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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EAST BAY SANCTUARY COVENANT,
et al.,

Plaintiffs,

vs.

WILLIAM BARR, et al.,

Defendants.

Case No. 4:19-cv-04073-JST

[Judge: Hon. Jon S. Tigar]

**NOTICE OF FILING OF TRANSCRIPT OF A
HEARING IN *M.M.V. V. BARR*, 19-CV-2773
(D.D.C.) DATED DECEMBER 18, 2019**

Date Action Filed: July 16, 2019

1 Proposed Plaintiff-Intervenors give notice of filing of the attached transcript of a hearing in
2 *M.M.V. v. Barr*, 19-CV-2773 (D.D.C.) (ECF 60) dated December 18, 2019, which Proposed Plaintiff-
3 Intervenors cited during oral argument on their motion for a preliminary injunction (ECF 95) before
4 the Court on October 29, 2020

5 Dated: October 29, 2020

Respectfully submitted,

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BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.M.V., et al.,
Plaintiffs,
vs.
WILLIAM P. BARR, Attorney
General of the United States,
et al.,
Defendants.

. Case Number 19-cv-2773
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Washington, D.C.
December 18, 2019
10:37 a.m.
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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE AMY BERMAN JACKSON
UNITED STATES DISTRICT JUDGE

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202-354-328412 Proceedings recorded by stenotype shorthand.
13 Transcript produced by computer-aided transcription.
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P R O C E E D I N G S

(Call to order of the court.)

THE COURTROOM DEPUTY: Your Honor, this is Civil Action Number 19-2773, M.M.V. et al., versus William P. Barr, et al.

Will counsel for the parties please approach the lectern and identify yourselves for the record.

MS. CAMBRIA: Your Honor, good morning. Bridget Cambria for the families.

MR. HAIR: Good morning. Christopher Hair for the United States. Also with me at counsel table is Erez Reuveni from the Office of Immigration Litigation at DOJ.

MS. CAMBRIA: I apologize. Let me introduce my co-counsel. Amy Maldonado, Gregory Copeland, Sarah Gillman, and Elora Mukherjee.

THE COURT: All right. We have recently -- I have recently granted docket 47, the motion to add new plaintiffs to this action, and I also granted the motion for leave to file a second amended complaint, which was docket 46.

The purpose of the hearing this morning had been to gain clarity about a few questions that I had that I wanted to ask before I could rule on what had been pending before me, but I think this development sets back a lot of the progress I wanted to make today, because the second amended complaint, to me, appears to change not only the identity of most of the

1 plaintiffs, but also some of the allegations, including the
2 jurisdictional allegations underlying the TRO. And it's a
3 fairly substantial rewrite of the complaint I had before me,
4 which is certainly the plaintiffs' prerogative, and I think it's
5 important to continue to refine your theories and your thoughts
6 as we move along. But right now, I'm having tremendous
7 difficulty trying to figure out if what I was thinking about and
8 what I thought I had to resolve is what I still should be
9 thinking about and what I still have to resolve. But there
10 still are some questions I had before that I still have.

11 So I think I want to start by asking the plaintiffs some
12 questions, and then I will get to the defendants. Yes, why
13 don't you come to the lectern. I actually do not plan to hear
14 argument. I'm really going to be asking questions. This isn't
15 a full-fledged motion hearing, but I will when I'm done ask if
16 there's anything that you felt you needed to tell me today.

17 MS. CAMBRIA: Understood, Your Honor.

18 THE COURT: The amended complaint that we were dealing
19 with, docket 28, in its jurisdictional allegation said in
20 paragraph 8, "The Court has jurisdiction under 8 U.S.C. Section
21 1252(e)(3) because the claims are systemic challenges to the
22 validity of the expedited removal system and the regulations and
23 written policies."

24 The defendants argued that the case didn't fall within that
25 statutory provision and that I lacked jurisdiction under

1 1252(a)(2)(A), and it also raised ripeness issues with respect
2 to numerous plaintiffs. And for those reasons, it said that the
3 TRO should fail because there was not a likelihood of success on
4 the merits, as well as these jurisdictional problems.

5 So we still have to figure out who is who with respect to
6 the plaintiffs and whose claims are ripe and whose aren't, and I
7 got the submission you filed this morning, and that was helpful.

8 But the first thing I need to understand is, are we then
9 dealing with the same jurisdictional issues anymore? The
10 proposed amended complaint said in paragraph 9 in the
11 jurisdictional allegation that I have federal question
12 jurisdiction, sovereign immunity has been waived through the
13 Administrative Procedure Act, and I have jurisdiction under the
14 Declaratory Judgment Act. And then there was a relatively
15 impenetrable sentence that said, "To the extent any claims fall
16 within the limits stated in 8 U.S. Code Section 1252(a)(2)(A),
17 jurisdiction also exists under U.S. Code Section 1252(e)(3)."

18 Now, let me just start with the Declaratory Judgment Act.
19 Do you agree that it is not an independent basis for
20 jurisdiction if there's no other statutory basis?

21 MS. CAMBRIA: That's correct, Your Honor.

22 THE COURT: Okay. So we still need to find a
23 statutory hook. What do you mean by "to the extent any claims
24 fall within the limits stated in 1252(a)(2)(A)"? Do you still
25 think they do or they don't, and if so, which claims in your

1 complaint do you now -- are you saying falls within that and
2 which don't?

3 MS. CAMBRIA: Your Honor, respectfully, we disagree
4 with the government's contention that there's no jurisdiction
5 here. In the matter of 1252(e)(3), there's a statutory
6 authorization for jurisdiction that was carved out specifically
7 for systemic challenges and expedited removal, which we have
8 here.

9 THE COURT: Right. And that's what you said in your
10 first complaint, and that is what I was prepared to address.
11 But this looks like you're backing away from it.

12 MS. CAMBRIA: Your Honor, we're not backing away from
13 it. What we are doing is securing it.

14 Now --

15 THE COURT: Is what?

16 MS. CAMBRIA: Securing it, so solidifying the
17 jurisdictional portion. 1331 also provides federal question
18 jurisdiction in this case. And there was a recent case, *Make*
19 *the Road v. McAleenan*, where Judge Ketanji Jackson ruled that a
20 1252(e)(3) action on its own might not be sufficient to
21 establish jurisdiction on its own through the statutory
22 authorization, that with a hook through a 1331 federal question
23 jurisdiction, them together in combination created sufficient
24 jurisdiction for the Court to hear the case.

25 THE COURT: The relevant federal question jurisdiction

1 is that it raises a federal question. So how can that -- it
2 still depends on 1252(e)(3).

3 MS. CAMBRIA: Absolutely, it does, Your Honor.

4 THE COURT: So I don't think federal question
5 jurisdiction adds anything. You either have it under (e)(3) or
6 you don't.

7 MS. CAMBRIA: Exactly, Your Honor.

8 THE COURT: Okay. So my question is, of the counts in
9 your complaint now, which ones fall within the limits stated
10 within -- you said to the extent they're covered, they're
11 covered, and I want to know which ones do you think --

12 MS. CAMBRIA: I believe they all are covered under
13 (e)(3).

14 THE COURT: All right.

15 MS. CAMBRIA: This covers both the claims regarding
16 the APA. It also covers constitutional actions. That is what's
17 provided for under 1252(e)(3) if you are providing a systemic
18 challenge within the jurisdictional time.

19 THE COURT: All right. What is the status of any of
20 the pending challenges to the rule itself which is not being
21 challenged in this case? Have there been injunctions entered by
22 any court staying deportations and any of them that also cover
23 these plaintiffs?

24 MS. CAMBRIA: These plaintiffs are not covered, Your
25 Honor. As far as I understand it, in the *I.A. v. Trump*

1 litigation, there are stays that cover individual plaintiffs who
2 are involved in that case, but that is not a nationwide
3 injunction. As far as I understand it right now, there is no
4 nationwide injunction for the transit ban. It is currently in
5 force, and every one of our plaintiffs that transited through a
6 third country -- which, by the way, are not all the
7 plaintiffs -- are subject to the transit ban. And for that
8 reason, they are not able to seek asylum in the credible fear
9 paradigm that we're talking about.

10 However --

11 THE COURT: Can you say that again?

12 MS. CAMBRIA: Yes. So, credible fear is the safety
13 net that Congress created when someone enters the United States
14 and is subject to expedited removal, which all of our clients
15 are. It's the one carve-out that Congress created so that we
16 would not deport asylum seekers to physical harm, because we
17 have mandates and treaty obligations that we do not do that. So
18 Congress carved out this one exception, and they created
19 credible fear.

20 In our case, our case involves plaintiffs all of whom are
21 subject to credible fear, some of whom are subject to the
22 transit ban and some of whom are not. But what we're
23 challenging in this case is not the transit ban itself. It's
24 the subsequent practices, policies, and procedures that the
25 defendants enacted against everyone that's in credible fear,

1 specifically in beginning targeting families, targeting children
2 and women initially at the South Texas Residential Center, where
3 our plaintiffs are from. They've expanded it to other family
4 residential centers now, and it is our belief that they will
5 expand those procedures to all of credible fear.

6 So what our plaintiffs have done is, upon noticing 11 or 12
7 different changes in the process immediately done, and
8 immediately done for all of our plaintiffs, when we noticed
9 these changes, we had to file something, because we're subject
10 to this jurisdictional time limit.

11 THE COURT: All right.

12 MS. CAMBRIA: So when the defendants changed credible
13 fear, we only have a certain time limit, and each of our
14 plaintiffs are subject to it. And respectfully, there are more.
15 There are lots of women and children right now who are subject
16 to immediate removal. There are lots of women and children who
17 are not getting a fair shot in credible fear, the thing that
18 Congress created to protect asylum seekers.

19 THE COURT: All right. You mentioned the time limits.
20 If you filed this action quickly to preserve making it within
21 the time limits, how does that cover the new plaintiffs who
22 you've just added? Is it 60 days from when the new rule was
23 enacted, in which case anybody who shows up in the country more
24 than 60 days thereafter can't challenge it anymore, or is it 60
25 days from when it's applied to you? How do you solve the

1 problem with respect to your -- because there's almost a --
2 we've gotten rid of a lot of plaintiffs whose determinations
3 were overturned. And then we've got a whole host of new people.
4 They haven't briefed the 60 days, but they kept telling me it's
5 a problem.

6 Why isn't it a problem for the new plaintiffs?

7 MS. CAMBRIA: Your Honor, because I believe what we
8 are challenging -- each individual in this case is challenging
9 the policy. And what we did is filed this timely with the
10 people who are available at that time.

11 There are continuing harms based on these policies, and we
12 believe that because we filed timely and there are continuing
13 harms, that we can add plaintiffs to this case, because this was
14 filed timely and they're challenging the exact same policies.

15 The jurisdictional time limit is a problem. It is not
16 something easily overcome, and it is the time from
17 implementation of the policy. So it does not matter if six
18 months from now someone is subject to that policy. They have no
19 right to contest it unless it is brought before a court within
20 60 days of implementation of the policy.

21 THE COURT: How did they get to just --

22 MS. CAMBRIA: I'm not saying I agree with it, but it
23 is a strong written language within 1252(e)(3) that it has to be
24 brought within 60 days.

25 THE COURT: I understand that. I guess what I'm

1 saying is, are you saying that if one person filed timely, to
2 the end of time you can just keep adding plaintiffs to the case,
3 and they're grandfathered in under the original claim? Is that
4 how it works?

5 I mean, certainly, statute of limitations wouldn't work
6 that way. It would be individual per plaintiff in the ordinary
7 situation.

8 MS. CAMBRIA: Because we are challenging the policies,
9 to not afford the same right for review while this case is
10 ongoing -- we have to first decide whether these 11 or 12
11 challenged actions are legal. So once that determination is
12 made, obviously, no new plaintiffs could be added. But until
13 the time that the policy -- since we have filed this action and
14 we are contesting the legality of the policy, plaintiffs should
15 be able to join and vindicate their rights the same as all of
16 our plaintiffs.

17 The other question that we have, Your Honor, is in this
18 case, we're still waiting for the government to provide what
19 written policies or whatever directives were given to asylum
20 officers to uniformly create these 11 or 12 different challenged
21 actions.

22 THE COURT: That's a whole different issue.

23 MS. CAMBRIA: That's right, but in order to qualify as
24 being a -- completely implemented as required under 1252(e)(3),
25 those policies have to be adopted by the Attorney General. And

1 it's not clear to us whether these are just written directives
2 provided to officers to go rogue, to violate what is their
3 normal obligations under the rule, or these are things that are
4 actually adopted by the highest levels of DHS. We don't know.

5 THE COURT: What you have basically just told me is
6 that you're not sure if you have the basis for this lawsuit or
7 you don't.

8 MS. CAMBRIA: No --

9 THE COURT: And that's the biggest problem for me from
10 the substantial likelihood of success on the merits. I
11 understand you're in a box, but I'm trying to figure out how
12 this fits the rulings that I have to make to get preliminary
13 relief. I'm going to get to that, because those problems -- I
14 still want to make sure I understand what your lawsuit is about
15 before I get to whether we have directives or not.

16 MS. CAMBRIA: I understand.

17 THE COURT: With respect to the -- what would you say
18 is the difference between the original complaint and the new
19 complaint, other than the added plaintiffs?

20 MS. CAMBRIA: Your Honor, what we did is we clarified
21 the challenged actions. So because we had filed our suit very
22 quickly in order to meet the statutory deadline and we had so
23 many plaintiffs, we were just trying to protect the people that
24 we could. We needed to clarify the challenged actions, to point
25 the Court to the different ways that the interviews were changed

1 and the different ways that they have obligations under the
2 regulations to provide the things that they're no longer
3 providing that they just uniformly stopped.

4 Additionally, we added in --

5 THE COURT: But the TRO, you provided a number of
6 affidavits and declarations giving me the factual basis to find
7 that this change had happened or that change had happened. But
8 I don't have that -- we're just transferring them. Even though
9 you're recharacterizing what the change is, it's still the same
10 underlying declarations that support the existence of the new
11 ones?

12 MS. CAMBRIA: It's exactly the same, Your Honor.
13 We're trying to make it more clear for the Court, because to be
14 fair, credible fear and expedited removal is probably the most
15 complicated area of immigration law, which is also probably one
16 of the most complicated areas of law. It's very difficult to
17 explain commonsensically how credible fear works, but it's so
18 important, because it's literally the only thing protecting
19 women and kids and, frankly, any asylum seeker from immediate
20 deportation to harm.

21 THE COURT: I don't want to belittle that. I totally
22 understand that. And so I really need to focus this morning on
23 the legal boxes, the findings the Court has to make to get
24 involved at this stage, no matter how strongly the showing is
25 made on the big picture.

1 MS. CAMBRIA: Understood.

2 THE COURT: So you keep taking me back there, and I
3 understand that, and that's important advocacy on behalf of your
4 client, but it's not where I need to be this morning.

5 I'm not sure that the amended complaint clarified the
6 challenged actions. The reason I had scheduled this hearing was
7 to talk about the challenged actions. And so now I have a new
8 set, new way of defining them. But part of the problem now is
9 you not only have to define them for purposes of Section
10 1252(e)(3)(A), that these are written policy directives,
11 guidelines, or procedures issued by or under the authority of
12 the Attorney General, but you've now hooked in the APA. And so
13 now they have to be final agency action for purposes of the APA.

14 So are you alleging that everything that you're saying is a
15 challenged action that gives me jurisdiction -- under Section
16 1252(e)(3)(A) gives me jurisdiction under APA Section 704?

17 MS. CAMBRIA: I am, Your Honor. And that's where the
18 *Make the Road v. McAleenan* case is so important, because they've
19 already actually addressed that exact issue, because that was an
20 APA claim where the question was, does 1252(e)(3) confer
21 jurisdiction. And they found that because it was an APA case,
22 that provided federal question, and in conjunction with the
23 1252(e)(3) --

24 THE COURT: But wasn't there a specific decision that
25 they were pointing to? You have to have final agency action to

1 get to 704. I don't have that opinion at my fingers. What was
2 the thing that triggered the APA in that case?

3 MS. CAMBRIA: In that case there was a written --
4 there was a written policy that had not gone through notice and
5 comment. So they were pointing to that final agency action.

6 THE COURT: Okay. That's different. All right.

7 So to the extent you're going to found jurisdiction on
8 Section 1252(a)(3)(A), which is what you need for 1331, in any
9 event, you agree that determinations subject to judicial review
10 are limited to whether a section or a regulation issued to
11 implement the regulation's constitutional.

12 Do you have any claims that are under Section 1, that
13 there's been an unconstitutional --

14 MS. CAMBRIA: We do have a Fifth Amendment claim, Your
15 Honor, and that's based upon the government not following their
16 own policies or procedures via the Accardi Doctrine, and also
17 that the rules that they are doing, they're placing on these
18 families is ultra vires, that they're not following their own
19 rules and regulations that are promulgated.

20 THE COURT: That's a constitutional claim. But under
21 1252(e)(3)(A), which is supposed to challenge new directives,
22 regulations, rules, are you saying that any new regulation or
23 rule that is unconstitutional or all of them under part 2?

24 MS. CAMBRIA: The challenged actions that we have
25 found absolutely deprive our clients of due process in the

1 credible fear scheme. We're talking about taking away trained
2 asylum officers and having children interviewed for asylum
3 relief, related relief, by CBP officers. We're talking about
4 putting kids and parents in interviews and telling them in the
5 middle of their interview, Asylum is denied and now we're going
6 to subject you to a different standard of law. You don't have
7 time to talk to an attorney or figure out what that law is;
8 you're just going to do it now.

9 These are all things that are brand-new. The interviews
10 are no longer nonadversarial. They're adversarial. We've gone
11 from interviews that lasted an hour and a half to eight to 10
12 hours, where children are battered with questions and parents
13 are battered with questions. There's substantive changes in the
14 interviews that create constitutional concerns. And that's why
15 we've listed the challenged actions that we have and why they're
16 so important in this scheme.

17 I'm not going to go back to the seriousness of it, but
18 we've laid out 11 different ways in which we have identified --
19 and these were done instantaneously and simultaneously -- to
20 render credible fear almost ineffective. We've gone from a
21 system where 90 to 97 percent of families succeeded in fear
22 screening -- and that's what it is, just a fear screening. This
23 is not -- you don't win any benefit from this interview. You
24 just win the right to talk to a judge. We've gone from a
25 97 percent success rate to 10 or below. I mean, it's a

1 substantial swing, a substantial change, and it all happened
2 within a month's time.

3 So something happened. Something happened uniformly,
4 because each of the officers are conducting the interviews in
5 the same way. That doesn't just happen, you know, on its own.
6 Something happened that created that change. And that's what
7 we're trying to identify. And we don't believe that the
8 government can hide these changes to prevent them from being
9 litigated in court, because we do have this really strict
10 jurisdictional timeline. I mean, they could create a system
11 where, you know --

12 THE COURT: Let me ask you, is there a pending Freedom
13 of Information Act request for any new policies or directives
14 issued since this rule change?

15 MS. CAMBRIA: No, there's not. The only one we are
16 aware of, Your Honor, is regarding using CBP officers to
17 interview children. That, we reference within our second
18 amended complaint, because that was previously filed by a
19 different organization, and we were seeking information from
20 them.

21 THE COURT: Well, isn't that an appropriate thing to
22 do? I mean, you don't necessarily get discovery in an APA case
23 or discovery under these immigration rules. The fundamental
24 thing we need to figure out here is whether there are policies
25 and written directives, and you can file a request. You can

1 expedite. There are a lot of things that we could be doing on a
2 parallel track here, and you're saying that's not happening?

3 MS. CAMBRIA: It hasn't happened, Your Honor, but I'm
4 not going to discount that that's not something we should be
5 doing. I agree with you.

6 THE COURT: Yes. I mean, the issue raised the day
7 this case walked in the door is, how are you going to prove the
8 existence of the policies as an element of your offense, of your
9 case. And an expedited request, while I'm not saying they would
10 have done it, they would have had to respond in 10 days. So we
11 would be sitting here with something where we'd also at least
12 have a parallel complaint before some other judge that these
13 should have been expedited and where are they, and there would
14 have been a schedule. At some point, they're going to have to
15 answer whether there's a written policy or not, but right now,
16 the onus is on you to establish that there is.

17 MS. CAMBRIA: And what we have to rely on, Your Honor,
18 in lieu of doing a FOIA, are the testimony of the families
19 themselves that acknowledge the change, the testimony of the
20 legal service providers that represent every single family
21 there.

22 THE COURT: Well, the families can say what's happened
23 to them. It's really the lawyers who can say this is different
24 than what was happening before.

25 MS. CAMBRIA: That's correct.

1 THE COURT: All right. I'm still, though -- even if I
2 find there's jurisdiction and the statute doesn't invest me of
3 my inherent equitable powers, we need to talk about the
4 likelihood of success on the merits. I'm having some difficulty
5 with what has been presented that would enable me to find that
6 you have made the necessary showing with respect to the
7 existence of written policy directives, guidelines, or
8 procedures, before we even get to whether they're illegal.

9 And now that you've thrown in the APA as the basis for the
10 lawsuit, to be final agency action, it has to be the
11 consummation of an agency decisionmaking process. It can't be
12 tentative. It can't be interlocutory. Rights or obligations
13 have to be determined. It has to be final agency action.

14 So I'm trying to find out how I can rule that there is a
15 substantial likelihood that you have established the existence
16 of written policies and final agency action.

17 The problems inherent in the previous complaint that you
18 say you were trying to clarify, to some extent, I think, were
19 exacerbated by the recharacterization of many of the aspects of
20 the new system which you were calling "policies" before, now
21 you're calling them "practices" or "the new regime."

22 For instance, the new amended complaint has in
23 paragraph 3, "On information and belief, the defendants or those
24 operating under their supervision or control have implemented
25 new directives, guidelines, initiatives, actions, and/or

1 procedures," which you're calling the challenged actions in sum.

2 Paragraph 4, "While at least some are believed on
3 information and belief to be memorialized in writing," and it
4 goes on.

5 Those are -- I understand why they're tentative and they're
6 vague, but how do we get to the Rule 65 standard with that kind
7 of characterization?

8 So what I want to do is go through the list of the 11
9 policies and talk about exactly what it is in the record that I
10 can rely upon to establish the likely existence of a new written
11 policy. And my concern is that some of them fall somewhere
12 within that ambit. But there are others -- inadequate
13 training -- that don't give rise to the notion that someone has
14 written a written policy, from now on we're going to have these
15 conducted by people with inadequate training. And saying this
16 was done by a person with inadequate training may be extremely
17 problematical in many ways, but I don't see how it falls under
18 final agency action for the APA or the written policies and
19 directives for my jurisdictional hook.

20 And so let's just go through them one by one. That is the
21 real reason I had this hearing.

22 MS. CAMBRIA: All right.

23 THE COURT: Policy number 1, before, you called it
24 "failure to meaningfully orient proper legal standard policy,"
25 and now you've called it "a policy to avoid meaningfully

1 orienting migrants to the applicable standards and procedures."

2 So first of all, how would that fall under the ambit of a
3 final decision for the APA? But second of all, where -- tell me
4 where exactly in the record -- and I went through that one.

5 We've got several declarations by a number of plaintiffs, and at
6 this point now, I don't know if they're still plaintiffs or not.
7 But basically, the argument is, the interviews were conducted by
8 different officers -- I think it's the Flaherty declaration --
9 under different legal standards, plaintiffs didn't understand
10 the changing nature of the legal threshold, they were nervous.

11 And how is that a challenge to the policy as opposed to the
12 merits, the outcome of the interviews?

13 MS. CAMBRIA: I can explain that, Your Honor.

14 THE COURT: Okay.

15 MS. CAMBRIA: So previously, people who were detained
16 at the Family Residential Center received an in-person
17 orientation from an asylum officer prior to their interview.
18 That is not happening anymore.

19 Secondly, the reason there's no meaningful orientation in
20 the majority of the cases that involve the plaintiffs, aside
21 from that, is that -- because of the transit ban. When CFIs are
22 conducted, they begin as a CFI, and they're required to read
23 them a form, called an M-444 form, that explains the purpose of
24 the interview, the purpose of a credible fear interview. You do
25 that for about two hours, where they determine transit ban

1 applies, you no longer qualify for credible fear, we're going to
2 change the standard and change the interview to a reasonable
3 fear interview.

4 And they read a paragraph -- and those are available in any
5 of the credible fear interviews for any of our plaintiffs
6 subject to the transit ban. They read a paragraph that says
7 you're now subject to a different standard of law. And there's
8 no break. There's no meaningful understanding of what legal
9 standard you're subject to when you walk into that -- when
10 you're sitting in that interview, until midstream.

11 And every person that is subject to a government process
12 that's going to decide their rights should understand the
13 purpose of the interview. So where we're --

14 THE COURT: One thing we haven't done, I don't think,
15 is specify which plaintiffs are transit ban plaintiffs. You've
16 said to me some of yours are and some of yours aren't.

17 MS. CAMBRIA: Yes.

18 THE COURT: So what you're saying is that this issue
19 applies to the transit ban plaintiffs?

20 MS. CAMBRIA: It would apply to both, Your Honor,
21 respectfully, because they're no longer being oriented previous.
22 They used to receive an in-person orientation. They're no
23 longer receiving an in-person orientation prior to the
24 interview. That's first.

25 Secondly --

1 THE COURT: The procedure to conduct one, was there a
2 written regulation or procedure or guideline in existence that
3 you are aware of before that said do it?

4 MS. CAMBRIA: Yes. And it is listed, Your Honor.
5 Paragraph 161 does provide citations for each of the changed
6 policies that we're alleging these are the areas of the
7 regulations that they're not following.

8 So 8 C.F.R. 235.3(b) (4) requires orientation of the process
9 that they're going through.

10 THE COURT: So the reason to believe that there's a
11 new policy is that what they're doing is contrary to the old
12 written policy, and that gives rise to an inference -- resolving
13 all inferences in your favor as a plaintiff, that there's been a
14 change in policy, that people have been told, Don't do X
15 anymore, do Y?

16 MS. CAMBRIA: Exactly. And it's not just that they're
17 doing it, but the credible fear interview transcripts which the
18 families receive do demonstrate for the transit ban the
19 cessation of the CFI and the beginning of an RFI and the reading
20 of one paragraph, which we don't think is a meaningful
21 orientation as to what the legal standard is you're going to be
22 subject to.

23 THE COURT: Okay. Is there anything more that I need
24 to know about what you're calling policy number 1 and why we
25 think there's evidence in the record that demonstrates that

1 there's a new written guidance with respect to that?

2 MS. CAMBRIA: The only other thing I would point Your
3 Honor to is the actual transit ban regulation itself, which does
4 describe that once a credible fear interview is conducted, they
5 will change midstream and conduct a reasonable fear interview.
6 So that is a written policy.

7 THE COURT: So are you challenging that policy, that
8 midstream policy, with respect to some or all of your
9 plaintiffs?

10 MS. CAMBRIA: Absolutely, because changing the legal
11 standard in the middle of an adversarial interview is chaotic
12 for anyone. When they hear, Your asylum is denied but we're
13 going to keep talking to you and read you a paragraph, there's
14 no orientation as to what they actually qualify for or can they
15 have a moment to talk with counsel or to understand what's
16 happening to them midstream. They have no idea.

17 THE COURT: All right. But that is a specific
18 regulation that you're challenging? Is that indicated in your
19 complaint somewhere that you're challenging that regulation?

20 MS. CAMBRIA: We're not challenging the transit ban
21 itself.

22 THE COURT: I know that.

23 MS. CAMBRIA: We're talking credible fear process.

24 THE COURT: You're telling me all these plaintiffs are
25 the same, but they're not all the same. Half of them are under

1 the transit ban, half of them aren't.

2 Policy number 1, I'm just trying to figure out what we're
3 challenging. Under policy number 1, that's it. And we got to,
4 they used to give them in-person orientations, now they don't.
5 That's number 1?

6 MS. CAMBRIA: That's correct.

7 THE COURT: But you keep going from there over here
8 and saying, and my transit ban plaintiffs halfway through are
9 read a piece of paper, and it's a new standard, but that is a
10 regulation, and it's written.

11 Is that regulation part of what you're challenging in
12 policy number 1 or this lawsuit?

13 MS. CAMBRIA: No. We're challenging the meaningful
14 orientation. So the regulation requires --

15 THE COURT: You're challenging the failure to do it?

16 MS. CAMBRIA: The failure to ensure that the person
17 being interviewed understands the legal standard they're subject
18 to.

19 THE COURT: Okay. But you can't challenge that. You
20 have to challenge a written policy and directive. So what you
21 are challenging is an alleged policy to no longer give the
22 orientation.

23 You understand what I'm saying?

24 MS. CAMBRIA: I understand.

25 THE COURT: Almost all of these are not cast in

1 language that would fit them under the only jurisdictional hook
2 we have here, which is the (e) (3), because the APA is even
3 harder to get to final agency action. So if you've got one, you
4 clearly have the other.

5 But let's just deal with going back to what we've been
6 saying, what you've been saying is your fundamental basis for
7 jurisdiction, especially if you add in 1331, which is
8 1252(e) (3) .

9 And so it has to be essentially a directive to do X or Y,
10 to implement immigration laws by doing X or Y.

11 MS. CAMBRIA: That's correct.

12 THE COURT: So policy number 1 is, I think what you're
13 saying, don't do the in-person orientations before the interview
14 anymore; is that correct?

15 MS. CAMBRIA: That's correct.

16 THE COURT: Okay. Is a part of that also reading them
17 some new standard in the middle of the interview?

18 MS. CAMBRIA: That's correct.

19 THE COURT: Okay. So there's like an A and B under
20 that?

21 MS. CAMBRIA: That's correct. And it falls under
22 8 C.F.R. 235.3, which requires meaningful orientation so that
23 the person understands the legal standard they're subject to
24 prior to the interview.

25 THE COURT: All right. So that's why it's unlawful?

1 MS. CAMBRIA: Yes.

2 THE COURT: Again, I'm not even getting to the merits
3 of whether it's lawful or unlawful right now. I'm just trying
4 to figure out what the "it" is.

5 MS. CAMBRIA: Understood.

6 THE COURT: I think I understand number 1.

7 Let's talk about number 2.

8 MS. CAMBRIA: Got it.

9 THE COURT: Proceeding without required staffing,
10 training, or guidance. This is one of the ones I have the most
11 difficulty fitting under the rubric -- the only rubric that I
12 have if I agree with you that I have it for jurisdiction.

13 So how is proceeding without the kind of staffing,
14 training, and guidance that one would need to do this properly
15 and fairly and constitutionally, all the things that are
16 important, how does that fit under the cubby hole of what we're
17 talking about?

18 MS. CAMBRIA: And I do understand Your Honor's concern
19 with the words "improperly trained," because it's highly
20 unlikely there's something out there that says we're going to
21 not train our officers.

22 What we're getting at in this action is that they are
23 assigning officers to credible fear interviews for children that
24 are not taught the appropriate standards. And this includes
25 employing CBP officers to interview children. And part of the

1 requirement, when children are interviewed, which comes in a
2 later action also, is that they apply children-friendly
3 standards.

4 THE COURT: Okay. When you talk about practices --
5 and you've kind of changed the whole thrust of the complaint
6 when you amended it to focus on practices -- how does that fall
7 under 1252(e)(3)(A)?

8 MS. CAMBRIA: Because the use -- this is the first
9 time ever in the United States that CBP officers are used to
10 interview asylum seekers. That has not been done yet. And
11 there's no other mechanism to challenge a change in credible
12 fear, so the use of CBP officers for the first time, but for
13 using 1252(e)(3).

14 THE COURT: I understand that, but it has to work.

15 MS. CAMBRIA: And we believe that there is writings,
16 because there's no mechanism to get CBP officers into the asylum
17 office besides an agreement between CBP and USCIS to conduct
18 those interviews.

19 THE COURT: So you are telling me that "proceed
20 without required staffing, training, or guidance," which is what
21 you're calling the new policy, is use of CBP officers to conduct
22 credible fear interviews?

23 MS. CAMBRIA: Yes.

24 THE COURT: Okay. And that would be something --

25 MS. CAMBRIA: That, I believe, we could get in

1 writing. I mean, I personally -- I do these interviews three or
2 four times a week. There's a dramatic shift in the type of
3 person who is interviewing kids now than before.

4 In the cases involving the plaintiffs here, we've
5 identified officers -- we've identified plaintiffs interviewed
6 by CBP officers. This is the first time that's ever happened.
7 And that's nationwide. This is a brand-new change, and it's one
8 of the reasons that we needed to include the "using agents
9 violating 18 U.S.C. 1225." The words "improperly trained," I
10 don't believe that there's going to be something out there that
11 says we're going to use improperly trained officers.

12 THE COURT: No, I understand that, but I think the
13 broader and mushier -- your characterization of the challenged
14 directives are, the more you make them into practices, regimes,
15 the further you wander from the only jurisdictional hook that
16 you're hanging your hat on, which they already have problems
17 with it, but if I say it's a jurisdictional hook, these have to
18 fit. And the way they're cast and the way they've been recast
19 makes that very challenging, and that's why I need the kind of
20 specificity that we're talking about right now.

21 MS. CAMBRIA: I'm happy to answer this, Your Honor.

22 THE COURT: Okay. And it may be that then we need to
23 go back with your giving me a list and telling me exactly in the
24 record and the declarations where I can find it, assuming that
25 it still applies to the new plaintiffs.

1 All right. I think I understand number 2.

2 Number 3, I think we had before, declaring a negative
3 decision in the middle of a screening directive was 4 and
4 eliminate supervisory review on concurrence of credible fear
5 determination directive as number 3, and now I think they've
6 been sort of combined as 3.

7 MS. CAMBRIA: Sorry. The only thing I would add:
8 Previously, before you could deny a CFI, a supervisor had to
9 sign it. Now they're denying CFIs in the middle of interviews
10 and converting them into RFIs. That's the slight
11 distinguishment from the first challenged action.

12 THE COURT: All right. What -- your current policy
13 number 3, I believe, you've characterized in paragraph 149 is
14 issues summary negative determinations to eliminate supervisory
15 review and concurrence and to avoid developing a complete
16 written record.

17 MS. CAMBRIA: That's correct.

18 THE COURT: And that one --

19 MS. CAMBRIA: So no longer is a supervisor
20 determining -- after a CFI is conducted, a supervisor is not
21 reviewing it to make sure that it's a correct decision before
22 they move forward into a reasonable fear interview.

23 Previously --

24 THE COURT: So these are just the transit ban ones
25 where they make the decision halfway through?

1 MS. CAMBRIA: That's correct, Your Honor.

2 THE COURT: So does this even apply to the nontransit
3 ban plaintiffs?

4 MS. CAMBRIA: It would not, Your Honor, because those
5 would receive full CFIs, and at the end, a supervisor would
6 review it.

7 The difference with the transit ban cases is that the
8 failure of the CFI is decided midstream.

9 THE COURT: All right. At some point, I may call for
10 additional briefing, but I definitely want a supplement to what
11 I got this morning that divides your plaintiffs and tells me who
12 the transit ban ones are and who the transit ban ones aren't.

13 MS. CAMBRIA: I will do that, Your Honor.

14 THE COURT: Okay. And you know, we have the problem;
15 plaintiffs are falling out and plaintiffs are coming in. It's a
16 moving target. And I recognize part of that is the time it's
17 taking to get to the merits of this. But it gets delayed when
18 things get amended.

19 All right. Number -- the fourth one, which I think was
20 similar to your prior fifth one, paragraph 140, limit
21 factfinding relevant to a significant possibility of eligibility
22 for asylum, withholding of removal, and relief against the
23 Convention Against Torture.

24 So maybe explain to me what the specific policy change is
25 that that specifically refers to.

1 MS. CAMBRIA: Your Honor --

2 THE COURT: And one thing you said last time is that
3 they didn't get to present testimony they wanted, and as a
4 result, there were negative findings, even though the facts of
5 their cases were sufficient to meet the standard. People were
6 cut off and didn't get to finish what they wanted to say.
7 Asylum officer didn't believe the story, didn't let them speak,
8 kept getting cut off, didn't want to hear drama. All of these
9 seem to me to be so merits-based.

10 So how does that one fall within, there's a policy change,
11 there's a sea change, there's a new directive, as opposed to
12 these people just are not doing my determination fairly,
13 multiple determinations fairly, but still?

14 MS. CAMBRIA: Well, what we've seen is a trend, and
15 when it's not just one or isolated incidents, when it's
16 happening in every case, when they're not following lines of
17 inquiry that they're supposed to follow throughout the
18 interview -- when I say "they," I'm sorry, asylum officers --
19 they're not -- they've been instructed to not completely
20 investigate certain lines of inquiry. If they receive, you
21 know, whatever information they need to to deny, they stop at
22 that moment. And it's not necessarily, We're going to do a de
23 novo interview where we investigate all lines of inquiry.
24 They're stopping people from talking.

25 And that's something that asylum officers typically don't

1 do, because their job is to investigate and to assist, not to be
2 adversarial and deny.

3 It's a trend that we've noticed, and there are requirements
4 under the C.F.R. that they don't leave incomplete records. They
5 have to follow those lines of inquiry. They can't tell someone
6 to stop talking. They can't let somebody explain -- not explain
7 their story. And I believe that that's supported by numerous
8 declarations.

9 THE COURT: Numerous declarations saying why it wasn't
10 happening. My concern was how -- where the hook came that said
11 this is a directive as opposed to they're just -- these were
12 individually bad interviews on a merits situation. What you're
13 saying, it's the consistency of it across the board and the
14 inconsistency of it with the regulations that makes you think
15 there's a new directive?

16 MS. CAMBRIA: Yes, Your Honor.

17 THE COURT: And I take it that's kind of the same
18 thing with respect to paragraph 151, to make interviews
19 adversarial.

20 MS. CAMBRIA: And this, Your Honor, is an extremely
21 important one in these cases. And I can tell from personal
22 experience, but also with the plaintiffs in this case, some of
23 these families are interviewed for 13 hours. I mean, that's
24 never happened ever.

25 THE COURT: And is all this -- number 4 and number 5,

1 are these -- these are not the CBP? These are the asylum
2 officers now?

3 MS. CAMBRIA: They're both, Your Honor. It's
4 important to understand that we can't -- unless we ask and we
5 get an affirmative answer as to whether someone is a CBP officer
6 or not, we can't identify in a lot of cases whether they are or
7 they're not, because they're provided with asylum officer
8 identification numbers. So in some cases, we have identified
9 them because they've disclosed that they are, or we've
10 identified them because we actually know by name that they are.

11 It's actually not disclosed to the person being interviewed
12 whether the officer is a CBP officer or not. They're all given
13 asylum officer identification numbers, and they introduce
14 themselves as asylum officers, even if they're brought over from
15 CBP.

16 But to get back to the adversarial nature of interviews,
17 the length of interviews, their requiring of children to
18 participate in interviews, the combative type of questioning,
19 never employed before by an asylum office -- and I've been doing
20 asylum interviews for more than five years, so long -- it's just
21 different. And they have an obligation under 8 C.F.R. 208.30(d)
22 to conduct nonadversarial interviews.

23 And where do you go when the agency has decided that we're
24 going to question you until you give up and start answering the
25 questions we want you to answer the way we want you to answer

1 them? And the way that we've seen it employed is extremely long
2 interviews, no breaks for lunch, involving children very young.
3 And it's really difficult as a parent to sit in a room for eight
4 hours with a child, and it's really hard to force a child to go
5 through that process if they just can't.

6 So it's a very different situation. And we're talking like
7 three months. Like three months ago, it was very different.
8 Interviews, one to two hours. Now they're eight hours. Using
9 children now. Weren't using children before. Types of
10 questions bordering on interrogation. Before, the whole idea
11 was to build trust and rapport to get someone's really traumatic
12 story out. That's over.

13 And that doesn't just come out of a -- that doesn't just
14 come out of nowhere. Somebody has to be told or trained, or
15 there has to be some kind of instruction as to what exactly
16 you're to do in these interviews.

17 So that's where the adversarial nature comes from.

18 THE COURT: Let me ask you a question.

19 MS. CAMBRIA: Yes, ma'am.

20 THE COURT: Let's say it turns out that for all of
21 these things, there was explicit instruction to start operating
22 this way and it wasn't written down.

23 Where would that put the Court? Would that satisfy the APA
24 still as a final decision?

25 MS. CAMBRIA: Where I would reach at that point, Your

1 Honor, is then we're talking about the Constitution. If we have
2 a situation where they're failing in all of these obligations
3 that they, through regulation, have always followed and they've
4 just decided now we're not going to do it anymore, that's when
5 you hit the constitutional violation. That's when 1252(e)(3)
6 matters, because it's a written directive or a constitutional
7 violation. And that's when I think we hit that point.

8 And for a lot of these kids, I think that we've hit that
9 point. And unfortunately -- not unfortunately. Fortunately for
10 our clients, 1252(e)(3), if we get it during the time frame that
11 these policies changed and it's a constitutional violation, they
12 have jurisdiction in this court to seek redress.

13 THE COURT: Do you think that all 11 have both
14 constitutional implications and -- or there's some in particular
15 that you believe have the constitutional implications?

16 MS. CAMBRIA: Your Honor, I think because all of them
17 are based in a regulatory scheme that they're required to do and
18 they're not doing it, I think they all ping on constitutional
19 violations. I think we're going to be hard-pressed to find in
20 writing each and every one of them. I think some of them do
21 exist, some of them might not. But certainly, all of them
22 certainly -- it really does border on, you know, the rights of
23 these clients, their constitutional violations, their rights to
24 be afforded what Congress intended them to have, and all these
25 regulations that say what they're supposed to be doing and

1 they're not.

2 So I do think that some are written. I think that all of
3 them pinge on the constitutionality of the scheme.

4 THE COURT: Going into 6, limiting migrants' rights to
5 meaningful consultation, this is similar to what you had before,
6 or this one is a new one?

7 MS. CAMBRIA: Your Honor, I just want to make sure the
8 Court is aware, there is another case that's challenging notice
9 of interviews and chance to consult with counsel, and that's
10 *L.M.-M. V. Cuccinelli*. It is before Judge Jackson as well, I
11 believe. In this situation, we don't want to interfere with
12 their case. I believe what we're talking about in this
13 meaningful advanced notice of interview and chance to consult is
14 for the transit ban cases, because when their status is changed
15 midstream, they have no opportunity -- this actually goes
16 into -- yeah, they have no opportunity to talk with counsel
17 about what standard they're subject to anymore.

18 THE COURT: Okay. So like 3, number 6 you're limiting
19 to your transit ban plaintiffs?

20 MS. CAMBRIA: That's correct. And it actually goes
21 into 7, no meaningful advanced notice, orientation, or
22 consultation with counsel.

23 But just so the Court is aware, the *L.M.-M. v. Cuccinelli*
24 is just another one of the things they have done to families in
25 family residential centers. They're not interviewing families

1 within 24 hours of arrival. We all want people to be in and out
2 of detention fast, but the purpose of that is to prevent
3 consultation with counsel. The idea is, if we interview them --
4 eight-hour interviews, within 24 hours of arriving from a CBP
5 station in a family detention center, to prevent their access to
6 counsel, then there's no understanding when they go into the
7 interview what they're subject to, and it ends up with just a
8 client's unknowing of what's really happening to them.

9 THE COURT: But that's her case.

10 MS. CAMBRIA: Yes.

11 THE COURT: And you're not saying this case is related
12 to that? It's just this is mine and that's hers?

13 MS. CAMBRIA: It's not.

14 THE COURT: You had one before, a directive about RFI
15 standards without RFI protections, and now you're not calling it
16 a directive anymore. You're just saying they're applying RFI
17 standards without RFI protections.

18 Obviously, that starts again -- we're talking about a
19 practice, a policy. So explain to me how that one falls under
20 the rubric that we've been talking about.

21 MS. CAMBRIA: So if you are subject -- credible fear
22 has a standard that's a significant possibility of success on
23 the merits of your asylum claim in a hearing. Reasonable fear
24 is the fear standard that is usually employed for withholding of
25 removal or protection under the CAT. It has a higher standard.

1 You have to establish a reasonable possibility that you will
2 succeed in a merits hearing on your case for withholding, or
3 CAT.

4 Now, because it's not under credible fear, it's reasonable
5 fear, you're subject to additional protections. You have the
6 right to know in advance that you have an interview.

7 So these families who are going into credible fear
8 interviews walk in --

9 THE COURT: So this is part and parcel with 1?

10 MS. CAMBRIA: Correct.

11 THE COURT: It changed halfway through, and it only
12 has to do with the transit ban plaintiffs?

13 MS. CAMBRIA: Correct.

14 THE COURT: But basically what you're saying there is
15 not so much that there's some new rule, but they're not applying
16 the rules that exist?

17 MS. CAMBRIA: Exactly, Your Honor.

18 THE COURT: And that falls under the jurisdictional
19 provision how?

20 MS. CAMBRIA: Because, Your Honor, the DHS not
21 following their own procedures, laws, guidelines is a
22 violation -- is ultra vires. It's violating the Accardi
23 Doctrine. It's violating what they're supposed to be doing.
24 It's a constitutional violation.

25 THE COURT: But the provision that you're pointing to

1 for my jurisdiction isn't based on I get to go in and stop
2 constitutional violations in terms of how they're performing
3 their job. I get to review sections or regulations and whether
4 they are constitutional and then whether regulations or written
5 policy directives, written policy guidelines or written
6 procedures are consistent with law.

7 And a failure to follow their own regulations, how do I get
8 to review that? You're saying they have perfectly good
9 regulations, and they're not following them -- or not perfectly
10 good. But the ones they have, the best we've got, they're not
11 even doing it.

12 MS. CAMBRIA: That's correct.

13 THE COURT: So what's the answer to their saying this
14 is just a merits challenge?

15 MS. CAMBRIA: Because, Your Honor, we're not
16 challenging whether they have a negative or not. We're
17 challenging the procedure that they were subjected to.

18 THE COURT: Okay.

19 MS. CAMBRIA: So that's --

20 THE COURT: That's your Fifth Amendment claim, the due
21 process claim.

22 MS. CAMBRIA: That's correct.

23 THE COURT: And you have a stand-alone due process
24 claim that doesn't depend on 1252(e)(3)(A). Which claim is
25 that?

1 MS. CAMBRIA: Third claim, Your Honor.

2 THE COURT: Because this one isn't really APA-like.

3 MS. CAMBRIA: That's correct.

4 THE COURT: This is, our due process is being violated
5 through these interviews because they're not following their own
6 rules.

7 MS. CAMBRIA: That's correct.

8 It's important, though, to understand, though, that
9 whatever rules that they promulgated to conduct the interviews
10 regarding the transit ban, they had to instruct them to conduct
11 a CFI first, deny it, state a paragraph saying you're subject to
12 a new standard, and conduct the other interview. That again
13 would not happen without instruction as to how to conduct them.

14 So it's likely that a writing exists, that they were told
15 to --

16 THE COURT: This is how to deal with the transit ban
17 plaintiffs now, when they say credible fear, we're going to
18 switch halfway through, and we're going to do this.

19 I understand.

20 MS. CAMBRIA: Okay.

21 THE COURT: Number 8, this relates to the most
22 favorable precedent in the CFI proceedings. So now you're
23 talking about not necessarily transit ban people; is that
24 correct?

25 MS. CAMBRIA: That's correct.

1 THE COURT: And what is the -- what are we saying?
2 What's the allegation there, that there's some new policy afoot
3 with respect to that?

4 MS. CAMBRIA: In this action, Your Honor, what -- the
5 obligations of the asylum officer doing the interview and making
6 the determination is to apply the most favorable case law in the
7 nation to these interviews. So it doesn't matter what circuit
8 you're in when the interview is conducted. They're to apply the
9 most favorable law in the nation, and they've stopped doing
10 that. They now are either silent and don't acknowledge
11 precedential laws that exist, or they affirmatively don't apply
12 certain laws.

13 And I can give an example. With regard to cases involving
14 gangs, which is highly contentious right now, but if you have
15 issues where you fear a gang and you're from a central American
16 country, your child's targeted, because perhaps you can't afford
17 whatever war tax they're putting on you, and they've said, Well,
18 we're going to kill your child if you don't pay this, and you
19 can't pay, your child's in danger, the Fourth Circuit determines
20 that that's protected.

21 But those cases will not succeed in Dilley anymore. So
22 what they've done, in *Grace v. Whitaker*, which is also a
23 companion case in this court, they determined that the asylum
24 officer is not allowed to do that, that they have to apply the
25 most favorable cases law in the circuit. And again, they're

1 just not doing that.

2 And in their determinations, Your Honor, they're not citing
3 or analyzing why that might not apply. They're just silent as
4 to it.

5 THE COURT: And again, the notion that this is a
6 written directive is based on the fact that you're saying this
7 is a sea change that started at a particular time and it's being
8 consistently applied?

9 MS. CAMBRIA: That's correct.

10 THE COURT: The mandatory concurrence review by the
11 Fraud Detection Unit is something new?

12 MS. CAMBRIA: That's correct. Akin to the CBP
13 officers coming to interview children, we've also -- it's come
14 to our attention that all positive credible fear determinations,
15 not negative, are subjected to at sometimes third-level review
16 by a Fraud Detection Unit. That's new. It's our understanding
17 that those in the Fraud Detection Unit are not asylum officers
18 and shouldn't be making these decisions. That's something new
19 that has happened within the 60 days that we filed this
20 complaint. And cases wouldn't go to a Fraud Detection Unit
21 without some instruction that that's to be done.

22 THE COURT: And then withholding facts relied upon,
23 this is the same as before?

24 MS. CAMBRIA: That's correct. It's very strange, in
25 the determinations that are being made for negative

1 determinations, they're no longer telling you why.

2 THE COURT: And they used to get a written form, and
3 now they're not?

4 MS. CAMBRIA: That's correct.

5 THE COURT: Okay. And the notion of -- well, you
6 changed "telephone interview directive," and now you've
7 got "abandoning child-sensitive treatment in credible fear
8 proceedings." So that seems to include the telephone interview.

9 Is there more to it than that?

10 MS. CAMBRIA: I believe that it's covered elsewhere,
11 but the -- in the South Texas Residential Center, children were
12 interviewed in person. That stopped. They're no longer
13 interviewed in person. They're interviewed telephonically. And
14 it doesn't matter how old the child is. They're interviewed
15 telephonically, and the parent as well.

16 And what's important about the child-sensitive interviewing
17 is that it's regulatorily required and also required under the
18 training manual for USCIS that they employ certain techniques
19 when they're talking to children.

20 So going back to having interviews conducted in an
21 adversarial manner, they're doing the same thing to adults that
22 they're doing to children -- doing the same thing to children
23 that they're doing to adults.

24 THE COURT: Okay. All right. I think this has been
25 helpful for me to understand what you're trying to say about

1 these issues. I want to ask you just a couple more questions
2 about brightness and mootness, and then I want to hear from the
3 defendants, and then probably wanting from both sides whether
4 you think, in light of the changes of the complaint, that
5 there's more you want to tell me in writing, particularly given
6 the clearer understanding you may have of where my focus is.

7 With respect to the ripeness and mootness issues in
8 docket 39, you categorized the plaintiffs, and you've redone it
9 this morning with the new plaintiffs. Category 1, basically,
10 you're dismissing on an ongoing basis people whose negative fear
11 determinations were vacated, either by the judge or the asylum
12 office. And so that's happening. And we appreciate the fact
13 that it's happening on an ongoing basis, and there's nothing
14 really to discuss, because that's being handled.

15 The second category were people for whom review is pending
16 but no hearing's been conducted or scheduled. And I think there
17 were two as of docket 39, but now we're back up to about seven
18 in this morning's filing, or yesterday's filing.

19 And I guess the question is, does the availability of the
20 option where they could be vacated -- and in a number of cases,
21 they are being vacated, perhaps on some of the grounds you've
22 been raising, perhaps on just factual grounds specific to the
23 individuals -- does that mean that the ones who have not yet had
24 review, that these really aren't ripe?

25 MS. CAMBRIA: Your Honor, I would argue that they are

1 ripe for this Court. I would point to the case of *O.A. v.*
2 *Trump*, which was in this court, not before this judge, last year
3 with the first asylum ban. In that case they rejected the
4 government's argument that 1252(e) limited the Court's
5 jurisdiction in cases where there was not a final order. In
6 that case they argued -- or the Court found that simply being
7 subject to expedited removal and contesting the procedures in
8 that permitted the Court to have jurisdiction without a final
9 order.

10 Additionally, it's important to understand in these cases,
11 for these seven plaintiffs, they're all statutorily outside the
12 time that they should be subject to an immigration judge review.
13 So 8 C.F.R. 1003.42(e) requires the government to conduct an ID
14 review within seven days of the final determination --

15 THE COURT: That does not affect the standing
16 analysis.

17 MS. CAMBRIA: No, it does not.

18 THE COURT: That's what I'm talking about here, is
19 standing.

20 MS. CAMBRIA: It's very possible that tomorrow, they
21 have the ID review, determined negative, and within hours
22 deported. So when you're in expedited removal, it's very fast.

23 In fact, in this case we lost three families that we did
24 not file in time for. Three families were deported, despite the
25 fact that we were rushing to court for them.

1 Expedited removal is fast. And in the case of these seven
2 families, they have negative determinations from the asylum
3 office. They're going to go before an IJ with what we believe
4 are tarnished credible fear interviews. So their IJ reviews are
5 compromised as well. And we believe that if they're affirmed by
6 the IJ, they're subject to removal within hours.

7 To be honest, we don't want to rush to court every time.
8 We understand the burden that this case puts on the Court.
9 We're just trying to protect the clients that we have. But the
10 nature of expedited removal is expedited, and these cases should
11 have already had ID reviews, and if they happen tomorrow, it's
12 very possible that tomorrow they are subject to immediate
13 removal within hours.

14 THE COURT: What percentage of the ones for whom
15 negative credible fear determinations have been made, how is it
16 playing out in terms of the numbers that are being vacated and
17 the numbers that are being affirmed?

18 MS. CAMBRIA: That's a good question, Your Honor.

19 THE COURT: It seems like a lot of plaintiffs dropped
20 out, and those are also procedures that -- determinations made
21 subject to all of these procedures that you're challenging. Is
22 that right?

23 You've said with category 2, the review is going to be
24 compromised by all these deficiencies. But even given these
25 deficiencies, some chunk of them are being overturned?

1 MS. CAMBRIA: Out of 240, 15. So it's a very small
2 percentage.

3 THE COURT: Okay.

4 MS. CAMBRIA: ID reviews have their own difficulty.
5 But when your initial interview is compromised, it's like fruit
6 of the poisonous tree. So when you go in front of an
7 immigration judge, they look at the interview you had. That's
8 what they use to determine whether the decision was right or
9 wrong. So if the interview was flawed, the judge is going to be
10 reading a flawed interview and making the review determination
11 on that interview. In some cases a lawyer is not even allowed
12 to speak in those interviews. You're not afforded a counsel in
13 the IJ review. In many cases you can't introduce additional
14 evidence.

15 In the cases at Dilley, we've recently had U.S. citizens in
16 these interviews, in these IJ reviews and were not even able to
17 express that they were citizens at that point. It's a very
18 truncated review, and it's subject entirely to the transcript of
19 the credible fear interview, which we think is tarnished by
20 these changes.

21 THE COURT: Okay. Thank you.

22 MS. CAMBRIA: Thank you. Any further questions?

23 THE COURT: No. I want to talk to the government.

24 MS. CAMBRIA: Thank you for your time to explain all
25 of those questions.

1 THE COURT: All right. Let me hear from counsel for
2 the government.

3 MR. HAIR: Good morning, Your Honor.

4 THE COURT: All right. My first question for you is,
5 you oppose the TRO based on the operative complaint that we had
6 at the time. Are there things that you need to argue when you
7 put in your opposition to the amended complaint that -- this
8 doesn't waive your objection to the people that are the 60-day
9 issue, but do you need to submit something, a supplement to your
10 opposition to the TRO that takes into consideration the extent
11 to which some of these claims have been changed and the changed
12 underlying legal basis for the claims, such as the APA?

13 MR. HAIR: Well, Your Honor, the missing piece for
14 us -- and I understand that sort of noting our objections or our
15 potential objections is not a lot of help at this stage. But
16 going through the claims today has been helpful, I think, and
17 may very well allow us to sort of supplement our opposition with
18 respect to the individual policies.

19 We've had some time now as this proceeding has been pending
20 to sort of review the individual written policies that we can
21 discern, and to not only apply whether or not they exist, but
22 also understand better how the 60-day bar would apply to the
23 policies that we do know exist.

24 THE COURT: Obviously, if you're going to argue a
25 60-day bar with respect to any policies, those policies should

1 be attached to your pleading.

2 MR. HAIR: Yes, Your Honor. And we --

3 THE COURT: That would advance the ball significantly,
4 I think, for everyone's sake.

5 And so explain to me, with respect to the 60 days, if the
6 clock starts ticking as of the time of the issuance of the
7 policy, are you saying that no one who is interviewed more than
8 60 days after a new rule is issued or no one who arrives in the
9 United States more than 62 days after a new rule or policy is
10 issued can challenge it?

11 MR. HAIR: So the 60-day bar would at least begin when
12 the policy is first implemented, and then it's sort of
13 irrespective of when the plaintiff's claims would arise.

14 THE COURT: It doesn't matter when it's applied to
15 you; it's only when it's implemented?

16 MR. HAIR: Correct, Your Honor. It sort of begins,
17 the clock starts once the policy is implemented by the
18 government, and if you present your challenge -- either as the
19 initial plaintiffs had in this case, you would look back to when
20 that policy was first implemented, and then for any additional
21 plaintiffs, as we have here as well, you know, that would sort
22 of be the operative time frame when they entered the case,
23 because their claims are all individual.

24 THE COURT: All right. So you disagree with the
25 notion that if there's a timely filed complaint, you can just

1 get on that train?

2 MR. HAIR: We do, Your Honor, because it's a, we
3 believe, jurisdictional requirement; there's no relate back to
4 the initial complaint. And this was a matter that received
5 review in the *American Immigration Lawyers Association v. Reno*
6 case that Judge Sullivan handled back in 1998 and was affirmed
7 by the D.C. Circuit in 2000.

8 THE COURT: Okay. I feel like the parties are going
9 to have to address that at this point. The problem with TRO and
10 preliminary injunction litigation is that it does overlap with
11 the merits significantly, but when you're talking about
12 jurisdiction, I'm legally required to ascertain whether I have
13 it before I go forward. And the complaint -- so many of the
14 original plaintiffs are gone, some because they've succeeded in
15 their challenges, some because they've given up. But with this
16 constantly evolving set of plaintiffs, I need to ensure myself
17 that I have plaintiffs over whom I have jurisdiction.

18 And so I am going to permit both parties to brief that
19 issue. I don't see how I can move forward without it.

20 MR. HAIR: To that end, Your Honor, I am prepared to
21 discuss sort of what -- we've gone through policy by policy, and
22 I think the government kind of sees them in three different
23 buckets. And I can go through what those are, if at the very
24 least it gives the Court an idea of our position, to the extent
25 it hasn't been covered in our prior briefing.

1 THE COURT: I'm happy to hear about your three
2 buckets, and then I do have some jurisdictional arguments under
3 the statute. But since we've just spent a lot of time talking
4 about the policies, I would like to hear what you have to say
5 about them.

6 MR. HAIR: Sure. So the three buckets would be, the
7 policies that we can identify as a written policy -- and just as
8 an initial matter, I think the government would agree with how
9 Your Honor sort of presented the statute and the limitations
10 therein, you know. Under Section (e) (3) (A) (i), the
11 constitutionality of the regulation would be at issue, and under
12 subsection 2, the text is quite clear that it has to be a
13 written policy.

14 So that's what we have framed our review around. And so
15 we've identified a few policies that do have a written component
16 to it and thereby would warrant further review.

17 The other two buckets, just for the sake of --

18 THE COURT: Let me just start with those.

19 With respect to those, then, do you agree that I have
20 jurisdiction?

21 MR. HAIR: No, Your Honor. And I can go through the
22 reasons why. There are four different policies that we
23 discussed today, four of the 11 that have some written component
24 to it, and two of them -- this would be the "avoid meaningfully
25 orienting migrants to applicable standards and procedures" and

1 then also "limit migrant's right to meaningful consultations."
2 The government believes that these policies pertain to those
3 subject to challenge in the *L.M.-M. v. Cuccinelli* matter before
4 Judge Moss.

5 And in any event, those policies were implemented on
6 July 8th of 2019. Therefore, the 60-day time bar would apply on
7 September 9th, 2019, which would mean that the complaint having
8 been filed, I believe, September 16th would fall outside of
9 those.

10 So those are sort of the two first. We can identify
11 written policies. Those are subject to other litigation in the
12 *L.M.-M.* matter. And in any event, they would be time-barred.

13 The other two that they have, one is the "proceed without
14 required staffing, training, or guidance." We talked a few
15 moments ago about Customs and Border Protections officers
16 conducting the credible fear interviews. And just as an initial
17 matter, I would note that the statute does define an asylum
18 officer -- and it's not specific to which branch or division of
19 the Department of Homeland Security that that officer is
20 employed under, but we are aware of a memorandum of agreement
21 for the use of Customs and Border Patrol agents as asylum
22 officers.

23 THE COURT: Doesn't that suggest, then, that the words
24 have different meaning?

25 MR. HAIR: I'm sorry?

1 THE COURT: Doesn't that suggest that asylum officer
2 means asylum officer and not Customs and Bureau -- CBP officer
3 if you had to do that?

4 MR. HAIR: No. It would just mean that the asylum
5 officer would have to have the proper training and requisite --
6 fill that role, not necessarily that a CBP agent could not do
7 that. It's just a matter of sort of, you know, resource sharing
8 amongst the government to have individuals from CBP perform that
9 function, but it would still need to perform that function
10 consistent with the statute.

11 But to the extent that that memorandum of agreement, you
12 know, constitutes a written policy, that was implemented
13 July 11th of 2019, which would mean the 60-day bar would bring
14 us to September 9th, 2019. So this action would also be
15 untimely under that rubric.

16 The final written policy that we can identify is the
17 mandatory concurrence review by the Fraud Detection Unit. And
18 I'm using plaintiffs' titles, of course, for the sake of ease.

19 THE COURT: Thank you.

20 MR. HAIR: And not to necessarily agree with the
21 context. I'm sure the Court understands that.

22 THE COURT: I understand that.

23 MR. HAIR: So this policy was implemented for fraud
24 detection and national security review, specifically at the
25 South Texas Family Residential Center in Dilley, Texas. This

1 policy began and was implemented on August 30th, 2019.

2 Additional written guidance was issued subsequent to that, in
3 early September. But based on the August 30th date, the 60-day
4 bar would bring us to November 4th, 2019.

5 THE COURT: All right. So with respect to this issue
6 for which you say there is a written policy in place that is not
7 more than 60 days old, do you deny that I have jurisdiction with
8 respect to that? Do you have a jurisdictional objection to
9 that?

10 MR. HAIR: We do, and the reason is -- well, first,
11 for the initial plaintiffs, you're right. The 60-day bar would
12 not apply. So no, we have no issue there.

13 THE COURT: Okay.

14 MR. HAIR: For the additionally added plaintiffs, for
15 the reasons that I discussed earlier on today, we do think that
16 those plaintiffs would be barred.

17 THE COURT: All right. There's no other objection to
18 the exercise of federal jurisdiction with respect to that
19 policy? If we have the right plaintiffs who file on a timely
20 basis, we have a written policy.

21 MR. HAIR: And that's an if, Your Honor, if we have
22 the right plaintiffs. I can't discern from the complaint any
23 plaintiffs that alleged that they had their positive credible
24 fear finding reversed because of this policy. Plaintiffs may
25 choose to identify those plaintiffs, if there are any. But just

1 from the allegations contained in the complaint, the government
2 would assert that they would lack standing unless, of course,
3 they were subject to that policy and had a credible fear
4 determination reversed pursuant to a subsequent fraud review.

5 So that would be the only sort of -- the threshold issue
6 here. Anything else, I would say, would go to the merits of
7 such a policy, and there's not much to go off of in the
8 complaint. So we don't think that the likelihood of success
9 would necessarily be overwhelming in this regard. But I do want
10 to flag that for the Court. This is within the 60-day time
11 frame.

12 THE COURT: All right.

13 MR. HAIR: Notwithstanding the standing issues that we
14 have with this one.

15 THE COURT: All right. And with respect to the other
16 policies that we've discussed, are you saying at this point that
17 you know that there's nothing written on the subject, or are you
18 just saying you don't have written policies that you do know
19 about?

20 MR. HAIR: No. I can convey to the Court that we do
21 not have any written policies on -- you know, there's a number
22 of policies that we went through that did seem facially like
23 they would not have written policies, of course, so they might
24 not be of surprise: The limited factfinding relevant to a
25 significant possibility of eligibility for asylum, make

1 interviews adversarial, do not apply the most favorable
2 precedent in CFI proceedings, withholding facts relied upon in
3 issuing credible fear determination, and abandon child-sensitive
4 treatment in credible fear proceedings.

5 I believe that last one was the telephone rule, and the
6 government doesn't dispute that hearings are conducted sometimes
7 by telephone. There's no policy to that effect. It's just
8 sometimes a necessity.

9 THE COURT: Well, is somebody going to -- am I going
10 to get something sworn by some human being in the Department of
11 Justice that says no, there is no written policy or directive
12 that relates to these, now that they've really honed in on
13 specifically what they're saying the change in procedure and
14 practice is that is happening, according to them, across the
15 board that was not happening before?

16 Let's put aside whether we're talking about July 9th versus
17 July 15th. Someone's going to take the position on behalf of
18 the agency in some sort of a declaration that this doesn't
19 exist?

20 MR. HAIR: Yes, Your Honor. And ideally, that would
21 have happened at the outset. It was a little bit difficult for
22 us to sort of comb through these and sort of discern them for
23 ourselves. And obviously, in light of the amendment, we
24 thought, just as a matter of good housekeeping, that we might
25 just take a look at these new allegations and see if they

1 changed the rubric. I think now that we've had some time to
2 spend with them and in preparation of the hearing, we sort of --
3 and also counsel's, you know, helpful explanation, I think, at
4 the beginning that these are clarifications on the policies that
5 were alleged in the initial complaint and not necessarily
6 bringing up new policies that we have to then go track down, so
7 I think we're comfortable with that, providing a declaration
8 from the relevant Department of Homeland Security office that
9 would --

10 THE COURT: All right. I think, given the various
11 jurisdictional issues you're raising in terms of timing, the
12 factual argument you're raising with respect to whether they can
13 meet their -- make the showing that they need for jurisdiction,
14 which is the existence of written policies, that you should
15 supplement your opposition to the TRO with all the information
16 that you want me to consider, and I would like to know whether
17 you think you can do that.

18 MR. HAIR: Understood, Your Honor. And if you would
19 give me a moment to confer with co-counsel on that --

20 THE COURT: Sure.

21 MR. HAIR: -- I can get back with you.

22 (Government counsel conferred.)

23 MR. HAIR: Thank you, Your Honor.

24 We can put a declaration before the Court in supplement to
25 our TRO opposition by next Friday, if that would be helpful. We

1 have a vested interest in sort of having finality in terms of
2 what issues remain in the case, are in or out, so we can sort of
3 focus on addressing those issues in our response to the
4 complaint and moving forward.

5 We are under the administrative stay now. So we sort of
6 had thought about doing this in one fell swoop in response to
7 the complaint. But if the Court were inclined to rule on the
8 TRO in advance of that response, that would be helpful, I think,
9 to achieve that finality and maybe pare things down in our
10 minds, at least.

11 THE COURT: Well, I mean, if the parties want to
12 consolidate with the merits and you agree to keep the
13 administrative stay in place while we deal with the merits, that
14 would be fine and dandy. Administrative stays being what they
15 are, I think at the outset, everybody wanted me to rule on the
16 TRO.

17 MR. HAIR: And that is still what we would like, Your
18 Honor.

19 THE COURT: All right. Then we need to go forward
20 with this. I do think the merits in the TRO are emerging on a
21 daily basis. And I don't actually -- I guess it's with the
22 preliminary injunction that I can consolidate a TRO. It seems
23 to have been largely obviated by the administrative stays.

24 But now we have two administrative stays in place, and I
25 have yet to rule. And part of my inability to get to this dealt

1 with -- other things that were before me, but it also dealt with
2 needing to get from both sides what I need to get, and then the
3 goalpost changed immediately before this hearing. I was a long
4 way down the road of an opinion, and now I kind can of have to
5 go down a new road, none of which I'm complaining about, but it
6 does extend the period of time that the administrative stay is
7 in place anyway.

8 So it may make sense to do less, or a more fulsome briefing
9 and get it done. On the other hand, plaintiffs don't want
10 people detained longer than they need to be detained, but that's
11 a little bit -- they also want review of these legal things.

12 So something has to give, one side of this or the other.

13 MR. HAIR: And I fully appreciate that, Your Honor. I
14 think we're sort of in preliminary injunction territory now, as
15 the Court noted.

16 THE COURT: Right.

17 MR. HAIR: And I think because of that, if it's
18 unlikely, for instance, that the Court would have sufficient
19 time to sort of allow the parties to supplement and then rule
20 prior to the parties engaging in briefing on the complaint --

21 THE COURT: I'm just not sure what's going to be left
22 to the merits of the complaint that you're not going to bring up
23 in your opposition. I mean, part of it is, we're not under
24 (e) (3) because there's nothing written. We're outside of
25 jurisdiction because of timing. No final agency action, I

1 imagine, is going to be a part of what you're going to say the
2 second time around. All of these are merits issues.

3 There is an issue that goes specifically to my authority to
4 issue injunctive relief, which I haven't asked you the questions
5 about yet, but if you assume I disagree with your position on
6 that, then we still have to get to likelihood of success on the
7 merits. Likelihood of success on the merits bears stunning
8 resemblance to the merits in almost every case, especially given
9 how jurisdictional your merits are.

10 So there might be some benefit to consolidation, but that
11 would require keeping the administrative stay in place. If
12 you're not willing to agree to that, I have to rule on the TRO.
13 So I can let you think about that.

14 But in any event, I don't have a problem with your having
15 until next Friday, which would be December something -- 27th, to
16 brief this. And I recognize that you are stepping up to do
17 that, you know, over the holidays, and I appreciate that. So
18 that's fine.

19 I was going to ask the plaintiffs to supplement on a
20 parallel basis, but I do think once they file what they're going
21 to file, you're going to want to answer it anyway. So I think,
22 to obviate your filing two, I'm going to give you an opportunity
23 to respond, since this is your motion. And so when would you
24 like to do that, assuming they file something on December 27th?

25 MS. CAMBRIA: We can respond a week later.

1 THE COURT: All right. So that would be January 3rd.
2 All right.

3 And in connection with that or before -- I think before
4 would be helpful -- I think it would be helpful to find out
5 which plaintiffs are the transit ban plaintiffs and which ones
6 are not.

7 And then I just have a couple of questions for the
8 government about the statutory argument about my authority to
9 issue injunctive relief, putting aside my authority to exercise
10 review.

11 MR. HAIR: I'm sorry, Your Honor.

12 THE COURT: That's all right.

13 I want to go back. We've talked about if 1252(e)(3)(A) is
14 the basis for judicial review, you have a secondary argument
15 which says that, notwithstanding, I don't have the authority to
16 enter a stay or declaratory injunctive relief. And you said
17 that Section 1252(e)(1)(A) says, "No court may enter declaratory
18 injunctive or other equitable relief, except as specifically
19 authorized in a subsequent paragraph of the statute."

20 There is a subsequent paragraph. The subsequent paragraph
21 that forms the basis for this action, or at least did, or I
22 guess still does, which is Section 1252(e)(3)(A), which provides
23 for judicial review of determinations made under Section 1225(b)
24 that are limited to, as we discussed, determinations about
25 whether sections, regulations, written policy directives are --

1 the sections or regulations are unconstitutional or written
2 policy directives are not consistent with the statute or
3 otherwise in violation of law.

4 So according to you, as I understand it, since the limited
5 judicial review provision that we're under provides for judicial
6 review but it doesn't specifically authorize declaratory
7 injunctive or other equitable relief, it's barred by subsection
8 (e) (1) (A); correct?

9 MR. HAIR: That's right, Your Honor.

10 THE COURT: All right. So my question is, what would
11 judicial review consist of? Do you agree that a review in court
12 could strike a policy down?

13 MR. HAIR: Yes. It could, Your Honor.

14 THE COURT: So how can you review a policy and strike
15 it down if you can't declare it to be lawful or unlawful at the
16 end of the day? Isn't the declaration essential to the review?

17 MR. HAIR: For this matter, Your Honor, with the
18 Court's indulgence, my co-counsel, Erez Reuveni, has been
19 litigating this for some time and will be better able to answer
20 this.

21 THE COURT: All right. That's fair.

22 Your turn.

23 MR. REUVENI: Hello again, Your Honor.

24 And apologies. I'm not contagious, but my voice is not
25 what it usually is.

1 On this, and my co-counsel is right, this is an issue
2 pending now in a number of cases before this court. The
3 government's eager to get a decision one way or the other on it
4 so we can stop litigating it.

5 But to answer your question, I think we have to distinguish
6 between a preliminary injunction and a final determination on
7 the merits.

8 THE COURT: Okay. Well, the statute that you're
9 relying on doesn't talk about "preliminary." It just says
10 declaratory injunctive or other equitable relief.

11 MR. REUVENI: So it defines what the Court can when do
12 in this box. All the Court can do reading 1252(e)(1) and (e)(3)
13 together, you start with a presumption, no equitable relief,
14 period. Then you go to the next subsection. Does the next
15 subsection authorize some kind of relief? There's two sections
16 that authorize some kind of relief. (E)(2), which is not at
17 issue here, has a specific remedy; put them in normal removal
18 procedures. That's (e)(2) plus (e)(4). And then (e)(3) says
19 make a determination that this is unlawful.

20 Sort of comparing it to APA terms, since apparently this is
21 now also somewhat of an APA case, when you have an APA case and
22 you're in a preliminary injunction box, you don't finally
23 declare the policy unlawful. You say it is likely to be that
24 this policy also may be set aside, but you don't set it aside
25 for everyone. You enjoin it as to the people in the case.

1 That's how preliminary injunction works.

2 Then on final relief, when you get to the merits on summary
3 judgment, you set it aside. And that may have systemic effects
4 just by nature of what a set-aside remedy is. You tell the
5 agency, this is vacated or set aside, and now the agency can't
6 apply that to anyone.

7 But that's not what this does. So comparing it again to,
8 say, the Hobbs Act, which says, during review of an agency
9 action, you may enjoin the regulation during the review of the
10 action. That's 28 U.S.C. I think it's in our papers. I can
11 get you the cite if you need it. But that's again not what this
12 does. This says specifically make a determination that the
13 policy, written directive, whatever you have, is unlawful.

14 And we think the only way to read that is that that's a
15 final determination. That's akin to a final declaration, after
16 merits review, that this is unlawful.

17 So while you're doing that on the one track, summary
18 judgment and you're making a determination whether this is or
19 isn't unlawful, what 1252(e)(1) tells you is, you cannot issue
20 any other sort of relief, including intermediate relief to stay
21 the individual's removal. I think you have to read that in
22 conjunction with 1252(f) and (g) as well, which we cite in our
23 papers.

24 First, with (g), (g) is just a general bar enjoining the
25 removal of individuals other than as permitted in the statute.

1 So again, there's something else permitted. As I've just
2 articulated, 1252(e)(3) is not what permits it.

3 There's a separate statute, 1252(f), which does allow for
4 injunctive relief. We cited this in our papers as well. It's
5 titled "limit on injunctive relief." And then it refers to part
6 4 of the subchapter. That's 8 U.S.C. 1221 to 32. And we're
7 right in that field, because this is 8 U.S.C. 1225(b)(1), the
8 statute that plaintiffs allege is being implemented unlawfully.

9 And what that provision says is, you can enter injunctive
10 relief, if at all -- so this is preliminary injunctive relief,
11 in our view -- to individuals who are actually in removal
12 proceedings. So you cannot set aside the policy writ large
13 under (e)(3).

14 And then under (f), you can enter --

15 THE COURT: Isn't that what they're asking for?

16 So are you saying (f) would apply?

17 MR. REUVENI: If you go to the merits analysis. The
18 way I had understood this hearing -- and apologies if I
19 misunderstood the way we were litigating this -- is does the
20 Court have the authority to stay their removals.

21 And there's two ways to look at that. Do you just have
22 inherent authority --

23 THE COURT: That was your issue, but not the only
24 issue.

25 MR. REUVENI: I understand.

1 THE COURT: You need to slow down. I talk fast, but
2 you're killing me right now. So you need to slow down. You
3 need to breathe at the end of sentences.

4 Okay. Give me the statutory section that you just quoted
5 me that ends in (f).

6 MR. REUVENI: 8 U.S.C. 1252(f).

7 THE COURT: Okay. Now --

8 MR. REUVENI: There's (1) and (2), and I'm referring
9 to subsection (1).

10 THE COURT: And that is a section that talks about
11 injunctive relief?

12 MR. REUVENI: Right. So that lets you issue a
13 preliminary injunction as to individuals before you, if you --
14 you know, they go through the showings, likelihood of success on
15 the merits. There's jurisdiction, irreparable harm, balance of
16 equities.

17 THE COURT: Like Rule 65.

18 MR. REUVENI: Right. In a way, in a sense. That's
19 separate, though, from 1252(e), which itself -- that's an
20 injunction. That's not a stay of removal. So if you were to
21 find for the plaintiffs that they made a likelihood of success
22 on the merits showing -- they've shown harm, they've shown a
23 balance of equities, and all that favors them, (f) allows you to
24 stay their and only their removal.

25 But (e) doesn't allow you to enter a preliminary injunction

1 that functions as a stay of removal. That's a separate kind of
2 equitable relief. So (e) doesn't carve out stay of removal.
3 (F) doesn't allow for stay of removal. (F) allows for an
4 injunction. So you would have to find for them on the merits,
5 likelihood of success, all those factors, and then you could
6 enter an injunction as to the operation of these alleged
7 policies to them.

8 THE COURT: Which would stay their removal?

9 MR. REUVENI: In effect.

10 THE COURT: Which is what we've done administratively.

11 MR. REUVENI: Which is what you've done
12 administratively, which we think the Court doesn't have
13 authority to do.

14 But understandably, we are where we are.

15 THE COURT: Why doesn't 1252(f)(1) give me authority
16 to do it if I find a likelihood of success on the merits?

17 MR. REUVENI: You haven't done that yet, but if you
18 do --

19 THE COURT: I know that. That's why we're having a
20 hearing.

21 MR. REUVENI: Your Honor, where we are is a stay has
22 been entered --

23 THE COURT: But we're not talking about whether I have
24 all of the findings in place. We're talking about whether, if I
25 made all the findings, I would have the jurisdiction to do it at

1 the end of the day.

2 MR. REUVENI: Sure.

3 THE COURT: And your brief said, I can't do it under
4 (e) (1) (A) because it says no declaratory injunctive or other
5 equitable relief at all unless it's specifically authorized in a
6 later provision.

7 MR. REUVENI: Correct.

8 THE COURT: And then I asked, and I still don't think
9 I got the answer to that question, why doesn't the judicial
10 review provision of 1252(e) (3) (A) count as the subsequent
11 authorization? And your position is, because that only lets you
12 make a merits determination, lets you review things, doesn't say
13 anything explicit about injunctive relief or declaratory relief.

14 MR. REUVENI: That's our position.

15 THE COURT: And so it just lets you make a
16 determination.

17 And so let's go back to the question I asked your colleague
18 when he went to the table and turned it over to you, which is,
19 if I am entitled to exercise judicial review under that
20 provision, how can you review a statute and strike it down or an
21 action and strike it down without declaring it to be unlawful?
22 And if I'm declaring it, isn't that inherent in judicial review?
23 So isn't there some equitable declaratory relief that is baked
24 into (e) (3) (A)?

25 MR. REUVENI: True. That's our position, and that's

1 the problem. There's no such thing as a preliminary declaratory
2 relief. I mean, the Supreme Court in *Doran*, a 1974 case we cite
3 in our brief, there's preliminary injunctive relief, which is
4 what they want. But there's no such thing as a preliminary
5 declaration.

6 And the statute --

7 THE COURT: I guess my problem with that is that
8 (e)(1)(A) lumps them together, declaratory injunctive or other
9 equitable relief. And it's saying, those all rise and fall
10 together. And when you're trying to tease them apart and say
11 some of them are in (e)(3) and some of them aren't but (e)(1)(A)
12 lumped them all together, so if (e)(3) says, Judge, you get to
13 do your thing, essentially, with respect to written directives,
14 why doesn't that give me the whole ball of wax?

15 MR. REUVENI: I think it's wrong to say that because
16 it says injunctive, equitable, declaratory in (e)(1), that
17 therefore, we apply some sort of canon of construction that says
18 determination in (e)(3) means all those things. And we know
19 that's wrong, because then (e)(4) tells you a specific type of
20 equitable relief the Court can provide in an (e)(2) action. It
21 says vacate the expedited removal order and place the individual
22 in full removal proceedings, colloquially a 240 proceeding, a
23 full removal proceeding, so not expedited.

24 So if you were right, because it says injunctive,
25 declaratory, equitable in one, therefore, the types of relief

1 that the next two sections allow for must be all three things,
2 then (e)(4) is meaningless. So a determination has to mean
3 something other than every type of equitable, injunctive, or
4 declaratory relief available.

5 We have taken the position here and other cases, including
6 in front of the D.C. Circuit in a case just argued, that
7 determination is declaratory relief. As you just suggested,
8 Your Honor, you can issue a declaration when you find on the
9 merits when all is said and done that the policy, if it's
10 reviewable otherwise, is unlawful. Issuing a declaration is
11 something you do after review with a record that, okay, this is
12 unlawful. Sorry, agency, you can't do this anymore, I declare
13 that this implementation is unlawful. It's not something you do
14 in a preliminary injunction, where you say, I preliminarily
15 declare this unlawful. That's an injunction. That's what's
16 barred, a preliminary injunction barring implementation of the
17 statute.

18 So if we're talking about an injunction, (e)(3) doesn't
19 allow for that. It allows for a determination. And I don't --

20 THE COURT: And so, but why doesn't 1252(f)(1), then,
21 fill the gap?

22 MR. REUVENI: That allows you to stay removals if you
23 find on the merits for them with respect to likelihood of
24 success, irreparable harm, balance of equity.

25 THE COURT: I have to find that anyway to issue a TRO.

1 You keep saying, You're going to have to do that. I, obviously,
2 have to do that. I can't do anything equitable without that;
3 right?

4 MR. REUVENI: Sure.

5 THE COURT: Okay. And if I do that -- and we've
6 talked all morning about why likelihood of success on the merits
7 might be difficult, but if I found it, that's a different
8 question about whether I have the power if I had found it to say
9 they have to stay until I finish with the merits determination
10 at the end of the day.

11 MR. REUVENI: Well, respectfully, I think we disagree.
12 I think those statutes do two different things.

13 Again, (e)(1) says what you can do in the universe of the
14 (e)(3)-type challenge. And what plaintiffs want here is to not
15 be removed until the merits of the case is resolved. That, we
16 don't think the Court can do.

17 THE COURT: I thought you said (f)(1) does apply to
18 the particular challenges brought here.

19 MR. REUVENI: (F)(1) allows you to issue an injunction
20 preventing the application of these policies to these plaintiffs
21 going forward, yes.

22 THE COURT: If I find the other elements that
23 ordinarily are necessary to support preliminary injunctive
24 relief?

25 MR. REUVENI: Correct.

1 THE COURT: So why doesn't that solve -- you can argue
2 that we haven't checked all the boxes yet, but why doesn't that
3 solve the problem of my power to do it if it persuaded me on all
4 the other elements?

5 MR. REUVENI: I think the answer to that -- and I
6 apologize if I overspoke -- (f) is like this general backstop
7 provision that exists separate from (e). (E) says specifically
8 what you can do in the world of a 1252(e) suit. (F) does not.
9 (F) is just a general, you can't enter any sort of injunctive
10 relief unless these boxes can be ticked. 1252(g) says you
11 cannot stay removal unless some other provision allows you to do
12 it. (E) says specifically unless otherwise authorized by
13 this -- a subsection of this provision. So it has to be in (e),
14 that you can't do it.

15 I think it's helpful to compare to Judge Sullivan's
16 decision in 1998 in the *American Immigration Lawyers Affairs v.*
17 *Reno* case. This was an argument that was sort of made there,
18 and it's made in each of these cases: What is the point of this
19 provision if someone can be removed before they get a hearing on
20 the merits? That that makes no sense, as the position that's
21 advanced in these cases.

22 That was the issue in Judge Sullivan's case, too. There
23 were a number of individual plaintiffs, two of which filed
24 within the time bar, many, many more of which did not. The two
25 that did file within the time bar were removed before there was

1 a decision on the merits. And the case was resolved in the
2 government's favor. So it never was an issue. What happens is
3 a remedy there.

4 But by comparison, in *Grace*, the recent decision Judge
5 Sullivan had, there were individuals who were removed before a
6 decision on the merits. There was no stay for those people,
7 those individuals. And the order, as a remedy when there was a
8 final decision, is to bring them back and redo the proceedings.
9 And so that you could do on a final judgment.

10 If you make a determination saying, Well, these procedures
11 that were applied to them are unlawful, their order is null and
12 void, then the impact of that is they get a hearing --

13 THE COURT: That may make sense in some ordinary
14 situation. But how -- I think the plaintiffs' argument is that
15 that doesn't work in an asylum situation where you're talking
16 about it's really not an adequate substitute to say, We will
17 bring you back later after you've been physically attacked once
18 you got there.

19 MR. REUVENI: Respectfully, like you said before,
20 these are sympathetic claims. I don't want to belittle that.
21 These are people seeking asylum and safety from another place
22 they believe they don't want to be. But they've had review by
23 an immigration officer. They've had review by an immigration
24 judge.

25 THE COURT: That begs the question: I can't say that

1 when they're saying all these procedural deficiencies marred the
2 interviews, that just because the interviews came out against
3 them, that I should be happy and not worried about what happens
4 to them when they get there.

5 MR. REUVENI: This may not be the reason I'm up here,
6 but I have to quibble with that characterization.

7 So plaintiffs' counsel says well, many, many, many of these
8 people are not subject to the transit bar. But the fact is, the
9 vast majority of their plaintiffs are not eligible for asylum
10 now. So that's sort of -- that's a fair point in a case where
11 someone is eligible for asylum. I think I wrote down, they have
12 maybe seven sets of plaintiffs who are not subject to the
13 transit bar.

14 THE COURT: Right. And I will let you know, the fact
15 that there's some that are and some that aren't is a piece of
16 information that I learned this morning for the first time. So
17 I'm still trying to process how it affects anything.

18 MR. REUVENI: Understood.

19 And I would like to consult with co-counsel on what makes
20 the most sense to get you all the information that you need so
21 that you can decide this. We had a sidebar just now, and it
22 doesn't make sense --

23 THE COURT: You have until next Friday to file
24 whatever you think --

25 MR. REUVENI: Right. It's -- the plaintiffs are the

1 ones to tell us which of their clients are not subject to the
2 transit bar.

3 THE COURT: They will tell us which, but you can
4 certainly argue this class versus that class, and they can tell
5 you who --

6 MR. REUVENI: My only point there is, when you talk
7 about -- it's kind of a hollow remedy that someone is sent back
8 to, say, Guatemala, and then say, Wait to see what happens in
9 your case in the United States, and then if you win you will
10 come back and start where you were before.

11 It's not really that hollow, because they're not eligible
12 for asylum at all unless they're Mexican nationals. That's not,
13 I think, a fair concern here for the vast majority of the
14 plaintiffs.

15 I would add one other jurisdictional provision that's
16 relevant to, I think, the question of what you can do in (e)(1).

17 So (e)(1) says what we just talked about, but I think we
18 also have to look at 1252(a)(2)(A), which we cited in our
19 papers. So 1252(a)(2)(A) is actually where we have to start
20 with what the Court does and does not have jurisdiction over.

21 And 1252(a)(2)(A) says review relating to
22 Section 1225(b)(1). So that's the starting point for what is
23 and isn't subject to review. And then it says -- it's got a
24 notwithstanding provision at the outset -- notwithstanding any
25 other provision of law, statutory or nonstatutory, and I'm going

1 to skip ahead, "no court shall have jurisdiction to review," and
2 then it lists four things.

3 Three of them say "other than subject to 1252(e)." So
4 that's Romanette 1, 2, and 4. Those things are subject to
5 review under (e), and it says: "Except as provided in
6 subsection (e), an individual determination or to review any
7 cause or claim arising from or relating to implementation or
8 operation of an order of removal under the statute." (ii) says,
9 again, "Except as provided in subsection (e), a decision by the
10 Attorney General to invoke these provisions," and (iv) says,
11 "Except as provided in subsection (e), procedures and policies
12 adopted by the Attorney General to implement."

13 So that's all available in a 1252(e) review.

14 But there's (iii), and that says -- and there's no
15 exception there for subsection 1252(e). It says, "The
16 application of that subsection to individual aliens, including
17 the determination made under Section 1225(b)(1)(B)." That's the
18 credible fear determination. So this statute says there's no
19 statutory review of the credible fear determination at all, even
20 under 1252(e).

21 And I think it doesn't make a whole lot of sense for
22 Congress to say --

23 THE COURT: Well, I don't think they're saying, I want
24 my credible fear determination reviewed. That's where I
25 disagree with your characterization. They are saying, We

1 disagree with these policies and procedures. I don't think
2 they're saying, Judge, please review my credible fear
3 determination.

4 MR. REUVENI: If you're staying the credible fear, the
5 implementation of the negative credible fear, you're staying the
6 implementation of their individual credible fear determination.
7 That's separate and apart from these policies they're
8 challenging. So no one is disputing that they can challenge
9 these policies if they file within 60 days and there's a written
10 policy guideline or directive that actually implements the
11 relevant statute.

12 THE COURT: But you're saying, Okay, well, you can
13 make declarations about policies, but you're not allowed to
14 apply them to actual people. And if that were true, if they
15 were saying, We just want you to make a declaration in the air
16 about some policy and not apply it to actual people, you would
17 be saying there's no case or controversy, and I don't have
18 jurisdiction because they don't have standing.

19 You can't have it both ways.

20 MR. REUVENI: We're not trying to have it that second
21 way. What we're saying is --

22 THE COURT: But you would if I -- if they didn't have
23 a human who was affected by the policies who is a plaintiff in
24 the case --

25 MR. REUVENI: We're not contesting that they can't be

1 plaintiffs if they check all the boxes. That's not our position
2 at all. We're not saying that whatever subset of their people
3 file within 60 days and have a written policy --

4 THE COURT: You're saying I'm allowed to issue an
5 opinion some day that applies to them, but I'm not allowed to
6 issue a stay that applies to them?

7 MR. REUVENI: That's our position, yes.

8 THE COURT: Got it.

9 MR. REUVENI: And if they happen to win on the merits,
10 we can give you a brief. We can tell you what we think should
11 happen.

12 But *Grace* gives -- Judge Sullivan's more recent decision
13 gives a model. They come back, and the proceeding is done
14 again.

15 THE COURT: And what I'm saying is, I don't think the
16 third provision under 1252(a)(2)(A), which carves out credible
17 fear determinations, is the reason why that's not the case. I
18 think we are under 1252(e) and whether the bar in Section (1)(A)
19 applies or whether there's something about (e)(3)(A) that pokes
20 a hole in that.

21 And you've explained to me why it doesn't, and I haven't
22 thought about it that way. I need to think about it that way.

23 But then there's also the question of my inherent
24 authority.

25 MR. REUVENI: So in answer to that, but before we get

1 to that, can I give you one more --

2 THE COURT: Sure.

3 MR. REUVENI: This is in our brief as well. These are
4 not new arguments.

5 1252(3)(a) says judicial review of, and I am quoting,
6 determinations under subsection 1225(b) of this title and its
7 implementation, end quote. Not "or."

8 So there's not like a separate, you challenge an
9 implementation, you need a determination that's actually
10 reviewable, and you need an implementation that's reviewable.
11 So if they have a policy, great. They can get the policy
12 reviewed. If they have this determination. 1252(a)(2)(A)(iii)
13 says one of those determinations that's not a predicate for
14 review under (e)(3) is a credible fear determination.

15 So all these things taken together say, if you're trying to
16 stay the effectuation of an order premised on the lack of a
17 positive credible fear finding, you can't do that under an
18 (e)(3) case.

19 There's a separate provision, (e)(2), that gives you
20 certain -- a limited ability to challenge an individual
21 determination, again not the credible fear determination, and
22 that's how you would get out of the box of having your order of
23 removal effectuated, because you make the showing that that
24 provision requires, and you get into a normal removal
25 proceeding. That, in our view, is the only way to get around

1 that.

2 Under the inherent authority point, if we are discussing
3 this on a blank slate, of course, the Court has inherent
4 authority. But I don't think anyone is disputing that Congress
5 can limit that inherent authority by specifically saying,
6 through a statute with a clear statement, that here are the
7 things you cannot do.

8 And so yes, there may be inherent authority to manage the
9 Court's docket and to issue stays in the administration of
10 justice or to determine jurisdiction as a default, but we would
11 submit 1252(e)(1) disrupts that default by saying you no longer
12 have this inherent authority to do these specific things unless
13 another subsection of the statute gives it back to you.

14 THE COURT: And that's where we sit, and that's what I
15 have to figure out.

16 MR. REUVENI: Yes, Your Honor.

17 THE COURT: All right. I think all of this has been
18 helpful. I will read everything that is submitted to me. If we
19 need another hearing, I will set another leering. But I think
20 this has been clarifying, and I will continue to keep this under
21 advisement, and the administrative stay will stay in place.

22 MR. REUVENI: Your Honor, a housekeeping matter:
23 Plaintiffs mentioned the case, and I would like to mention it,
24 too, the case pending before Judge Moss, the *L.M.-M. v.*
25 *Cuccinelli* case.

1 The policies that exist on that that plaintiffs refer to
2 have been submitted as a part of an administrative record in
3 that case. And as my co-counsel told you, in the government's
4 view -- and we will give you a declaration on that with the
5 filing next Friday -- those are really the only written policies
6 that go to an alien's ability to consult prior to a credible
7 fear proceeding that exist.

8 The two other policies that co-counsel mentioned that CBP
9 officers are conducting some of these credible fear interviews
10 because they've received training to do so, you mention they're
11 time-barred. So we will lay it out in our briefs. That leaves
12 our fraud review provision. That's not subject to the
13 Cuccinelli lawsuit that I just mentioned.

14 THE COURT: I -- initially this case came to me
15 because someone had designated it as related to Judge Kelly's
16 case. He decided it wasn't. It came to me. That made sense,
17 given the thrust of the two lawsuits.

18 Is anybody claiming that this lawsuit is related to Judge
19 Moss's case? Plaintiffs say they're not, shaking their heads
20 no.

21 MR. REUVENI: But they're time-barred on those two
22 issues, because again, those policies were submitted July 8th.
23 That lawsuit was filed in September within the 60-day limit.

24 Of course they would say that. I would say it, too.

25 THE COURT: But let's say Judge Moss says, I don't

1 like these policies, they're unconstitutional. It would still
2 apply to them if they had been subjected to an unconstitutional
3 scheme; correct?

4 MR. REUVENI: If they're still in the country, but
5 that's -- if the policies get vacated -- actually, no, let me
6 take that back.

7 I don't think that's how it works. If they're a party to
8 the lawsuit, they will get their orders vacated. If they're
9 not, I don't necessarily know that they would benefit from that,
10 because the case would issue some sort of remedy as to the
11 plaintiffs before the Court.

12 This is what happened in *Grace*. There were thousands of
13 people who were subject to the challenged procedures there. The
14 relief there was prospective, not retrospective. That would
15 mean thousands of people not party to the case would have their
16 credible fear determinations overturned, and have to have those
17 proceedings done again and be returned from a foreign country
18 back to the United States.

19 So I don't know that I would agree -- it's a little
20 hypothetical at this point. If the case is related and ends up
21 in front of Judge Moss, I guess that would be a decision for
22 Judge Moss. And we would argue in front of him that they're
23 time-barred, they don't get relief.

24 But I don't know that that's the issue right now.

25 I would say -- just one last point on the asylum ban issue.

1 I keep hearing plaintiffs saying, We're not challenging the
2 transit bar, we're not challenging the transit bar, and that's
3 how they got away from Judge Kelly. Judge Kelly says they say
4 they're not challenging the transit bar, so it's not related.
5 Fine.

6 THE COURT: I don't think they were trying to get away
7 from Judge Kelly.

8 MR. REUVENI: I don't mean to impugn. Apologies if it
9 sounded that way.

10 They wanted the case to be cited as an individual case,
11 which is their right under the random case assignment system.

12 But now I'm hearing them explaining what policies they're
13 challenging, and a good number of these are just the
14 implementation of the transit bar. They say, Well, they stop
15 the interview halfway and say oh, you're not eligible for
16 asylum, they never used to do that before. Of course, they
17 never used to do that. Before, there was no transit bar that
18 made them ineligible for asylum before.

19 They say, It used to be 90 percent of the people passed,
20 and now only 10 percent of the people passed. Yeah, of course,
21 because a vast majority of people are eligible for asylum now
22 since the Supreme Court issued the stay of the injunction in
23 those cases.

24 So when they say they're challenging the implementation of
25 things that have followed the transit bar, I'm hearing them

1 saying they don't like that the transit bar is being applied to
2 them, and they think that is a separate sort of policy. To me,
3 that sounds like they are challenging the transit bar. And we
4 would be happy to lay this out in our supplemental brief.

5 THE COURT: I don't think you need to do that. I
6 think you made that clear at the beginning. I think they're not
7 doing what you're saying. I understand what you're saying, but
8 if someone subject to the transit bar is subject to a different
9 legal standard and they learn about it for the first time during
10 the interview and they're saying, Because I wasn't oriented to
11 that, because I didn't know about that, so I wasn't prepared for
12 that, didn't get to talk to my lawyer when it changed, that's my
13 problem.

14 That's not a challenge to the bar. It's a challenge to the
15 written policies or the guidance under which it's being
16 implemented. It is different.

17 MR. REUVENI: And neither of which exist. The
18 guidance is --

19 THE COURT: Fine. That's a merits issue.

20 MR. REUVENI: The guidance is in the rule. And the
21 rule says this is what you do. And as they implement it case by
22 case, they're applying the rule on the Federal Register and
23 specific guidance that has gone out saying this is the transit
24 rule, this is what you do.

25 When they say that they're not being oriented mid-hearing,

1 I don't know where that comes from. They know -- everyone who
2 goes through a credible fear proceeding knows you do two things
3 in a credible fear proceeding. You make an asylum claim, and if
4 you fail to make your asylum claim, you make what's called a
5 withholding of removal or Convention Against Torture claim.

6 Those are two different claims, two different standards.

7 So when they say, Well, my client, hypothetical client
8 didn't know they were going to be subject to a withholding
9 claim, too, that's not correct. It's in the regulations that
10 says if you go through a credible fear review, you get asylum,
11 which we now know is off the table for everyone but their
12 Mexican national clients, or you get withholding of removal in
13 CAT, which is a different standard.

14 Everyone knows that. It's in the regulations. It's a
15 surprise to no one.

16 That's why what I hear them saying, Well, it used to be
17 that they would go through the whole credible fear proceeding
18 and apply that one standard but now they're applying two
19 different standards, because we have this asylum bar which says
20 if you can't get asylum -- so we don't deal with that standard.
21 Now what we deal with is what they call a reasonable fear
22 standard. It's a higher standard. That's the transit bar being
23 applied.

24 THE COURT: All right. But if there is a regulation,
25 if it's in the bar itself, then you need to direct me to where

1 it is in the new rule. If it's a regulation that's been
2 promulgated subsequent to the new rule, you need to direct me to
3 that.

4 MR. REUVENI: The supplemental filing will have that
5 for you, Your Honor.

6 THE COURT: All right.

7 MR. REUVENI: As Mr. Hair mentioned, we will give you
8 a declaration, someone will sign under penalty of perjury saying
9 these are the policies that we understand to exist.

10 THE COURT: If, for instance, the shift in what the
11 test should be is something that's specified in the rule itself,
12 then I need to know that. I think we've all been hampered to a
13 certain extent by not being exactly clear about what's on the
14 table. But I think now we're exactly clear about what's on the
15 table. And so you should file what you think I need to know,
16 and they're going to file what they think I need to know. And
17 then I will read it and find out if I need to know more.

18 MR. REUVENI: Very good, Your Honor.

19 THE COURT: All right. I think that's it for today.
20 I appreciate everybody's thoughtfulness in answering my
21 questions, and I will keep it under advisement.

22 Thank you.

23 MR. HAIR: Your Honor, I apologize.

24 This is with respect to the timing of the new plaintiffs
25 and the administrative stay. In light of the supplemental

1 filing we were planning on providing, is it a fair statement
2 that the Court would deem the new plaintiffs and everybody in
3 this case subject to the original --

4 THE COURT: Administrative stay?

5 MR. HAIR: Yes.

6 THE COURT: Yes.

7 MR. HAIR: Thank you, Your Honor.

8 MS. CAMBRIA: One other thing, Your Honor, because
9 we're talking about timelines, especially for the CBP officers,
10 the MOU that they alleged, we also believe that after an MOU,
11 guidance would be issued about how CBP officers would come to
12 interview children.

13 I'm going to talk with government counsel about getting as
14 many of the records as possible, and we are going to file an
15 additional FOIA just to get that rolling, as the Court
16 suggested.

17 Thank you.

18 THE COURT: Yes. To the extent you're relying on any
19 written directives that have dates, if there have been follow-up
20 guidance, whatever, ultimately, this is all going to be a part
21 of whatever record there is. So there's no reason to not make
22 it a part of your next submission. I think that would be
23 helpful.

24 All right. Thank you.

25 (Proceedings adjourned at 12:48 p.m.)

1 CERTIFICATE OF OFFICIAL COURT REPORTER

2
3 I, Sara A. Wick, certify that the foregoing is a
4 correct transcript from the record of proceedings in the
5 above-entitled matter.
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9 /s/ Sara A. WickDecember 21, 2019

10 SIGNATURE OF COURT REPORTER

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