IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

E.Q. *et al*., Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY et. al, Defendants.	Case No.: 1:25-cv-00791

PLAINTIFF E.Q.'S EMERGENCY MOTION TO STAY REMOVAL WITH SUPPORTING POINTS AND AUTHORITIES

(Plaintiff E.Q. Faces Imminent Removal to Danger)[1]

[1] Plaintiff E.Q., a national of Afghanistan, received an expedited removal order from Defendants on February 25, 2025. Defendants are rapidly removing people from Afghanistan to third countries that then deport them to Afghanistan.

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Plaintiff E.Q.[2] respectfully seeks an emergency stay of his removal. E.Q. faces persecution and death at the hands of the Taliban in Afghanistan, his country of citizenship. E.Q. fears removal to Afghanistan or to a third country that may remove him to Afghanistan. After fleeing to the United States, E.Q. sought asylum and withholding of removal but received an expedited removal order because of the unlawful regulations challenged in this suit. He is currently detained by Defendants in Arizona and may be removed imminently. Pursuant to Local Civil Rule 7(m), Plaintiff's counsel conferred with Defendants' counsel, who indicated that Defendants oppose the stay of removal requested in this motion. Defendants further stated that they are unable to provide any information concerning the timing of E.Q.s removal.

INTRODUCTION

The Immigration and Nationality Act ("INA") sets out a comprehensive scheme for determining whether a noncitizen may receive asylum or related humanitarian relief in the United States. First, the INA grants any noncitizen who is physically present in, or arrives in, the United States the right to apply for asylum, subject only to a short list of enumerated exceptions. Second, the INA lists the eligibility factors noncitizens must demonstrate to prevail in their applications for relief. And third, the INA sets forth certain "mandatory bars" that, if deemed applicable as part of a decision on the merits, require the denial of relief to otherwise-eligible noncitizens.

Defendants have upended this statutory framework. In December 2024, the Department of Homeland Security ("DHS") issued a rule that bars certain noncitizens from even applying for asylum or withholding of removal if it "appears" that a mandatory bar applies. DHS, Application of Certain Mandatory Bars in Fear Screenings, 89 Fed. Reg. 103370 (Dec. 18, 2024) ("the

[2] E.Q.'s full names and other identifying information have been filed under seal in support of Plaintiff's concurrently filed Sealed Motion for Leave to Proceed Under Pseudonyms and to File Supporting Exhibits Under Seal (Dkt. #2).

Mandatory Bars Rule").[3] That Rule took effect on January 17, 2025.

This Rule has serious and tragic consequences. The mandatory bars are extraordinarily complex and rebutting them requires the presentation of both documentary evidence and nuanced legal arguments. Neither is possible in cursory screening interviews, which are conducted while a noncitizen is held in immigration detention without access to counsel or critical evidence. Applying the mandatory bars at the screening stage is causing meritorious refugees to be erroneously barred from relief, tagged as serious criminals (or worse), and deported to persecution.

The Mandatory Bars Rule violates the INA and the Administrative Procedure Act ("APA") in multiple respects. First, the INA expressly distinguishes between exceptions to the right *to apply for asylum* and the mandatory bars, which require the denial of relief to otherwise-eligible applicants following a proceeding on the merits. The Mandatory Bars Rule violates 8 U.S.C. § 1158 by denying noncitizens the right to simply *apply for* asylum based on the *possibility* that they may be subject to one of the mandatory bars.

Second, the Mandatory Bars Rule violates both the asylum statute, 8 U.S.C. § 1158(b)(2)(A), and the withholding of removal statute, § 1231(b)(3)(B), because: (i) it requires the denial of relief based on a finding that one of the mandatory bars "appears" to apply, which is a materially lower standard than the statutorily required determination that a bar actually *does apply*; and (ii) it delegates this determination to DHS despite the relevant statutes conferring that authority exclusively on "the Attorney General" (and immigration judges under her supervision).

Third, the Mandatory Bars Rule violates the expedited removal statute, 8 U.S.C. § 1225(b)(1)(B)(v) in two respects. That provision imposes a low screening standard for credible

[3] After DHS issued the Mandatory Bars Rule, the Executive Office for Immigration Review ("EOIR") issued a companion rule addressing the cursory optional immigration judge review of these premature and predictive judgments. EOIR, *Clarification Regarding Bars to Eligibility During Credible Fear and Reasonable Fear Review*, 89 Fed. Reg. 105392 (Dec. 27, 2024) ("the EOIR Companion Rule").

fear interviews, which was meant to ensure that no applicant with a bona fide fear would be removed to persecution without receiving an opportunity to seek protection; that standard is upended by the rule. In addition, the statutory text of § 1225(b)(1)(B)(v) makes it clear that the screening interview decision is meant to be based on testimony alone, but the bars to relief—including the ones imposed in E.Q.'s case—require consideration of complex factual and legal issues that cannot be addressed without an opportunity to present evidence and legal argument.

Finally, the Mandatory Bars Rule is arbitrary and capricious. Defendants' reasoning in support of the rule relies extensively "on a false factual premise" (*Cigar Ass'n of Am. v. United States Food & Drug Admin.*, 126 F.4th 699, 705 (D.C. Cir. 2025)), namely that their regulation limits review of mandatory bars to circumstances where there is "easily verifiable evidence" that such bars apply. *See*, *e.g.*, 89 FR at 103397 ("In all cases, the AO will only consider mandatory bars under this rule as a matter of discretion and only when there is easily verifiable information that a mandatory bar applies to the noncitizen").

The actual regulation created by the Mandatory Bars Rule, however, includes no such limitation; indeed, the phrase "easily verifiable" appears nowhere in the regulation's text. Rather, the Mandatory Bars Rule instructs asylum officers to consider mandatory bars whenever it "appears" that one might apply. 89 Fed. Reg. at 103413-14, 8 C.F.R. §§ 208.30(e)(5)(ii), 208.31(c). In this way, the Rule is also internally inconsistent: the preamble and the regulatory text do not match, which is a notable hallmark of arbitrary and capricious decision making. *See Nat'l Wildlife Fed. v. EPA*, 286 F.3d 554, 570 (D.C. Cir. 2002).

The Mandatory Bars Rule also fails to address record evidence and public comments, and it represents a radical departure from Defendants' prior policy determinations, without "display[ing] awareness that [they are] changing position" or "show[ing] that there are good

reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, at 221 (2016). Defendants recognized in 2022 "that considerations of procedural fairness counsel against applying mandatory bars that entail extensive fact-finding during the credible fear screening process." Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18093 (Mar. 29, 2022). Without any explanation, Defendants now completely reverse their 2022 determination concerning the mandatory bars.

Both the Mandatory Bars Rule and the EOIR Companion Rule violate the INA and are contrary to law and arbitrary and capricious under the APA. Plaintiff E.Q. is likely to succeed on the merits and has met all other requirements for obtaining an emergency stay of his removal.

BACKGROUND[4]

The mandatory bars include six statutory conditions that, if found applicable, require the denial of asylum and withholding of removal to otherwise eligible noncitizens. Under 8 U.S.C. 1158(b)(2), asylum must be denied "if the Attorney General determines that" noncitizens: (1) persecuted others; (2) have convictions for particularly serious crimes; (3) committed serious nonpolitical crimes outside the United States; (4) are a danger to national security; (5) have engaged in terrorist activity; or (6) were firmly resettled in another country prior to arriving in the United States. *Id*. § 1158(b)(2)(A)(i)-(vi). With the exception of the firm resettlement bar, these same mandatory bars also generally apply to eligibility for withholding of removal, both under the statute and under the Convention Against Torture.

Congress created credible and reasonable fear screening interviews in 1996 to "focus on two questions: is the [noncitizen] telling the truth; and does the [noncitizen] have some

[4] Plaintiffs refer the Court to the Complaint (Dkt. #1, ¶¶23-39, ¶¶68-98) for a fuller recitation of the relevant statutory background.

characteristic that would qualify the [noncitizen] as a refugee." H. Rep. 104-469 - Immigration in the National Interest Act of 1995, p. 158. Congress never contemplated, much less intended, that screening interviews would be used to deny relief to refugees based on application of the mandatory bars. Until the Mandatory Bars Rule went into effect on January 17, 2025, Defendants had never applied the mandatory bars in these screening interviews.

This is unsurprising. The legal and factual complexity of the bars means that applying them in the context of screening interviews conducted on rushed timetables—without counsel or the opportunity to present documentary evidence—will inevitably result in the return to persecution (*refoulement*) of many people who could show eligibility for asylum or withholding of removal on the merits. As Defendants themselves acknowledged in 2022, this system is incompatible with the "intricacies of the fact-finding and legal analysis often required to apply mandatory bars." 87 Fed. Reg. at 18094. Defendants also previously recognized that application of the mandatory bars in cursory screening interviews would stretch those screening interviews "beyond [their] congressionally intended purpose[.]" 87 Fed. Reg. at 18093.

Nonetheless, in December 2024, Defendants reversed their 2022 position and announced the Mandatory Bars Rule, which directs asylum officers in screening interviews to "consider the applicability" of the mandatory bars if a person simply "appears to be subject to" such a bar. 89 Fed. Reg. at 103413-14; 8 C.F.R. §§ 208.30(e)(5)(ii), 208.31(c); *see also id*. § 208.33(b)(2)(i) ("if there is evidence that" the bar applies). If a noncitizen does not adequately rebut the application of a bar considered by the asylum officer, "[t]he asylum officer *shall* issue a negative fear finding." 8 C.F.R. § 208.30(e)(5)(ii)(A) (emphasis added); *see id.* § 208.33(b)(2)(iii) (using "will"). Once an asylum officer decides to consider a mandatory bar in a credible fear interview, the burden immediately shifts to the noncitizen to demonstrate "a significant possibility that [they] would be

able to show by a preponderance of the evidence that such bar(s) do not apply." 89 Fed. Reg. at 103413; 8 C.F.R. § 208.30(e)(5)(ii)(B). Noncitizens in reasonable fear interviews likewise must prove "a reasonable possibility that no mandatory bar applies." 89 Fed. Reg. at 103413-14; 8 C.F.R. §§ 208.31(c) & 208.33(b)(2)(ii). Defendants also issued the EOIR Companion Rule (89 Fed. Reg. 105392), which covers the optional immigration judge review of screening interviews.

As detailed in E.Q.'s declaration (filed under seal at Dkt. #2, Att. 1), the application of these rules to E.Q. demonstrates the arbitrary and capricious nature of Defendants' new rulemaking. E.Q. received a credible fear interview while detained on February 4, 2025. E.Q. testified that a close family member had worked for an international organization that cooperated with the previous Afghan government and the U.S. military. That family member now lives in the United States and is a U.S. citizen. E.Q. testified that in the spring of 2024, the Taliban raided his home and accused him of being an "American spy." Shortly thereafter, E.Q. fled Afghanistan and traveled to the United States.

E.Q. also testified that, before he left Afghanistan, he worked at a business that served the general public. Members of the Taliban would sometimes patronize that business, although E.Q. never personally served them. An asylum officer deemed E.Q.'s testimony credible but nonetheless issued a negative credible fear determination under the Mandatory Bars Rule, stating that "there are reasonable grounds to believe that the applicant may be subject to a bar(s) to asylum or withholding of removal." According to the asylum officer:

> [T]he applicant worked for a place of work that gave material support to the Taliban. As of 2010 . . . Government records indicate that the applicant was confirmed by National Targeting Center[5] and security checks confirm the applicant

[5] Part of Customs and Border Protection, the National Targeting Center ("NTC") flags passengers and cargo believed to pose a risk to national security. *See* U.S. Customs and Border Protection, CBP National Targeting Center (https://www.cbp.gov/frontline/cbp-national-targeting-center). But the NTC is frequently incorrect. The NTC's flagging practices have snared, for example, a U.S. citizen artist

> to be a member of the Taliban and is a Suspected Terrorist (KST). As such, there are reasonable grounds to believe that the applicant is a danger to the security of the United States and is a person described in the Terrorism-Related Inadmissibility Grounds (TRIG).

In sum, an asylum officer accepted that the Taliban had threatened E.Q. and accused him of working as a U.S. spy but nonetheless ordered E.Q.'s removal to Afghanistan, ostensibly because: (i) he worked at a business that sometimes served members of the Taliban just as it served the general public, and (ii) a government database suggested that E.Q. was a member of the Taliban—the very group that the asylum officer accepted would persecute him.

In the absence of the Mandatory Bars Rule, E.Q. would have passed his credible fear interview and would have been referred for full removal proceedings, where (i) he could rebut the secret, unreliable evidence relied on by the asylum officer, and (ii) a judge could evaluate those issues based on more complete information. Instead, because of the Mandatory Bars Rule, he received a negative credible fear determination in an interview where he was unrepresented by counsel and had no opportunity to gather evidence or contest the accusations made against him. Indeed, the documentation of his interview does not indicate that he was ever informed that his name appeared in a government database. Now, E.Q. is subject to an expedited removal order and faces removal to Afghanistan and persecution by the Taliban, despite the asylum officer having credited his testimony that he fears death or torture at their hands.

LEGAL STANDARD

Courts deciding whether to grant a stay of removal weigh four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will

returning from a show of his work in Belgium. Melissa del Bosque, *Secretive CBP Counterterrorism Teams Interrogated Over 180,000 U.S. Citizens Over Two-Year Period,* The Intercept, Sept. 4, 2021.

substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). As courts in this district have noted, "there is substantial overlap between these factors and the factors governing preliminary injunctions." *Ctr. for Biological Diversity v. Regan*, No. CV 21-119, 2024 WL 1740078, at *2 (D.D.C. Apr. 23, 2024) (cleaned up) (quoting *Nken*, 556 U.S. at 434).

ARGUMENT

I. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS.

A. The Mandatory Bars Rule Is Contrary to Law

The APA provides that courts "shall … hold unlawful and set aside agency action" that is "not in accordance with law." 5 U.S.C. § 706(2)(A). The Mandatory Bars Rule—and the derivative EOIR Companion Rule—are contrary to the INA in multiple respects. The Mandatory Bars Rule violates 8 U.S.C. § 1158 by denying noncitizens the right to simply *apply for* asylum based on the possibility that they may be subject to one of the mandatory bars. The Mandatory Bars Rule also violates both the asylum and withholding of removal statutes, 8 U.S.C. § 1158(b)(2)(A) and 8 U.S.C. § 1231(b)(3)(B), because it: (i) requires the denial of relief based on a finding that one of the mandatory bars "appears" to apply, which is a materially lower standard than the statutorily required determination that a bar actually *does apply*, and (ii) delegates this determination to DHS even though the relevant statutes confer that authority exclusively on "the Attorney General." And the Mandatory Bars Rule violates the expedited removal statute, 8 U.S.C. § 1225(b)(1)(B)(v), because it runs afoul of the low screening standard contemplated for credible fear interviews.

1. The Mandatory Bars Rule Violates the INA by Preventing Eligible Noncitizens from Applying for Asylum

The Mandatory Bars Rule unlawfully denies noncitizens the right to apply for asylum based on the possibility that one of the bars may apply. Under the INA's plain language:

> *Any [noncitizen] who is physically present in the United States or who arrives in the United States* (whether or not at a designated port of arrival and including a[noncitizen] who is brought to the United States after having been interdicted in international or United States waters), irrespective of such [noncitizen]'s status, *may apply for asylum* in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1) (emphases added). This broad right to apply for asylum is subject to only three narrow exceptions in § 1158(a)(2), none of which includes the mandatory bars outlined in the subsequent section of the asylum statute. But under the Mandatory Bars Rule, E.Q. and others like him are deprived of even the *opportunity* to seek asylum.

Congress instead created the mandatory bars as "[e]xceptions" that prevent the *grant* of asylum to someone who showed that they would otherwise be "eligib[le]." 8 U.S.C. § 1158(b)(1)(A) & (2). Congress placed these bars—which are fundamentally different in character than the exceptions in 1158(a)(2)—in a separate provision and worded them differently than the bars to *seeking* asylum outlined in § 1158(a)(2). Congress thus intended that the mandatory bars be applied only at the end of the process, after a full hearing in which the noncitizen established refugee status and had the opportunity to present evidence to rebut the bars.

Congress did *not* allow for the bars to be applied in the context of screening interviews held before a person even applies for asylum. The result is that the Mandatory Bars Rule violates § 1158. *See, e.g.*, *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803 (1989) ("Words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); *Morton v. Mancari*, 417 U.S. 535 (1974) ("Courts must read statutes (where possible) to avoid conflict between them, and to give meaning to, all relevant provisions.")

The credible fear statute, 8 U.S.C. § 1225(b), confirms as much. There, Congress made clear that any noncitizen who shows a "credible fear of persecution" must be allowed to seek relief in full removal proceedings in immigration court. 8 U.S.C. § 1225(b)(1)(B)(ii). And Congress

defined a "credible fear of persecution" as "a significant possibility … that the [noncitizen] could establish *eligibility for asylum under section 1158 of this title*." *Id.* § 1225(b)(1)(B)(v) (emphasis added); *see* 8 C.F.R. § 208.30(e)(2)-(3).

Congress's use of the phrase "eligibility for asylum under section 1158" refers to Section 1158(b)(1)(a), which is titled "Eligibility," and which provides that asylum may only be granted if the "Attorney General determines that such [noncitizen] is a refugee within the meaning of section 1101(a)(42)(A) of this title." *See Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 38 (D.D.C. 2020), *appeal dismissed*, No. 20-5372, 2021 WL 3716392 (D.C. Cir. July 1, 2021) ("Section 1225(b) defines 'credible fear of persecution'" as "a significant possibility . . . that the [noncitizen] could establish eligibility for asylum under section 1158 of this title . . . As relevant here, a noncitizen is eligible for asylum under section 1158 if she demonstrates that she "is a refugee[.]'") The text of § 1225, like the text of § 1158, thus compels the conclusion that Congress intended for the bars to be applied *only* in full removal proceedings.

The legislative history confirms this intent. During debate over H.R. 2022, the bill that provided the language of 8 U.S.C. § 1225(b), opponents raised significant concerns that the new credible fear screening process would lead to the denial of meritorious asylum claims in violation of international obligations. In reporting out H.R. 2022, the Judiciary Committee stated that:

> Under this system, there should be no danger that a [noncitizen] with a genuine asylum claim will be returned to persecution. The initial screening, which should take place in the form of a confidential interview, will focus on two questions: is the [noncitizen] telling the truth; and does the [noncitizen] have some characteristic that would qualify the [noncitizen] as a refugee.

H. Rep. 104-469 - Immigration in the National Interest Act of 1995, p. 158. From 1996 to 2024, the credible fear determination process remained focused on answering only these "two questions." *Id*. And as recently as 2022, Defendants themselves acknowledged this Congressional intent, noting that adjudicating mandatory bars in credible fear interviews would expand screening

interviews "beyond [their] congressionally intended purpose … and would instead become a decision on the relief or protection itself." 87 Fed. Reg. at 18093.

Moreover, Congress's statutory scheme makes perfect sense. The mandatory bars in § 1158(b)(2) are both factually and legally complex, and they can generally be overcome only following the presentation of nuanced legal arguments and/or rebuttal evidence that may originate abroad. *See* Compl., ¶¶40-67. Congress thus had good reason to create a system that allows for a broad right to seek asylum and permits application of the bars only after: (i) presentation of evidence and legal arguments and (ii) an actual determination that the bars do, in fact, apply.

In short, the Mandatory Bars Rule is contrary to the INA because it allows for the application of bars before a noncitizen has ever applied for asylum, in contravention of § 1158.

2. The Mandatory Bars Rule Violates the INA by Denying Asylum and Withholding of Removal Based on a DHS Determination that a Mandatory Bar "Appears" to Apply

The Mandatory Bars Rule also violates the INA in two other ways. Under the statutes governing asylum and withholding of removal, otherwise-eligible noncitizens will be denied asylum "if the Attorney General determines that" one of the mandatory bars applies. *See* § 1158(b)(2)(A) (asylum); § 1231(b)(3)(B) (withholding of removal).

The Mandatory Bars Rule is contrary to both statutes in two respects. First, the Mandatory Bars Rule provides for the denial of relief to a noncitizen who "*appears* to be subject to" a mandatory bar. 89 Fed. Reg. at 103413-14; 8 C.F.R. §§ 208.30(e)(5)(ii), 208.31(c) (emphasis added). This is a materially lower standard than a determination that the bar *does* apply. *See*, *e.g.* *Kiakombua*, 498 F. Supp. 3d 1, 41 (D.D.C. 2020) ("Congress' use of a verb tense is significant in construing statutes . . . and there is no doubt that the word 'is' connotes a more certain determination than 'could.'") (internal quotations omitted).

Thus, for example, the Mandatory Bars Rule provides for the denial of asylum based solely on a finding that it "appears" that the noncitizen "participated in the persecution of an individual." 8 U.S.C. § 1231(b)(2)(A)(i) & (b)(3)(B). Congress has not authorized Defendants to apply this lower standard to exclude otherwise-eligible noncitizens from obtaining asylum or withholding of removal. Application of this standard, therefore, contravenes the INA.

Second, the Mandatory Bars Rule permits asylum officers working *in the Department of Homeland Security* to deny relief based on the mandatory bars when the INA expressly reserves this power *for the Attorney General* (and thus Immigration Judges under her supervision). In contrast to 8 U.S.C. § 1158(b)(1), which was specifically amended to allow for a grant of asylum "if the *Secretary of Homeland Security or the Attorney General determines* that such [noncitizen] is a refugee," § 1158(b)(2)(A) provides for the denial of relief only "if the *Attorney General determines* that" a mandatory bar applies (emphases added). Likewise, § 1231(b)(3)(B) provides for the denial of relief only "if the *Attorney General determines* that" a mandatory bar applies (emphasis added). The Mandatory Bars rule thus contravenes the INA by delegating to DHS authority that has not been authorized by Congress.

3. The Mandatory Bars Rule Is Contrary to the INA Because It Undermines the Significant Possibility Standard in the Expedited Removal Statute

Finally, the Mandatory Bars Rule is contrary to the expedited removal statute, 8 U.S.C. § 1225(b), because the Rule is inconsistent with the "significant possibility" standard. To establish a credible fear of persecution, a noncitizen must demonstrate that there is "a significant possibility, taking into account the credibility of the statements made by the [noncitizen] in support of the [noncitizen]'s claim and such other facts as are known to the officer, that the [noncitizen] could establish eligibility for asylum under section 1158 of this title." 8 U.S.C. § 1225(b)(1)(B)(v). The Mandatory Bars Rule undermines this provision in two respects.

First, as mentioned above, the significant possibility standard was always meant to represent a low screening standard. *Grace v. Barr*, 965 F.3d 883, 902-03 (D.C. Cir. 2020); *see* H.R. Rep. No. 104-469, pt. 1, at 158 (1995). The Mandatory Bars Rule undermines the purpose of this provision by requiring asylum seekers to establish a "significant possibility" (or, worse, a "reasonable possibility" or "reasonable probability") that they are not "subject to a mandatory bar." *See* Compl. ¶¶ 111-12. This approach requires a noncitizen to affirmatively offer evidence that they did *not* persecute others, or that they have *not* committed certain crimes or supported terrorism. The Rule thus substantially changes the credible fear inquiry because "as a practical matter it is never easy to prove a negative." *Elkins v. United States*, 364 U.S. 206, 218 (1960).

Second, the statute contemplates that the outcome of a credible fear interview should be based on "the credibility of the statements made by the [noncitizen]" and "such other facts as are known to the officer." 8 U.S.C. § 1225(b)(1)(B)(v). In other words, the statute *does not* contemplate the possibility that applicants would need to produce rebuttal evidence to overcome the application of a bar or make complex factual and legal arguments about the validity of any accusation levied in their case. E.Q.'s case clearly illustrates this problem. In full removal proceedings, he could rebut Defendants' allegations with evidence, including testimony from his U.S. citizen family member, other evidence from Afghanistan, and reports demonstrating the unreliability of the government database relied on by the asylum officer. But the expedited removal process and the credible fear interview do not contemplate that kind of process.

In short, both the text of § 1225(b) and the congressional intent behind that statute make clear that Congress did not intend for the credible fear process to serve as an unreviewable means to deny relief to refugees based on untested allegations that a mandatory bar *may potentially* apply. Yet that is precisely what the Mandatory Bars Rule does, as E.Q.'s case aptly illustrates.

B. The Mandatory Bars Rule Is Arbitrary and Capricious

Even if the Mandatory Bars Rule did not violate the INA (which it does), it would remain unlawful under the APA because it is arbitrary and capricious. Agency action is arbitrary and capricious if it "relied on factors which Congress has not intended it to consider, entirely failed to consider [] important aspect[s] of the problem, [and] offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In assessing agency action, the Court's underlying "task involves examining the reasons for [the] agency decision[]—or, as the case may be, the absence of such reasons." *Judulang v. Holder*, 565 U.S. 42, 53 (2011).

The Mandatory Bars Rule fails to meet the APA's reasoned decision-making standard for at least two reasons. First, Defendants' reasoning in support of the rule relies extensively "on a false factual premise," *Cigar Ass'n,* 126 F.4th at 705—namely, that the rule limits review of mandatory bars to circumstances where there is "easily verifiable evidence" that a bar applies. Second, the Mandatory Bars Rule fails to meaningfully address record evidence and public comments and represents a radical departure from Defendants' prior policy determinations without "display[ing] awareness that [they are] changing position" or "show[ing] that there are good reasons for the new policy." *Encino,* 579 U.S. at 221.

1. Defendants' Reasoning Relies on the False Factual Premise that Asylum Officers Will Assess Mandatory Bars Only Where There is "Easily Verifiable Evidence" That They Apply.

Agency action is arbitrary if the agency's rationale "rested on a false factual premise." *Cigar Ass'n*, 126 F.4th at 705; *see also Genuine Parts Co. v. Env't Prot. Agency*, 890 F.3d 304, 346 (D.C. Cir. 2018) (internal quotation omitted) ("An agency action is arbitrary and capricious if it rests upon a factual premise that is unsupported by substantial evidence.").

Here, the Mandatory Bars Rule squarely rests on such a premise. In the rule's preamble, Defendants assert at least thirty times that the rule limits review of mandatory bars to circumstances where there is "easily verifiable evidence" that a bar applies. 89 Fed. Reg. at 103373, 103376, 103378, 103383-89, 103391, 103394-97, 103403, 103411. The preamble even asserts that the Mandatory Bars Rule "instructs" asylum officers to consider mandatory bars "only" in such situations. *Id*. at 103385. The text of the rule itself, however, includes no such limitation; indeed, the phrase "easily verifiable" appears nowhere in the text of the new regulations. Rather, the regulations instruct asylum officers to consider mandatory bars whenever it "appears" that one might apply. 8 C.F.R. §§ 208.30(e)(5)(ii), 208.31(c), 208.33(b)(2)(i).

When the text of a rule conflicts with the rule's preamble, there can be no doubt which controls. "A preamble does not create law; that is what a regulation's text is for." *Texas Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 237 (D.D.C. 2014). It is "the language of the regulatory text, and not the preamble, that controls." *Nat'l Wildlife Fed. v. EPA*, 286 F.3d 554, 570 (D.C. Cir. 2002), *supplementing opinion, In re Kagan*, 351 F.3d 1157 (D.C. Cir. 2003).[6] Here, the regulatory text forecloses any claim that the rule applies only where "easily verifiable" evidence exists.

This inconsistency between the preamble text and the regulation undoes the rule. The Mandatory Bars Rule rests on an efficiency rationale (*see*, *e.g.*, 89 FR at 103381-82), and Defendants' assertion of that rationale rests on the view that it can be applied only to a small number of cases with easily verifiable evidence, *id.* at 103381. Stripped of this false premise, the efficiency rationale cannot be sustained. As Defendants explained in 2022, "[a]pplying a mandatory bar often involves a complex legal and factual inquiry," and, as a result, "[r]equiring

[6] *Accord, e.g.*, *Mejia-Velasquez v. Garland*, 26 F.4th 193, 202 (4th Cir. 2022); *Sierra Club v. EPA*, 964 F.3d 882, 893 (10th Cir. 2020); *Gustavsen v. Alcorn Labs., Inc.*, 903 F.3d 1, 13 (1st Cir. 2018) (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000)).

asylum officers to broadly apply mandatory bars during credible fear screenings would [make] these screenings less efficient, undermining congressional intent that the expedited removal process be truly expeditious[.]" 87 Fed. Reg. at 18092-93.

Furthermore, Defendants repeatedly rely on the "easily verifiable" incantation in defending the rule against critical comments. To take one example, Defendants reject comments that "the inability to compile evidence" about a bar before a screening interview "would adversely impact noncitizens" by asserting that "evidence gathering" is unnecessary because asylum officers "will only consider a bar in those cases where there is easily verifiable (as opposed to unverified or difficult-to-verify) evidence" that a bar applies. 89 Fed. Reg. at 103375-75. Defendants also cite the (nonexistent) "easily verifiable evidence" limitation as their chief basis for rejecting concerns that the Mandatory Bars Rule would be open to "abuse" by an "overtly hostile anti-immigrant administration." *Id*. at 103383 (quotation omitted). And Defendants rely on the same fictional limitation to dispute comments that "consideration of the mandatory bars at the screening stage is inconsistent with congressional intent that the 'significant possibility' standard be a low threshold to avoid the risk that people would erroneously be screened out." 89 Fed. Reg. at 103385. This repeated, critical reliance on a false factual premise, standing alone, compels the conclusion that the rule "constitute[s] arbitrary agency action." *See Cigar Ass'n*, 126 F.4th at 705.

2. Defendants Fail to Consider Important Aspects of the Problem or Explain Departures from Prior Policy Judgments

The preamble to the Mandatory Bars Rule also justifies its positions by repeatedly insisting that the mandatory bars are not too complex to be decided in screening interviews. *See* 89 Fed. Reg. at 103375-82, 103385-86, 103390-91. As detailed above (Section I.B.1), that justification is arbitrary and capricious because it is based on the erroneous premise that the rule applies only in situations with easily verifiable evidence. But it is also arbitrary and capricious on its own terms

because commenters showed that the mandatory bars are not amenable to adjudication in screening interviews. Specifically, commenters showed, and Defendants do not dispute, that noncitizens affected by the Mandatory Bars Rule carry the burden of proof whenever an asylum officer determines a bar might apply and must meet that burden without the benefit of evidence, counsel, or the procedural protections available in immigration court proceedings. 89 Fed. Reg. at 103395-96.

Commenters also showed, and Defendants cannot dispute, that the bars are both legally and factually complex and have often lead to erroneous decisions even after full merits hearings conducted *with* the benefit of evidence and counsel. *See, e.g.*, Comment of Amica Center for Immigrant Rights 8-17;[7] Comment of Center for Gender and Refugee Studies ("CGRS Comment") 20-30;[8] Comment of National Immigrant Justice Center 22-29;[9] And commenters showed, and Defendants cannot dispute, that noncitizens in screening interviews will often not even be told the asylum officer's basis for speculating that a bar applies. *See, e.g.*, Amica Center Comment 16; CGRS Comment 35.

Again, E.Q.'s situation is illustrative. When applying the terrorism bar in removal proceedings, Defendants must first make "a threshold showing of particularized evidence of the bar's applicability before placing on the applicant the burden to rebut it." *Budiono v. Lynch*, 837 F.3d 1042, 1048 (9th Cir. 2016). But under the Mandatory Bars Rule, Defendants shifted the burden onto E.Q. because, on the basis of an expansive reading of "material support" and secret factual evidence of questionable reliability, *see supra* n.5, it "appear[ed]" to the asylum officer that E.Q. was subject to a mandatory bar.

[7] https://www.regulations.gov/comment/USCIS-2024-0005-4196.
[8] https://www.regulations.gov/comment/USCIS-2024-0005-4260.
[9] https://www.regulations.gov/comment/USCIS-2024-0005-2345.

Moreover, Defendants never provided E.Q. with any meaningful opportunity to respond. Defendants did not tell E.Q. that they believed a bar applied or that they believed he was a member of the Taliban, much less why they believed so. E.Q. could present only his general testimony—and, indeed, E.Q. testified that he was opposed to the Taliban and faced persecution by that group. The asylum officer credited that testimony. Yet the asylum officer held that E.Q. had failed to sufficiently rebut bars that E.Q. had no idea the officer thought might apply. In short, the officer reached the unfounded conclusion that E.Q. is a member of the Taliban even though his own credible testimony shows that he is likely to be persecuted by the very same group. The conclusion is all the more remarkable given that Defendants accepted as credible all of E.Q.'s testimony, including that he had never "been a member of an armed group or a group that uses violence to achieve its goals" and never "provided any type of support, like food, housing, money, or transportation, to an armed group or any group or person that uses violence to achieve their goals."

Despite the comments making clear that such situations could and would occur routinely under the Mandatory Bars Rule, Defendants' response was to bury their heads in the sand. Aside from the erroneous claim that bars will be considered only where there is easily verifiable evidence, Defendants never directly addressed the comments that the bars are too complex to be addressed fairly in screening interviews without evidence or counsel. They instead sidestepped those issues in favor of assertions about credible fear procedures generally and the nonsequitur that asylum officers decide other complex questions. 89 Fed. Reg. at 103375. And Defendants nakedly asserted that noncitizens *would* be given an opportunity to rebut the bars in interviews, but in doing so they blinded themselves to significant contrary evidence in the record, *see supra* p. 17—evidence underscored by E.Q.'s experience. Defendants' failure to meaningfully engage with these comments provides an independent ground for vacatur of the rules. *E.g.*, *Tesoro Alaska Petroleum*

Co. v. FERC, 234 F.3d 1286, 1294 (D.C. Cir. 2000) ("unless an agency answers objections that on their face appear legitimate, its decision can hardly be said to be reasoned").

That failure is unsurprising given that Defendants themselves agreed with commenters as recently as 2022, finding "that considerations of procedural fairness counsel against applying mandatory bars that entail extensive fact-finding during the credible fear screening process." 89 Fed. Reg. at 18093. Given the "intricacies of the fact-finding and legal analysis often required to apply mandatory bars," Defendants concluded that people with a credible fear of persecution "generally should be afforded the additional time, procedural protections, and opportunity to further consult with counsel" that come with proceedings on the merits. *Id*. at 18094.

Defendants specifically stated in 2022 that the particularly serious crime bar requires "fact-intensive" and "complex" "case-by-case adjudication" that make it unsuited for adjudication in screening interviews. *Id.* And in addition to these procedural considerations, Defendants concluded that that applying the mandatory bars in screening interviews would make those interviews "less efficient" and that, while asylum officers could always ask questions about potential bars in screening interviews, those questions did not reflect the level of "detail that would be necessary if the issue of a mandatory bar was outcome-determinative for a credible-fear determination." *Id*.

Defendants are, of course, free to alter the position they took in 2022—but when they do so, the APA requires that they acknowledge and reasonably explain that change. *See, e.g.*, *Encino Motorcars,* 579 U.S. at 221; *Grace*, 965 F.3d at 900. Defendants did not do so here. The Mandatory Bars Rule does not even mention all of these prior positions. And while it does acknowledge the existence of some of Defendants' prior positions, *see* 89 Fed. Reg. at 103386, the rule does *not* acknowledge that its provisions represent a change in position. Rather, Defendants asserted that the Mandatory Bars Rule is "not inconsistent with" their earlier positions—but that assertion, like

so much in the rule, rests solely on the indefensible assumption that the rule applies only "where the evidence is clear." *Id.* Defendants have failed to either acknowledge or reasonably explain their change in position from 2022, and the rule at issue is therefore arbitrary and capricious.

II. PLAINTIFF E.Q. WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A STAY

There is no question that Plaintiff E.Q., an asylum seeker who fears brutal persecution in his home country, will suffer irreparable harm if removed to Afghanistan (or to a third country that will in turn remove him to Afghanistan) based on the Mandatory Bars Rule. The Supreme Court has long recognized that removal is a "particularly severe" injury, inflicting substantial harm on a noncitizen. *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (quoting *Fong Yeu Ting v. United States*, 149 U.S. 698, 740 (1893)). Special care accordingly must be taken in asylum cases lest the court permit persecution to occur. *See Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011) (threat of persecution, including beatings, constitutes irreparable harm).

III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST BOTH FAVOR A STAY OF REMOVAL

A stay of removal will not substantially injure the government and would further the public interest. It is in both the public interest and the government's interest—and consistent with the government's domestic and international obligations—to ensure that the government does not remove asylum seekers like Plaintiff E.Q. to a place where they risk persecution or death. *See Nken*, 556 U.S. at 436 ("Of course there is a public interest in preventing [applicants] from being wrongfully removed, particularly to countries where they are likely to face substantial harm.").

Moreover, the public interest is served when the government complies with its obligations under the INA and the APA. The "public also has an interest in ensuring that its government respects the rights of immigrants[.]" *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 124 (D.D.C. 2018) (preventing immigration authorities from removing Plaintiffs pursuant to expedited removal

orders)*; see also O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (stating that preliminary relief "would serve the public's interest in maintaining a system of laws" where the government must comply with its legal obligations); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 342 (D.D.C. 2018) ("The public interest is served when administrative agencies comply with their obligations under the APA.") (citation and quotation marks omitted); *R.I.L-R. v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (explaining that the public interest is served by relief that "ends an unlawful practice" and ensures compliance with the APA) (citation and quotation marks omitted). Far from undermining the public interest, treating asylum seekers with basic fairness and dignity is among our nation's most time-honored traditions. *See*, *e.g.*, Refugee Act of 1980, Pub. L. No. 96- 212, § 101(a), 94 Stat. 102 ("[I]t is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including . . . admission to this country of refugees of special humanitarian concern[.]").

It is also relevant that, if he were to be removed from the United States, E.Q. would have no clear way to litigate this case from abroad. His ability to communicate with counsel, stay informed about the case, and participate in decision making will be at best sharply diminished if he is in hiding in Afghanistan—or, worse, imprisoned or killed by the Taliban. That issue is of particular significance in systemic challenges to expedited removal policies, because those challenges must be brought within 60 days, and the D.C. Circuit has interpreted that deadline as jurisdictional—meaning that other noncitizens cannot bring other cases challenging the rule. *See* 8 U.S.C. § 1252(e)(3); *M.M.V. v. Garland*, 1 F.4th 1100, 1109 (D.C. Cir. 2021)

In short, the balance of harms and the public interest decisively favor staying E.Q.'s removal from the United States pending a determination on the merits of Plaintiffs' claims.

CONCLUSION

For the foregoing reasons, Plaintiff's motion should be GRANTED.

Dated: March 19, 2025

Respectfully Submitted,

/s/ Amanda Shafer Berman Amanda Shafer Berman (DC Bar No. 497860) CROWELL & MORING LLP 1001 Pennsylvania Ave., N.W. Washington, D.C. 20004 (202) 624-2500 ABerman@crowell.com Jared A. Levine (*pro hac pending*) Joachim Steinberg* CROWELL & MORING LLP 375 9th Ave, 44th Floor New York, NY 10001 (212) 223-4000 JLevine@crowell.com JSteinberg@crowell.com Judy He* Jeremy Iloulian* Jung Shin* CROWELL & MORING LLP 455 N Cityfront Plaza Dr #3600, Chicago, IL 60611 (312) 321-4200 JHe@crowell.com JIloulian@crowell.com JShin@crowell.com	Keren Zwick (D.D.C. Bar. No. IL0055) Richard Caldarone (D.C. Bar No. 989575)* Colleen Cowgill* Fizza Davwa* NATIONAL IMMIGRANT JUSTICE CENTER 111 W. Jackson Blvd., Suite 800 Chicago, IL 60604 (312) 660-1370 kzwick@immigrantjustice.org rcaldarone@immigrantjustice.org ccowgill@immigrantjustice.org fdavwa@immigrantjustice.org Melissa Crow (D.C. Bar. No. 453487) CENTER FOR GENDER & REFUGEE STUDIES 1121 14th Street, NW, Suite 200 Washington, D.C. 20005 (202) 355-4471 crowmelissa@uclawsf.edu Anne Peterson* Center for Gender & Refugee Studies 200 McAllister Street San Francisco, California 94102 T: 415.610.5729 petersonanne@uclawsf.edu Robert Pauw* CENTER FOR GENDER & REFUGEE STUDIES c/o Gibbs Houston Pauw 1000 Second Avenue, Suite 1600 Seattle, WA 98104 (206) 682-1080 rpauw@ghp-law.net Peter Alfredson (D.C. Bar No. 1780258) AMICA CENTER FOR IMMIGRANT RIGHTS 1025 Connecticut Ave. NW, Suite 701

	Washington, DC 20036 (202) 899-1415 peter@amicacenter.org Anwen Hughes* Human Rights First 75 Broad St., 31st Fl. New York, NY 10004 (212) 845-5244 HughesA@humanrightsfirst.org *Certificate of pro bono representation or pro hac vice forthcoming

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

E.Q. *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY *et al.*, Defendants.	)	No. 1:25-cv-00791

CERTIFICATE OF COUNSEL REQUIRED BY LOCAL RULE 65.1(a)

Pursuant to Local Rule 65.1(a), the undersigned counsel for Plaintiffs hereby certifies as follows:

On March 17, 2025, Plaintiffs' counsel contacted Erez R. Reuveni, Assistant Director, Office of Immigration Litigation, United States Department of Justice by email (erez.r.reuveni@usdoj.gov) to notify Defendants of Plaintiffs' intent to file an application for an Emergency Stay of Removal concurrently with the filing of the complaint in this action or shortly thereafter. Defendants' Counsel responded that day confirming that Defendants intend to oppose Plaintiffs' motion. Defendants further advised that Christina Greer, Senior Litigation Counsel, Office of Immigration Litigation, United States Department of Justice (Christina.P.Greer@usdoj.gov) and Cara Alsterberg (cara.e.alsterberg@usdoj.gov) will be acting as counsel on this matter for Defendants.

On March 18, 2025, Plaintiffs' counsel contacted Ms. Greer and Ms. Alsterberg and inquired whether Defendants could "give us an indication as to the timeline we should expect for [E.Q.'s] removal, including to a third country, so that we can flag to the court how much urgency

there is to this matter." Ms. Alsterberg responded that: "[w]e have requested the below information from our clients but do not have anything additional to share at this time."

Copies of all pleadings and papers filed in this action to date, or to be presented to the Court at the hearing on the application for an emergency stay of removal, have now been delivered to Defendants by emails addressed to Ms. Greer and Ms. Alsterberg. A courtesy copy has also been sent to Brian Hudak, Acting Chief, Civil Division, United States Attorney's Office for the District of Columbia (brian.hudak@usdoj.gov). That communication occurred at approximately 9:05 AM ET on March 19, 2025.

Moments after emailing Ms. Greer, Plaintiffs' counsel telephoned Ms. Greer to alert her that she had been sent these papers by email.

A copy of the summons and file-stamped papers will be emailed to the same recipients promptly after receiving summonses from the Clerk of Court, and paper copies will be served promptly thereafter.

Dated: March 19, 2025

Respectfully submitted,

/s/ *Amanda S. Berman*

Amanda Shafer Berman (DC Bar No. 497860)
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500
ABerman@crowell.com
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

E.Q. *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY *et al.,* Defendants.	)	No. 1:25-cv-00791

[PROPOSED] ORDER

Upon consideration of the Plaintiff's Emergency Motion to Stay Removal, and any opposition, reply, and further pleadings and argument thereto;

Having determined that Plaintiffs are likely to succeed on the merits of their claims for violations of the Immigration and Nationality Act and the Administrative Procedure Act, that Plaintiff E.Q. will suffer irreparable injury in the absence of a stay of removal, and that the balance of hardships and public interest favor relief, it is, therefore:

ORDERED that Plaintiff's Emergency Motion to Stay Removal is hereby GRANTED; and

ORDERED that, pending further order of this Court, Defendants, their agents, representatives, and all persons or entities acting in concert with them shall not remove Plaintiff E.Q. from the United States; and

ORDERED that, insofar as Plaintiff E.Q. is in the process of being removed or has already been removed from the United States, but remains within the custody, control, and/or jurisdiction of the United States, Defendants, their agents, representatives, and all persons or entities acting in concert with them shall return Plaintiff E.Q. to the United States

Dated: _____

_____
United States District Judge