IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION

J.O.P. (by and through Next Friend G.C.P.), **M.A.L.C.**, **M.E.R.E.**, and **K.A.R.C.,** on behalf of themselves as individuals and on behalf of others similarly situated, Plaintiffs, v. **U.S. DEPARTMENT OF HOMELAND SECURITY** et al. Defendants.	Civil Action No. 8:19-CV-01944-GJH

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION TO ENFORCE THE PRELIMINARY INJUNCTION

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Plaintiffs respectfully move this Court for an order enforcing the Court's preliminary injunction and requiring Defendants to stop rejecting jurisdiction over asylum applications based on the 2019 Redetermination Policy. Despite the Court's Order expressly prohibiting USCIS from "applying the asylum eligibility policy, as set forth in USCIS's May 31, 2019 memorandum, to bar individuals previously determined to be unaccompanied alien children ("UACs") from seeking asylum before the agency," and enjoining the Defendants from rejecting jurisdiction over asylum applications from UACs, USCIS continues to reject jurisdiction over asylum applications based on the new policy.

Under the enjoined 2019 Redetermination Policy, USCIS instructed its asylum officers to defer to an immigration judge's decision as to whether USCIS had initial jurisdiction over an asylum application.[1] The previous policy (the "2013 Kim Memo"), however, does not permit this abdication of USCIS's jurisdiction to an immigration judge. Rather, it directs USCIS to process asylum applications as long as the applicant had been determined to be a UAC before she filed her application, and even if the applicant had turned 18 or been reunited with a parent before she filed. The only exception where USCIS can decline initial jurisdiction of an asylum applicant with a previous UAC determination are narrow circumstances where another DHS entity or the U.S. Department of Health and Human Services ("HHS") had expressly taken an "affirmative act" before the filing of the asylum application. Despite the Court's Orders, USCIS has rejected jurisdiction over at least one asylum application for an applicant who had a UAC determination in place at the time he filed his application. USCIS rejected jurisdiction over the UAC's asylum

[1] 2019 Redetermination Memorandum (Ex. 1 to the DeJong Declaration) at 4 n.5 (setting forth new USCIS policy that "If EOIR has explicitly determined that USCIS does not have jurisdiction over an asylum application because it is not one filed by a UAC, the asylum officer will defer to that determination").

application by relying solely on an immigration judge's ruling over 10 months later that he was no longer a UAC at the time he filed for asylum—thereby continuing to follow the enjoined 2019 Redetermination Policy rather than the 2013 Kim Memo that the Court's Orders have restored pending resolution of this litigation.

Plaintiffs attempted to resolve this dispute without the Court's intervention by apprising counsel for the Defendants of this USCIS decision effectively applying the enjoined 2019 Redetermination Policy. Defendants take the view, however, that this refusal by USCIS to exercise initial jurisdiction is consistent with the Court's order. According to Defendants, USCIS did not need to rely on the 2019 Redetermination Policy to dismiss for lack of jurisdiction in this case because it already was the "consistent practice" of USCIS to defer to an immigration judge under the 2013 Kim Memo. DeJong Decl. Ex. 2 (Oct. 24, 2019 email from Mr. Loucks). That assertion does not withstand scrutiny. Unlike the 2019 Redetermination Policy, the 2013 Kim Memo does not cede USCIS's statutory "initial jurisdiction" when an immigration judge makes a contrary decision. USCIS's own public statements in its training manuals and public meetings show that it did not defer to immigration judges in deciding its own jurisdiction under the 2013 Kim Memo. Indeed, as set forth in Declarations filed in support of this motion, USCIS granted asylum to applicants notwithstanding an immigration judge's ruling that the applicant was not a UAC at the time of filing and that the immigration court had initial jurisdiction.

Although this dispute involves a single violation of the Court's Order, Plaintiffs' counsel have reason to believe that USCIS will adopt the same narrow and flawed reading of the Court's Order for other applicants, allowing the agency to implement aspects of the 2019 Redetermination

Policy in the face of an injunction.[2] Plaintiffs respectfully request that the Court require USCIS to comply with the Court's Order to process asylum applications under the 2013 Kim Memo without deferring to an immigration judge.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. USCIS's Policies for Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children

In 2008, Congress enacted the William Wilberforce Trafficking Victims Protection Reauthorization Act ("TVPRA"). The TVPRA provides multiple protections to unaccompanied immigrant children, who are often vulnerable to trafficking, persecution, trauma, and other harms en route to or while in the United States. TVPRA § 235(d). Under the TVPRA, children determined to be UACs have the right to pursue asylum relief through a child-appropriate, trauma-informed, non-adversarial process administered by USCIS even though they are in removal proceedings before an immigration judge. 8 U.S.C. § 1158(b)(3)(c). In these cases, USCIS, *not* the immigration court, has "initial jurisdiction over any asylum application." *Id.*

1. The 2013 Kim Memo

Under the 2013 Kim Memo, an asylum applicant whom DHS has previously determined to be a UAC—as typically occurs immediately upon the child's apprehension after crossing the border—is eligible for heightened asylum protections. DeJong Decl. Ex. 3. The 2013 Kim Memo instructs asylum officers that "[i]n a case in which CBP or ICE has already determined that the applicant is a UAC, Asylum Offices will adopt that determination and take jurisdiction

[2] After the parties' discussion of the underlying dispute at issue in this motion, Defendants filed a Motion to Dismiss or, in the Alternative, for Summary Judgment. D.I. 73. Plaintiffs intend to file a written opposition to that motion, but note for present purposes that the question about the scope of the preliminary injunction also arises under Defendants' proposed resolution of the case.

over the case." *Id.* at 2. Under this policy, whether the individual had turned 18 or reunited with a parent or legal guardian before filing an asylum application is, in itself, immaterial. Indeed, under the 2013 Kim Memo, "USCIS will take initial jurisdiction over the case, even if there appears to be evidence that the applicant may have turned 18 years of age or may have reunited with a parent or legal guardian since the CBP or ICE determination." *Id.*

The sole exception recognized by the 2013 Kim Memo to that policy of taking jurisdiction based on a previous UAC determination is narrow: USCIS must accept initial jurisdiction over applications filed by those with previous UAC determinations "[u]nless there was an affirmative act by HHS, ICE or CBP to terminate the UAC finding before the applicant filed the initial application for asylum." *Id.* at 2. The 2013 Kim Memo limits relevant "affirmative acts" in two key ways. First, it only considers "affirmative acts" if they are taken by one of three specified agencies—HHS, ICE, and CBP. It does not allow an action taken by an immigration judge, who sits within the Department of Justice's Executive Office for Immigration Review ("EOIR"), to qualify as an "affirmative act" that would divest USCIS of initial jurisdiction over an asylum application. Second, an action by an enumerated agency may only qualify as an "affirmative act" if it took place *before* the individual filed for asylum. This policy is consistent with the fact that, under the statute, USCIS has initial jurisdiction over the application—the immigration court having no clear jurisdictional basis for making such a determination while the application remains pending with USCIS.

2. The 2019 Redetermination Policy

The enjoined 2019 Redetermination Policy marked a drastic change in USCIS policy. First, all asylum officers were required to "mak[e] independent factual inquiries in all cases in order to determine whether the individual met the UAC definition on the date of first filing the

asylum application." DeJong Decl. Ex. 1 at 3. The 2019 Redetermination Policy also directs asylum officers to "examine whether the individual was a UAC at the time of first filing for the purposes of determining whether the one-year filing deadline applies." *Id.* at 5. Thus, under the enjoined 2019 Redetermination Policy, USCIS took it upon itself to independently determine whether an applicant had turned 18, or had been reunited with a parent, before she filed her asylum application. *Id.*

Second, and especially relevant to this motion, the 2019 Redetermination Policy directs asylum officers to "defer to [a] determination" by an immigration judge "that USCIS does not have jurisdiction over an asylum application because" the immigration judge had itself redetermined the applicant's status as a UAC. *Id.* at 4 n.5. This aspect of the 2019 Redetermination Policy was purportedly a response to the Board of Immigration Appeal's ("BIA," also a part of EOIR) October 16, 2018 *Matter of M-A-C-O-* decision, in which the BIA held that an immigration judge may determine whether an applicant in removal proceedings qualifies as a UAC based on age. *Id.* at 2; 27 I&N Dec. 477 (BIA 2018). Thus, unlike the 2013 Kim Memo, the enjoined 2019 Redetermination Policy instructed asylum officers to defer to an immigration judge's determination that an applicant had ceased to be a UAC.

B. The Court's TRO and Preliminary Injunction Orders

On August 2, 2019, the Court granted Plaintiffs' Motion for Temporary Restraining Order, which enjoined Defendants from implementing any aspect of the 2019 Redetermination Policy. D.I. 55. The Court subsequently granted several extensions to the temporary restraining order, and, on October 15, 2019, converted the order into a preliminary injunction by Plaintiffs' unopposed motion. D.I. 60 (extended until September 3, 2019); D.I. 62 (extended to September 24, 2019); D.I. 66 (extended to October 15, 2019); D.I. 71 (granting PI).

In granting the TRO and PI, the Court held that Plaintiffs are likely to succeed on their claims that (1) "USCIS failed to engage in the required notice-and-comment procedure for rulemaking," D.I. 54 at 10-11, and (2) "that the [2019] policy is arbitrary and capricious in violation of the APA because USCIS failed to consider serious reliance interests engendered by the agency's longstanding prior policy." *Id.* at 12-13.[3] The Court also held that Plaintiffs have "met their burden to demonstrate that the redetermination policy will cause irreparable harm if the status quo is not maintained," including because "individuals who relied on USCIS's longstanding policy of not rescinding UAC status may miss their opportunity to file for asylum all together if the one-year filing deadline from which they would have otherwise been exempt is now imposed." *Id.* at 14-15.

The Court's Order enjoined Defendants "from applying the asylum eligibility policy, as set forth in USCIS's May 31, 2019 memorandum, to bar individuals previously determined to be unaccompanied alien children ('UACs') from seeking asylum before the agency." D.I. 55; D.I. 71. Defendants are also "enjoined and restrained from rejecting jurisdiction over the application of any UAC (as defined in the Homeland Security Act, 6 U.S.C § 279(g)(2)) under the [TVPRA] whose application would have been accepted under the USCIS policy predating the May 31, 2019 memorandum." The policy predating the 2019 Redetermination Memo was the 2013 Kim Memo.

C. USCIS's Violation of the Court's Orders

E.D.G. is a twenty-year old from Honduras who seeks asylum in the United States. Mariscal Decl. ¶ 2. Defendant DHS determined that E.D.G. was a UAC when he entered the

[3] The Court also acknowledged that Defendants consented to Plaintiffs' due process claims based on the issue of retroactive application of the policy. D.I. 54 at 8.

United States on July 4, 2016. *Id.* ¶ 3. A day later, DHS placed E.D.G. in removal proceedings in immigration court. *Id.* ¶ 4.

E.D.G. attended a master calendar hearing before the immigration judge on November 16, 2017. *Id.* ¶ 7. There, through his counsel, E.D.G. requested that the immigration judge either administratively close or continue his removal proceedings to provide USCIS the opportunity to adjudicate his UAC asylum application. *Id.* ¶ 8. The immigration judge denied both requests and instead scheduled a merits hearing on E.D.G.'s asylum application for September 26, 2018. *Id.*

On November 14, 2017, while his removal proceedings were pending in immigration court, E.D.G. filed his asylum application with USCIS. *Id.* ¶ 6. Although E.D.G. was 18 years old at the time he filed his asylum application, USCIS was required to exercise initial jurisdiction under the 2013 Kim Memo because he had been determined to be a UAC and neither HHS, ICE, nor CBP had taken any affirmative act to terminate his UAC status as of that date.

On March 6, 2018, an asylum officer interviewed E.D.G. on the merits of his asylum claim for approximately 2.5 hours. *Id.* ¶ 9. During the interview, E.D.G. recounted being the victim of sexual abuse for years as a child. E.D.G had a difficult time recounting this traumatic past and shut down at times. *Id.* ¶ 9.

On October 10, 2018, about 10 months after E.D.G. had filed his asylum application with USCIS, and seven months after USCIS had interviewed him, an immigration judge issued a decision denying E.D.G.'s asylum application. *Id.* ¶ 18. E.D.G. appealed the asylum denial to the Board of Immigration Appeals.

USCIS then waited until July 2019, 16 months after the interview and after the 2019 Redetermination Policy had gone into effect, to reject E.D.G.'s asylum application for lack of jurisdiction. *Id.* ¶ 15. Specifically, on July 25, 2019, USCIS rejected his asylum application on

the ground that he had not established that he was under 18 years old at the time of filing. *Id.* ¶ 15. A week later, this Court issued the TRO enjoining USCIS from applying the 2019 Redetermination Policy, and ordering USCIS to reinstate consideration of such cases for the agency to exercise its initial jurisdiction under the terms set by the 2013 Kim Memo. *Id.* ¶ 16. On August 5, 2019, USCIS reopened E.D.G.'s case in response to his attorney's request based on this Court's Order. *Id.* ¶ 17.

On September 30, 2019, while the Court's TRO remained in effect, USCIS *again* rejected E.D.G.'s asylum application relying on the 2019 Redetermination Policy. USCIS issued a Notice of Lack of Jurisdiction on grounds that the "Immigration Judge made an affirmative act to terminate UAC status on October 10, 2018" (almost 10 months after he filed the application with USCIS). *Id.* ¶ 18; Marsical Decl. Ex. A at 2.

E.D.G.'s appeal of the immigration judge's asylum denial remains pending with the Board of Immigration Appeals, and his opening brief is due on November 25, 2019. *Id.* ¶ 14.

II. ARGUMENT

Federal courts have the "inherent power to enforce compliance with their lawful orders." *Shillitani v. United States*, 384 U.S. 364, 370 (1966).#USCIS violated the Court's Orders by applying the 2019 Redetermination Policy to reject jurisdiction over an asylum application based on deference to an immigration judge's determination of whether the applicant is a UAC—even though the applicant had already filed his asylum application with USCIS before the immigration judge's determination. Particularly because Defendants take the view that this action is somehow consistent with the Court's order, this Court should take action to make clear that USCIS is enjoined from implementing *any* aspect of the 2019 Redetermination Policy, which this Court concluded was likely issued in violation of the APA.

A. USCIS Applied the Enjoined 2019 Redetermination Policy to Deny Jurisdiction Over an Asylum Application

In its September 30, 2019 denial letter, USCIS states that it rejected E.D.G.'s asylum application because "the Immigration Judge made an affirmative act to terminate UAC status on October 10, 2018." Mariscal Decl. ¶ 18 & Ex. A. In short, USCIS deferred to the immigration judge's October 10, 2018 decision on whether E.D.G. was a UAC at the time he filed his asylum application with USCIS. This deference to an immigration judge decision effectively implements the enjoined 2019 Redetermination Policy, as such deference is expressly called for by that Policy in a marked departure from the 2013 Kim Memo. Under the 2019 Redetermination Policy, "if EOIR has explicitly determined that USCIS does not have jurisdiction over an asylum application because it is not one filed by a UAC, the asylum officer will defer to that determination." DeJong Decl. Ex. 1 at 4 n.5. It was plainly improper for USCIS to reject E.D.G.'s asylum application based on a policy adopted in the 2019 Redetermination Policy that this Court has enjoined.

B USCIS's Rejection Is Not in Compliance with the 2013 Kim Memo#

Defendants have attempted to justify USCIS's rejection by arguing that it is consistent with 2013 Kim Memo. Defendants mistakenly argue that, "[w]here an IJ makes a determination about whether an application was filed by a UAC and who has jurisdiction over it, it has been the consistent practice for USCIS under the 2013 memo to defer to that decision." DeJong Decl. Ex. 2 (Oct. 24, 2019 email from Mr. Loucks). That assertion is simply not true, because it contradicts the express terms of the 2013 Kim Memo. Under the 2013 Kim Memo, USCIS did not direct its officers to defer to decisions taken by immigration judges on whether USCIS had jurisdiction over a case filed by a UAC. Instead, the 2013 Kim Memo directs USCIS to "adopt the previous DHS [ICE or CBP] determination that the applicant was a UAC," "without another factual inquiry" and

"even if there appears to be evidence that the applicant may have turned 18 years of age or may have reunited with a parent or legal guardian since the CBP or ICE determination." DeJong Decl. Ex. 3 at 2. The Kim Memo does not say that such evidence becomes relevant if it has been presented to an immigration court, but that it simply is not relevant to USCIS's maintenance of its statutory "initial jurisdiction."

Here, USCIS's purported basis for denial—that the immigration judge's decision was an "affirmative act to terminate UAC status"—is a contrived misreading of unrelated provisions in the 2013 Kim Memo. The immigration judge's decision cannot be an "affirmative act" to defeat USCIS jurisdiction under the 2013 Kim Memo for two reasons: (1) the 2013 Kim Memo only sets forth a policy of deferring to "affirmative acts" by *HHS, ICE, or CBP*, not EOIR, to terminate UAC status; and (2) an "affirmative act" under the 2013 Kim Memo can defeat USCIS jurisdiction only if it occurs ***before*** the applicant first files her asylum application, not nearly a year later as occurred here.

Under the 2013 Kim Memo, "affirmative acts" that may terminate UAC status defeat USCIS initial jurisdiction are limited to acts taken by one of three specified agencies before the applicant files her asylum application with USCIS: "Unless there was an ***affirmative act by HHS, ICE or CBP*** to terminate the UAC finding ***before the applicant filed the initial application for asylum***, Asylum Offices will adopt the previous DHS determination that the applicant was a UAC." DeJong Decl. Ex. 3 at 2. USCIS's own Asylum Manual explains the same point in different words: "Unless there was an affirmative act terminating the UAC finding before the applicant filed the initial application for asylum, Asylum Offices will adopt the previous DHS UAC status determination." DeJong Decl. Ex. 4 at 33. Indeed, USCIS has routinely confirmed to practitioners that, under the 2013 Kim Memo, it has jurisdiction over UACs unless HHS, ICE, or

CBP have terminated their status. *See* Vega Decl. ¶ 5. Accordingly, the immigration judge's decision could not possibly terminate UAC status as an "affirmative act" under the 2013 Kim Memo: The decision both occurred ***after*** E.D.G. filed his asylum application and it was made by an Executive Branch employee who is not HHS, ICE, or CBP.

USCIS's own public statements since promulgation of the Kim Memo show that it knew that an immigration judge's post-filing determinations regarding UAC status do not defeat USCIS jurisdiction under that policy, and that its practice was—until recently—consistent with that policy. On May 20, 2019, just over a week before the 2019 Redetermination Policy was issued, USCIS made clear in publicly available meeting minutes that the 2013 Kim Memo remained in effect and that the agency would not defer to an immigration judge under that memo, regardless of the BIA's *Matter of M-A-C-O-* ruling:

> Can you confirm that the May 28, 2013, memorandum on initial jurisdiction over asylum applications filed by UACs and related June 2013 policy documents remain in effect?
>
> **Response:** The May 28, 2013 memorandum on initial jurisdiction over asylum applications filed by UACs and the related June 2013 policy documents remain in effect.

> How is USCIS handling UAC filings after *Matter of M-A-C-O-*, both for children who have turned 18 and those who've reunified with a parent?
>
> **Response:** *Matter of M-A-C-O-* addresses immigration judge determinations as to whether an asylum application was filed by a UAC. It does not address USCIS determinations about its own jurisdiction. USCIS continues to make its jurisdictional determinations under its own procedures.

DeJong Decl. Ex. 5 at 3. USCIS agreed that it would "continue[] to make its jurisdictional determinations under its own procedures," which did not allow USCIS to defer to an immigration judge's determination. *See* DeJong Decl. Ex. 3 (2013 Kim Memo); DeJong Decl.

Ex. 4 (Asylum Manual) at 32-33. In short, the 2013 Kim Memo does not provide a basis for denying jurisdiction over E.D.G.'s asylum application.

Nor is there any support for Defendants' counsel's contention that USCIS had a "consistent practice" while the 2013 Kim Memo was in effect, notwithstanding its text, of deferring to an immigration judge's decision that occurred after the applicant filed for asylum with USCIS. In fact, USCIS has regularly granted asylum to such applicants. Plaintiffs' supporting declarations provide examples where USCIS held interviews and granted asylum to a UAC *after* an immigration judge made negative findings about UAC status. Ross Decl. ¶¶ 10, 12, 14; *see also* Vega Decl. ¶¶ 6, 7 (USCIS scheduled asylum interviews for UACs despite an IJ's finding that they were no longer UACs).

Defendants' claims to "consistent practice" are also belied by the statements of two former USCIS asylum officers who were deeply familiar with USCIS's policy, training, and actual practice in implementing the 2013 Kim Memo. Lauren Esterle explains that the Asylum Office's in-depth, six-week training taught officers to "respect" a prior DHS UAC determination, and never indicated that officers would defer to any later determination by an immigration judge. Esterle Decl. ¶¶ 6, 7. Ms. Esterle herself *taught* further training modules, and as late as January 2019, was never aware of trainings, instructions, or guidance "that allowed, much less required, asylum officers to defer to a determination by EOIR that USCIS lacked jurisdiction over an asylum application because it was not one filed by a UAC," or that such a finding could qualify under the Kim Memo's provision for "affirmative acts." *Id.* ¶ 12. Another former asylum officer, who was responsible for training officers on the rollout of the Kim Memo in 2013, confirms that the 2013 policy meant that "immigration judges did not have the authority to make any determinations about UAC status or to terminate UAC findings." Bibby-Gerth Decl. ¶ 6.

This is not first time that USCIS has played fast and loose with a court order that blocks its procedurally defective implementation of new policies. Indeed, in similar circumstances, USCIS was recently found to be in violation of another court's preliminary injunction. In *Guam Contractors Ass'n v. Sessions*, the court entered an injunction against USCIS to prevent the agency from denying H-2B Temporary Worker petitions based on a new policy. 2019 WL 2588499, at *2-3 (D. Guam June 25, 2019). Despite the injunction, USCIS continued to deny Temporary Worker petitions. *Id.* The court held USCIS in contempt, explaining "that the purpose of the PI Order was to maintain the status quo—to enjoin USCIS's adjudication herein in a manner which is inconsistent with historical and long standing prior policy." *Id.* Likewise, this Court issued its TRO/PI orders to maintain the status quo—to enjoin USCIS's adjudication of UAC asylum applications in a manner inconsistent with the 2013 Kim Memo. The decision by USCIS to reject E.D.G.'s asylum application for lack of jurisdiction based on a rule of deference that was set forth in the enjoined policy flouts this Court's orders.

III. CONCLUSION

For all of the above reasons, Plaintiffs respectfully move this Court for an order enforcing the Court's preliminary injunction and requiring Defendants to stop rejecting jurisdiction over asylum applications based on the 2019 Redetermination Policy, which necessarily requires Defendants to stop rejecting such jurisdiction based on a determination by an immigration judge.

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Respectfully submitted,

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