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Via Email

November 26, 2019

Mr. Kenneth T. Cuccinelli, II  
Acting Deputy Secretary  
Department of Homeland Security

Mr. Mark Koumans  
Acting Director  
U.S. Citizenship and Immigration Services  
Department of Homeland Security

Re: **Recent Actions by USCIS Management Gagging Whistleblowers**

Dear Acting Deputy Secretary Cuccinelli and Acting Director Koumans,

On behalf of, and as the exclusive representative of, the 13,500 unionized employees of the U.S. Citizenship and Immigration Services (USCIS), we are writing to express our grave concern about recent publicly-reported actions by USCIS management that effectively and illegally stifle guaranteed whistleblower rights. We consider these actions extremely concerning, so much so that American Federation of Government Employees (AFGE) Council 119, our AFGE Counsel, and Government Accountability Project are partnering in the representation of these matters.

**Illegal and Improper Conduct**

As you know, on November 21, 2019, Mr. Koumans sent to all USCIS employees a communication stating that they would suffer increasingly severe discipline—including termination of employment—for the unauthorized disclosure, or “leaking,” of non-public information. According

to Mr. Koumans, the communication was expressly issued because of “recent unauthorized disclosures of sensitive, for official use only, and internal use only information by USCIS personnel to media outlets.”<sup>1</sup> That assertion ignores the fact that the recent information reported in the media about USCIS was lawfully reported by whistleblowers. Thus, the Koumans directive was intended to illegally intimidate whistleblowers from lawfully reporting ongoing abuses by the Department of Homeland Security (DHS).

In the same vein and equally disturbing is the recent television pronouncement by Mr. Cuccinelli that 27 USCIS employee “leakers” were disciplined within 100 days of his appointment (in June 2019, as then-acting USCIS Director).<sup>2</sup> No further information has been disclosed by DHS. This comment along with the absence of information regarding disciplinary action taken demonstrates a deliberate management strategy to illegally intimidate whistleblowers.

### Violation of the Whistleblower Protection Act

Mr. Kouman’s directive fails to include statutorily required language informing employees that their whistleblower rights supersede any non-disclosure policies. The “anti-gag” provision of the Whistleblower Protection Enhancement Act (5 U.S.C. § 2302(b)(13)) specifically states that employers with authority to take personnel actions cannot implement or enforce any non-disclosure policy—the November 21 communication for instance—unless the policy statement contains the explicit language guaranteeing whistleblower rights as set forth in the footnote, below.<sup>3</sup>

The Office of Special Counsel (OSC) has repeatedly instructed that agencies cannot implement or enforce nondisclosure policies, forms or agreements that restrain federal employees without “including the required language. As stated by the head of OSC on January 25, 2017:

<sup>1</sup> Hamed Aleaziz, *A Top US Immigration Official Threatened to Fire Employees For Leaking to the Media*, BuzzFeed News (Nov. 21, 2019), available at <https://www.buzzfeednews.com/article/hamedaleaziz/us-immigration-officials-threatened-media-leaks>.

<sup>2</sup> Sharyl Attkisson, *Immigration Battles*, FullMeasure (November 3, 2019) (video interview with Ken Cuccinelli, available at <http://fullmeasure.news/news/immigration/immigration-battles>).

<sup>3</sup> 5 U.S.C. § 2302(b)(13) reads as follows:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: “These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower.

Nondisclosure agreements and policies can chill would-be whistleblowers from coming forward. These orders must clearly state that federal employees have a right to make disclosures of wrongdoing.<sup>4</sup>

The OSC has read the anti-gag statutory language to include all authoritative management communications and has ordered corrective actions to federal agencies that have issued unlawful gag orders. Those agencies include the Department of Justice, Department of Health and Human Services, the Drug Enforcement Administration within Justice, the Department of Housing and Urban Development, the U.S. Department of Agriculture, the Department of Energy, the Department of the Interior, as well as the Department of Homeland Security.<sup>5</sup>

Mr. Kouman's directive does not contain the required anti-gag language. That it is intended to chill employees from engaging in protected whistleblowing is demonstrated by the fact that the directive was issued just days after current and former USCIS employees publicly blew the whistle on significant misconduct, particularly concerning MPP—the Migrant Protection Protocols or “Remain in Mexico” policy—as well as a new policy ordering the deportation of asylum seekers to Guatemala.

### Lawful Whistleblower Reports

Douglas Stephens, a former Asylum Officer, first reported to Congress that he had sent to his supervisors a legal memo challenging MPP's legality on no less than seven separate grounds. This has been widely reported on in recent days by Senator Jeff Merkley (D-OR), the Washington Post, CNN, the Los Angeles Times, This American Life, and the New York Times.<sup>6</sup> After sending the

<sup>4</sup> OSC Press Release, *OSC's Enforcement of the Anti-Gag Order Provision in Whistleblower Law* (Jan. 25, 2017), available at <https://www.scribd.com/document/337635299/OSC-s-Enforcement-of-the-Anti-Gag-Order-Provision-in-Whistleblower-Law>.

<sup>5</sup> Irvin McCullough and Zack Kopplin, Washington Post, *Gag Orders at Federal Agencies Are Violating Whistleblower Laws*, (June 8, 2018), available at <https://www.washingtonpost.com/news/posteverything/wp/2018/06/08/gag-orders-at-federal-agencies-are-violating-whistleblower-laws/> (McCullough and Kopplin Washington Post Op Ed).

<sup>6</sup> Office of Sen. Jeff Merkley, *Shattered Refuge, A U.S. Senate Investigation into the Trump Administration's Gutting of Asylum* (November 2019), Appendix N: Confidential Whistleblower Email to USCIS Management Regarding Migrant Protection Protocols (August 12, 2019), pp. 77-80, available at <https://www.merkley.senate.gov/imo/media/doc/SHATTERED%20REFUGE%20-%20A%20US%20Senate%20Investigation%20into%20the%20Trump%20Administration%20Gutting%20of%20Asylum.pdf>; Greg Sargent, *In scathing manifesto, an asylum officer blasts Trump's cruelty to migrants*, Washington Post (November 12, 2019), available at <https://www.washingtonpost.com/opinions/2019/11/12/scathing-manifesto-an-asylum-officer-blasts-trumps-cruelty-migrants/#comments-wrapper>; Priscilla Alvarez, *Senate Report: Whistleblowers Blast Trump Administration's Immigration Policies*, CNN (Nov. 14, 2019), available at <https://www.cnn.com/2019/11/14/politics/merkley-asylum-report/index.html>; Molly O'Toole, *Asylum Officers Rebel Against Trump Policies They Say are Immoral and Illegal*, Los Angeles Times (Nov. 15, 2019), available at <https://www.latimes.com/politics/story/2019-11-15/asylum-officers-revolt-against-trump-policies-they-say-are-immoral-illegal>; *The Out Crowd*, This American Life (Nov. 15, 2019), available at <https://www.thisamericanlife.org/688/transcript>; *Why I Quit My Job Carrying Out Trump's Immigration Policies*, New York Times (Nov. 20, 2019), available at <https://www.nytimes.com/2019/11/20/opinion/trump-asylum-remain-mexico-policy.html>.

memo, Mr. Stephens was told he was going to be disciplined for insubordination; instead, he resigned rather than work under MPP. Mr. Stephens submitted a written statement to Congress on November 19, 2019, and testified before Congress on November 22, 2019.<sup>7</sup>

Similarly, Michael A. Knowles, Special Representative for Refugee Asylum and International Operations for the National Citizenship and Immigration Services AFGE Council 119, testified before Congress on November 19, 2019 about MPP. He provided significant details about many wrongful and illegal abuses.<sup>8</sup>

The Whistleblower Protection Act specifically allows federal employees to lawfully make whistleblower disclosures to Congress.<sup>9</sup>

In addition, on November 20, 2019, media outlets reported that USCIS is training Asylum Officers to implement a new policy that will return asylum seekers from Honduras and El Salvador to Guatemala.<sup>10</sup> The reports note that Asylum Officers received, with their training materials, information about the dangers faced in Guatemala -- including extreme and pervasive gang-related violence. Anonymous Asylum Officers expressed deep concern about the consequences of sending asylum seekers to Guatemala in light of the known dangers.

These disclosures fall squarely within well-established categories of protected whistleblower activity. Mr. Stephens raised concerns with his USCIS management and Congress that conducting asylum interviews under MPP violates migrants' due process rights, international treaty obligations, and the Immigration and Nationality Act. He added that it knowingly endangers those forced to remain in Mexico awaiting asylum hearings, putting them in an unsanitary location lacking in basic services and at risk of rape, kidnapping and violence. Mr. Knowles, testifying as a union

<sup>7</sup> Written Statement of Douglas Stephens, Esq., Examining the Human Rights and Legal Implications of DHS' "Remain in Mexico" Policy, before the House Homeland Security Subcommittee on Border Security, Facilitation and Operations (Nov. 19, 2019), available at <https://www.whistleblower.org/wp-content/uploads/2019/11/111819-cover-letter-Testimony-of-Douglas-Stephens-for-the-House-Homeland-Security-Committee-FINAL.pdf>; Statement of Douglas Stephens before the House Foreign Affairs Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations, *Humanitarian Aspects of the United States Migratory Crisis* (Nov. 22, 2019), available at <https://foreignaffairs.house.gov/2019/11/humanitarian-aspects-of-the-united-states-migratory-crisis>.

<sup>8</sup> Statement of Michael A. Knowles before the House Homeland Security Subcommittee on Border Security, Facilitation and Operations, *Examining the Human Rights and Legal Implications of DHS' "Remain in Mexico" Policy* (Nov. 19, 2019), available at <https://homeland.house.gov/activities/hearings/examining-the-human-rights-and-legal-implications-of-dhs-remain-in-mexico-policy>.

<sup>9</sup> See 5 U.S.C. 2302(c)(2)(C)(iii).

<sup>10</sup> Ted Hesson *Trump Administration Prepares to Send Asylum Seekers to Guatemala*, Reuters (Nov. 20, 2019), available at <https://www.reuters.com/article/us-usa-immigration-guatemala-asylum/trump-administration-prepares-to-send-asylum-seekers-to-guatemala-idUSKBN1XU2SI>; Hamed Aleaziz, *Asylum Officers Were Told of Killings and Violence in Guatemala. They Were Ordered to Send People There Anyway*, BuzzFeed News (Nov. 21, 2019), available at <https://www.buzzfeednews.com/article/hamedaleaziz/asylum-officers-guatemala-deport-central-guidance>.

representative, expressed similar concerns independently. The disclosures by Asylum Officers about Guatemala show that removing asylum seekers to Guatemala will place them in serious danger. These disclosures, and similar future disclosures by federal employees, are protected whistleblowing activity. They express clearly reasonable beliefs about the illegality and adverse effects of conducting asylum interviews pursuant to USCIS mandates.<sup>11</sup>

### Constitutional Violation

The Koumans directive is also a prior restraint that violates the Constitution. The Supreme Court unequivocally has held that prior restraint is incompatible with the First Amendment. *Nebraska Press Association v. Stewart*, 427 U.S. 539 (1976). Forcing citizens to disclose whom they communicate with long has violated First Amendment freedom of association rights. *NAACP v. Buttons*, 371 U.S. 415 (1963), *United States v. Garde*, 848 F.2d 1307 (D.C. Cir. 1988).

### Deeply Troubling Cuccinelli Statements

We are also gravely concerned about Mr. Cuccinelli's public comments. On November 3, 2019, he boasted to a television interviewer: "in my first 100 days here [(from June 2019 when he was first appointed acting USCIS Director)] we disciplined 27 leakers. We have a handful more still in the pipeline for discipline."<sup>12</sup>

USCIS has provided no further information about this boast. But if any employees have been disciplined for "leaking"—when in fact those disclosures constitute protected whistleblowing activity—discipline of any kind, or its threat, is an illegal prohibited personnel practice.

USCIS' messages to employees in form of illegal gags and threats seek to and likely will impede the exercise of their whistleblower rights. Employees reading their agencies' rules will not know they have the right to contact Congress or the media to expose misconduct. Even employees who know their rights may be intimidated from speaking out of fear of violating agency policy.<sup>13</sup>

Ultimately, when an agency unlawfully gags its employees, it threatens Congress's ability to engage in oversight, hampers citizens' right to know about serious abuses and dangers to public safety, and undermines policy-making that depends on information provided by expert civil servants in the best position to identify wrongdoing.

<sup>11</sup> Whistleblowers are only barred from publicly disclosing classified or otherwise statutorily prohibited information (such as trade secrets or privacy information). For instance, in *Department of Homeland Security v. MacLean*, 135 S. Ct. 913 (2015), the Supreme Court reversed the termination of a DHS whistleblower for publicly disclosing Sensitive Security Information. Thus document – like training materials -- marked "Sensitive But Unclassified," "For Official Use Only," or "Internal Use Only" can be disclosed when they evidence wrongdoing protected by whistleblower laws.

<sup>12</sup> Sharyl Attkisson, *Immigration Battles*, FullMeasure (November 3, 2019) (video interview with Ken Cuccinelli, available at <http://fullmeasure.news/news/immigration/immigration-battles>).

<sup>13</sup> See McCullough and Kopplin Washington Post Op-Ed, n. 5.

Action Demanded

We demand that USCIS and DHS immediately issue a corrective communication to the USCIS workforce that conforms with the statutory mandate of 5 USC §2302(b)(13), discussed above. In addition, if any employees have been disciplined as “leakers” under this or similarly faulty non-disclosure directions, those personnel actions should be immediately reversed.

Very truly yours,

/s/

Danielle Spooner  
President, AFGE Council 119

/s/

Tom Devine  
Legal Director, Government Accountability Project

Cc: J. Ward Morrow, Assistant General Counsel, AFGE

Michael Knowles, President, AFGE Local 1924

Dana Gold, Senior Counsel and Director of Education, Government Accountability Project

David Z. Seide, Senior Counsel, Government Accountability Project

Congresswoman Karen Bass, Chair, House Foreign Affairs Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations

Congresswoman Kathleen Rice, Chair, House Homeland Security Subcommittee on Border Security, Facilitation and Operations