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9 **UNITED STATES DISTRICT COURT**
FOR THE DISTRICT OF ARIZONA

10
11 E.Q.,
Petitioner,
12 v.
13 John Cantú, *et al.*,
Respondents.

Case No. cv-25-02442-PHX-KML (CDB)

**PETITIONER'S REPLY TO
RESPONDENT'S OPPOSITION TO
MOTION FOR PRELIMINARY
INJUNCTION**

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16 Petitioner, E.Q., hereby submits his reply to the Government's Opposition to the
17 Motion for Preliminary Injunction.

18 **I. E.Q.'s Claims are not Barred by *Res Judicata***

19 The Government fundamentally misunderstands how the doctrine of *res judicata*
20 applies in this case. The proceedings in *E.Q. v. DHS*, Case No. 25-cv-791 (D.D.C.) ("the
21 D.C. court case") do not provide a basis for barring the Petitioner's claims in this case.
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1 As the Government notes, the doctrine of *res judicata* applies when (1) the claims
2 in the two proceedings are identical; (2) there was a final judgment on the merits of those
3 claims in the prior proceeding; and (3) there is privity of the parties. There is no dispute
4 regarding the third element: Petitioner agrees that there is privity of the parties. Nor does
5 there appear to be dispute regarding the second element. The Government apparently
6 concedes that there is no final judgment. *See* Dkt. 15, p.6, n.2. In any event, it is clear
7 that there is not a final judgment in the D.C. case. The Government's *res judicata*
8 argument must be rejected for that reason alone.

9 As to the first element, the Government fails to understand (or obfuscates) the fact
10 that the claims in the two proceedings are not identical. In this case, E.Q. presents three
11 claims: (1) removal to a third country without an opportunity to apply for withholding of
12 removal or CAT relief violates the statute, Dkt 1, p. 11 (Third Cause of Action); (2) E.Q.
13 was not given a lawful credible fear interview on his request to apply for asylum under
14 §1158,¹ a violation of §1225(b)(1)(B)(i) and (ii), including §1225(b)(1)(B)(v) which
15 defines what constitutes a "credible fear of persecution"), Dkt. 1, pp. 9-10 (First and
16 Second Cause of Action); and (3) the Respondents erred in determining that there are no
17 substantial grounds for believing that E.Q. would be in danger of being subject to torture
18 if returned to Afghanistan. Dkt. 1, pp. 11-12 (Fourth Cause of Action). *See also* Motion
19 for Preliminary Injunction, Dkt. 14, pp. 14-15. None of those claims were presented in
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22 ¹ Unless otherwise indicated, all references to the statute are found in Title 8 of the United States Code.

1 the litigation pending before the D.C. District Court. The claim presented in that case
2 was a challenge to the “Mandatory Bars Rule” adopted by DHS, *see* “Application of
3 Certain Mandatory Bars in Fear Screenings,” 89 Fed. Reg. 103370 (Dec. 18, 2024),
4 and by EOIR, *see* “Clarification Regarding Bars to Eligibility During Credible Fear
5 and Reasonable Fear Review,” 89 Fed. Reg. 105392 (Dec. 27, 2024).

6 The Government argues that *res judicata* should apply because the two
7 lawsuits arise out of “the same transactional nucleus of facts.” Dkt. 15, p. 3, citing
8 *International Union of Operating Engineers-Employers Constr. Indus. Pension, etc.*
9 *v. Karr*, 994 F.2d 1426, 1430 (9th Cir. 1993). However, the Government overlooks
10 what the Ninth Circuit said regarding what constitutes the same transactional
11 nucleus of facts: “Whether two events are part of the same transaction or series
12 depends on whether they are related to the same set of facts and whether they could
13 conveniently be tried together.” *Id.* at 1429 (emphasis added). Here, the claims
14 that E.Q. presents in this case could not have been “conveniently tried together”
15 with the challenge to the Mandatory Bars Rule; indeed, the D.C. District Court does
16 not have jurisdiction over the claims brought in this lawsuit.

17 Jurisdiction in the D.C. litigation was based on §1252(e)(3), which provides
18 jurisdiction over claims that the Mandatory Bars Rule is unconstitutional or
19 violates the statute or is otherwise in violation of law. §1252(e)(3)(i) and (ii). The
20 claims that E.Q. brings in this case can only be brought in habeas corpus
21 proceedings, which have to be brought in the district where the petitioner is held in
22 custody. According to the Supreme Court describing claims challenging removal:

1 Regardless of whether the detainees formally request release from
2 confinement, because their claims for relief “necessarily imply the invalidity”
3 of their confinement and removal under the AEA, their claims fall within the
4 “core” of the writ of habeas corpus and thus must be brought in habeas. ...
5 For “core habeas petitions,” “jurisdiction lies in only one district: the district
6 of confinement.”

7 *Trump v. J.G.G.*, 145 S. Ct. 1003, 1005-06 (2025), quoting *Rumsfeld v. Padilla*, 542
8 U. S. 426, 443 (2004)). In other words, the first element necessary for *res judicata*
9 to apply is not present.²

10 The Government suggests that immigration judge’s finding that that there is
11 “no reasonable probability” of establishing a nexus to the persecution that E.Q.
12 fears resolves the credible fear issue. Dkt 15, p. 4. But that is not correct. As
13 described above, there are three claims that E.Q. presents in this case: (1) unlawful
14 removal to a third country; (2) failure to provide a lawful credible fear interview as
15 required by §1225(b)(1); and (3) improper denial of CAT relief. The D.C. court said
16 nothing relevant to the first or third claim, and the “nexus” finding is not relevant
17 to those claims. The Government’s only argument is that the “nexus” finding is
18 relevant to E.Q.’s second claim. But that argument is incorrect. The D.C. court did

19 ² The Government’s assertion, Dkt. 15, p. 3, that the D.C. district court “considered and
20 rejected the Petitioner’s allegation that the credible fear determination and resulting
21 removal order are invalid” is highly misleading. What the court concluded is that there
22 was not a likelihood that E.Q. could establish that the Mandatory Bars Rule is unlawful.
Dkt. 15-1, p. 12. The court did not consider whether the alleged removal order against
E.Q. is unauthorized because the Secure the Border Rule is unlawful. Indeed, the court
had no jurisdiction to consider that issue. The Secure the Border Rule was issued on June
4, 2024. Any challenge to that rule had to be filed within 60 days. *See* §1252(e)(3)(B).
The D.C. court case was filed on March 17, 2025, well past the jurisdictional 60-day time
limit. Similarly, the D.C. court had no jurisdiction to review E.Q.’s CAT claim, which
is reviewable only in habeas corpus proceedings.

1 not address E.Q.'s eligibility for asylum because it had no jurisdiction to consider
2 the validity of the Secure the Border rule. The D.C.'s ruling concerned only E.Q.'s
3 claim that the denial of withholding of removal under §1231(b)(3) violated the
4 Mandatory Bars Rule. The finding that there is "no reasonable probability" of
5 establishing a nexus for purposes of withholding of removal does not resolve the
6 issue of whether the Respondents have provided a lawful credible fear interview as
7 required by §1225(b)(1).³

8 For these reasons, the Government's arguments that E.Q.'s claims are barred
9 by the doctrine of *res judicata* have no merit.

10 **II. E.Q. Has Shown a Likelihood of Success**

11 The Government has no response to E.Q.'s arguments that he is likely to succeed
12 on his first claim described above (Third Cause of Action in the Petition: removal to a
13 third country without an opportunity to apply for withholding of removal or CAT relief
14 violates the statute) and his third claim described above (Fourth Cause of Action in the
15 Petition: error in determining that there are no substantial grounds for believing that E.Q.
16 would be in danger of being subject to torture if returned to Afghanistan).⁴ For that
17

18 ³ The rules regarding review of claims for withholding of removal during a credible fear
19 interview are different from and distinct from what §1225(b)(1) requires with respect to
20 claims for asylum. Section 1225(b)(1) provides specific rules that asylum officers must
21 follow in considering a noncitizen's request for asylum. Section 1225(b)(1) does not
22 mention withholding of removal. *See* §1225(b)(1)(B), including §1225(b)(1)(B)(v).

⁴ As to CAT relief, the Government asserts that the immigration judge affirmed the
asylum officer's finding of no reasonable possibility of torture. But the Government does
not respond to Petitioner's argument that this court has jurisdiction to review the merits
of the CAT claim, *see* Dkt 14, p. 12, citing *Riley v. Bondi*, 222 L. Ed. 2d 497, 507 (June

1 reason alone, this court should find a likelihood of success on those claims and grant
2 E.Q.'s motion for a preliminary injunction prohibiting his removal from the United
3 States.

4 As to E.Q.'s second claim described above (First and Second Cause of Action in
5 the Petition: E.Q. was not given a lawful credible fear interview of his asylum claim as
6 required by §1225(b)(1)), the Government's argument that E.Q. is not likely to succeed is
7 misguided. The Government claims that E.Q. was not denied on the unlawful Secure the
8 Border Rule, but was instead denied on the basis of an adverse credibility determination.
9 Dkt. 15, pp. 6-7. But that is incorrect. When E.Q. was referred to an asylum officer
10 under §1225(b)(1), the asylum officer did not conduct a credible fear interview as
11 required under §1225(b)(1)(B)(i), (ii) and (v). At both the first CFI and the Second CFI,
12 the asylum officer stated the E.Q. was not eligible for asylum based on the Secure the
13 Border Rule, *see* Dkt 2-1, p. 48 (part A); p. 54 (part A), which has been determined to be
14 unlawful. *Las Americas v. DHS*, 2025 U.S. Dist. LEXIS 94453, 2025 WL 1403811
15 (D.D.C. 2025).

16 The asylum officer did make a determination as to withholding of removal to
17 Afghanistan. At the first CFI, the asylum officer found that E.Q. was not eligible for
18 withholding of removal because of the Mandatory Bars Rule and because of a "no nexus"
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21 26, 2025) (review of CAT claim is not limited by §1252 jurisdictional rules because "a
22 CAT order is not a final order of removal"). E.Q. seeks review of the merits of the
decision to deny his CAT claim, and he is likely to succeed on his CAT claim. *See* Dkt.
14, p. 15.

1 finding. But that “no nexus” finding was made under a higher, more burdensome
2 “reasonable probability” standard, not the “significant possibility” standard required
3 under §1225(b)(1),⁵ and such finding is not relevant to the asylum decision. *See* Dkt. 2-1,
4 p. 48 (part B). At the second CFI, the asylum officer stated that E.Q. was not eligible for
5 withholding of removal to Afghanistan on the basis of a “not credible” finding. But that
6 determination also was made on the basis of the “reasonable probability” standard, not
7 the “significant possibility” standard, and the decision does not explain in what respects
8 E.Q. was not credible. Dkt. 2-1, p. 54 (part C). Again, that determination is not relevant
9 to the decision denying eligibility for asylum.

10 The Government apparently relies on the D.C. court’s statement that E.Q. failed to
11 rebut ineligibility for asylum based on the Circumvention of Lawful Pathways Rule (CLP
12 Rule). Dkt.15, p. 5. However, the D.C. court’s statement regarding the CLP Rule is
13 dicta, not a holding; because E.Q. was deemed ineligible for asylum based on the Secure
14 the Border Rule, the issue regarding his eligibility for asylum was not raised or argued in
15 the case before the D.C. court and it is irrelevant to the resolution of the issue in that case.
16 Moreover, the statement is incorrect. The asylum officer found E.Q. ineligible for
17 asylum based on the Securing the Border regulations; the immigration judge affirmed that
18 decision. The immigration judge did not make a separate decision that E.Q. was
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20 ⁵ The Respondents have recognized that the “significant possibility” standard better
21 “align[s] with Congress’s intent that a low screening threshold standard apply” for
22 purposes of §1225(b)(1). *See* 88 Fed. Reg. at 11,745-46 (citing 87 Fed. Reg. at 18,091-
93, 86 Fed. Reg. at 46,914).

ineligible under the CLP Rule. *See* §1225(b)(1)(B)(iii)(III) (IJ reviews the determination made by the asylum officer that the applicant does not have a credible fear of persecution).

In any event, the IJ's decision is not relevant. The statute requires the asylum officer to determine if the noncitizen "has a credible fear of persecution (within the meaning of clause (v))". *See* §1225(b)(1)(B)(i), (ii). It is undisputed that the asylum officer failed to comply with this requirement.

For the foregoing reasons, E.Q. has established a likelihood of success on the three claims he has presented in this lawsuit.

III. E.Q. Has No Objection to a Stay of Proceedings

The Government has argued in the alternative that these proceedings should be stayed pending resolution of the litigation before the court in the District of Columbia. Dkt. 15, pp. 15-16. Petitioner has no objection to a stay of proceedings in this court pending the outcome of the lawsuit in the District of Columbia, provided this court extends the stay of removal while the litigation is ongoing.

CONCLUSION

For the foregoing reasons, Petitioner E.Q. requests that this Court issue a preliminary injunction prohibiting his transfer out of this court's jurisdiction and his removal from the United States unless and until a lawful final order of removal has been issued.

1 Dated this 11th day of August, 2025.

2
3 /s/ Robert Pauw
4 Robert Pauw
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8 Attorneys for Petitioner
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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2025, I served a copy of the foregoing on counsel for Respondents via the Court's CM/ECF system.

/s/ Robert Pauw