Please note: This motion was prepared by Restoration Immigration Legal Aid (RILA), the Asylum Seeker Advocacy Project (ASAP), and Catholic Legal Immigration Network, Inc. (CLINIC) in April 2018 for San Antonio Immigration Court. Please be sure to check the relevant and up-to-date case law in your jurisdiction. Exhibits have been omitted.

NON-DETAINED

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN ANTONIO, TEXAS

In the Matter of	
[redacted]	**File No.** [redacted]
[redacted]	**File No.** [redacted]
[redacted]	**File No.** [redacted]
Respondents	

Hon. Judge [redacted]

Post-Decision Motion

MOTION TO RESCIND *IN ABSENTIA* REMOVAL ORDER and TO REOPEN REMOVAL PROCEEDINGS

NO FEE REQUIRED PER 1003.24(b)(2) AS MOTION BASED ON ASYLUM

AUTOMATIC STAY OF REMOVAL

[redacted]

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U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN ANTONIO, TEXAS

In the Matter of	)	
	)	
[redacted]	)	**File No.** [redacted]
	)	
[redacted]	)	**File No.** [redacted]
	)	
[redacted]	)	**File No.** [redacted]
	)	
Respondents	)	
	)	

MOTION TO RESCIND *IN ABSENTIA* REMOVAL ORDER AND REOPEN PROCEEDINGS

INTRODUCTION

Lead Respondent [redacted] and her minor children, [redacted] and [redacted] move this Honorable Court to rescind its January 30, 2017 *in absentia* removal order and reopen their proceedings pursuant to INA § 240(b)(5)(C)(i) and (ii). Ms. [redacted] files a Motion to Change Venue to the [redacted] Immigration Court concurrently with this motion and an I-589, Application for Asylum and Withholding of Removal, as Exhibit D. Because Ms. [redacted] failure to appear was the result of lack of notice and exceptional circumstances, the *in absentia* removal order is automatically stayed until such time as this Immigration Court renders a decision. INA § 240(b)(5)(C).

Ms. [redacted] and her children fled El Salvador fearing persecution at the hands of the [redacted] gang. Rescission and reopening are warranted because this family did not receive notice of their master calendar hearing date: their sponsor maliciously withheld their mail and an

Immigration and Customs Enforcement ("ICE") officer gave Ms. [redacted] incorrect information about how to update her address. INA § 240(b)(5)(C)(ii). Furthermore, the malicious withholding of mail and the misinformation from an ICE official, combined with Ms. [redacted] vulnerable social status as an indigent, monolingual Spanish speaker and single mother, constitute exceptional circumstances that prevented Respondents from attending their master calendar hearing. INA §240(b)(5)(C)(i). Ms. [redacted] has been diligent in filing this motion and has faced extraordinary circumstances such that this Court should equitably toll the 180-day filing requirement. In the alternative, Ms. [redacted] respectfully requests that this Court apply its *sua sponte* authority to rescind and reopen these proceedings to avoid the serious risk of death that would befall Ms. [redacted] and her children should they be removed to El Salvador.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

As described in her attached declaration, Ms. [redacted] is a 30-year-old, single mother of three who came to the United States with her two youngest children to escape imminent threats of violent persecution at the hands of the [redacted] gang as a result of her brother's refusal to join the gang. Exh. A, Declaration of [redacted] (hereinafter "Resp. Decl.") ¶¶ 2-8. In September of 2016, Ms. [redacted] 16-year-old brother, [redacted], was kidnapped by the [redacted] gang. Exh. B, Declaration o[redacted] ¶ 3. [redacted] members took him to a trailer, blindfolded him, and beat him repeatedly. *Id.* ¶¶ 4-6. The [redacted] members specifically told [redacted] that his refusal to join the gang rendered him subject to punishment by death. *Id.* ¶ 6. [redacted] managed to escape, and a gang member shouted at him that if he didn't stop running, someone in his family would pay the price. *Id.* ¶ 10. [redacted] immediately went into hiding. *Id.* ¶ 12. Ms. [redacted], living alone with her children in a [redacted]-controlled neighborhood, became a specific target for retaliation by [redacted] gang members who

were angry over [redacted]s escape and subsequent disappearance. *Id.* ¶¶ 12, 14; Resp. Decl. ¶¶ 7, 8.

In the weeks following the kidnapping incident, Ms. [redacted] and her children, her adult sister [redacted] also a single mother, and [redacted] all fled El Salvador, fearing for their safety and the safety of their family. Resp. Decl. ¶ 8; [redacted] Decl. ¶ 12. Just a few weeks after Ms. [redacted] and her siblings left El Salvador, their cousin [redacted] was shot and killed in their hometown. Resp. Decl. ¶ 11; [redacted] Decl. ¶ 13. [redacted] believes the murder was in retaliation for [redacted]s escape and disappearance. [redacted] Decl. ¶ 13. [redacted] and [redacted] were extremely close and everyone in the community knew that they were not only cousins but also close friends. *Id.*; Resp. Decl. ¶ 11. Ms. [redacted] did not seek protection from the local police because she believed that her family would be in even more danger if they reported [redacted], since the police often act as informants for the gangs. Resp. Decl. ¶ 9. Ms. [redacted] believes she will be killed in El Salvador because of her identity as an immediate family member of [redacted] a known escapee of the [redacted] gang. Resp. Decl. ¶¶ 6, 10; [redacted] Decl. ¶ 14.

After they entered the United States, Ms. [redacted] and her children were held in detention in [redacted] Resp. Decl. ¶ 12. Upon release, Ms. [redacted] was issued a Notice to Appear dated November 13, 2016. Exh. D, Respondent's Notice to Appear (hereinafter "NTA"), at 2. The date and time of her hearing were not set at the time she received the NTA. *Id.* at 1. Ms. [redacted] is a monolingual Spanish speaker. Exh. D, Respondent's I-589 Application Asylum and Withholding of Removal (hereinafter "I-589"), at 1. Ms. [redacted] swears in her declaration that the NTA was not read to her in Spanish, nor was she informed in Spanish about how to notify ICE or the immigration court of an address change. Resp. Decl. ¶ 12. The ICE officer who spoke with Ms. [redacted] about the NTA did not speak Spanish well. *Id.* No one offered

her an interpreter, and she did not know she could ask for one. *Id.* Although the ICE officer did not speak Spanish well, Ms. [redacted] was able to understand that she had an ICE check-in on November 28, 2016. *Id.*

At the time of her release, Ms. [redacted] provided the address of her sponsor, Ms. [redacted], the ex-wife of Ms. [redacted]'s father's cousin. Resp. Decl. ¶ 12. Ms. [redacted] was the only person who agreed to accept Ms. [redacted] and her children from detention. *Id.* ¶ 13. Ms. [redacted] and [redacted] went to live with Ms. [redacted] in [redacted], and Ms. [redacted] was very grateful. *Id.* ¶ 12. Ms. [redacted] assured Ms. [redacted] that she would let her know if any mail arrived for her. *Id.* However, no mail arrived for Ms. [redacted] while she was living with Ms. [redacted]. *Id.* ¶ 13.

Ms. [redacted] attended her first ICE check-in at the [redacted] field office on November 28, 2016. *Id.*¶ 15. At this check-in, Ms. [redacted] met with an ICE officer and reported her intention to move to [redacted] *Id.* The ICE officer told Ms. [redacted] that she should call the Executive Office of Immigration Review ("EOIR") 1-800 hotline number ("EOIR hotline") to update her address once she moved. *Id.* The ICE officer then wrote the EOIR hotline number on a piece of paper, but did not give her any other instructions or tell her about her next ICE appointment in Spanish. *Id*. Her ICE check-in sheet was only in English, and she could not read it. *Id.*

In the beginning of December 2016, Ms. [redacted] moved to [redacted]s. *Id.* ¶ 16. Before she moved, Ms. [redacted] told Ms. [redacted] that she would let her know if any mail arrived for her. *Id.* ¶¶ 13, 18. Ms. [redacted] attempted to change her address by calling the EOIR hotline but was unable to do so, and she did not know any other way to change her address. *Id.* ¶ 16. In fact, there is no way to change one's address by calling the EOIR hotline, which Ms.

[redacted] did not discover until meeting with Restoration Immigration Legal Aid, the organization now representing her, in October 2017.[1] *Id.* Ms. [redacted] was confused and did not understand the immigration process. *Id.* ¶ 19. She only attended primary school in her home country and does not know how to use a computer or research information on the internet. *Id.* She did not know she could find other information about her case on the EOIR hotline, nor did she realize that she would have hearings in immigration court. *Id.* ¶¶ 17, 22. She thought she was doing everything right because she attended her ICE check-in and was attempting to change her address on the EOIR hotline. *Id.* ¶ 22.

After moving to [redacted], Ms. [redacted] started to receive harassing phone calls and texts from Ms. [redacted] insisting on payment for expenses incurred during the time Ms. [redacted] lived with Ms. [redacted] in [redacted]. *Id.* ¶ 20. Ms. [redacted] was surprised because, before they moved, Ms. [redacted] had never requested that Ms. [redacted] pay her for any expenses. *Id.* Ms. [redacted] sought the help of her sister, [redacted] to speak with Ms. [redacted] *Id.* ¶ 21. Ms. [redacted] informed [redacted] that she received some mail for Ms. [redacted] but she refused to give the mail to Ms. [redacted] unless she received payment. *Id.*

According to FOIA results requested by undersigned counsel, on January 6, 2017, the [redacted] Immigration Court mailed a Notice of Hearing in Removal Proceedings for Ms. [redacted] to Ms. [redacted]'s mailing address. Exh. E, Notice of Hearing in Removal Proceedings (hereinafter, "Notice of Hearing"). Ms. [redacted] never received this notice, and in fact never received *any* correspondence from EOIR. Resp. Decl. ¶ 28. [redacted] attempted to plead with Ms. [redacted] to obtain Ms. [redacted]'s immigration related mail on several occasions, but because Ms. [redacted] is indigent and lacked the resources to fulfill Ms. [redacted]'s financial demands,

[1] See the EOIR website for list of information available by dialing 1-800-898-7180. EOIR, available at https://www.justice.gov/eoir/customer-service-initiatives

Ms. [redacted] withheld Ms. [redacted]'s mail. *Id.*¶¶ 23, 28, 31.

At the time, Ms. [redacted] did not know that the mail Ms. [redacted] received could have been a hearing notice or a removal order. *Id.* ¶ 22. Lacking information about the immigration system, Ms. [redacted] did not realize she could be ordered removed if she had not committed a crime. *Id.* She was also not aware that she would have hearings in immigration court; she thought she only had appointments with ICE. *Id.*

In February 2017, Ms. [redacted] moved to [redacted] with her two youngest children to be closer to her oldest son, [redacted] *Id*. ¶ 25. During this time, Ms. [redacted] was also navigating how to communicate with [redacted]s father, from whom she is estranged. *Id.* ¶¶ 24-25. In June 2017, Ms. [redacted] moved with her two youngest children to [redacted], where she currently lives. *Id*. ¶ 27.

After she moved to [redacted] in February 2017, Ms. [redacted] continued to be indigent, unable to pay Ms. [redacted], and thus unable to obtain any of her mail. *Id.* ¶ 28. Despite her limited resources, she sought legal counsel. *Id.* In the spring of 2017, Ms. [redacted] met with an attorney to seek legal advice but received no advice or information because she was unable to pay the attorney's $500 fee. *Id.* ¶ 29. She thus remained ignorant of the fact that she had missed a hearing and been ordered removed *in absentia*. *Id.*

Finally, in the fall of 2017, with the help of a friend, Ms. [redacted] connected with a small non-profit legal services organization, called Restoration Immigration Legal Aid (RILA). *Id.* ¶ 30. On October 18, 2017, Ms. [redacted] received assistance from RILA staff and learned of her *in absentia* removal order. *Id.* She arranged a follow-up appointment with RILA and, on October 25, 2017, Ms. [redacted] met with Ms. [redacted] ("Ms. [redacted] who provided interpreting services for Ms. [redacted], and legal advocate Ms. [redacted] ("Ms. [redacted]

Id. ¶ 31. Ms. [redacted] Ms. [redacted], and Ms. [redacted] spoke with Ms. [redacted] by phone on that day and established that Ms. [redacted] had in fact withheld all EOIR mail from Ms. [redacted] and also failed to inform Ms. [redacted] of a phone call from an immigration officer. *Id.* ¶ 31; Exh. F, Declaration of Ms. [redacted] (hereinafter "[redacted] Decl."). Since discovering the removal order in October 2017, Ms. [redacted] has worked with undersigned counsel to prepare a Motion to Reopen to continue her case before the Immigration Court. *Id.* ¶ 34. She now submits this motion within 180 days of the date she learned that she and her children had been ordered removed *in absentia*. *Id.* ¶¶ 30, 34.

LEGAL ARGUMENT

I. Ms. [redacted]s Case Should be Reopened Due to Lack of Notice

Ms. [redacted] did not appear at her master calendar hearing because she never received notice of it, and as such she respectfully moves this Court to rescind the *in absentia* removal order and reopen these removal proceedings. An *in absentia* removal order may be rescinded at any time upon a showing that the respondent did not receive notice of the hearing at which they were ordered removed. INA § 240(b)(5)(C)(ii). Ms. [redacted]'s case should be reopened due to lack of notice for four reasons: (1) she did not receive actual notice of her hearing because she was the victim of malicious withholding of mail, (2) she complied with the statutory requirement to provide the Attorney General with a valid mailing address, (2) she did not evade notice, and (3) she would have attended her hearing *had* she had notice.

A. Ms. [redacted] did not receive actual notice of her hearing because her mail was intentionally withheld by her sponsor

Ms. [redacted] did not receive notice of her hearing because of Ms. [redacted]'s intentional, coercive, and potentially unlawful withholding of Ms. [redacted]'s mail. The Board of Immigration Appeals ("BIA") has previously found that the presumption of delivery is weaker

for hearing notices sent by regular mail than by certified mail. *Matter of M-R-A-*, 24 I&N Dec. 665, 673 (BIA 2008). The question is therefore "whether the respondent has presented sufficient evidence to overcome the weaker presumption of delivery attached to notices delivered by regular mail." *Id.* Here, Ms. [redacted] has presented substantial evidence that she did not receive notice of her hearing due to Ms. [redacted]'s actions.

Ms. [redacted] has further established that her victimization by Ms. [redacted] goes beyond a mere "failure in the internal workings of the household." *Nunez v. Sessions*, 882 F.3d 499, 506 (5th Cir. 2018). The Fifth Circuit has held that, "when a notice of hearing reaches the correct address but does not reach the alien through some failure in the internal workings of the household, the alien can be charged with receiving proper notice." *Id.* (quotations and citations omitted). Unlike the situation in *Nunez*, however, Ms. [redacted]'s interference was deliberate and knowing. It was undertaken with the explicit intention of extracting money from Ms. [redacted], who was indigent and unable to pay. Resp. Decl. ¶¶ 21-22. Ms. [redacted]'s declaration illustrates the extent and nature of Ms. [redacted]'s actions, and Ms. [redacted]'s declaration corroborates the nature of Ms. [redacted]'s behavior. *See generally* Resp. Decl.; [redacted] Decl.

Furthermore, Ms. [redacted]'s malicious interference with Ms. [redacted]'s official mail from EOIR amounts to potentially unlawful behavior. Given that the documents withheld were official communication from the United States Government and that Ms. [redacted] sought to extract money from Ms. [redacted], her behavior may have been unlawful as an act of theft under Texas State law.[2] It may also have been enough for Ms. [redacted] to establish the common law tort

[2] "A person commits theft where the person unlawfully appropriates property with the intent to deprive the owner of the property, and in this context, "deprive" means to restore the property only on payment of a reward or other compensation." 19 Tex. Jur. 3d Criminal Law: Offenses Against Property § 34.

of conversion of personal property.[3] Finally, it is possible Ms. [redacted]'s actions were unlawful pursuant to 18 U.S.C.A. § 1708 "Theft or receipt of stolen mail matter generally."[4] While none of these claims have been brought against Ms. [redacted], it is clear that her actions go far beyond a mere "failure of internal household workings" and demonstrate a knowing and conscious intent to deprive Ms. [redacted] of her official documents from the United States government.

This Court should therefore grant this motion based on lack of notice due to Ms. [redacted]'s malicious, coercive, and potentially illegal actions. The BIA has granted motions to reopen based on a wide variety of circumstances ranging from a lack of notice due to a forgetful elderly matriarch, to a lack of notice as a result of forced relocation due to an abusive spouse. *See* Exh. G, *Karla de Jesus Alfaro-Martinez*, A202 076 417 (BIA May 21, 2015) (rescinds in absentia order where respondent was unaware of hearing because grandmother had misplaced the hearing notice); Exh. H, *P-R-S-*, AXXX XXX 503 (BIA Sept. 13, 2017) (Respondent rebutted presumption of delivery by regular mail where abusive spouse forced her to move to a different address).

Between these two extremes of an accidental but notice-destroying error by a family member and domestic abuse, the BIA has recognized that deceptive family members who withhold or hide immigration court papers are capable of depriving a Respondent of notice in the context of a Motion to Reopen. Exh. I, *Wilson Orlando Escobar*, A095 082 121 (BIA Aug. 14, 2013) (remanding for consideration of new evidence that the respondent's mother intentionally hid the NTA and hearing notices and forged respondent's signature). In Ms. [redacted]'s case, the

[3] To establish a claim for conversion of personal property under Texas law a plaintiff must prove: "(1) the plaintiff owned or had legal possession of the property or entitlement to possession; (2) the defendant unlawfully and without authorization assumed and exercised dominion and control over the property to the exclusion of, or inconsistent with, the plaintiff's rights as an owner; (3) the plaintiff demanded return of the property; and (4) the defendant refused to return the property." *Smith v. Maximum Racing, Inc.*, 136 S.W.3d 337, 341 (Tex. App. 2004).

[4] "…Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted--Shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C.A. § 1708 (West).

actions of Ms. [redacted] are akin to the actions of the Respondent's mother in *Wilson Orlando Escobar*. Ms. [redacted]'s behavior was intentionally disruptive, manipulative, and coercive and made it impossible for Ms. [redacted] to have notice of her hearing date.

B. Ms. [redacted] complied with INA §239(a)(1)(F) and provided DHS with a reliable and accurate mailing address

Ms. [redacted] duly informed DHS of Ms. [redacted]'s address, where she and her children would be living, prior to their release from detention. Before Ms. [redacted] and her children moved to a new address, Ms. [redacted] assured Ms. [redacted] that she would let her know if any mail arrived for her. Resp. Decl. ¶ 13. As such, Ms. [redacted]'s address continued to be a valid mailing address at which Ms. [redacted] reasonably expected to receive mail. *Id.* ¶ 18. INA §239(a)(1)(F) requires only that a respondent provide the Attorney General with "an address and telephone number (if any) at which the alien may be contacted" and inform the Attorney General of any change in address. There is no requirement that the address be a residential address.

Other circuits have found that the address that a Respondent claims to be a valid mailing address may be different from her residential address. *Renaut v. Lynch*, 791 F.3d 163, 168 (1st Cir. 2015) ("the notice mentions nothing of a residential or physical address requirement…We are aware of no BIA precedent explaining that 'address' is defined as a residential one…"); *see also Arrieta v. I.N.S.*, 117 F.3d 429, 432 (9th Cir. 1997) (per curiam) (stating that the BIA erred by requiring petitioner to provide a residential address, even though she provided a valid mailing address); *Mecaj v. Mukasey*, 263 Fed. App'x. 449, 451 (6th Cir. 2008) (concluding that petitioner "may present evidence that he normally would receive correspondence at that location, yet did not receive notice."). Because Ms. [redacted] reasonably believed that she would continue to receive mail at Ms. [redacted]'s address – based on Ms. [redacted]'s statement that she would inform Ms. [redacted] of any mail that arrived – Ms. [redacted] complied with INA §239(a)(1)(F).

INA §239(a)(1)(F) also does not require that any specific form be submitted nor that the respondent notify a specific immigration court. At neither her release from detention, nor her check-in with ICE, was Ms. [redacted] informed in Spanish that she needed to update her address in writing if she moved. Resp. Decl. ¶ 12. An ICE officer gave her incorrect information about how to change her address. *Id*. ¶ 15. He did *not* tell her that she needed to file an EOIR-33 form to change her address or that she had any additional check-ins scheduled. *Id.* Rather, he erroneously told her to call the EOIR hotline, which in fact does not allow one to change one's address. *Id.* As a result, despite her efforts to do so, she was unable to change her address. Resp. Decl. ¶ 16. Ms. [redacted] does not read or speak English and has only a primary school education. Resp. Decl. ¶ 19. Based on the information given to her, she did everything she could to comply with INA §239(a)(1)(F). Ms. [redacted] fulfilled the statutory address requirement: she maintained an address where she reasonably believed she could receive mail, and she attempted to update her address to the best of her ability and knowledge.

C. Ms. [redacted] did not try to evade notice

Ms. [redacted] did not try to evade notice at any point. When making an inquiry of the sufficiency of notice, the BIA examines whether the respondent "evade[d] delivery of a properly sent Notice of Hearing by relocating without providing the required change of address." *Matter of M-R-A-*, 24 I&N Dec. 665, 675 (BIA 2008). Here, Ms. [redacted] appeared at her ICE check-in in [redacted] less than two weeks after being released from immigration detention. Resp. Decl. ¶ 15. She also actively tried to update her address and get her mail from Ms. [redacted]. *Id.* ¶¶ 16-23. Far from evading notice, Ms. [redacted]s actions demonstrate her intention and willingness to comply with the post-release legal process of seeking immigration relief.

Ms. [redacted] thus did not engage in any wrongdoing to avoid receiving notice of her

hearing. When the First Circuit addressed the issue of non-receipt of notice, it found that "evasion" entails wrongdoing and effort on the part of the respondent to actively avoid notice. *Renaut*, 791 F.3d at 167. That is not the case here. At her November 28, 2016 ICE check-in, Ms. [redacted] notified ICE of her intention to move from [redacted] to [redacted] Resp. Decl. ¶ 15. In response, the ICE Officer erroneously told Ms. [redacted] that she should call the EOIR hotline once she had an address in Houston. *Id.* Ms. [redacted] did in fact attempt to do this, but was unable to navigate the EOIR hotline, and was unable to update her address by way of the hotline. *Id.* In Ms. [redacted]'s case, it was sensible for Ms. [redacted] to leave Ms. [redacted]'s address as her mailing address because Ms. [redacted] told her that she would let her know if any mail arrived. *Id.* ¶¶ 13, 18. While Ms. [redacted] did have a sense that she should update the authorities with a new address, as reflected in her forthright disclosure of her intention to move to [redacted] at her ICE check-in, she also had no reason to anticipate the Ms. [redacted] would not forward her important mail. *Id.* Ms. [redacted] did everything she could to try to receive her mail and update her address, and was therefore not attempting to evade notice of her master calendar hearing.

D. Ms. [redacted] would have attended her master calendar hearing if she had notice of it

Ms. [redacted]'s actions and her declaration demonstrate that, had she been informed of the January 30, 2017 hearing, she would have attended. Resp. Decl. ¶ 34. In *Matter of M-R-A-*, the BIA took into account the fact that the Respondent did not receive notice, had filed an application for affirmative relief, had appeared at an earlier hearing, and exercised due diligence in promptly requesting reopening of proceedings. 24 I&N Dec. at 674-76. Like the respondent in *Matter of M-R-A-*, Ms. [redacted] appeared at the only ICE check-in she was aware of, demonstrating that if she had received notice she would have continued to appear at all court hearings and check-ins.

Also like the Respondent in *Matter of M-R-A-,* Ms. [redacted] presents an affirmative application for relief and has a strong family-based claim for asylum, where she has a well-founded fear of future persecution on account of her membership in an immutable family group. *See Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017). [redacted]s declaration documenting particularized, violent threats to his family members as a result of his own refusal to join the [redacted] gang corroborates Ms. [redacted]s fear of persecution. Ms. [redacted] has every reason to attend her immigration court hearings in order to gain asylum and legal status in the United States, including for the sake of her three minor children.

Ms. [redacted] has demonstrated that she did not receive notice of her January 30, 2017 hearing. Due process requires that a respondent be provided with notice of proceedings and an opportunity to be heard. *Matter of G-Y-R*, 23 I&N Dec. 181 (BIA 2001) (citations omitted). Because Ms. [redacted] and her children did not receive notice of this hearing date, due process requires that the *in absentia* removal orders against them be rescinded and their proceedings be reopened.

II. Ms. [redacted]'s Case Should Be Reopened Because Exceptional Circumstances Prevented Her from Attending Her Master Calendar Hearing

If the Court is not persuaded to reopen Ms. [redacted]'s case based on a lack of notice, this matter should be reopened due to exceptional circumstances beyond the respondent's control that caused her to miss her hearing. An alien ordered removed *in absentia* may rescind the order "upon a motion to reopen filed within 180 days after the date of the order of removal or deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances…" INA §240(b)(5)(C)(i). Ms. [redacted]'s failure to appear at the January 30th 2017 hearing was due to exceptional circumstances involving misinformation from ICE, the coercive withholding of Ms. [redacted]'s mail, and a vulnerable social status as an indigent, monolingual Spanish-speaking single mother of three. As such, she moves this Court to rescind the *in absentia* order and

reopen these removal proceedings.

In the interest of fairness, the Court should equitably toll the time limitation because, although Ms. [redacted] exercised diligence in attempting to follow the misinformation from an ICE officer regarding how to update her address, she did not even learn that she had been ordered removed until after 180 days from the date of the *in absentia* order. She now submits this motion within 180 days of the date she discovered the removal order, on October 18, 2017.

A. Exceptional circumstances beyond Ms. [redacted]'s control, including her vulnerable social status combined with malicious treatment by her sponsor and misinformation from ICE, prevented her from attending her master calendar hearing

Ms. [redacted] was unable to attend her master calendar hearing due to exceptional circumstances. The applicable standard for determining exceptional circumstances is consideration of the totality of the circumstances. *See Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996). In this case, the totality of the circumstances show that Ms. [redacted] was prevented from attending her master calendar hearing due to exceptional circumstances: she was misinformed by ICE about how to update her address; a hostile sponsor withheld her mail and demanded money; she is an indigent monolingual Spanish-speaking single mother with only a primary school education; and she and her children are facing severe poverty. Furthermore, she has a very limited understanding of the U.S. legal system and did not learn of her *in absentia* removal order until October 18, 2017.

As described in Section I.B and I.C, *supra*, Ms. [redacted] was misinformed by an ICE officer about how to effectively communicate with EOIR and, as a result, she could not update her address. Resp. Decl. ¶ 15. Furthermore, her sponsor, Ms. [redacted], not only intentionally withheld information from Ms. [redacted], but also tried to use receipt of mail from EOIR to coerce Ms. [redacted] into making a payment in exchange for her mail. *Id.* ¶¶ 20-23. Ms. [redacted] also withheld important telephonic messages from immigration officers calling to communicate with

Ms. [redacted]. [redacted] Decl. ¶ 5.

Moreover, Ms. [redacted] had the added difficulty of having to navigate the legal process as a monolingual Spanish speaker with limited financial resources. For example, Ms. [redacted] was asked to sign the NTA without the assistance of an interpreter, despite the ICE officer's limited Spanish language ability. Resp. Decl. ¶ 12. Despite Executive Order 13166 requiring all federal agencies to provide meaningful access to limited-English proficient speakers, Ms. [redacted] did not know that she could ask for an interpreter to explain to her what she was signing. *Id.*; Exh. J, Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency." Since Ms. [redacted] arrived in the United States, she has been indigent and lacked the economic resources to pay an attorney to help her with legal matters. Resp. Decl. ¶ 26. Ms. [redacted] and her children have also faced housing and food insecurity as a result of her limited financial resources. *Id.* ¶¶ 26, 33. Lastly, in the months following her release from detention, Ms. [redacted] was trying to relocate to be nearer to her eldest son. *Id.* ¶ 24. Taken together, these were exceptional circumstances that prevented Ms. [redacted] from attending her master calendar hearing.

B. This Court Should Equitably Toll the Deadline and Reopen These Proceedings

Ms. [redacted] moves this Court to equitably toll the 180-day deadline, which she missed as a result of extraordinary circumstances that prevented her from becoming aware of her final order of removal *in absentia* within 180 days of its issuance. This Court should equitably toll the Motion to Reopen deadline because Ms. [redacted] exercised due diligence, and extraordinary circumstances caused the delay. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (holding that when a party seeks equitable tolling they "[bear] the burden of establishing two elements: (1) that [the litigant] has been pursuing his rights diligently, and (2) that some

extraordinary circumstance stood in his way."). Whether equitable tolling is appropriate "ultimately depends on *all* of the facts of the case, not just the chronological ones." *Gordillo v. Holder*, 640 F.3d 700, 705 (6th Cir. 2011) (emphasis added).

a. Ms. [redacted] was diligent in seeking information and assistance

The circumstances Ms. [redacted] faced and her unyielding effort to find legal assistance show that she was diligent. Any consideration of diligence "must be fact-intensive and case-specific, assessing the reasonableness of petitioner's actions in the context of his or her particular circumstances." *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011). Maximum feasible diligence is not required, and "[c]ourts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate." *Lugo-Resendez v. Lynch,* 831 F.3d 337, 344-45 (5th Cir. 2016) (citation and quotation marks omitted). Specifically, the Fifth Circuit in *Lugo-Resendez* directed the BIA to "give due consideration to the reality that many departed aliens are poor, uneducated, unskilled in the English language, and effectively unable to follow developments in the American legal system—much less read and digest complicated legal decisions." *Id.* at 345. Those factors are also present in this case. The Court should therefore consider the particular difficulties Ms. [redacted] faced and find that she reasonably diligent in light of her circumstances, including her status as a monolingual Spanish speaker with extremely limited financial resources and only a primary school education.

Ms. [redacted]'s efforts evince that she was diligently seeking legal representation and trying to obtain her mail and change her address, while also pursuing alternative methods to learn about her immigration case. Resp. Decl. ¶¶ 16-18; 28-30. In doing so, Ms. [redacted] "took…action to pursue [her] rights," and was "at least trying to learn whether [she] had any grounds for relief." *Gordillo*, 640 F.3d at 705. However, because of her limited financial resources, Ms. [redacted] was still not aware of a final order of removal or the possibility of filing a motion

to reopen, even after speaking with an attorney in the spring of 2017. Resp. Decl. ¶ 29. Nevertheless, she went further than the clients found diligent in *Gordillo*, as she continued her search for legal counsel until she secured *pro bono* representation. *Id.* ¶¶ 28-31. As soon as Ms. [redacted] learned that she could submit a Motion to Reopen, she diligently prepared this motion and filed it within 180 days of her discovery of the existence of a final order of removal.

The time it took for Ms. [redacted] to find a lawyer willing to assist her, and the corresponding delay in filing the motion, was not for lack of diligence and should not discount the compelling equities in her case. In *Pervaiz v. Gonzales*, the Seventh Circuit clarified, "…the test for equitable tolling, both generally and in the immigration context, is not the length of the delay...it is whether the claimant could reasonably have been expected to have filed earlier." 405 F.3d 488, 490 (7th Cir. 2005). Here, Ms. [redacted] was unaware of the removal order until October 2017 and was unable to access legal assistance before that time due to her financial circumstances. As a result, she could not reasonably have filed this motion earlier.

b. Extraordinary circumstances caused the delay in Ms. [redacted]'s timely filing

The exceptional circumstances that prevented Ms. [redacted] from attending her hearing also merit equitable tolling of the 180-day deadline, and this motion should be considered timely. *See* Section II.A. The Eleventh Circuit has found, "…no material distinction between the 'exceptional circumstances' in the INA regulations and the 'extraordinary circumstance' requirement for equitable tolling." *Avila-Santoyo v. U.S. Atty. Gen.*, 713 F.3d 1357, 1363, n.5 (11th Cir. 2013). Ms. [redacted] should not have been reasonably expected to quickly understand and navigate the legal process associated with her case, especially "bearing in mind that [she] is a foreigner who may, therefore, have more than the average difficulty in negotiating the shoals of American law…" *Pervaiz*, 405 F.3d at 491. Under such circumstances, equitable tolling is plainly

appropriate in order to protect Ms. [redacted], a victim of misinformation from ICE and financial coercion by a manipulative sponsor.

Given Ms. [redacted]'s diligent efforts to fight her case despite extraordinary obstacles beyond her control, this Court should equitably toll the 180-day deadline and reopen the case to correct an injustice to Ms. [redacted] and her minor children.

III. In the Alternative, Ms. [redacted] Merits the Court's Exercise of *Sua Sponte* Authority to Rescind Her *In Absentia* Removal Order

Even if this Court is not persuaded that this matter should be reopened due to the lack of notice or exceptional circumstances, the Court should reopen these proceedings *sua sponte.* An Immigration Judge may at any time reopen a proceeding in which he or she has made a decision. 8 C.F.R. Sec. 1003.23(b)(1). The BIA has held that this *sua sponte* authority is "not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, when enforcing them might result in hardship." *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). *Sua sponte* authority is "an extraordinary remedy reserved for truly exceptional situations." *Matter of G-D-*, 22 I&N Dec. 1132, 1134 (BIA 1999). This case merits this court's exercise of discretion for all of the reasons discussed above and because of the danger they face in El Salvador. If they are forced to return to El Salvador, Ms. [redacted] and her minor children face a particularized and specific threat of murder at the hands of [redacted] as a result of her brother's refusal to join [redacted]

Ms. [redacted]'s case is precisely the type of case in which *sua sponte* reopening is appropriate. Since arriving in the United Sates, Ms. [redacted] has suffered from exceptional and extraordinary circumstances in the form of malicious and coercive withholding of her mail, even though she intended to comply with every immigration requirement and had every incentive to do so. She also received incorrect information from an ICE official, which was the origin of her inability to update her address. She has a strong claim for asylum and has diligently pursued it

since fleeing El Salvador and seeking refuge in the United States. She appeared faithfully at her first ICE check-in upon release from detention. She did not receive notice of her master calendar hearing but, if she had, she would have appeared and continued to pursue her asylum claim.

This case also merits this court's exercise of discretion because Ms. [redacted]'s circumstances – including being indigent, uneducated, a single mother of three, a victim of possibly tortious and unlawful conduct by her sponsor and receiving misinformation from ICE – make her vulnerable and deserving of *sua sponte* reopening. Her diligent contact with *pro bono* legal services providers also favors reopening, because if reopened, she now has *pro bono* counsel to prepare her asylum case.

CONCLUSION

For all of the reasons stated above, Ms. [redacted] respectfully moves this Honorable Court to rescind the *in absentia* removal order that it entered against her and her minor children, [redacted] and [redacted] on January 30, 2017, to reopen their removal proceedings and to concurrently grant their motion to change venue.

Ms. [redacted] and her children have demonstrated that they never received notice and faced exceptional circumstances that prevented them from attending their hearing. Given the extraordinary circumstances Ms. [redacted] faced and her diligent pursuit of her case, her motion to reopen should be considered timely, and her case should be reopened to allow her and her children to pursue their asylum claims.

Dated: [redacted], 2018

Respectfully Submitted,

[redacted]
Pro Bono Counsel for Respondents

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN ANTONIO, TEXAS

In the Matter of	)	
	)	
[redacted]	)	**File No.** [redacted]
	)	
[redacted]	)	**File No.** [redacted]
	)	
[redacted]	)	**File No.** [redacted]
	)	
Respondents	)	
	)	

Hon. Judge [redacted]

Post-Decision Motion

INDEX OF EXHIBITS

Exhibit	Description	Page
A	Declaration of [redacted] ("Resp. Decl.")	[redacted]
B	Declaration of [redacted] ("[redacted]'s Decl.")	
C	Notice to Appear issued November 13, 2016 ("NTA")	
D	Respondent's Form I-589 ("I-589")	
E	Notice of Hearing in Removal Proceedings ("Notice of Hearing")	
F	Declaration of Ms. [redacted] (hereinafter "[redacted] Decl.")	
G	*Karla de Jesus Alfaro-Martinez*, A202 076 417 (BIA May 21, 2015)	
H	*P-R-S-*, AXXX XXX 503 (BIA Sept. 13, 2017)	
I	*Wilson Orlando Escobar*, A095 082 121 (BIA Aug. 14, 2013)	
J	Executive Order 13166	

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN ANTONIO, TEXAS

In the Matter of	)	
	)	
[redacted]	)	**File No.** [redacted]
	)	
[redacted]	)	**File No.** [redacted]
	)	
[redacted]	)	**File No.** [redacted]
	)	
Respondents	)	
	)	

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of Respondents' Motion to Rescind In Absentia Removal Order and Reopen Proceedings, it is HEREBY ORDERED that the motion be _____ because:

___ DHS does not oppose the motion.
___ A response to the motion has not been filed with the court.
___ Good cause has been established for the motion.
___ The court agrees with the reasons stated in the opposition to the motion.
___ Other: _____

Deadlines:

___ The application(s) for relief must be filed by _____.
___ The respondent must comply with DHS biometrics instructions by _____.

_____ _____
Date The Hon. Thomas G. Crossan Jr.

Certificate of Service

This document was served by: [ ] Mail [ ] Personal Service

To: [ ] Alien [ ] Alien c/o Custodial Officer [ ] Atty/Rep [ ] DHS

Date: _____ By: Court Staff_____

CERTIFICATE OF SERVICE

I, [redacted], hereby certify that I served the attached Motion to Rescind In Absentia Removal Order and Reopen Proceedings and supporting documents upon the Office of Chief Counsel, Department of Homeland Security, on [redacted] 2018 by mail to:

Department of Homeland Security
San Antonio Office of Chief Counsel
1015 Jackson-Keller Road, Suite 100
San Antonio, TX, 78213
Phone: (210) 979-4600

[redacted]

[redacted]