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

E.Q.,
Petitioner,

v.
John Cantú, *et al.*,
Respondents.

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

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

1 The position taken by the Government is extreme. The Government does not
2 dispute the fact that the Securing the Border Rule on asylum ineligibility was found
3 unlawful in *Las Americas v. DHS*, 2025 U.S. Dist. LEXIS 94453, 2025 WL 1403811
4 (D.D.C. 2025), or that the asylum officer applied that rule to E.Q. Its argument is that
5 although the removal of E.Q. from the United States may violate the statute, this Court
6 lacks jurisdiction to do anything about it. That argument is without merit.

7 **I. Jurisdiction**

8 **A. This Court Has Jurisdiction under 28 U.S.C §2241.**

9 The Government argues that this Court does not have jurisdiction over E.Q.’s
10 claims because they do not necessarily result in release from detention and so fall outside
11 the “core” of habeas. ECF 19 at 8-9.¹ As E.Q. explained in his Reply to the Order to
12 Show Cause, that argument is misguided; statutory habeas claims under 28 U.S.C. §2241
13 do not necessarily have to be “core” habeas claims. *See* ECF 22 at 2-3.

14 The Supreme Court’s decision in *Trump v. J.G.G.*, 145 S.Ct. 1003 (2025),
15 supports E.Q.’s argument. The petitioners in that case – like EQ here – “challenge[d] the
16 Government’s interpretation of the Act” and argued that U.S. Immigration and Customs
17 Enforcement (ICE) could not lawfully remove them from the United States because there
18 was no valid removal order. 145 S.Ct. at 1005. They were not seeking release from
19 custody. The Court stated that “immediate physical release [is not] the only remedy
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22 ¹ The page numbers refer to the ECF page number, not the page number written at the bottom of the document.

1 under the federal writ of habeas corpus,” quoting *Peyton v. Rowe*, 391 U. S. 54, 67
2 (1968). The cite to *Peyton* is telling. There, the Court held:

3 [T]he statute does not deny the federal courts power to fashion appropriate relief
4 other than immediate release. Since 1874, the habeas corpus statute has directed
5 the courts to determine the facts and dispose of the case summarily, “as law and
6 justice require.” Rev. Stat. §761 (1874), superseded by 28 U. S. C. §2243.

7 Thus, “to the extent that [the Government] relied on the notion that immediate physical
8 release was the only remedy under the federal writ of habeas corpus, it finds no support
9 in the statute and has been rejected by this Court in subsequent decisions.” *Id.*

10 **B. Jurisdiction Is Not Barred by 8 U.S.C. §1252(a) and (e).**

11 The Government argues next that 8 U.S.C. §1252(a) and (e) preclude jurisdiction
12 over E.Q.’s claims. According to the Government, review of E.Q.’s claims is “foreclosed
13 by Section 1252(e)(1)” because E.Q. was “ordered removed on an expedited basis.” ECF
14 19 at 13. But the Government nowhere mentions the relevant threshold language in
15 §(e)(1); the jurisdictional limits established in section (e) apply only to review of “an
16 order to exclude [a noncitizen] in accordance with section 1225(b)(1).” 8 U.S.C.
17 §1252(e)(1) (emphasis added). The Government does not dispute the fact that the
18 Securing the Border (STB) Rule is unlawful and therefore removal orders issued under
19 that Rule are not “in accordance with section 1225(b)(1).” Because E.Q. was not ordered
20 removed “in accordance with section 1225(b)(1),” the limits in section (e) do not apply.

21 The Government argues that the fact that E.Q. was ordered removed under the
22 STB Rule “does not change the jurisdictional outcome” because the three permitted bases
for review in §(e)(2) are inapplicable to E.Q. ECF 19 at 13. But that simply begs the

1 threshold question; the Government has not established that §(e)(2) is applicable because
2 it has nowhere established that the removal order against E.Q. was issued “in accordance
3 with section 1225(b)(1).”

4 Even assuming that §(e)(2) applies, that section allows review of whether the
5 petitioner “was ordered removed under [§1225(b)(1)].” According to §(e)(5), this inquiry
6 includes “whether such an order [i.e., an order “under §1225(b)(1)”] in fact was issued.”
7 Thus, this court does have jurisdiction to hear E.Q.’s claim that he was not given a lawful
8 credible fear interview in accordance with §1225(b)(1)(B)(i) and (ii), and therefore no
9 order of removal was “in fact” issued “under [§1225(b)(1)]”.

10 E.Q.’s argument that §1225(e) does not bar his claim is consistent with the
11 decisions in several other cases. For example, in *Smith v. CBP*, 741 F.3d 1016 (9th Cir.
12 2014), the Ninth Circuit rejected the government’s argument that federal courts have no
13 jurisdiction to consider whether U.S. Customs and Border Protection (CBP) exceeded its
14 statutory and regulatory authority in issuing an expedited removal order. *Id.* at 1018. The
15 petitioner argued that as a Canadian citizen, he was entitled to an exception to the
16 expedited removal process under 8 CFR 235.3(b)(2)(i).² Although the court rejected the
17 petitioner’s claim on the merits, it is significant that it adjudicated the merits of the claim;
18 in doing so, the court made clear that it had jurisdiction to determine whether DHS was
19 exceeding its statutory authority.
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22 ² See 8 C.F.R. §235.3(b)(2)(i) (expedited removal does not apply to individuals “for
whom documentary requirements are waived”); 8 CFR §212.1(a)(1) (Canadian citizens
seeking entry as visitors are not required to present a nonimmigrant visa).

1 Similarly, in *Dugdale v. CBP*, 88 F. Supp. 3d 1 (D.D.C. 2015), a Canadian citizen
2 who was the subject of an expedited order of removal filed a habeas petition claiming
3 that he had not been lawfully ordered removed because his removal order was not signed
4 by the supervisor of the issuing immigration officer, as required by the regulations. The
5 court recognized that 8 U.S.C. §1252(e)(5) includes review of whether the expedited
6 removal order “in fact was issued,” and concluded that “a determination of whether a
7 removal order ‘in fact was issued’ fairly encompasses a claim that the order was not
8 lawfully issued due to some procedural defect.” *Id.* at 7. The court held that it had
9 jurisdiction to consider the petitioner’s claims and noted:

10 [G]iven how few means [noncitizens] have to challenge expedited removal orders,
11 the Court believes it important that CBP follow the letter of the law in issuing
12 them, even in cases where the grounds for removal appear clear. Supervisory
approval is one of the few checks on erroneous or arbitrary expedited removals. It
should be taken seriously.

13 *Id.* at 7–8.³ See also *American-Arab Anti-Discrimination Committee v. Ashcroft*, 272 F.
14 Supp. 2d 650, 663 (E.D. Mich. 2003) (court has jurisdiction “to determine whether the
15 expedited removal statute was lawfully applied to petitioners in the first place”; accepting
16 the government’s argument “would effectively mean that the Bureau would be allowed to
17 judge the bounds of its own statutory authority”).

18 The cases relied on by the Government, ECF 19 at 13-14, are not to the
19 contrary. In *United States v. Barajas-Alvarado*, 655 F.3d 1077 (9th Cir. 2011), the
20 noncitizen assumed that the removal order was issued within CBP’s statutory
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22 ³ The case was dismissed as moot after CBP vacated the expedited removal order. 2015
U.S. Dist. LEXIS 59163 (D.D.C. May 6, 2015).

1 authority and argued that CBP committed certain “procedural errors” that were
2 improper even though not in violation of the statute. There was no argument that
3 the noncitizen was not the subject of an expedited removal order issued “under
4 §1225(b)(1)” or that the expedited removal order was not made “in accordance with
5 section 1225(b)(1).” Similarly, in *Avendano-Ramirez v. Ashcroft*, 365 F.3d 813 (9th
6 Cir. 2004), the noncitizen conceded that she had been ordered removed “pursuant
7 to 8 U.S.C. §1225(b)”; there was no argument that CBP had acted outside its
8 statutory authority in issuing the expedited removal order.

9 In *Meng Li v. Eddy*, 259 F.3d 1132 (9th Cir. 2001), there was an important
10 dissent from the majority’s statement on page 1134 that “subsection (e)(2) does not
11 appear to permit the court to inquire into whether section 1225(b)(1) was properly
12 invoked, but only whether it was invoked at all.” Judge Hawkins reasoned:

13 If true, this means that INS can issue an expedited removal order for *any*
14 [noncitizen] seeking to enter the United States (other than a permanent
15 resident, refugee, or asylum-seeker) for *any* reason, including clearly
16 improper grounds such as racial or ethnic bias, and the courts cannot review
the legal basis of that order. A careful reading of §1252(e)(2)(B), grounded in
the overall expedited removal provisions of IIRIRA, coupled with our
precedent interpreting similar review provisions, compels the opposite result.

17 *Id.* at 1138. After a petition for rehearing was filed, the court vacated the decision
18 as moot. 324 F.3d 1109 (9th Cir. 2003). Thus, *Meng Li* does not support the
19 Government’s claim that the court cannot “inquire into whether section 1225(b)(1)
20 was properly invoked.” Indeed, such a claim is inconsistent with *Smith*.

21 The Government argues that a challenge to the STB Rule must be brought in
22 the District Court for the District of Columbia within 60 days after the regulation

1 was first implemented. ECF 19 at 14. That challenge was brought in the *Las*
2 *Americas* case, and the court there held that the STB Rule regarding asylum
3 ineligibility is unlawful. In other words, *Las Americas* establishes on a nationwide
4 basis that a noncitizen has not received a credible fear interview (CFI) as required
5 by §1225(b)(1)(B) if credible fear was denied on the basis of the STB Rule. There is
6 no need for E.Q. to bring a separate additional challenge to the STB Rule.

7 The Government argues further that E.Q.'s claims are barred by
8 §1252(a)(2)(A)(iii), which precludes review of (1) "the application of [§1225(b)(1)] to
9 [an] individual"; and (2) "the determination made under section 1225(b)(1)(B)." ECF
10 19 at 15. However, §1225(b)(1) was never applied to E.Q. because he never received
11 the CFI required by the statute. Instead, the STB Rule was applied to E.Q., he was
12 deemed ineligible for a CFI as required by the statute, and there never was a
13 determination made "under section 1225(b)(1)(B)." Accordingly, E.Q. has not been
14 ordered removed "under section 1225(b)(1)(B)." ⁴ In other words, §1225(b)(1) was
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18 ⁴ According to §1225(b)(1)(A), an inspecting CBP officer can issue an order of removal
19 "unless [the noncitizen] indicates either an intention to apply for asylum under section
20 1158 or a fear of persecution." Because E.Q. indicated an intention to apply for asylum
21 and a fear of persecution, the inspecting CBP officer did not issue the order of removal.
22 According to §1225(b)(1)(B), where the case is referred to an asylum officer for a
credible fear interview, it is the asylum officer who issues the order of removal "if the
officer determines that [the noncitizen] does not have a credible fear of persecution" as
that term is defined in §1225(b)(1)(B)(v). Because the asylum officer never made a
credible fear determination "within the meaning of clause (v)," under §1225(b)(1) no
lawful order of removal has been issued.

1 not applied to E.Q., and §1252(a)(2)(A)(iii) thus does not preclude jurisdiction over
2 E.Q.'s claims.⁵

3 The Government's reliance on *Mendoza-Linares v. Garland*, 51 F.4th 1146 (9th
4 Cir. 2022), ECF 19 at 15, is misguided. In that case – unlike here – the petitioner was
5 asking the court to review “the merits of a credible fear determination” *Id.* at 1155. But,
6 as the Ninth Circuit has recognized, there is a difference between reviewing the merits of
7 an agency's decision (which is precluded by *Mendoza-Linares*) and determining that the
8 agency had no authority to issue a removal order (which is permitted under *Smith*). The
9 panel in *Mendoza-Linares* could not have overruled the holding in *Smith*, in which the
10 Ninth Circuit held that courts have jurisdiction to determine whether DHS has the legal
11 authority under the INA to issue an expedited order of removal. *Smith*, 741 F.3d at
12 1018 (holding that the court had jurisdiction to determine whether DHS was
13 exceeding its statutory and regulatory authority in issuing an expedited removal).
14 Nothing in *Mendoza-Linares* overrules that holding. Accordingly, this court
15 properly exercised jurisdiction in *Tabatabaeifar v. Scott*, 2025 U.S. Dist. LEXIS 91554,
16 2025 WL 1397114 (D.Az. May 14, 2025), where the petitioner alleged that DHS failed
17 to provide a CFI as required by §1225(b)(1)(B). The court noted that “[r]ather than follow
18 the procedure mandated by 8 U.S.C. §1225(b) and 8 C.F.R. §208.30 for the expedited
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21 ⁵ With respect to E.Q.'s CAT claim, it is very clear that §1252(a)(2)(A)(iii) does not bar
22 review. The “application of [§1225(b)(1)]” results in an order of removal. But the
removal order does not include the decision on the CAT claim. *See Riley v. Bondi*, 145
S. Ct. 2190, 2198 (June 26, 2025) (“a CAT order is not a final order of removal” and it
“[does] not merge into a final order of removal for purposes of judicial review”).

1 removal of unauthorized [noncitizens] who claim asylum,” the asylum officer deemed
 2 the petitioner ineligible for asylum. Thus, “[s]ince Petitioner was not subjected to any
 3 expedited removal proceedings pursuant to Section 1225(b), Section 1252(a)(2)(A) does
 4 not strip the court of jurisdiction over Petitioner’s claims.” *Id.* at *4 (footnotes omitted).
 5 This court distinguished *Mendoza-Linares*, noting that it stands for the proposition that
 6 “jurisdiction over the merits of individual expedited removal orders” is precluded. *Id.* at
 7 n.4 (emphasis added). Jurisdiction is not precluded where DHS takes action that it is not
 8 authorized to take.

9 Because §1252(a)(2)(A) and (e) do not bar jurisdiction over E.Q.’s claims, neither
 10 do those provisions preclude jurisdiction under 28 U.S.C. §1361, the Mandamus Statute.

11 **C. E.Q. Does Not Lack Standing to Raise His Third-Country Claim.**

12 The Government’s claim that E.Q.’s fear of removal to a third country is
 13 “conjectural” or “hypothetical” should be taken with a grain of salt. DHS has deported
 14 noncitizens to third countries including Mexico, Guatemala, El Salvador, Panama, and
 15 South Sudan.⁶ The United States has recently obtained the agreement from Kosovo,
 16 Rwanda, and Uganda to accept deportees.⁷ According to an ICE memo, ICE may deport
 17 some migrants to third countries without assurances they won’t be tortured. The memo
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 20 ⁶ Canadian Broadcasting Corporation (May 13, 2025), available at:
<https://www.cbc.ca/news/world/us-deportations-country-agreements-1.7530868>.

21 ⁷ EU Balkan News (August 1, 2025), available at: [https://balkan.eu.com/kosovo-to-host-u-](https://balkan.eu.com/kosovo-to-host-u-s-deportees-igniting-regional-migration-concerns-2/)
[s-deportees-igniting-regional-migration-concerns-2/](https://www.nbcnews.com/world/africa/rwanda-says-reaches-deal-us-take-250-migrants-rcna223069); NBC News (August 5, 2025),
 22 available at: [https://www.nbcnews.com/world/africa/rwanda-says-reaches-deal-us-take-](https://www.nbcnews.com/world/africa/rwanda-says-reaches-deal-us-take-250-migrants-rcna223069)
[250-migrants-rcna223069](https://www.nytimes.com/2025/08/21/world/africa/uganda-us-deportees.html); NY Times (August 21, 2025), available at:
<https://www.nytimes.com/2025/08/21/world/africa/uganda-us-deportees.html>.

1 instructs ICE employees on how to deport people to countries other than their country of
2 origin, in some cases in as little as six hours.⁸ In light of these circumstances, E.Q.’s fear
3 is not merely “conjectural” or “hypothetical” and he does have standing for his third
4 country claim. *See, e.g., Mahdejian v. Bradford*, 2025 U.S. Dist. LEXIS 154931, 2025
5 WL 2269796 (E.D. Tex. July 3, 2025) (finding a likelihood of success on the petitioner’s
6 third country claim, even though ICE had not designated a country of removal and he
7 feared removal to Libya, Rwanda, or South Sudan).

8 **II. E.Q. Is Likely to Succeed on the Merits of His Claims.**

9 In arguing that E.Q. is not likely to succeed on the merits, the Government focuses
10 on the second CFI. According to the Government, at the second CFI the asylum officer
11 did not deny E.Q. on the basis of the STB Rule, but “on a different basis”: a lack of
12 credibility. ECF 19 at 17, citing the D.C. court’s decision in *E.Q. v. Noem*, ECF 15-1 at
13 11. Here, the Government conflates the asylum officer’s decision regarding eligibility for
14 asylum under §1158 with his decision regarding eligibility for withholding of removal
15 under §1231(b)(3) and CAT protection.

16 The expedited removal statute, §1225(b)(1), requires that the asylum officer must
17 conduct a credible fear interview to determine whether or not the applicant has a
18 “credible fear of persecution,” which is defined as “a significant possibility” that the
19 applicant can establish eligibility for asylum under §1158. 8 U.S.C. §1225(b)(1)(B)(v).
20 The statute says nothing about withholding of removal or CAT. As the court noted in *Las*
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22 ⁸ NBC News, July 15, 2025, available at: <https://www.nbcnews.com/news/us-news/ice-deport-migrants-third-countries-assurances-wont-tortured-memo-rcna218990>.

1 *Americas*, “it is undisputed that the INA does not require any particular screening
2 standard for statutory withholding of removal and CAT protection.” 2025 U.S. Dist.
3 LEXIS 94453 at *61, citing 89 Fed. Reg. at 81246 (“While Congress clearly expressed its
4 intent that the ‘significant possibility’ standard be used to screen asylum claims, section
5 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), and FARRA section 2442 are silent as to what
6 screening procedures are to be employed with respect to statutory withholding of
7 removal and CAT protection.”).⁹ Thus, at the time of E.Q.’s CFI interviews, there were
8 two different standards at play: first, the “significant possibility” standard required by
9 statute for purposes of determining eligibility for asylum; and second the more restrictive
10 “reasonable probability” standard used for screening withholding and CAT relief.

11 In E.Q.’s case pending before the D.C. district court, the court understood the
12 difference between these two standards. The court noted that at the first CFI, the asylum
13 officer found: (1) E.Q. was ineligible for asylum based on the STB Rule (and thus the
14 asylum officer did not apply the “significant possibility” standard); (2) next, as to
15 withholding of removal, E.Q. did not establish a “reasonable probability” of persecution,
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17 ⁹ For that reason, the court in *Las Americas* could hold that the “reasonable probability”
18 standard does not violate the INA. The court noted that the “reasonable probability”
19 standard is used “to screen for statutory withholding of removal and CAT protection
20 claims,” citing 89 Fed. Reg. at 81168, but not to screen for asylum eligibility. *See id.* at
21 *16, *61-62. That is important because the “reasonable probability” standard is designed
22 to be more restrictive than the “significant possibility” standard. *Id.* at *16. *See also* 8
C.F.R. §208.35(b)(2)(i) (“*reasonable probability* means substantially more than a
reasonable possibility, but somewhat less than more likely than not”). As *Las Americas*
recognized, although the “reasonable probability” standard can be used for withholding
and CAT, that standard cannot be applied during the CFI to determine asylum eligibility
without violating §1225(b)(1)(B)(v). 2025 U.S. Dist. LEXIS 94453, at *61-62.

1 and E.Q. was subject to two mandatory bars to withholding of removal; and (3) E.Q. did
2 not establish a “reasonable probability” of torture for purpose of CAT relief. ECF 15-1 at
3 8-9. Regarding the second CFI, the court stated that the asylum officer again found E.Q.
4 ineligible for asylum based on the STB Rule. ECF 15-1 at 11 (“The asylum officer again
5 concluded the Securing the Border limitation on asylum ineligibility applied but did not
6 find that E.Q. was subject to a mandatory bar.”). The negative credibility finding was the
7 basis for finding E.Q. ineligible for withholding of removal and CAT relief. That is
8 significant because it means that the asylum officer found that E.Q. did not satisfy the
9 more difficult standard: proving a “reasonable probability” of a likelihood of future
10 persecution. The D.C. district court recognized that the asylum officer never made the
11 determination required by §1225(b)(1) – whether E.Q. has a “significant possibility” of
12 proving a “well-founded fear of persecution.” In other words, the Government is
13 misguided in its suggestion that the D.C. district court concluded that the asylum officer
14 found E.Q. ineligible for asylum on a “different basis” other than the STB Rule.

15 Where an asylum officer denies asylum based on the STB Rule, the applicant has
16 not been afforded a credible fear interview required by §1225(b)(1). *See Las Americas*,
17 *supra*. Thus, there is a strong likelihood that E.Q. will succeed on the merits of his
18 claims. *See Motion for Preliminary Injunction*, ECF 14 at 14-15.

20 CONCLUSION

21 For the foregoing reasons, E.Q. requests that this Court issue an injunction
22 prohibiting his transfer out of this jurisdiction and removal from the United States.

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3 Dated this 24th day of August, 2025.

4 /s/ Robert Pauw
5 Robert Pauw
6 GIBBS HOUSTON PAUW

7 Delia Salvatierra
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9 Attorneys for Petitioner
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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2025, I served a copy of the foregoing on counsel for Respondents via the Court's CM/ECF system.

/s/ Robert Pauw