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

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

When Congress created the credible fear interview (CFI) process in 1996, it sought to avoid any "danger that a [noncitizen] with a genuine asylum claim will be returned to persecution." H. Rep. 104-469 – Immigration in the National Interest Act of 1995, p. 158. Congress achieved this objective by imposing a low evidentiary burden, under which a noncitizen is entitled to pursue protection in full removal proceedings if there is a significant possibility that they could establish eligibility for asylum after a full hearing. But Defendants have now upended Congress's carefully considered statutory framework through the Mandatory Bars Rule and EOIR Companion Rule.[1]

Under these Rules, Defendants require applicants in CFIs to prove a negative, namely that they are not subject to certain "mandatory bars" that could require the denial of relief. These bars are extraordinarily complex; rebutting them requires the presentation of both documentary evidence and nuanced legal arguments. Neither is possible in cursory fear screening interviews, which are conducted on a hyper-compressed timeline, while a noncitizen is held in detention without access to counsel or evidence. The Rules violate the Immigration and Nationality Act (INA) and the Administrative Procedure Act (APA) in multiple respects, and their application is causing bona fide refugees to be erroneously denied relief and deported to persecution and death.

In this case, Plaintiffs proposed that Defendants produce an administrative record and that the parties proceed directly to summary judgment. Defendants rejected this proposal and have moved to dismiss the Complaint. Dkt. 42 (MTD). Defendants thus have the burden of establishing that the Complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to

[1] *See* DHS, *Application of Certain Mandatory Bars in Fear Screenings*, 89 Fed. Reg. 103370 (Dec. 18, 2024) (the Mandatory Bars Rule or the Rule), and EOIR, *Clarification Regarding Bars to Eligibility During Credible Fear and Reasonable Fear Review*, 89 Fed. Reg. 105392 (Dec. 27, 2024) (the EOIR Companion Rule) (collectively, the Rules).

relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As detailed below, Defendants come nowhere close to satisfying their burden.

BACKGROUND

A. Asylum and Withholding of Removal

The Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102, enshrined "one of the oldest themes in America's history—welcoming homeless refugees to our shores." *Id.* Congress passed the Refugee Act to "bring United States refugee law into conformance" with U.S. international treaty obligations, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987), including the "commitment to avoid refouling individuals to countries where their lives are threatened," *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 674 (9th Cir. 2021). The INA now provides three primary forms of relevant relief: asylum, *see* 8 U.S.C. § 1158; statutory withholding of removal, *see* 8 U.S.C. § 1231(b)(3); and protection under the Convention Against Torture (CAT), *see* 8 U.S.C. § 1231; 8 C.F.R. § 1208.

Though its language has evolved over time, the Refugee Act has consistently afforded a broad right to seek the discretionary benefit of asylum. It now allows "any [noncitizen] who is physically present in the United States" to seek asylum "whether or not" they enter at a port of entry and "irrespective" of their immigration status. 8 U.S.C. § 1158(a)(1). Noncitizens who apply for asylum are eligible to receive this protection if they establish a well-founded fear of persecution on account of a protected ground in their country of origin. *Id.* §§ 1101(a)(42)(A) & 1158(b)(1)(A).

The statute also contains barriers to asylum: some prohibit an application from moving forward and others are bars to asylum that apply even where a person meets the definition of a refugee. *Compare* 8 U.S.C. § 1158(a)(2) (exceptions to the authority to apply for asylum) *with id.* § 1158(b)(2)(A) (exceptions to conditions for granting asylum).

This case involves a regulation that allows Defendants to apply most of the latter bars to asylum in threshold screening interviews that occur as part of the expedited removal process, discussed below. The bars to being *granted* asylum apply if "the Attorney General determines" that the applicant: (1) persecuted others; (2) has been convicted of a particularly serious crime; (3) committed a serious nonpolitical crime outside the United States; (4) is a danger to national security; (5) has engaged in terrorist activity; or (6) was firmly resettled in another country prior to arriving in the United States. *Id.* § 1158(b)(2)(A)(i)-(vi). The Rules at issue here call for consideration of all but the firm resettlement bar in the credible fear process.

Application of the mandatory bars is complex and requires detailed analysis. It involves interpretation of criminal statutes and national security determinations, issues that typically require careful research and consultations that cannot be adequately carried out in a screening setting. And overcoming these bars requires applicants to prove a negative, *e.g.* that they have not been convicted of a certain crime or participated in the persecution of others. To do so, an applicant must make nuanced legal arguments, produce substantial factual corroboration, or both. But the time constraints and limited access to legal counsel and the outside world during the credible fear process make these steps generally impossible.

From the time that Congress created the expedited removal process in 1996 until the January 2025 effective date of the Rules, Defendants never applied these bars during credible fear screening interviews. *See infra* pp. 33-34. Instead, Defendants applied the bars solely in full removal proceeding where, due to their complexity, the Office of the Principal Legal Advisor in U.S. Immigration and Customs Enforcement (ICE) created a specialized team of attorneys to assess the bars. *See, e.g.*, *Application of Certain Mandatory Bars in Fear Screenings*, 89 Fed. Reg. 41347, 41352 (May 13, 2024). And the bars are so complex that, even after a full hearing on the

merits, immigration judges and the Board of Immigration Appeals (BIA) have frequently reached determinations that have been rejected by the federal courts of appeals. Compl. ¶¶ 42-67 (discussing the bars and providing examples).

The Rules also affect applications for withholding of removal, either under the statute or the CAT. The INA prohibits the government from removing a noncitizen "to a country if . . . the [noncitizen's] life or freedom would be threatened in that country because" of a protected ground. 8 U.S.C. § 1231(b)(3). As with asylum, the mandatory bars foreclose access to statutory withholding of removal, but only "if the Attorney General decides" that a bar applies. 8 U.S.C. § 1231(b)(3)(B). The same is true for withholding of removal under the CAT. 8 C.F.R. § 1208.16(c)(2). Withholding of removal is a mandatory form of protection that must be afforded to an applicant who qualifies, but it requires the applicant to meet a higher burden of proof and does not bar removal to a third country. *See I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999).

B. Credible Fear and Reasonable Fear Interviews

In 1996, Congress established expedited removal to "substantially shorten and speed up the removal process" for certain noncitizens arriving without valid immigration documents or who enter without inspection. *Make The Rd. N.Y. v. Wolf*, 962 F.3d 612, 618 (D.C. Cir. 2020); *see* 8 U.S.C. § 1225(b)(1). At the time Defendants promulgated the Rules, DHS applied expedited removal to these noncitizens if they encountered DHS agents within 100 miles of a U.S. border and within 14 days of entry. On January 21, 2025, however, DHS expanded its application of expedited removal to all noncitizens anywhere in the country if they cannot prove two years of continuous presence in the United States. *See Designating Aliens for Expedited Removal*, 90 Fed. Reg. 8139 (Jan. 24, 2025). DHS is now also seeking to apply expedited removal to noncitizens who are already in removal proceedings in immigration court, even if they have already filed an

application for asylum. *See, e.g.*, *Immigration Advocates Response Collaborative v. U.S. Dep't of J.*, No. 1:25-cv-2279 (D.D.C. filed July 16, 2025).

Noncitizens in expedited removal are ordered removed by an immigration officer "without further hearing or review" unless they express an intent to apply for asylum or a fear of persecution. 8 U.S.C. § 1225(b)(1)(A)(i). Noncitizens who express such a fear receive a threshold screening interview known as a CFI. Congress intended for these interviews to screen out only those "who indisputably have no authorization to be admitted to the United States" while permitting people with colorable asylum claims to seek humanitarian relief from inside the United States. *Grace v. Barr*, 965 F.3d 883, 887 (D.C. Cir. 2020) (quotation omitted). The standard that applies in CFIs is thus low; a noncitizen must demonstrate "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).

CFIs occur in rushed conditions and nearly always while the noncitizen is detained by Defendants. Noncitizens have a statutory right to consult with a person of their choosing before a CFI, *see* 8 U.S.C. § 1225(b)(1)(B)(iv), but Defendants' current policy provides only a 24-hour window for this consultation to occur, which renders it difficult (and often impossible) for noncitizens to exercise that right. Compl. ¶ 77. Moreover, these interviews are often conducted by telephone and frequently suffer from significant interpretation problems. *Id*. ¶ 79.

Noncitizens who show a credible fear of persecution are placed in full removal proceedings before an immigration judge, where they can file an application for asylum, withholding, and CAT relief. 8 U.S.C. § 1225(b)(1)(B)(v). In those proceedings, the noncitizen has a right to retain a

lawyer, collect and present evidence, cross-examine witnesses, and file appeals with the BIA and a federal court of appeals. *See* 8 U.S.C. §§ 1229, 1229a, 1252(a)-(b).

Noncitizens who receive a negative CFI determination from an asylum officer can request review by an immigration judge, which occurs "to the maximum extent practicable within 24 hours, but in no case later than 7 days" after the initial interview. 8 U.S.C. § 1225(b)(1)(B)(iii)(III). Like the interview, this review generally occurs by telephone and while the applicant remains detained. If the immigration judge finds a credible fear, the noncitizen is generally placed in full removal proceedings. 8 CFR § 1208.30(g)(2)(iv)(B). If, however, the immigration judge affirms the asylum officer's adverse finding, the applicant is subject to removal "without further hearing or review." 8 U.S.C. § 1225(b)(1)(B)(i), (iii); *see* 8 U.S.C. § 1252(a)(2)(A), (e).

In addition to statutorily mandated CFIs, DHS created a "reasonable fear" process that applies to noncitizens in two sets of circumstances: (1) those who have previously received a removal order and have that removal order reinstated under 8 U.S.C. § 1231(a)(5); and (2) those who have been convicted of an aggravated felony and then receive a final administrative removal order from DHS under 8 U.S.C. § 1228(b). Reasonable fear interviews (RFIs) are non-statutory but are "[m]odeled on the credible fear screening mechanism" and serve to prevent the wrongful removal to persecution or torture of noncitizens who are not eligible for asylum. *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999); *see* 8 C.F.R. § 208.31. In contrast to the "significant possibility" of persecution standard in CFIs, in a reasonable fear interview the noncitizen must meet a heightened standard by establishing a "reasonable possibility" of persecution or torture in the country of removal. 8 C.F.R. § 208.31(c). Noncitizens who meet this standard are referred for withholding-only removal proceedings where they have the procedural and appellate rights described above. *Id.* § 1208.31(e). If an asylum officer finds no

reasonable fear, the noncitizen may request review of that decision by an immigration judge. *Id.* § 1208.31(f). If the judge agrees with the asylum officer, the person is subject to immediate removal. *Id.* § 1208.31(g)(1). The resulting final order of removal is subject to judicial review in a federal court of appeals, subject to the limitations in 1252(e). 8 USC 1252(a), (e).

C. The Rules' Novel Application of the Mandatory Bars in Screening Interviews

Though Congress created expedited removal and the credible fear process nearly 30 years ago in 1996, the mandatory bars to asylum have never applied in either credible or reasonable fear interviews until the Rules at issue here were promulgated. Instead, CFIs and RFIs focused on whether applicants could establish eligibility for protection following a full hearing on the merits.

In 2020, Defendants promulgated a rule that would have permitted consideration of the mandatory bars to asylum during CFIs, *see Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274, 80391 (Dec. 11, 2020); but that rule never took effect, *see Pangea Legal Servs. v. DHS*, 512 F. Supp. 3d 966 (N.D. Cal. 2021). Then, in 2022, Defendants issued a rule reaffirming their longstanding practice of not applying the mandatory bars in screening interviews. *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 Fed. Reg. 18078, 18093-94 (Mar. 29, 2022). In that rulemaking, Defendants acknowledged that consideration of the bars would make screening interviews "less efficient," take them "beyond [their] congressionally intended purpose," and raise serious questions of "procedural fairness." *Id.* at 18093.

But in December 2024, Defendants suddenly reversed their 2022 position through the Mandatory Bars Rule and the EOIR Companion Rule. 89 Fed. Reg. at 103413-14; 89 Fed. Reg. 105392. The Mandatory Bars Rule provides broad discretion for asylum officers conducting CFIs

and RFIs to "consider the applicability" of mandatory bars if a person "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). The Rules give asylum officers discretion to consider: (i) all mandatory bars to asylum except the firm-resettlement bar, and (ii) all mandatory bars to withholding of removal. 89 Fed. Reg. at 103413-14; 8 C.F.R. §§ 208.30(e)(5)(ii), 208.31(c), 208.33(b)(2)(i).

If an asylum officer decides to consider a mandatory bar, a noncitizen in a CFI must prove a negative, namely "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). A noncitizen in an RFI must demonstrate "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). Disputing the mandatory bars is a complicated endeavor that often requires complex legal briefing and the collection of evidence from abroad. *See* Compl. ¶¶ 43-67 (discussing examples).

In addition, the Rules are meant to be applied even in "credible fear screenings where the" 2023 Circumvention of Lawful Pathways rule or the 2024 Securing the Border rule applies. 89 Fed. Reg. at 103370. Those rules bar asylum based on a noncitizen's manner of physical entry into the United States and require noncitizens in screening interviews to meet a "reasonable possibility" (under the 2023 rule) or "reasonable probability" (under the 2024 rule) of establishing eligibility for relief to proceed with an application for withholding of removal.[2] Thus, noncitizens interviewed under those rules must show a reasonable possibility or reasonable probability that a bar does not

[2] Although a court in this district struck down the asylum ban in the Securing the Border Rule, it upheld the "reasonable probability" standard. *See Las Americas Immigrant Advocacy Ctr. v. DHS*, No.: 24-1702 (RC), ___ F. Supp. 3d ___, 2025 WL 1403811 (D.D.C. May 9, 2025), *appeal filed,* (D.C. Cir. Aug. 27, 2025).

apply. *See* 8 C.F.R. § 208.35(b)(2)(i); 89 Fed. Reg. at 103397. To satisfy the "reasonable probability" standard, noncitizens must rebut the application of the bar with "greater specificity" than under the other standards. 89 Fed. Reg. at 81246. If a noncitizen does not adequately rebut the application of a bar considered by the asylum officer, the Mandatory Bars Rule states that "[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"). The EOIR Companion Rule, meanwhile, states that immigration judges will review the application of the mandatory bars whenever asylum officers consider a bar in the context of a screening interview. *See* 89 Fed. Reg. at 105402; 8 C.F.R. §§ 1003.42(d), 1208.31(g), 1208.33(b)(1).[3]

D. Plaintiffs' Complaint

Plaintiffs timely filed their Complaint challenging the Rules under 8 U.S.C. § 1252(e)(3) on March 17, 2025. Plaintiff E.Q. is a man born in Afghanistan who was subjected to the Rules in the credible-fear process and who received a negative credible-fear determination based on the Rules. *See* Compl. ¶¶ 132-44. The remaining Plaintiffs are organizations who provide legal services to noncitizens in both credible fear and reasonable fear interviews. *See id.* ¶¶ 145-67. Each Organizational Plaintiff has alleged that the Rules significantly disrupt its core business activities. Among other things, Plaintiffs Amica Center for Immigrant Rights (Amica Center) and Florence Immigrant and Refugee Rights Project (Florence Project) allege that the Rules have forced them to overhaul their models for providing legal representation and other services to detained noncitizens. Compl. ¶¶ 149-50, 157, 162. The Florence Project further alleges that the Rules hinder its core work as appointed counsel for people who are incompetent to represent themselves, a

[3] EOIR promulgated the Companion Rule as a "clarification" without public notice and comment because of the Mandatory Bars Rule. *See* 89 Fed. Reg. at 105396 (stating the "clarification is particularly important" to implement the Mandatory Bars Rule).

substantial number of whom are seeking asylum or other protection and thus subject to fear screenings. *Id.* ¶ 158. And Plaintiff Refugee and Immigrant Center for Education and Legal Services (RAICES) alleges that, due to the Rules, it must either provide its core service of pre-credible fear interview consultations to fewer clients or scale back those services. *Id.* ¶¶ 165, 167.

Plaintiffs allege that the Rules are contrary to law because they violate the statutes governing asylum (8 U.S.C. § 1158), withholding of removal (*id*. § 1231(b)(3)), and the expedited-removal process (*id*. § 1225(b)). Plaintiffs further allege that the Rules are arbitrary and capricious because Defendants:

> (i) failed to articulate reasoned explanations for their decisions, including but not limited to their decision to depart from prior policies; (ii) offered explanations at odds with the plain text of the Mandatory Bars Rule; (iii) considered factors that Congress did not intend to be considered; (iv) entirely failed to consider important aspects of the problem; (v) failed to consider or respond to significant comments; (vi) failed to consider the effects of related policies; (vii) ignored record evidence; and (viii) offered explanations for their decisions that run counter to the evidence.

Compl. ¶ 187.

ARGUMENT

I. Defendants' Threshold Challenges Lack Merit.

Defendants raise several barriers to reaching the merits of this case—including standing, mootness, and zone of interests—none of which is valid. To establish Article III standing at the motion-to-dismiss stage, a plaintiff need only allege an "'actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision.'" *Equal Rts. Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011) (quoting *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990)) (organizational plaintiff); *see Spokeo, Inc. v. Robins*, 578 U.S. 330, 338-39 (individual plaintiff). For the reasons discussed below, both E.Q. and the Organizational Plaintiffs easily satisfy these requirements. Moreover, E.Q.'s claims remain live, the Organizational Plaintiffs fall squarely within the INA's zone of

interests, and the INA's statutory scheme does not preclude them from challenging the reasonable fear provisions of the Rules under the APA.

A. E.Q. Has Standing to Challenge the Rule.

E.Q. has standing to maintain his claims against the Rule. Indeed, E.Q. need only show that Defendants "failed to abide by a procedural requirement that was 'designed to protect some threatened concrete interest'" belonging to E.Q.—which is to say, it is sufficient for standing purposes that E.Q. had a CFI in which the Rule applied. *See Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 24 (D.D.C. 2020). Plaintiffs disagree with the Court's preliminary conclusion to the contrary, Dkt. 35, at 18, and urge the Court to revisit it. Plaintiffs do not, however, belabor their position and instead preserve it for any appeal in this case.

In any event, this Court has already determined (s*ee* Dkt. 35, at 13), and Defendants do not dispute (s*ee* MTD 14), that E.Q. has standing to challenge the Rules if his first CFI was denied based solely on the mandatory bars. This Court previously reached the preliminary conclusion that E.Q. was instead denied on two independent grounds—the Rules and nexus. *See* Dkt. 35, at 13-18. On that basis, the Court concluded that E.Q.'s injury was not likely to be "fairly traceable" to the Rules or redressable in this case. *Id.* at 13. The Court recognized that the Form I-869 in E.Q.'s credible fear packet reflects a denial solely based on mandatory bars, but the Court noted that the Form I-870 also suggests a denial based on nexus, and the Court believed there was no evidence "that Form I-869 has special force." *Id.* at 14.

There can now be no question that Form I-869 is the controlling document. Attached as Exhibit A is the declaration of a former senior asylum officer with more than five years' experience at United States Citizenship and Immigration Services (USCIS). *See* Decl. of Amanda Meadow, attached as Ex. A. That declaration makes clear that "the I-869 is the controlling document

regarding the reason for [a] negative [credible fear] determination[.]" *Id.* ¶ 11. The declaration further specifies that "[t]he Asylum Officer's checking of the 'no nexus' box on the I-870 does not necessarily mean there is a legally sufficient denial based on a lack of nexus" and that "the I-869, which is supported by [a legally sufficient] checklist… indicates the *actual* reason for the denial and the legal sufficiency of that determination." *Id.* ¶ 10 (emphasis in original). Specifically, as to E.Q.'s interview, the declaration states that:

> [T]he checklist analysis focuses on the application of the mandatory bar rule as the sole reason for the denial of the applicant's claim. Although the checklist does include a brief mention of other potential bases for denial of the claim, the reasoning for those bases is incomplete and not adequate to serve as legally sufficient to deny the applicant's claim. Conversely, the final paragraph of the checklist consists of an in-depth analysis of the reason for the Asylum Officer's application of the mandatory bar rule.

Id. ¶ 12. The declarant concludes that these factors, among others, "strongly indicate that ... the mandatory bar rule is the sole reason for the denial of [E.Q.'s] claim." *Id.* These specific, unambiguous statements are more than sufficient to meet Plaintiffs' burden on standing at the pleading stage, which is "not onerous" and can even rest on "general factual allegations of injury resulting from the defendant's conduct." *NB ex rel. Peacock v. Dist. of Columbia*, 682 F.3d 77, 82 (D.C. Cir. 2012).

There is ample support for the declarant's conclusions. As she notes, the "controlling nature" of the I-869 is indicated by its "position" as "the very first document in the credible fear packet." Ex. A, ¶ 11. Moreover, as Plaintiffs have previously argued, *see* Dkt. 27, at 7-8, regulatory language states that a "negative credible fear determination" is "issued on the Form I-869," 8 C.F.R. § 1003.42(e). Defendants also conceded in the Rule that Form I-869 is the only document that is "read to the noncitizen aloud at service of the decision in a language they understand," 89 Fed. Reg. at 103378. And Defendants do not dispute that E.Q. received *only* the I-869 following his first CFI, Dkt. 24-1, Decl. of Colleen Cowgill, at 2.

Additionally, language in the Rule itself supports the conclusion that an asylum officer would reach the applicability of the bars only if a noncitizen satisfies all other requirements for a positive credible fear determination, including nexus. 8 C.F.R. § 208.30(e)(5)(ii) (2024). That provision states that where a person "*is* able to establish a credible fear of persecution *but* appears to be subject to one or more of the mandatory bars . . . the asylum officer may consider the applicability of such bar(s)." *Id.* (emphasis added). This structure plainly contemplates that there would be no reason for an asylum office to reach the application of the bars for a person who has not demonstrated nexus. That interpretation and the declarant's conclusions are further buttressed by the structure of § 1158, under which the mandatory bars are "exceptions" that apply to noncitizens who otherwise show "eligibility" for asylum. 8 U.S.C. § 1158(b)(1)(A) & (b)(2)(A).

Moreover, nothing on which the Court relied in its stay opinion contradicts the declaration. The statutory and regulatory requirements for CFIs, *see* Dkt. 35, at 14-15, do not expressly mention Form I-870, much less state that it controls when it conflicts with Form I-869. Nor does the fact that a supervisory asylum officer signed Form I-870, *see id.* at 15, present such a contradiction specially given that the regulations require the supervisor to "concur[] with … Form I-869," 8 C.F.R. § 1003.42(e). The opinion in *Singh v. DHS*, 2020 WL 420589, at *9 (W.D. Wash. Jan. 3, 2020), which this Court addressed in a prior decision (Dkt. 40, at 15-16), is not to the contrary. That case held only that the existence of a detailed analysis on Form I-870 defeated a claim that a CFI result did not contain a "reasoned analysis," not that Form I-870 is dispositive. The *only* direct evidence of which form controls before the Court therefore makes it unambiguously clear that the

I-869 provides the official record of the reasons for E.Q.'s denial. Defendants' argument that E.Q. lacks standing should therefore be rejected.[4]

That result would not change even if the declaration did no more than create significant doubt about the basis for the asylum officer's decision. As this Court previously recognized, "a plaintiff alleging deprivation of a procedural protection need not prove the outcome would have been different if the protection were afforded." Dkt. 35, at 18; *see Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89 (D.C. Cir. 2002). Because E.Q. suffered the procedural injury of being subjected to the Rules he alleges are illegal, he has standing to challenge those rules. *See Kiakombua*, 489 F. Supp. at 25. The sworn statement of a former asylum officer, uncontradicted in the record, that the bases for denial listed on Form I-869 are controlling, does *at least* that much. On the record before the Court at this stage, E.Q. has standing.[5]

B. E.Q.'s Claims Are Not Moot.

Defendants have failed to satisfy their "heavy burden" of showing that E.Q.'s claims are moot. *Honeywell Int'l, Inc. v. Nuclear Reg. Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010), *remanded to* 75 N.R.C. 256 (2012), *aff'd,* 77 N.R.C. 1 (2013). Moreover, because Defendants' mootness argument rests on their own voluntary action, it implicates the voluntary cessation doctrine, an exception to mootness that applies unless two conditions are met. *Aref v. Lynch*, 833

[4] At the motion to dismiss stage, Plaintiffs are "protected from an evidentiary attack" on their theories of standing. *Haase v. Sessions*, 835 F.2d 902, 907 (D.C. Cir. 1987); *see Warth v. Seldin*, 422 U.S. 490, 501-02 (1975). Defendants thus may not "offer[their] own evidence to negate [E.Q.'s] alleged injury." *Ferrer v. CareFirst, Inc.*, 265 F. Supp. 3d 50, 52 (D.D.C. 2017). "[T]he standing inquiry" at this stage instead turns only "on the allegations in the complaint and any affidavits submitted by" Plaintiffs. *Id.*; *see Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1107 (D.C. Cir. 2005) (at motion to dismiss stage, "district court exceeded the bounds of" permissible review by rejecting standing based on "evidence submitted by" the defendant).

[5] As of this filing, E.Q. has not been removed from the United States. If the Court denies Defendants' motion to dismiss as to E.Q., it should revisit E.Q.'s request for a stay of removal, given that the reason given for denying a stay related to E.Q.'s standing. *See* Dkt. 35 at 19.

F.3d 242, 251 (D.C. Cir. 2016). First, "interim relief or events" must "have completely and irrevocably eradicated the effects of the alleged violation" of law. *See id.* And second, it must be "'*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (quoting *Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000), *remanded to* 208 F.3d 209 (4th Cir. 2000) (emphasis in *Aref*)). Defendants retain the burden of proof on both prongs. *Guarascio v. FBI*, No. 18-cv-2791 (CRC), 2023 WL 7182057, at *5 (D.D.C. Nov. 1, 2023) (Cooper, J.).

Defendants argue that E.Q.'s claims were mooted by Defendants' decision, taken in their unfettered discretion, to give E.Q. a second CFI. MTD 14. But "a case is not moot if a court can provide an effective remedy." *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008). Thus, "[i]f there is *any* possibility that the prior adverse credible fear determination could be used to thwart [E.Q.'s] efforts to obtain full consideration of [his] asylum application[]" in a later proceeding, his "claims are not moot." *Kiakombua*, 498 F. Supp. 3d at 28. Here, the first CFI "remain[s] a part of [E.Q.'s] record," *id.*; indeed, his expedited removal order still rests on that CFI, because the negative result of E.Q.'s second CFI was based on purported inconsistencies with statements E.Q. made during the first CFI. Dkt. 24-2 at 63-65; *see Dugdale v. CBP*, 2015 WL 2124937, at *1 (May 6, 2015) (Cooper, J.) (case mooted only by "vacatur of [plaintiff's] expedited removal order" that "returned" him to his prior "legal position"). If E.Q. were to be removed from the United States and return to once again seek protection, he would face reinstatement of his removal order under 8 U.S.C. § 1231(a)(5), which would again thwart his efforts to obtain protection. Indeed, any future application for an immigration benefit, including a temporary visa, is likely to be hindered both by his prior removal order and by the CFI findings.

Furthermore, Defendants have not carried their burden under the "voluntary cessation" doctrine. With respect to E.Q. himself, Defendants did not formally vacate his first credible fear determination or provide him with an independent second CFI. Instead, Defendants simply continued the interview from the first CFI, asking followup questions based on information provided in the first interview, as a form of cross-examination. Far from completely and irrevocably eradicating the effects of the first CFI, in which Defendants applied the Rule, the second CFI reached an adverse credibility finding that rests wholly on statements E.Q. made in the first, tainted CFI. Dkt. 24-2 at 63-65. The result is that the second CFI perpetuated, rather than eradicated, the effects of the earlier CFI.

Notably, Defendants do not suggest that they are ceasing application of the Rules. *See Aref*, 833 F.3d at 251. To the contrary, Defendants concede they have "neither ceased the conduct that [Plaintiffs] challenge[] nor professed any intent to cease" that conduct. *N. Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1258 (D.C. Cir. 2020). Defendants cannot meet their burden under the voluntary cessation doctrine where, as here, the policy Plaintiffs challenge remains in effect. *See, e.g.*, *Sierra Club v. U.S. Dep't of Transp.*, 125 F.4th 1170, 1180 (D.C. Cir. 2025) ("[S]uspension of" a rule, absent promise "never [to] enforce the Rule," does not moot claim.); *Crowley Gov't Servs. v. GSA*, 2023 WL 4846719, at *12 (D.D.C. July 28, 2023) ("ad hoc, discretionary, and easily reversible" policy change does not moot a case), *aff'd as relevant*, 143 F.4th 518, 530-31 (D.C. Cir. 2025); *Colo. Wild Public Lands v. U.S. Forest Serv.*, 691 F. Supp. 3d 149, 172 (D.D.C. 2023) (Cooper, J.) (case not moot where "the challenged policies have not yet been revised").

Defendants also "have not even attempted to satisfy [their] heavy burden" to establish that E.Q. will not be subjected to the Rules in the future. *Guarascio*, 2023 WL 7182057, at *5. And "there is significant reason to" believe that E.Q. could again be subjected to the Rule. *Id.* After all,

if E.Q. is able to return to the United States from Afghanistan to seek protection, he would have to do so without a visa or prior authorization to enter, which means he would again face a credible or reasonable fear interview and therefore again face application of the Rules. It is also not unreasonable to believe that E.Q. would seek to return to the United States in a renewed attempt to avoid persecution or murder by the Taliban and that he would succeed—after all, he did so once before. Defendants have therefore failed to satisfy *either* prerequisite to showing that their actions mooted E.Q.'s claims.[6] *See, e.g.*, *FBI*, 601 U.S. 234, 243 (2024) (Defendant had burden to show that it will not "resume its challenged conduct . . . [regardless of] whether the challenged conduct might recur immediately or later at some more propitious moment"); *City of N.Y. v. Baker*, 878 F.2d 507, 511 (D.C. Cir. 1989) (case not moot where plaintiff could refile a visa application, and be subjected to the same policy, in the future).

In any event, E.Q.'s claims cannot be moot because they arise under 8 U.S.C. § 1252(e)(3). The deadline in that statute, which the D.C. Circuit has held to be jurisdictional, *see M.M.V. v. Garland*, 1 F.4th 1100, 1109-10 (D.C. Cir. 2021), requires a policy challenge to be filed within 60 days after an expedited-removal policy is first implemented. E.Q. thus stands in the shoes of *all* noncitizens who would be subject to the Rules in the future. Defendants' contention that they can moot a claim about CFI procedures by providing a new CFI, if accepted, would mean that they can unilaterally force "this Court to lose jurisdiction under § 1252(e)(3) … up to the moment the Court enters final judgment" and thereby allow them to escape judicial review of unlawful policies forever. *O.A. v. Trump*, 404 F. Supp. 3d 109, 140 (D.D.C. 2019), *appeal dismissed*, No. 19-5272, 2023 WL 7228024 (D.C. Cir. Nov. 1, 2023). But given that Congress expressly *preserved*

[6] Voluntary cessation applies whether or not the second CFI occurred "because of this litigation." *Aref*, 833 F.3d at 251 n.6 (quotation omitted). Moreover, Defendants have not advanced any other reason for the second CFI—and no plausible reason separate from this litigation exists.

challenges like the one E.Q. brings when it enacted § 1252(e)(3), "[t]here is no reason to believe that Congress intended to cede to" Defendants the ability to avoid review "at [their] whim." *Id.*; *see Kiakombua*, 489 F. Supp. 3d at 29 (noting "the compelling concern that an agency whose removal practices are challenged in court can effectively insulate itself from judicial review by acting quickly" to supposedly moot claims).[7] For these reasons, Defendants' mootness argument should be rejected.

C. Organizational Plaintiffs' Claims Are Also Justiciable.

1. Organizational Plaintiffs Have Article III Standing.

With respect to the Organizational Plaintiffs' standing, Defendants contest only the existence of a cognizable injury, MTD 15-21, but their arguments fail. Organizational Plaintiffs have alleged that the Rules would "directly affect[] and interfere[] with [their] core business activities" by "perceptibly impair[ing] [their] ability to provide counseling" and legal services to noncitizens at risk of removal in their respective service areas. *FDA v. Alliance for Hippocratic Med.*, 602 U.S. 367, 395 (2024) ("*Alliance*") (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 353, 379 (1982)); *see People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) (standing satisfied where agency action "perceptibly impaired" organization's interest and organization used its resources to counteract that harm). Indeed, courts in this District have previously determined that Organizational Plaintiffs had standing to challenge regulations rendering certain noncitizens ineligible for asylum. *See O.A.*, 404 F. Supp. 3d 109, 142-43 (D.D.C. 2019) (RAICES and Amica Center, formerly Capital Area Immigrants' Rights Coalition); *Refugee*

[7] As reflected in application of the inherently transitory exception to mootness in the class context, courts recognize that mootness is a flexible concept that should not be applied in a manner that would insulate unlawful conduct from judicial review. *See*, *e.g.*, *J.D. v. Azar*, 925 F.3d 1291, 1310 (D.C. Cir. 2019) ("[I]nherently transitory" class claims not mooted by action in individual cases.).

& Immigrant Ctr. for Educ. & Legal Servs. v. Noem, No. CV 25-306 (RDM), ___F. Supp. 3d ___, 2025 WL 1825431, at *22-*24 (D.D.C. July 2, 2025) (RAICES and Florence Project); *Las Americas v. DHS*, 2025 WL 1403811, at *8-*9 (RAICES).

Organizational Plaintiffs' core business activities include providing immigration legal services, counseling, and representation in CFIs and RFIs to give as many noncitizens as possible a meaningful opportunity to present their claims—regardless of the outcome of their proceedings. Compl. ¶¶ 13, 145 ("Amica Center provides direct legal services to migrant adults and children ... including with respect to credible and reasonable fear interviews."), *id*. ¶¶ 14, 156-57 (Florence Project provides free legal services to noncitizens detained in Arizona, including many who "are in or have been through the credible or reasonable fear process," and "strives to ensure that noncitizens facing removal have access to counsel."), *id*. ¶¶ 15, 164 ("A central aspect of RAICES' work is providing legal services to migrants seeking asylum and other statutory protections upon crossing the border, i.e., the population most often subjected to expedited removal and the credible fear process."). To optimize their reach, all three organizations also prioritize "Know Your Rights" presentations and pro se assistance to detained noncitizens, including those who are in or have been through the credible or reasonable fear process. *Id.* ¶¶ 13-14, 164-65.

Organizational Plaintiffs allege the Rules will seriously impede these core activities by forcing them to divert scarce resources away from other critical programs to compensate for the additional time, procedures, staffing, and training required to address the potential application of the mandatory bars during the fear screening process. *See* Compl. ¶¶ 146-150, 152-53, 155-62, 165-66. The Rules would also impact the Florence Project's core work as appointed counsel for people who are incompetent to represent themselves, a substantial number of whom are subject to fear screenings. *Id.* ¶ 158. Because the Florence Project gets appointed by immigration judges to

represent such individuals only after their fear screenings have been completed, Florence Project lawyers will be completely unable to assist them in contesting the mandatory bars—thus depriving the Florence Project of its ability to provide meaningful legal representation. *Id.*

In addition, Organizational Plaintiffs alleged that the Rules would hinder critical efforts to provide pro se assistance and reduce the number of people whom they can serve in this capacity. Amica Center's "Know Your Rights" (formerly "Legal Orientation Program") team will now be required to spend additional time and resources explaining the complexities of the bars during Know Your Rights presentations to detained noncitizens. Compl. ¶ 147. RAICES also must update its Know Your Rights presentations and reduce the number of presentations it provides. *Id.* ¶ 165. Similarly, the Florence Project must spend more time providing information and legal advice on mandatory bars to individuals facing credible and reasonable fear interviews and helping them collect documentary evidence to dispute the applicability of mandatory bars. *Id.* ¶ 160. And both Amica Center and the Florence Project will be forced to dedicate additional time and resources to create informational materials about the Rules to share with the populations they serve, community members, and other stakeholders. *Id.* ¶¶ 148, 159. In sum, because the Rules require complex analyses during the credible and reasonable fear screening processes, Organizational Plaintiffs must conduct more in-depth consultations with their clients on a compressed timetable and expend resources that would otherwise have been unnecessary.

As such, the Rules will reduce the total number of noncitizens Organizational Plaintiffs can represent or connect with pro bono counsel and force them to reject cases of individuals whom they would have previously served—thus undermining their core activities of providing legal assistance to noncitizens going through the fear screening process. *See* Compl. ¶¶ 147, 151, 158, 165, 167. That suffices for organizational standing.

Defendants' main argument against organizational standing is that Organizational Plaintiffs seek to vindicate the rights of their clients. MTD 21-22. But as Defendants themselves acknowledge, Organizational Plaintiffs have not alleged third-party standing. *Id.* at 22. To the contrary, they seek to redress harms resulting from the Rules' interference with their own core activities. Organizational Plaintiffs seek to redress their inability to *serve* noncitizens, not any harm associated with the *outcome* of noncitizens' cases. Defendants do not—and cannot—provide any explanation of their contrary assertion. And Defendants' attempts to rely on *American Immigration Lawyers Association (AILA) v. Reno*, 199 F.3d 1352, 1364 (D.C. Cir. 2000), and *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004), fail because those cases *did* involve third-party standing. *See AILA*, 199 F.3d at 1354 ("We hold that the organizational plaintiffs lacked standing to litigate the rights of [noncitizens]" but not that organizational plaintiffs lack standing to vindicate their own rights); *accord Kowalski*, 543 U.S. at 134 (holding non-organizational attorney plaintiffs lacked third-party standing).[8]

Defendants also assert that Organizational Plaintiffs fail to allege that the Rules inhibit their daily operations. MTD 16-17. But the Complaint alleges that the Rules will require both Amica Center's Detained Adult Program and the Florence Project to overhaul their models for providing legal representation and other services to detained noncitizens. Compl. ¶¶ 149-50, 157, 162. Previously, both organizations generally initiated their representation of detained noncitizens once they had been placed in full removal proceedings, following the completion of the fear screening

[8] The decision in *AILA* has been further cabined. In *Make the Road New York v. Wolf,* 962 F. 3d 612 (D.C. Cir. 2020), the Court accepted an organization's bid for associational standing and distinguished *AILA* on the ground that the plaintiff in *AILA*—unlike here and unlike in *Make the Road*—challenged the rule not as a means to vindicate "their rights or the rights of their members but the constitutional and statutory rights of unnamed [noncitizens] who were or might be subject to the statute and regulations." *Id.* at 627-28 (quoting *AILA,* 199 F.3d at 1357).

process, because they could present and respond to relevant evidence and complex legal arguments regarding applicability of the mandatory bars at that stage. *Id.* ¶¶ 149, 157. Because of the Rules, both organizations will now be forced to dramatically reallocate resources to initiate representation many weeks earlier, at the fear screening stage, to ensure that they can assist their clients in contesting the mandatory bars and preserving their eligibility for relief. *Id.* ¶¶ 150, 157. The time-consuming and labor-intensive nature of this additional work will force both organizations to reallocate significant resources from other core activities and reduce their overall caseloads. *See id.* ¶¶ 161-62 (increased number of negative fear determinations will force Florence Project to advise and/or represent more clients in immigration judge reviews); ¶¶ 150-51 (when bars are applied in reasonable fear interviews, Amica Center's Detained Adult Program attorneys will have to file more petitions for review in federal court). And RAICES will likewise be forced to serve fewer clients or to provide fewer services due to the increased complexity and time required to address the mandatory bars during fear screenings based on the Rules. *Id.* ¶¶ 165, 167.

Defendants also attempt to downplay the Rules' impact on Organizational Plaintiffs' educational activities as merely a diversion of resources. MTD 19-20. But that argument ignores that counseling noncitizens is among the organizations' core activities, and that the Rules will significantly reduce the number of noncitizens they are able to reach. Compl. at ¶¶ 145-67. Relatedly, although Defendants seek to rely on *Alliance*, MTD 19-20, that decision reaffirmed *Havens* in relevant part. The Court in *Alliance* rejected the standing of certain "issue-advocacy" organizations "based on their incurring costs to oppose [agency] actions" and held that organizations "cannot manufacture" standing "simply by expending money to gather information and advocate against the defendants' action." 602 U.S. at 394-95. That is consistent with D.C. precedent. *E.g.*, *Spann,* 899 F.2d at 27 (organization cannot "manufacture [an] injury" by directing

resources to litigation seeking redress for that injury). "Critically," however, the plaintiff in *Havens* "not only was an issue-advocacy organization, but also operated a housing counseling service." *Alliance*, 602 U.S. at 395 (citing *Havens*, 455 U.S. at 368). It had standing because the defendants' actions "directly affected and interfered with" the plaintiff's "core business activities" of providing those services. *Id.*

Here, Organizational Plaintiffs have explained in detail how the Rules will not only make "their educational efforts more difficult," MTD 17, but also directly obstruct their efforts to counsel and represent asylum seekers and require the diversion of resources. *RAICES*, 2025 WL 1825431, at *24 ("perceptible impairment" to immigration organizations' core activities sufficient to confer standing post *Alliance*); *O.A. v. Trump*, 404 F. Supp. 3d 109, 142–43 (D.D.C. 2019) (finding cognizable injury because the challenged rule imposed "additional demands" on the organizational plaintiff that made it more difficult to serve its client base).

For the same reasons, Defendants' reliance on *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905 (D.C. Cir. 2015), MTD 20, is misplaced. In that case, the D.C. Circuit held that the organizational plaintiff lacked standing, despite having expended resources in response to the challenged poultry inspection regulation, because the rule did not impede its core activities, including educating its members. *Id.* at 920–21. Here, however, the Rules will directly interfere with Organizational Plaintiffs' ability to engage in their core activities of educating, counseling, and providing legal representation. *See id.* at 919 (organizational plaintiff may demonstrate injury if "the defendant's conduct cause[d] an inhibition of [the organization's] daily operations.") (citation and quotation marks omitted).

As Defendants correctly acknowledge, MTD 19, Plaintiffs need do no more than allege that "[s]omething about the challenged action itself—rather than the organization's response to

it—makes the organization's task more difficult." *Ctr. for Responsible Science v. Gottlieb*, 346 F. Supp. 3d 29, 41 (D.D.C. 2018), *aff'd*, 809 Fed. Appx. 10 (D.C. Cir. 2020). That is precisely the case here. Defendants' implementation of the Rules complicates Organizational Plaintiffs' ability to carry out their core business activities by interfering with, and even preventing, their provision of legal assistance to the populations they previously served. This injury satisfies Article III.

2. Organizational Plaintiffs Are Within the Zone of Interests of the INA.

As nonprofits whose missions are to serve noncitizens seeking asylum on a *pro bono* or low-cost basis, Organizational Plaintiffs fall squarely within the zone of interests of the INA.

The zone-of-interests test is "not especially demanding"; it bars only actions where "a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in a statute that it cannot reasonably be assumed that' Congress authorized that plaintiff to sue." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (quotation omitted). Further, the "benefit of any doubt goes to the plaintiff," meaning that the test is satisfied so long as the plaintiff "arguably" falls "within the zone of interests to be protected or regulated by the statute." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (quotation omitted).

Courts in this district have repeatedly rejected Defendants' arguments and held that these same Organizational Plaintiffs and other immigration nonprofits satisfy this permissive test. *See, e.g.*, *RAICES*, 2025 WL 1825431, at *28 (finding that RAICES, also a plaintiff in this case, is within the zone of interests of the INA); *see Las Americas v. DHS,* 2025 WL 1403811, at *10 (same); *Capital Area Immigrants Rights' Coal. v. Trump*, 471 F. Supp. 3d 25, 43 (D.D.C. 2020) ("*CAIR Coal.*") (same as to the organization now known as Amica Center). Indeed, those courts have had "no trouble" finding that legal service organizations serving noncitizens fall within the

zone of interests because their "daily work is governed by the INA" and because "the INA contemplates an important role for organizations like the Plaintiffs." *Cath. Legal Immigr. Network, Inc. v. EOIR.*, 513 F. Supp. 3d 154, 171 (D.D.C. 2021) (citing *Nw. Immigrant Rights Proj.*, 496 F. Supp. 3d at 51-52); *see also CAIR Coal.*, 471 F. Supp. 3d at 43.

The same result follows here. The INA expressly contemplates a role for nonprofit organizations to provide immigration legal services to noncitizens, including as relevant here, during the credible fear and asylum processes. *See* 8 U.S.C. § 1225(b)(1)(B)(iv) (providing noncitizens with the right to "consult with a person or persons of [their] choosing prior to the [CFI] or any review thereof"); *id*. § 1229a(b)(2) (requiring that noncitizens in removal proceedings be provided a list of pro bono attorneys); *id*. § 1158(d)(4)(A)-(B) (requiring the distribution of a list of service providers to asylum seekers along with a document advising about the right to counsel). And as discussed above, all three Organizational Plaintiffs have shown how the Rules have impeded their ability to provide these very legal services. *See supra* Section I.C.1.

Finally, Defendants' reliance on Justice O'Connor's opinion in *INS v. Legalization Assistance Project*, 510 U.S. 1301, 1302 (1993), is misplaced. MTD 24-25. That non-precedential opinion expressed the view "of only a single Justice" about "a statute other than the INA." *CAIR Coal.*, 471 F. Supp. 3d at 43. Moreover, since then, the Supreme Court has "consistently adopted a broader view" of the zone-of-interests test. *CAIR Coal.*, 471 F. Supp. 3d at 44; *see, e.g., Lexmark*, 572 U.S. 118; *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998).

3. Organizational Plaintiffs May Challenge the Reasonable Fear Provisions of the Rules.

Defendants also erroneously argue that the INA bars the Organizational Plaintiffs' APA challenges to the reasonable-fear provisions of the Rules. MTD 25. Citing *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984), Defendants posit that the INA's "comprehensive scheme

provides no role for third parties like the Plaintiff organizations to play in" the reasonable fear "process in their own right (rather than as counsel for their clients)," and that this absence is "sufficient to conclude that Congress intended to preclude Plaintiff organizations from challenging the Rule through the APA." MTD 26.

Defendants' argument is unfounded in the context of reasonable fear interviews, which are intended as a screening tool for people who qualify for *mandatory* protection in the form of withholding of removal or relief under the CAT. The INA makes no mention whatsoever of those interviews; they are entirely a creature of Defendants' own regulations. *See* 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999); *see* 8 C.F.R. §§ 208.31 & 1208.31. Defendants' argument is thus either that complete Congressional silence is equivalent to a "complex and delicate administrative scheme" enshrined in a statute, *Block*, 467 U.S. at 348, or that they can hijack Congressional intent—including with respect to the consideration of mandatory forms of protection—and avoid judicial review by creating new administrative mechanisms and seeking to clothe them in statutory garb. Tellingly, Defendants do not even acknowledge this disconnect, which is fatal to their argument.

Defendants' argument would fail even if Congress had created reasonable fear interviews. "[F]undamentally, the text of Section 1252 provides no support for the proposition that organizations may not facially challenge under the APA immigration-related regulations that harm their own interests." *CAIR Coal.*, 471 F. Supp. 3d at 40. As then-Judge Jackson explained, "the weight of authority in this judicial circuit now strongly supports the conclusion that section 1252(e)(3) of the INA preserves this Court's subject-matter jurisdiction over Plaintiffs' claims under section 1331." *Las Americas Immigrant Advoc. Ctr. v. Wolf*, 507 F. Supp. 3d 1, 19 (D.D.C. 2020), *dismissed sub nom. Las Americas Immigrant Advoc. Ctr. v. Mayorkas*, No. 20-5386, 2024

WL 3632500 (D.C. Cir. Aug. 1, 2024). Here, Defendants have not identified any case precluding an organization from challenging an immigration-related rule under the APA.

Nor have Defendants provided a plausible reason to treat the reasonable-fear provisions of the Rules differently. Defendants cite "the 'zipper clauses' of" § 1252(a)(5) and (b)(9) to argue that any suits challenging those provisions "must be brought by individual [noncitizens] in petitions for review." MTD 26 n.3 & 27. But "the specific channeling provisions cited by Defendants apply to challenges that either seek review of a removal order or involve questions arising from a removal action or proceeding." *CAIR Coal.*, 471 F. Supp. 3d at 40. They do not apply here because the Organizational Plaintiffs are not subject to removal proceedings and do not "challeng[e] an immigration enforcement decision"; rather, they "argue that the Rule will directly injure *them* by making it harder for them to conduct their own basic activities." *Id.* Defendants' reliance on *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984), MTD 26, which states only that "private persons ... have no judicially cognizable interest in procuring enforcement of the immigration laws," is unavailing for the same reason.

Finally, Defendants argue that Section 1252(e)(3), which allows "challenges on the 'validity of the system,'" with respect to CFIs, does not support Plaintiffs' challenge to reasonable fear proceedings. That may be so, but Organizational Plaintiffs have also invoked federal-question jurisdiction under 28 U.S.C. § 1331 (*See* Compl., ¶ 2), and Defendants have not identified any provision of the INA (in 8 U.S.C. § 1252 or otherwise) that would restrict an ordinary APA challenge to the RFI regulations (as opposed to an individual RFI determination). Given the longstanding presumption in favor of judicial review, *see Kucana v. Holder*, 558 U.S. 233, 237(2010), and ample case law from this circuit and courts in this district, Organizational Plaintiffs can invoke Section 1331 to supply jurisdiction over their claims as to reasonable fear interviews.

See, e.g., *Make the Road New York v. Wolf*, 962 F. 3d at 624-25; *Cap. Area Immigrants' Rts. Coal.*, 471 F. Supp. 3d at 40; *O.A.*, 404 F. Supp. 3d at 138.

II. Plaintiffs' Claims Are Viable.

A. Plaintiffs' Contrary to Law Claims Are Viable.

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 Rules are contrary to the INA because they (i) deny individuals with a credible fear of persecution the right to apply for asylum in full removal proceedings; and (ii) allow claims to be denied on the basis of *DHS employees'* predictions that the bars *might* apply.

1. The Rules Violate the Expedited Removal and Asylum Statutes by Preventing Noncitizens with a Credible Fear of Persecution from Seeking Relief in Full Removal Proceedings.

Congress adopted a CFI screening standard designed to identify noncitizens who "*could* establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added). That standard does not call on the adjudicator to make ultimate findings. Instead, it is appropriately focused on whether there is a significant possibility that applicants could establish that they meet the definition of a refugee, the prima facie showing needed to establish asylum eligibility. *See* 8 U.S.C. § 1158(b)(1)(A). The Rules violate the underlying statutes and Congressional intent because they expand the CFI inquiry to consider the mandatory bars, which have no bearing on the applicant's prima facie asylum eligibility and were not meant to be considered in the expedited removal process. As a result, the Rules unlawfully deny individuals with a credible fear of persecution the right to pursue their asylum claims in full removal proceedings. Three separate factors support Plaintiffs' position.

First, the structure and text of both the asylum and expedited removal statutes favor Plaintiffs' understanding. As to the asylum statute, Section 1158 makes it clear that the bars are meant to be considered only *after* a person satisfies their burden of demonstrating that they meet the refugee definition. Congress addressed the "conditions for granting asylum" in 8 U.S.C. § 1158(b)(1). Under the heading "Eligibility," Congress provided that "[t]he Secretary of Homeland Security or the Attorney General may grant asylum" to a noncitizen if they meet a singular defining condition: that they qualify as "a refugee within the meaning of section 1101(a)(42)(A) of this title." *Id.* § 1158(b)(1)(A). Then, under the heading "Burden of Proof," Congress directed that "[t]he burden of proof is on the applicant to establish" one thing and one thing only: "that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title." *Id.* §1158(b)(1)(B).

Separately, under a section titled "Exceptions," Congress directed that the discretionary authority to grant asylum "shall not apply" to an applicant whom "the Attorney General" determines to be subject to a mandatory bar. *Id.* § 1158(b)(2). Simply put, the statutory scheme in Section 1158 makes it plain that the mandatory bars preclude a grant of asylum to an applicant who has already met their prima facie burden to establish that they qualify as a refugee.

The text of the expedited removal statute further supports Plaintiffs' position. For example, Congress instructed adjudicators to consider "the credibility of the statements made by [the noncitizen] in support of [their] claim and such other facts as are known to the officer." 8 U.S.C. § 1225(b)(1)(B)(v). The statute *does not* contemplate that applicants would need to produce rebuttal evidence to overcome the application of a bar or make complex factual and legal arguments about any information presented against them.

The expedited removal process also requires a timeline on which the production of complex legal arguments and evidence is simply not possible. The statute instructs that an applicant may "consult" with a person before the interview, but that consultation "shall be at no expense to the Government and shall not unreasonably delay the process." 8 U.S.C. § 1225(b)(1)(B)(iv). "Regulations from 1997 provided for a 48-hour consultation window; in 2023, DHS reduced the consultation period to 24 hours." *Las Americas v. DHS*, 2025 WL 1403811, at *3 (citing 62 Fed. Reg. at 10320).

Even an immigration judge's review of the decision is meant to happen "as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the [credible fear interview]." 8 U.S.C. § 1225(b)(1)(B)(iii)(III). An applicant who receives a favorable credible fear finding is referred to an immigration judge for consideration of their case in full removal proceedings under 8 U.S.C. § 1229a. *See* 8 C.F.R. § 1208.31(e). The fast-paced structure of the credible fear process was never meant to accommodate consideration of the bars to relief at issue here.

Defendants argue that because the language of the significant possibility standard asks whether an applicant could establish "eligibility for asylum" and not whether they meet the definition of a refugee, they are free to consider the bars during CFIs. MTD 36-37. But the Court must consider that language in the context of the statutory scheme. *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."). That approach requires consideration of the textual points relating to both the asylum and expedited removal statutes above. And those factors undermine the notion that bars to protection—which have no bearing on an applicant's prima facie

eligibility and could not be considered within the constructs of the speedy expedited removal process—were meant to be considered in threshold screenings.

Second, requiring applicants to address the mandatory bars in screening interviews undermines the careful balance that Congress struck between: (i) the efficient removal of certain noncitizens, and (ii) the "equally important" goal of "ensuring that individuals with valid asylum claims are not returned to countries where they could face persecution" without an opportunity for a full removal process. *Grace v. Barr*, 965 F. 3d 883, 909 (D.C. Cir. 2020). There is no dispute that Congress intended the significant possibility standard to represent a low screening standard. *Id.* at 902-03; *see* H.R. Rep. No. 104-469, pt. 1, at 158 (1995). During debate over H.R. 2022, the bill that provided the language of 8 U.S.C. § 1225(b), opponents raised concerns that the new screening process would lead to the denial of meritorious asylum claims in violation of U.S. international obligations. In reporting out H.R. 2022, the House Judiciary Committee stated:

> 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.

The Mandatory Bars Rule undermines the purpose of this standard 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."[9] *Elkins v. United States*, 364 U.S. 206, 218 (1960).

Defendants contend that this burden-shifting framework is not problematic because, *in full removal hearings*, the government can shift the burden to the noncitizen "[i]f the evidence indicates that one or more grounds for mandatory denial of the application for relief *may* apply." MTD 31 (citing 8 CFR § 1240.8 and *Matter of M-B-C-*, 27 I. & N. Dec. 31, 37 (BIA 2017), both of which apply to full removal proceedings under § 1229a, but not to expedited removal proceedings). That simply proves Plaintiffs' point. In a full removal hearing, the applicant has access to counsel and the opportunity to collect rebuttal evidence *before* the burden ever shifts. Applicants also have a procedural right "to examine the evidence" used against them and "cross-examine witnesses presented by the Government" before a judge makes an *actual determination* as to whether the mandatory bars apply. 8 U.S.C. § 1229a(b)(4)(B). It is the absence of these procedural protections that led Congress to adopt the much lower "significant possibility" standard for screening interviews.

E.Q.'s first CFI illustrates this problem. In full removal proceedings, he could have rebutted Defendants' allegations with evidence, including testimony from his U.S. citizen family member, evidence from Afghanistan, and reports demonstrating the unreliability of the government database on which the asylum officer relied. But the expedited removal and CFI process do not provide that kind of opportunity.

[9] While Defendants contend that "the rule does not require [noncitizens] to prove a negative," MTD 33, that contention is belied by the plain text of the Rule. In Defendants' own words, the burden shifts to the noncitizen to demonstrate "a significant possibility that, in a proceeding on the merits, the [noncitizen] would be able to establish by a preponderance of the evidence that such bar(s) do not apply." *Id*.

Plaintiffs' position is buttressed by both the history of the credible fear standard and substantial Supreme Court case law from that time. When Congress created expedited removal in 1996, it adopted the "credible fear of persecution" standard that the agency had used since 1991 to screen Haitians detained at sea. There, the agency defined "credible fear of persecution" to mean "(1) that it is more probable than not that the statements made by the person in support of his or her asylum claim are true, and (2) that there is a significant possibility ... that the person could establish eligibility as a refugee."[10]

Contrary to Defendants' arguments, MTD 30-31, the fact that Congress ultimately used "eligibility for asylum" and not "eligibility for refugee status" in the text of Section 1225(b)(1)(B)(v) did not shift the focus away from whether an applicant meets the definition of a refugee. By 1996, landmark immigration caselaw had long equated "eligibility for asylum" with a showing that an individual qualifies as a refugee. In 1987, the Supreme Court explained that "eligibility for asylum depends entirely on the Attorney General's determination that [a noncitizen] is a 'refugee.'" *INS v. Cardoza-Fonseca,* 480 U.S. 421, 427-28 (1987); *see INS v. Stevic,* 467 U.S. 407, 423 (1984) ("[u]nder § 208(a), in order to be eligible for asylum, a [noncitizen] must meet the definition of 'refugee' contained in § 101(a)(42)(A)"); *INS v. Elias-Zacarias*, 502 U.S. 478, 485 (1992) (asking whether an individual "would be classified as a 'refugee' and therefore be eligible for a grant of asylum").[11]

[10] Testimony of Gene McNary, Comm'r of Immigration and Naturalization Service before the Committee on Gov't Ops. Subcommittee on Legislation & National Security on U.S. Human Rights Policy in Haiti (Apr. 9, 1992), https://heinonline.org/HOL/P?h=hein.cbhear/cbhearings6020&i=214.

[11] S*ee also, e.g.*, *Farbakhsh v. INS*, 20 F.3d 877, 881 (8th Cir. 1994) ("In order to establish eligibility for asylum . . . petitioner had to demonstrate that he was a 'refugee' as defined in § 101(a)(42)(A) of the Act."); *Kazlauskas v. INS*, 46 F.3d 902, 905 (9th Cir. 1995) (same).

Defendants argue that had Congress intended to adopt an approach that focused on only credibility of the applicant and whether the individual meets the refugee definition, "it could have done so." MTD 30. But the statement above from the House Judiciary Committee confirms that Congress understood the language of Section 1225(b) to achieve precisely this result. *See supra* p. 31. Defendants have identified no evidence at all that Congress ever even considered the possibility (much less intended) that mandatory bars might be adjudicated in the context of CFIs.[12]

Finally, the history of the statute's application, and Defendants' own prior understanding of Congressional intent confirm Plaintiffs' position. It is undisputed that Defendants never applied the mandatory bars in CFIs over the 29 years following Congress's passage of the expedited removal statute. As recently as 2022, Defendants themselves acknowledged that doing so would fly in the face of 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.

While conceding the historical practice, Defendants suggest that "the Executive has always viewed the credible fear definition as allowing for consideration of statutory bars." MTD 28. But Defendants cite no evidence in support of this contention. And the fact that Defendants' regulations did not affirmatively prohibit application of the Mandatory Bars in CFIs "until 2000," MTD 29 is irrelevant. As early as December 30, 1997, the Executive Associate Commissioner for Field Operations issued guidance instructing that "[if] there is some evidence or concern that [a noncitizen] who meets the credible fear standard may be a security risk or subject to a terrorist

[12] It is true that the definition of refugee in 8 U.S.C. § 1101(a)(42)(B) already excluded persecutors from eligibility for asylum. MTD 30. But Defendants have not even attempted to explain how Congress's decision to restate the persecutor bar in 1158(b)(2)(A)(i) is somehow "consistent with consideration of the bars during credible fear screening interviews." *Id*.

bar," the noncitizen's "case should" nonetheless "be referred for a [full] removal hearing" in immigration court. 75 NO. 7 Interpreter Releases 255 (available on Westlaw).

2. The Rules Violate the Asylum and Withholding Statutes by Allowing Claims to be Denied on the Basis of DHS Employees' Predictions that the Bars Might Apply.

Under the asylum and withholding statutes, otherwise-eligible noncitizens will be denied relief "if the Attorney General determines" or "decides" that one of the mandatory bars applies. 8 U.S.C. § 1158(b)(2)(A) (asylum); *id*. § 1231(b)(3)(B) (withholding of removal). The Rules violate these statutes by impermissibly allowing for the denial of claims without an actual determination or decision by the Attorney General. The Rules are contrary to the INA in two ways.

First, the Rules violate the asylum and withholding statutes by permitting asylum officers working in the Department of Homeland Security to deny relief based on the mandatory bars when the INA expressly reserves this authority 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," Section 1158(b)(2)(A) provides for the denial of relief only "if the *Attorney General* determines that" a mandatory bar applies (emphases added). Likewise, 8 U.S.C. 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.

Preserving this determination for the Attorney General—and thus immigration judges—has significant ramifications. As detailed in the Complaint (¶¶ 43-67), application of the mandatory bars is exceedingly complex and involves detailed analysis, including the interpretation of criminal statutes and national security determinations. Asylum officers are not generally trained on these issues, nor is there time to develop the factual or legal record to present these claims in the context

of screening processes. To ensure that these determinations are fairly and reliably made, the INA continues to require that they be made by immigration judges in full removal proceedings, with the full panoply of accompanying procedural protections and appellate rights.

Defendants' contrary interpretation of the statute is based on the Homeland Security Act of 2002 (HSA), under which some references to the Attorney General in the INA are now read to also refer to the Secretary of Homeland Security. *See* MTD 32. But the HSA did not transfer *all* powers to DHS. Instead, the Secretary was charged with implementing the INA "except insofar as [the immigration laws] relate to the powers, functions, and duties conferred upon" other officials, including "the Attorney General." 8 U.S.C. § 1103(a)(1). And the HSA retained for the Attorney General any "authorities and functions . . . relating to the immigration and naturalization of [noncitizens] as were exercised by the Executive Office for Immigration Review" in 2002. *Id.* § 1103(g)(1). That carve-out is dispositive. Defendants themselves acknowledge that INS expressly prohibited asylum officers from applying the mandatory bars in screening interviews in 2000. MTD 29 (citing *Asylum Procedures*, 65 Fed. Reg. 76,121, 76,129). Thus, in 2002, when DHS was created, it is undisputed that the authority to apply the mandatory bars was exercised exclusively by immigration judges in the Department of Justice. Accordingly, that authority did not transfer to, and cannot be exercised by, DHS.

In any event, three years after it passed the HSA, Congress passed the Real ID Act. *See* Pub. L. 109-13, 119 Stat. 231 (2005). Real ID amended Section 1158(b)(1)(A), the paragraph on eligibility for asylum, by "striking 'the Attorney General' . . . and inserting "the Secretary of Homeland Security or the Attorney General." Congress also amended Section 1158(b)(2), the paragraph on the mandatory bars, but did *not* add the Secretary of Homeland Security to the list of those able to make determinations about the mandatory bars. Where, as here, "Congress includes

particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *City & Cnty. of S.F. v. EPA*, 604 U.S. 334, 344 (2025) (quotation omitted).[13]

Defendants argue that Plaintiffs' reading of the statute is "illogical" because it would mean that, while either asylum officers or immigration judges could grant asylum, an asylum seeker "who applies for asylum affirmatively before asylum officers could never be denied asylum on a security ground." MTD 32. But that is precisely how the affirmative asylum process works. There, a person not in removal proceedings applies for asylum with the Asylum Office in the first instance, and the officer may grant asylum but *may not conclusively* deny the claim on any basis, including the mandatory bars.[14] Rather, asylum officers must refer the case to the immigration court for *de novo* adjudication. 8 C.F.R. § 208.14(c)(1). In every case that begins in the affirmative asylum process, it is DOJ rather than DHS that makes a final determination and issues a removal order based on the mandatory bars. The same is true of withholding of removal. *See* 8 C.F.R. § 208.16.[15] Thus, far from being "illogical," Plaintiffs' reading of the statute reflects Defendants' own longstanding practice.

Second, the Rules further violate the asylum and withholding statutes by providing for the denial of relief to a noncitizen who "*appears* to be subject to" a mandatory bar and, without any

[13] This omission was expressly flagged during the legislative process. A May 2005 report prepared for Congress noted that "the REAL ID Act would [] amend § 208(b)(1) of the INA to insert references to both the Attorney General and the Secretary of Homeland Security. However, this would only address references for that particular subsection and would not amend the rest of § 208, which would continue to refer only to the Attorney General." (May 9, 2005) Immigration: Analysis of the Major Provisions of H.R. 418, the REAL ID Act of 2005, at CRS-5.

[14] The only scenario in which DHS may deny an affirmative asylum claim on any ground is when the applicant has some other form of lawful immigration status and will not become removable as a result of the denial. 8 C.F.R. § 208.14(c)(2).

[15] Defendants promulgated a rule in 2022 that changed this practice in limited circumstances not relevant here. *See* 87 Fed. Reg. 18078 (Mar. 29, 2022).

opportunity to collect or present evidence, is unable to demonstrate a "sufficient likelihood" that a mandatory bar does not apply. MTD 31. Both 8 U.S.C. § 1158(b)(2)(A) (asylum) and § 1231(b)(3)(B) (withholding) disqualify an applicant from obtaining relief only if the Attorney General actually "determines" or "decides" that a mandatory bar applies. A "determination," is "[t]he act of deciding something officially." Determination, Black's Law Dictionary (12th ed. 2024). And a decision is "[a] judicial or agency determination after consideration of the facts and the law." Decision, Black's Law Dictionary (12th ed. 2024).

A preliminary prediction that an applicant will not be able to carry their burden to disprove application of a mandatory bar is not a "determination" or a "decision" that the bar actually applies. The Rules thus permit Defendants to apply a standard significantly lower than the one prescribed by Congress and to do so in a process that is shielded from appellate review and in which the applicant has no opportunity to collect or present evidence. *See*, *e.g. Kiakombua*, 498 F. Supp. 3d at 41 ("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 quotation omitted). Congress has not authorized Defendants to apply this lower standard to exclude otherwise-eligible noncitizens from pursuing their claims for protection.

Defendants' opposition effectively concedes this point: Defendants admit that denials under the Mandatory Bars Rule are based on a finding of "a sufficient likelihood that" a bar would apply rather than a determination that a bar *actually* applies. MTD 31. And Defendants' reliance on procedures in full removal proceedings, *id.*, misses the point. No matter the process that leads up to a decision in those proceedings and no matter who bears the burden, an Immigration Judge then makes a determination that a bar does or does not apply. That, unlike the predictive determination in the Mandatory Bars Rule, is precisely what the statutes require.

Defendants' remaining argument, that the "screening standard" in 8 U.S.C. § 1225(b) somehow trumps the plain language of the asylum and withholding-of-removal statutes, MTD 31, simply rehashes their erroneous contention that Congress intended the consideration of "eligibility for asylum" in CFIs to include the mandatory bars. *See supra* Section II.A.1. And Defendants' acknowledgement that § 1225(b) "is silent regarding the nature and availability of" withholding of removal, MTD 28, favors Plaintiffs. That silence is best understood to reflect Congress' view that these screening interviews were entirely irrelevant to the assessment of withholding of removal, which is a form of mandatory protection available whenever a judge determines that a person qualifies. *See* 8 U.S.C. § 1231(b)(3); *Aguirre-Aguirre*, 526 U.S. at 419.[16]

B. Defendants' Arguments Concerning the Arbitrary and Capricious Count Are Both Premature and Erroneous.

1. Plaintiffs' Arbitrary and Capricious Claims Require the Full Record.

Defendants' arguments concerning the arbitrary and capricious claims are premature. It is axiomatic that "'to review an agency's action fairly,'" the court "'should have before it neither more *nor less* information than did the agency when it made its decision.'" *Dist. Hosp. Partners, L.P. v. Sebelius*, 792 F. Supp. 2d 162, 171 (D.D.C. 2011) (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)) (emphasis in *Dist. Hosp. Partners*). Defendants, however, have declined to produce the administrative record or identify any relevant record materials that support their motion to dismiss. Without the record, there is no way for the Court to

[16] The fact that claims for withholding of removal have recently been addressed in the credible fear process, which was intended to cover *only* asylum, is largely a reflection of recent administrative efforts to narrow asylum access in ways that are contrary to Congressional intent and that have been repeatedly invalidated by Courts. *See, e.g.*, *Las Americas v. DHS*, 2025 WL 1403811; *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023), *vac'd for consideration of new developments,* 15 F.4th 545 (9th Cir. Apr. 10, 2025); *CAIR Coal.*, 471 F. Supp. 3d at 25; *O.A.*, 404 F. Supp. at 109.

"evaluate the agency's rationale at the time of its decision." *Id.* (cleaned up).

Although arbitrary and capricious claims may sometimes be "resolved on the agency record in the context of a motion to dismiss," *Atl. Sea Island Gp. v. Connaughton*, 592 F. Supp. 2d 1, 12-13 (D.D.C. 2008), courts in this District routinely reject attempts to force adjudication of such claims without the benefit of the record. *See Vassiliades v. Rubio*, No. 24-1952 (TJK), ___ F. Supp. 3d ___, 2025 WL 1905654, at *1, *12 (D.D.C. July 10, 2025); *Browder v. Wormuth*, No. 18-2411 (TJK), 2024 WL 5168281, at *6 (D.D.C. Dec. 19, 2024); *Hamal v. DHS*, No. 19-2534 (RC), 2020 WL 2934954, at *4 (D.D.C. June 3, 2020); *Farrell v. Tillerson*, 315 F. Supp. 3d 47, 69 (D.D.C. 2018); *Bean v Perdue*, No. 17-0140 (RC), 2017 WL 4005603, at *6 (D.D.C. Sept. 11, 2017); *Zemeka v. Holder*, 963 F. Supp. 2d 22, 24 (D.D.C. 2013).

This prohibition on decisions without the record applies with full force here. Count IV in the Complaint alleges that Defendants, among other things, "failed to consider or respond to significant comments," "ignored record evidence," and "offered explanations for their decisions that run counter to" the record. Compl. ¶ 187; *see also id.* ¶¶ 128-29. These claims are expressly premised on the content of the record and cannot be resolved without its production. Whether Defendants "failed to consider important aspects of the problem" or "the effects of related policies," Compl. ¶ 187; *see also id.* ¶¶ 129-31, likewise turns on the information before Defendants when they promulgated the Rule. And the questions whether Defendants "failed to articulate reasoned decisions" and reasoned responses to comments, *id.* [paras.] 120, 187, implicate both what information underpinned the decisions and what commenters said.

Defendants do not argue that Plaintiffs failed to adequately plead any of these issues (and have thus forfeited any such argument). Instead, they simply ignore them, devoting their briefing to addressing the *merits* (not the adequacy) of certain discrete arguments, and thereby attempting

to shoehorn summary-judgment arguments into their motion to dismiss. As detailed below, even the arbitrary-and-capricious issues that Defendants do address cannot be fully understood or adjudicated without production of and citation to the record. For example, public comments raised concerns that "the legal and factual complexity of the bars means that applying them in the context of screening interviews ... will inevitably result in" *refoulement,* and the question of whether Defendants considered evidence on that point, *see* MTD 36, is a factual issue[17] for which Defendants have failed to produce (much less cite) any specific record evidence. The Court should reject that attempt to short-circuit judicial review, because "[w]ithout the administrative record, this Court has no ability to determine whether the agency's action was rational, or whether it was arbitrary and capricious." *Int'l Longshoreman's Ass'n*, 2005 WL 850358, at *4.

2. Defendants' Arguments on the Merits Are Unavailing.

Defendants would not be entitled to the dismissal of Count IV even if their merits-based arguments could be fully adjudicated at this stage (which they cannot). The Mandatory Bars Rule fails to meet the APA's reasoned decisionmaking standard for at least two reasons. First, Defendants' reasoning in support of the Rule relies extensively "on a false factual premise," *Cigar Ass'n of America v. FDA,* 132 F.4th 535, 540 (D.C. Cir. 2025)—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

[17] To take an extreme example, the substantive question concerning *refoulement* could not reasonably be called a mere "disagreement with policy choices," MTD 36, if the record contained 5,000 pages of direct evidence that *refoulement* will result and none that it will not. In that case, Defendants would unquestionably have acted contrary to the evidence.

reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

The Mandatory Bars Rule clearly "rest[s] on a false factual premise." *Cigar Ass'n* , 132 F.4th at 540. 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; *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). It is, of course, "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). Here, the regulatory text forecloses any claim that the rule applies only where "easily verifiable" evidence exists.

Defendants likewise repeatedly relied on the "easily verifiable" incantation in defending the rule against critical comments. Defendants rejected 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. 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." *Cigar Ass'n*, 132 F.4th at 540.

In lieu of offering a meaningful defense, Defendants argue only that no inconsistency exists because the "preamble explains how DHS expects the discretion [provided by the Rule] to be exercised." MTD 36. That argument mischaracterizes the preamble. The preamble says that "[t]his rule will allow [asylum officers] to, in their discretion, consider bars in the issuance of negative fear determinations *only where there is sufficient, easily verifiable evidence that a bar applies to a noncitizen*." 89 Fed. Reg. at 103378 (emphasis added). The preamble further says: "*the Rule instructs that* the [asylum officer] should only consider any possible mandatory bar … when there is easily verifiable evidence." *Id.* at 103385 (emphasis added). And the preamble says that, under its provisions, asylum officers "would determine whether there is easily verifiable information." *Id.* at 103387. These statements made in justifying the Rule affirmatively misstate the scope and meaning of the Rule's text; they do not even purport to provide guidance concerning its application.[18] The Rule is thus arbitrary and capricious because its justifications depend on a reading of the Rule that contradicts its plain text.[19]

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.

[18] The same conclusion would hold even if Defendants' characterization were correct. Statements in a preamble, even if construed as guidance on the application of the rule, are not binding and cannot narrow the plain text of the Rule itself. Defendants therefore could not permissibly seek to justify the Rule, and dismiss concerns about the Rule's operation, based on the assumption that statements in the preamble mean that the Rule will consistently and forever be applied in only a subset of the situations authorized by its text.

[19] As Plaintiffs will show at summary judgment, Defendants' argument is also inconsistent with their own practice. Defendants issue a variety of regular publications to provide training and guidance to asylum officers. Defendants cannot credibly suggest that they have, in this instance, provided guidance through a preamble instead.

Reg. at 103375-82, 103385-86, 103390-91. That justification is arbitrary and capricious on its own terms because commenters showed that the mandatory bars are not amenable to adjudication in screening interviews. Commenters also showed, and Defendants cannot dispute, that the bars are both legally and factually complex and often lead to erroneous decisions even after full merits hearings conducted *with* the benefit of evidence and counsel. 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.[20]

Aside from the erroneous claim that bars will be considered only where there is easily verifiable evidence, Defendants never directly addressed comments that the bars are too complex to be addressed fairly in these interviews without evidence or counsel. This 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").

Defendants' scattershot citation to discussions of other topics in the preamble, MTD 36-37, cannot salvage the rule. In particular, the paragraph stating that CFIs involve other complex issues, MTD 38 (quoting 89 Fed. Reg. 103385), is unresponsive to the concern that considering *this* complex issue in CFIs would implicate serious fairness concerns. Defendants may not create a situation where a noncitizen "appearing before one official may suffer deportation" and "an identically situated [noncitizen] appearing before another may gain the right to stay in this country." *Judulang v. Holder*, 565 U.S. 42, 58 (2011). That, "the Supreme Court has warned, is precisely 'what the APA's arbitrary and capricious standard is designed to thwart.'" *Grace v. Barr*,

[20] Again, the relevant comments are not before the Court at this stage of the litigation.

965 F.3d 883, 900 (D.C. Cir. 2020) (quoting *Judulang*, 565 U.S. at 59). And pointing to the existence of other complicated questions does nothing whatsoever to address that concern.

Defendants' inability to address these fairness concerns is unsurprising. As recently as 2022, Defendants agreed with commenters "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 are, of course, free to alter the position they took in 2022—but when they do so, the APA requires that they both 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. While the Mandatory Bars Rule does acknowledge "that this rule implements a policy choice that is different from its position in 2022," *see* 89 Fed. Reg. at 103386, it simultaneously claims that it is "not inconsistent with" Defendants' earlier position. But that assertion, like so much in the Rule, rests solely on the assumption that the Rule applies only "where the evidence is clear." *Id.* Defendants have failed to reasonably explain their change in position from 2022.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motion to dismiss.

Dated: August 29, 2025

Respectfully Submitted,

/s/ Jared A. Levine
Jared A. Levine (admitted *pro hac*)
Joachim Steinberg*
CROWELL & MORING LLP
375 9th Ave, 44th Floor
New York, NY 10001

Keren Zwick (D.D.C. Bar. No. IL0055)
Colleen Cowgill*
Fizza Davwa*
NATIONAL IMMIGRANT JUSTICE CENTER
111 W. Jackson Blvd., Suite 800
Chicago, IL 60604

(212) 223-4000
JLevine@crowell.com
JSteinberg@crowell.com

Judy He (admitted *pro hac*)
Jeremy Iloulian*
Jung Shin (admitted pro hac)
CROWELL & MORING LLP
455 N Cityfront Plaza Dr #3600,
Chicago, IL 60611
(312) 321-4200
JHe@crowell.com
JIloulian@crowell.com
JShin@crowell.com

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

Richard Caldarone (D.C. Bar No. 989575)
REFUGEE & IMMIGRANT CENTER FOR
EDUCATION AND LEGAL SERVICES
P.O. Box 786100
San Antonio, TX 78278
(210) 960-3206
richard.caldarone@raicestexas.org

(312) 660-1370
kzwick@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

Anwen Hughes*
Human Rights First
75 Broad St., 31st Fl.
New York, NY 10004
(212) 845-5244
HughesA@humanrightsfirst.org

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

**Certificate of pro bono representation or pro hac vice forthcoming*