screenings ordered to be conducted by USCIS Asylum Officers for each Plaintiff and all other individuals previously screened by CBP agents.

**COUNT SIX—VIOLATION OF RIGHT OF *NON-REFOULEMENT***
**(Violation of the Immigration and Naturalization Act, the Convention Against Torture, and the Administrative Procedure Act)**

132. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

133. The 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees, to which the United States is party, prohibits the return of individuals to countries where they would directly face persecution on a protected ground as well as to countries that would deport them to conditions of persecution. These obligations require that the United States not "expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a

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208.18(a) (defining torture), 208.30(d) (right to consult attorney or advocate, right to non-adversarial interview, right to record memorializing all material facts), 208.30(e) (right to complete factual record, supervisory review, and determination by legal standard).

particular social group or political opinion." United Nations Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 150; *see also* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, Art. 3.

134. Congress has codified these prohibitions in the "withholding of removal" provision at INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), which bars removal of an individual to a country where it is more likely than not that he or she would face persecution. *See also* 8 C.F.R. § 208.16(c), (d). Congress also codified the prohibition against *refoulement* in Article 3 of CAT. FARRA § 2242(a), Pub. L. No. 105-207, Div. G Title XXI, 112 Stat. 2681 (codified at 8 U.S.C. § 1231). Only an immigration judge can decide if an individual faces a risk of persecution and is entitled to withholding of removal after full removal proceedings in immigration court. 8 C.F.R. § 1208.16(a).

135. The MOA and its implementation, however, permit CBP agents to conduct CAT screening, including with the goal, expectation, or practical result that these law enforcement officers will not abide by or respect the safeguards meant to protect against *refoulement* (through lack of training, lack of experience, and/or personal bias), therefore violating 8 U.S.C. § 1231(b)(3) and its implementing regulations.

136. The MOA and its implementation thus violate 5 U.S.C. § 706(2)(A), (C), (D).

137. Plaintiffs are thus entitled to and seek (i) a declaration that the MOA and Defendants' actions authorizing or directing CBP agents to conduct CAT screening violate Plaintiffs rights against *refoulement* and Defendant's corresponding obligations under CAT, (ii) a preliminary and permanent injunction barring CBP agents from conducting such screenings, and

(iii) an order that the MOA and CBP action conducting CAT screenings are unlawful, set aside, or vacated, with new screenings ordered to be conducted by USCIS Asylum Officers for each Plaintiff and all other individuals previously screened for non-*refoulement* by CBP agents.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully pray that the Court grant the following relief:

a) Declare the MOA and its implementation are contrary to law, unconstitutional, and taken without proper authorization, including as pleaded above;

b) Enter an order that the MOA and CBP's conduct of credible fear interviews are unlawful and unconstitutional, and that the MOA is set aside and vacated;

c) Enter an order preliminarily and permanently enjoining Defendants from continuing to implement the MOA or continuing to permit CBP agents to conduct credible or reasonable fear or CAT interviews or make credible or reasonable fear or *refoulement* determinations;

d) Enter an order striking any negative fear or CAT determinations issued without adequate process under the MOA and/or its implementation;

e) Enter an order that new screenings be conducted by USCIS Asylum Officers for each Plaintiff and for any other individual previously screened for asylum or CAT by CBP agents;

f) Enter an order enjoining Defendants from removing Plaintiffs without first providing each of them with a new credible fear and CAT interview under correct legal standards and procedures or, in the alternative, paroling them subject to full immigration court removal proceedings pursuant to 8 U.S.C. § 1229a;

g) Order Defendants to pay Plaintiffs' litigation costs and reasonable attorney fees pursuant to the Equal Access to Justice Act and 28 U.S.C. § 2412; and

h) Order all other relief that the Court deems just and proper to ensure that the government Defendants act according to law.

**JURY TRIAL DEMAND**

Plaintiffs demand a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure.

Respectfully submitted this 27th day of March 2020.

Respectfully submitted,

Dated: March 27, 2020

*/s/ Julie Carpenter*

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