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UNITED STATES DEPARTMENT HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
BORDER PATROL
[CITY, STATE] STATION

In the Matter of:	)	
	)	**File No.: A XXX XXX XXX**
XXXXXX XXXXXX, Xxxxxx Xxxxxx,	)	
a.k.a. XXXXXX XXXXXX, Xxxxxx Xxxxxx	)	
	)	
In expedited removal proceedings	)	

MOTION TO REOPEN EXPEDITED REMOVAL PROCEEDINGS AND RESCIND [DATE], 20XX REMOVAL ORDER

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MOTION TO REOPEN EXPEDITED REMOVAL PROCEEDINGS AND RESCIND JUNE XX, 2014 REMOVAL ORDER

The Respondent, Xxxxxx Xxxxxx Xxxxxx Xxxxxx, a.k.a. Xxxxxx Xxxxxx Xxxxxx Xxxxxx, moves Customs and Border Protection ("CBP" or "the Agency") to reopen her expedited removal proceedings and rescind the removal order it issued, pursuant to INA § 235(b)(1), on [DATE], 20XX. As this motion and the attached documents demonstrate, CBP violated its own regulations, the Immigration and Nationality Act, and the Due Process Clause of the United States Constitution in executing the expedited removal order against Ms. Xxxxxx. As such, Ms. Xxxxxx has established the requisite "proper cause" for rescission of the expedited removal order under 8 C.F.R. § 103.5(a).

Ms. Xxxxxx is a 22-year-old transgender woman.[1] Exh. C, (Affidavit of Xxxxxx Xxxxxx [hereinafter "Xxxxxx Aff."]), at ¶ 1. She is a citizen of El Salvador, but she fled her country of origin in 20XX after suffering a lifetime mistreatment on account of her gender identity and perceived sexual orientation, including childhood physical and sexual abuse, death threats, and

[1] The word "transgender" is "an umbrella term for persons whose gender identity, gender expression, or behavior does not conform to that typically associated with the sex to which they were assigned at birth." *Shaw v. District of Columbia*, 944 F. Supp. 2d 43, 48 n.3 (D.D.C. 2013). In Ms. Xxxxxx's case, although assigned the male sex at birth, she identifies as a woman.

several violent attacks by gang members. *Id.* at ¶¶ 1–2. She sought safety and asylum in the United States. *Id.* at ¶¶ 2–3. However, when CBP apprehended Ms. Xxxxxx after she entered the country in [DATE] 2014, the officers issued her an expedited removal order, failed to document her repeatedly stated fear of return and desire to seek asylum, and removed her to El Salvador. *Id.* at ¶ 3; Exh. A, Administrative Record of 2014 Removal Order, at 1–7. After being removed to El Salvador, Ms. Xxxxxx immediately fled the country, and she reentered the United States in April 2016. Exh. C, Xxxxxx Aff., at ¶ 4. CBP then reinstated her prior removal order and released her from custody. Exh. B, Administrative Record of 2016 Removal Order, at 8–12.

CBP's improper execution of an expedited removal order against Ms. Xxxxxx endangered her life by returning her to a country that saw the murder of 25 transgender women last year and three within 72 hours in [DATE] 2017. Exh. F-7, Nelson Renteria, *U.N. Calls for Probe into Violence Against Transgender Women in El Salvador*, Reuters (May 12, 2017), at 163; Exh. F-8, Rossalyn Warren, *El Salvador's Trans Community Lives in Fear*, Vice News (Apr. 28, 2017), at 164. By reinstating that removal order, CBP has permanently barred Ms. Xxxxxx from asylum and permanent residency while heightening her risk of removal to El Salvador once again. *See* INA § 241(a)(5). Because CBP's actions were unlawful and caused Ms. Xxxxxx life-threatening and enduring prejudice, the Agency must rescind the [DATE], 2014 expedited removal order.

I. FACTUAL AND PROCEDURAL HISTORY

[Redacted personal history]

At the XXX Station, Border Patrol Officer Xxxx Xxxxxx inspected Ms. Xxxxxx and processed her for expedited removal. Exh. A, Administrative Record of 2014 Removal Order, at 1–5. Officer Xxxxxx interviewed Ms. Xxxxxx and prepared Form I-867A/B. *Id.* However,

Officer Xxxxxx did not explain the purpose of the interview, Ms. Xxxxxx's rights in the proceedings, the charge of inadmissibility against Ms. Xxxxxx, or the legal protections extended by law to those who fear persecution or torture. Exh. C, Xxxxxx Aff., at ¶ 37. Nor did Officer Xxxxxx read the four prefatory paragraphs contained on Form I-867A, which provide an advisory of rights and consequences. *Id.* During the course of the interview, Ms. Xxxxxx stated that she came to the United States to live with family in [CITY[, Texas because "the gangs in El Salvador made life intolerable" and she was "especially scared because [she] was transgender." *Id.* at ¶ 35. She also explained that she was afraid to return to her country of origin because "transgender people aren't safe in El Salvador." *Id.*

After concluding the interview, Officer Xxxxxx presented Ms. Xxxxxx with Form I-867A/B for her initials and signature. *Id.* at ¶ 36; Exh. A, Form I-867A/B, at 2–5. Ms. Xxxxxx could not read the documents herself because they were printed in English, a language she did not speak. Exh. C, Xxxxxx Aff., at ¶ 36. She asked Officer Xxxxxx to explain the documents to her, but the officer just responded that he needed the forms "to complete [her] file." *Id.* Officer Xxxxxx then told Ms. Xxxxxx where to initial and sign each page. *Id.* He never read the documents to her nor explained their purpose. *Id.* Ms. Xxxxxx initialed and signed the I-867A/B because she "believed that [she] had no other choice." *Id.*

After Officer Xxxxxx questioned Ms. Xxxxxx, he told her to sit down. *Id.* at ¶ 38. A while later, Ms. Xxxxxx again approached Officer Xxxxxx because she wished to clarify her intention to request asylum. *Id.* She explained again that she was afraid to return to El Salvador. *Id.* at ¶ 39. Officer Xxxxxx responded that all Salvadoran nationals wanted to request asylum and that doing so would subject Ms. Xxxxxx to indefinite detention in the United States and could ultimately result in her deportation. *Id.* Ms. Xxxxxx told the officer that she understood but

"wanted to apply for asylum anyway." *Id.* Officer Xxxxxx told Ms. Xxxxxx to sit down again and said that he would call her again. *Id.* He never did. *Id.* Ms. Xxxxxx believed that the officer had done something to initiate the asylum process. *Id.* He had not. Exh. A, Administrative Record of 2014 Removal Order, at 1–7. On [DATE], 2014, Immigration and Customs Enforcement removed Ms. Xxxxxx to El Salvador pursuant to an expedited removal order issued by Officer Xxxxxx and Supervisory Border Patrol Agent Xxxx Xxxxxxx on [DATE], 2014. *Id.*

Once more in El Salvador, Ms. Xxxxxx was afraid for her life and again fled the country almost immediately. Exh. C, Xxxxxx Aff., at ¶ 45. With few financial resources, Ms. Xxxxxx had no choice but to find work in Mexico to pay for her transit to the United States border. *Id.* at ¶ 46. While in Mexico, Ms. Xxxxxx suffered frequent homophobic ridicule, sexual harassment, and threats. *Id.* at ¶¶ 36, 48. She also spent some five months detained in the custody of Mexican immigration authorities, who eventually released her when they could not confirm her Salvadoran nationality. *Id.* at ¶ 47. Ms. Xxxxxx was finally able to reenter the United States on [DATE], 2016. *Id.* at ¶ 50; Exh. B, Administrative Record of 2016 Removal Order, at 8–12.

On [DATE], 2016, Border Patrol apprehended Ms. Xxxxxx and inspected and processed her at the [CITY], Texas Station. Exh. B, Administrative Record of 2016 Removal Order, at 8–12. Although CBP reinstated Ms. Xxxxxx's prior removal order, the officers treated Ms. Xxxxxx respectfully and acknowledged her stated fear of return to El Salvador. *Id.*; Exh. C, Xxxxxx Aff., at ¶ 51. Ms. Xxxxxx cooperated with CBP in investigating her smuggler, signing a photo spread to identify the man. *Id.* at ¶ 52; Exh. B, Photo Spread, at 13. DHS released Ms. Xxxxxx from custody on [DATE], 2016 under an Order of Supervision. Exh. D, Order of Supervision, at 28–31. After her release, Ms. Xxxxxx moved to [City] to live with her brother, who had recently relocated from [CITY]. Exh. C, Xxxxxx Aff., at ¶ 53.

While living in the United States, Ms. Xxxxxx has continued to timely report to ICE in accordance with her Order of Supervision. *Id.* at ¶¶ 53, 56; Exh. D, Order of Supervision, at 28–31. She has retained counsel to assist her in seeking permission to remain in the United States. Exh. C, Xxxxxx Aff., at ¶ 58. On [DATE], 2017, the [CITY] Asylum Office conducted a reasonable-fear interview with Ms. Xxxxxx. Exh. F, Form I-899, Record of Determination/Reasonable Fear Worksheet, at 70. The examining Asylum Officer considered Ms. Xxxxxx's testimony concerning her prior mistreatment in El Salvador to be credible and determined that she had suffered past persecution and had a reasonable fear of future persecution if removed to El Salvador. *Id.* at 72. The asylum officer referred Ms. Xxxxxx to the immigration court for adjudication of her application for withholding of removal. Exh. D, DHS Form I-863, Notice of Referral to Immigration Judge, at 25–26. The [CITY] Immigration Court has scheduled an initial hearing for [DATE], 2018. Exh. D, Notice of [DATE], 2018 Hearing, at 24.

In [CITY], Ms. Xxxxxx has enjoyed for the first time feeling "safe and protected" and free from "constant discrimination." Exh. C, Xxxxxx Aff., at ¶ 54. Nonetheless, on one occasion, a Salvadoran man claiming to be a gang member contacted Ms. Xxxxxx via Facebook, called her a faggot, and threatened to kill her. *Id.* at ¶ 55; Exh. F, Facebook Threats, at 89–103. If removed to El Salvador, Ms. Xxxxxx fears "being beaten, raped, or killed by gangs or other transphobic people." Exh. C, Xxxxxx Aff., at ¶ 59. If permitted to remain in the United States, Ms. Xxxxxx looks forward to improving her English, studying for her G.E.D., and securing a cosmetology license. *Id.* at ¶ 62. Ms. Xxxxxx dreams of becoming a lawful permanent resident of the United States and attaining "the same rights and responsibilities as everyone else." *Id.*

II. STATEMENT OF JURISDICTION

DHS officers have authority, under 8 C.F.R. § 103.5, to adjudicate motions to reopen or reconsider previously issued expedited removal orders. *See Escoto–Castillo v. Napolitano*, 658 F.3d 864, 866 (8th Cir. 2011) ("As the government notes, . . . [the petitioner] could have filed a timely motion to reopen the [expedited] removal proceedings."). Subject to several exceptions not relevant here,[2] the regulatory framework extends a general grant of authority to DHS officials over motions to reopen filed by the "affected party." *See* 8 C.F.R. § 103.5; *see also Liu v. Allen*, 894 A.2d 453, 456 n.6 (D.C. 2006) (explaining that 8 C.F.R. § 103.5 "permit[s] INS officers to reconsider decisions"). In this instance, the "affected party" is the Respondent, Ms. Xxxxxx, to whom CBP issued an expedited removal order in contravention of its own regulations and in violation of her constitutional and statutory rights. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) (defining "affected party" to mean, *inter alia*, "the person or entity with legal standing in a proceeding"). As such, CBP has jurisdiction to consider this motion—indeed the Agency has previously acknowledged its jurisdiction in similar cases by adjudicating motions to reopen expedited removal orders. Exh. G, Prior CBP Rescissions, at 170–182 [3]

Venue for a motion to reopen a decision by the Department of Homeland Security is proper with "the official who made the latest decision in the proceeding." 8 C.F.R. § 103.5(a)(1)(ii). In this motion, Ms. Xxxxxx seeks reopening of the [CITY] Border Patrol Station's decision to issue her an expedited removal order on [DATE], 2014. Therefore, the

[2] Excluded from the scope of 8 C.F.R. § 103.5 are cases (1) where the Board of Immigration Appeals has jurisdiction; (2) where the Executive Office for Immigration Review has jurisdiction, 8 C.F.R. § 3; (3) involving special agricultural workers, 8 C.F.R. § 210; (4) and involving legalization under INA § 245A, 8 C.F.R. § 245A.
[3] The validity of Ms. Xxxxxx's [DATE], 2014 expedited removal order is not presently the subject of any judicial proceeding. *See* 8 C.F.R. § 103.5(a)(1)(iii)(C).

[CITY] Border Patrol Station is the proper venue for adjudication of this motion to reopen. *See* 8 C.F.R. § 103.5(a)(1)(ii).[4]

A motion to reopen a DHS decision is timely if filed within 30 days of the decision, or if the movant "demonstrate[s] that the delay was reasonable and was beyond [her] control." 8 C.F.R. § 103.5(a)(1)(i). In this case, Ms. Xxxxxx has filed her motion as soon as possible after obtaining, with the assistance of counsel, the administrative record of her prior expedited removal. Exh. E, Affidavit of [Attorney Name] ("Attorney Aff."), at ¶ 9. Ms. Xxxxxx retained undersigned counsel in [DATE] 2017. *Id.* at ¶ 2. Prior to obtaining legal representation, Ms. Xxxxxx did not know that she had a prior removal order, much less the procedure for rescinding it. Exh. C, Xxxxxx Aff., at ¶ 58. Once retained by Ms. Xxxxxx, counsel immediately began fact investigation, attempting to obtain the record of Ms. Xxxxxx's expedited removal order by filing Freedom of Information Act ("FOIA") requests with CBP and U.S. Citizenship and Immigration Services. Exh. E, Attorney Aff., at ¶¶ 3–5.

On [DATE], 2017, CBP responded to counsel's initial FOIA request, disclosing Forms I-213, Record of Deportable/Inadmissible Alien related to CBP's 2014 and 2016 apprehensions of Ms. Xxxxxx, and no other documents. *Id.* at ¶ 6. Counsel filed an administrative appeal of CBP's disposition of the FOIA request on [DATE], 2017. *Id.* at ¶ 7. On [DATE], 2017, CBP granted the appeal, but disclosed just two additional documents: (1) an unsigned Form I-867A, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act, dated [DATE], 2014, and (2) an unsigned Form I-215B, Record of Sworn Statement in Affidavit Form, dated [DATE], 2016. *Id.* Finally, on [DATE], 2017, USCIS responded to counsel's FOIA request, disclosing,

[4] If CBP concludes that venue is proper with the official having jurisdiction over Ms. Xxxxxx's current place of residence, Ms. Xxxxxx requests that the [CITY] Border Patrol Station forward this motion to the [CITY] CBP Field Office. *See* 8 C.F.R. § § 103.5(a)(1)(iii)(E).

among other documents, Form I-860, Notice and Order of Expedited Removal, dated [DATE], 2014, and Form I-867A/B, also dated [DATE], 2014. *Id.* at ¶ 8.

Ms. Xxxxxx could not have filed this motion to reopen without first obtaining the administrative record of the prior removal, including the order itself and Form I-867A/B. *See* 8 C.F.R. § 103.5(a)(2) ("A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."); *see also* N.Y. Rules of Prof. Conduct, Rule 1.1, cmt. 5 ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem . . . . It also includes adequate preparation."). Ms. Xxxxxx now files this motion to reopen within 30 days of obtaining the necessary administrative records. *See* 8 C.F.R. § 103.5(a)(1)(i).

Ms. Xxxxxx's decision to seek legal representation and obtain the record of the removal order she challenges was reasonable, and any delay related to the timing and content of various DHS disclosures under the FOIA was beyond her control. Therefore, CBP should excuse Ms. Xxxxxx from the 30-day filing deadline and consider this motion timely filed.[5]

III. ARGUMENT

A motion to reopen "must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." 8 C.F.R. § 103.5(a)(2). The DHS officer having jurisdiction may grant a motion to reopen "for proper cause shown." *Id.* §

[5] Even should CBP treat this filing as a motion to reconsider, the Agency should still consider it timely filed. Although the reconsideration provision of section 103.5(a) does not contain an express exception to the 30-day filing deadline, longstanding principles of equitable tolling apply. *See Lugo–Resendez v. Lynch*, 831 F.3d 337, 344 (5th Cir. 2016) (ordering the Board of Immigration Appeals to apply equitable tolling to motions to reopen and toll the filing deadline if the movant "pursued his rights with reasonable diligence, not maximum feasible diligence" and established "that an extraordinary circumstance beyond his control prevented him from complying with the applicable deadline" (internal quotation marks omitted)); *Mendez–Alcaraz v. Gonzales*, 464 F.3d 842, 845 (9th Cir. 2006) (explaining that the filing deadline for a motion to reconsider is equitably tolled if, "despite all due diligence, the party invoking equitable tolling is unable to obtain vital information bearing on the existence of the claim"). Therefore, for the same reasons that this filing is a timely motion to reopen, so too is it timely if treated as a motion to reconsider.

103.5(a)(1)(i). Here, Ms. Xxxxxx has provided a sworn affidavit that, together with the other attached supporting documents, demonstrates regulatory, statutory, and constitutional violations that constitute proper cause to reopen Ms. Xxxxxx's expedited removal proceedings, rescind the [DATE], 2014 expedited removal order, and subsequently rescind the [DATE], 2016 reinstated removal order.

A. CBP must reopen Ms. Xxxxxx's expedited removal proceedings and rescind her [DATE] 2014 removal order because the order's issuance and execution violated the agency's own regulations, deprived Ms. Xxxxxx of due process of law and her statutory right to apply for asylum, and caused Ms. Xxxxxx life-threatening and ongoing prejudice.

Although CBP's issuance of an expedited removal order to Ms. Xxxxxx on [DATE], 2014 appears procedurally regular from the administrative record, those government documents are unreliable because they contain numerous material factual inaccuracies. As Ms. Xxxxxx's affidavit and other supporting documents demonstrate, in issuing the order, CBP violated its own regulations that set forth the mandatory procedural steps in expedited removal proceedings. When CBP failed to refer Ms. Xxxxxx to an asylum officer before Ms. Xxxxxx's removal on [DATE], 20XX, it again violated its own regulations. These actions also denied Ms. Xxxxxx rights guaranteed to her under the Due Process Clause and the Immigration and Nationality Act. Moreover, these procedural violations caused Ms. Xxxxxx prejudice by returning her to a country where she had suffered and continued to fear persecution and by rendering her permanently ineligible for asylum. For these reasons, the expedited removal order cannot stand, and CBP should rescind the order pursuant to 8 C.F.R. § 103.5(a).

1. The administrative record of Ms. Xxxxxx's prior expedited removal order is unreliable because it contains numerous material inaccuracies.

Records produced by DHS lose the presumption of reliability ordinarily afforded to government documents when they contain "information that is incorrect or was obtained by

coercion or duress." *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988); *accord Bustos–Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990); *Espinoza v. INS*, 45 F.3d 308, 311 (9th Cir. 1995). In fact, a form that misstates significant information deserves "little (if any) weight." *Murphy v. INS*, 54 F.3d 605, 610–611 (9th Cir. 1995). Whether due to careless drafting or information from an untrustworthy source, a form that is materially contradicted by other evidence is unreliable. *See id.* (source's "ulterior motive" against the respondent cast doubt on the validity of the I-213); *Pouhova v. Holder*, 726 F.3d 1006, 1014 (7th Cir. 2013) (discrepancies demonstrated that the I-213 was "drafted carelessly" and "not inherently reliable"); *Lopez–Chavez v. INS*, 259 F.3d 1176, 1184 (9th Cir. 2001) (materially contradictory evidence cast doubt on the reliability of the I-213).

Here, the record of Ms. Xxxxxx's expedited removal order consists primarily of Form I-867A/B. *See* 8 C.F.R. § 235.3(b)(2)(i) (requiring the inspecting immigration officer to use Form I-867A/B to conduct expedited removal proceedings). Those forms contain numerous material factual inaccuracies. Most crucially, the Form I-867A/B that Officer Xxxxxx completed indicated that Ms. Xxxxxx did not express fear of persecution or torture if returned to El Salvador and that the purpose of her entry to the United States was "to work and live in [CITY]." Exh. A, Form I-867A/B, at 2–5. These assertions are false. In fact, Ms. Xxxxxx left El Salvador with the express purpose of seeking protection from persecution in the United States, and she repeatedly indicated to Officer Xxxxxx that she was afraid to return to her country of origin. Exh. C, Xxxxxx Aff., at ¶¶ 28, 31, 35, 38–39.

That the omission of Ms. Xxxxxx's fear of removal on Form I-867A/B reflects Officer Xxxxxx's failure to record it, rather than Ms. Xxxxxx's failure to express it, is buttressed by the form's numerous other material inaccuracies. Among these are the following statements: (1) that

Ms. Xxxxxx's mother lived in Mexico (she in fact has resided her entire life in El Salvador); (2) that Ms. Xxxxxx entered the United States on [DATE], 20XX at 4:00 AM (she actually entered several days prior); (3) that Ms. Xxxxxx entered the United States by crossing the [REDACTED] "on a raft" (she swam across the river); (4) that Ms. Xxxxxx was "going to [CITY]" (she was going to [CITY], Texas); (5) and that Ms. Xxxxxx "planned on residing here for two years" (she in fact intended to seek permanent protection from persecution in the United States). *Compare* Exh. A, Form I-867A, at 2–5 *with* Exh. C, Xxxxxx Aff., at ¶¶ 5, 28, 32–33, 35. Because Form I-867A/B contains so much incorrect information, it is unreliable.[6] *See, e.g.*, *Barcenas*, 19 I&N Dec. at 611. Therefore, the Agency should credit Ms. Xxxxxx's enclosed sworn affidavit in discerning the factual circumstances of her expedited removal proceedings. *See United States v. Raya–Vaca*, 771 F.3d 1195, 1205 (9th Cir. 2014) (crediting the petitioner's signed declaration in adjudicating a collateral attack on an expedited removal order).

2. CBP's execution of an expedited removal order against Ms. Xxxxxx violated the Agency's own regulations, including 8 C.F.R. § 235.3(b)(2)(i) and 8 C.F.R. § 235.3(b)(4).

A removal effected in violation of DHS's own regulations is invalid and subject to vacatur. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (1954); *Bridges v. Wixon*, 326 U.S. 135, 151, 156 (1945). In *Accardi*, the Court reversed a removal order where the Attorney General circulated to members of the Board of Immigration Appeals a list of "unsavory characters," including the petitioner, whom he "planned to deport." 347 U.S. at 267. The Board found the petitioner deportable and denied him discretionary relief. *Id.* at 263. On

[6] In addition to the record's various factual inaccuracies, it also contains other mistakes. For instance, Form I-867B indicates that the entire sworn statement is composed of "1 pages." In fact, the statement is four pages long. This inaccuracy further undermines the document's reliability. *See United States v. Raya–Vaca*, 771 F.3d 1195, 1205 (9th Cir. 2014) (taking into account an identical error on Form I-867B in concluding that the inspecting officer did not comply with the regulations in issuing an expedited removal order).

review, the Court concluded that the Attorney General, by announcing his views on a pending proceeding, effectively "dictat[ed] the Board's decision." *Id.* at 267. The Court held that this elimination of the Board's discretionary authority—discretion that binding agency regulations required the Board to exercise—invalidated the deportation order. *Id.* at 267–68.

Today, *Accardi* "stands for the unremarkable proposition that an agency must abide by its own regulations." *Richardson v. Joslin*, 501 F.3d 415, 418 (5th Cir. 2007) (quoting *Chevron Oil Co. v. Andrus*, 588 F.2d 1383, 1386 (5th Cir. 1979)). Crucially, "an agency's failure to afford an individual procedural safeguards required under its own regulations may result in the invalidation of the ultimate administrative determination." *Richardson*, 501 F.3d at 418; *accord Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1041 n.48 (5th Cir. 1982) ("[A]gency deviation from its own regulations and procedures may justify judicial relief . . . ."). Courts have applied this principle broadly to invalidate administrative actions in a variety of contexts, particularly where the regulatory violation prejudices the protected party. *See, e.g.*, *United States v. Morgan*, 193 F.3d 252, 267–68 (4th Cir. 1999) (forcible administration of antipsychotic medication to an incompetent criminal defendant); *Alamo Express, Inc. v. United States*, 613 F.2d 96, 98 (5th Cir. 1980) (Interstate Commerce Commission grant of emergency temporary authority to a carrier); *United States v. Calderon–Medina*, 591 F.2d 529, 532 (9th Cir. 1979) (collateral attack on a prior deportation order in a prosecution for unlawful reentry). The Department of Justice has also accepted the *Accardi* doctrine's application to removal proceedings. *See Matter of Garcia–Flores*, 17 I&N Dec. 325, 329 (BIA 1980); *see also Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980).

i. In issuing Ms. Xxxxxx an expedited removal order on [DATE], 20XX, CBP violated 8 C.F.R. § 235.3(b)(2)(i), requiring the inspecting officer to read the contents of Form I-867A to the respondent, to read the respondent's sworn statement to her, and to advise the respondent of the charges against her and provide the opportunity to respond in the sworn statement.

Under the controlling regulations, an immigration officer conducting expedited removal proceedings must take the respondent's sworn statement using Form I-867A. 8 C.F.R. § 235.3(b)(2)(i). Before beginning the interview, the inspecting officer "shall read (or have read) to the alien all information contained on Form I-867A." *Id.* Under CBP policy, this includes advising the respondent of "the serious nature and impact of the expedited removal process" and reading the "statement of rights and consequences contained on the first page of Form I-867A." Exh. G, CBP Inspector's Field Manual, at 210. After recording the respondent's statement on Form I-867A/B, the officer must then "have the alien read (or have read to him or her) the statement" before requesting the respondent's initials and signature. 8 C.F.R. § 235.3(b)(2)(i). The officer must then advise the respondent of the charges against her and provide her "an opportunity to respond to those charges in the sworn statement." *Id.* Finally, the officer must seek supervisory concurrence and serve the expedited removal order on the respondent. *Id.*

When Officer Xxxxxx issued Ms. Xxxxxx an expedited removal order on [DATE], 20XX, he did not read her "all the information contained on Form I-867A." Crucially, he did not read her the four paragraphs that explain the purpose of the interview, the respondent's rights, and the opportunity to pursue asylum. Exh. C, Xxxxxx Aff., at ¶ 37 ("The officer who questioned me never told me what the purpose of the interview was or what rights I had. The officer didn't explain that I could request to speak to an asylum officer about my case."). After concluding the interview, Officer Xxxxxx did not read the contents of the I-867A/B to Ms. Xxxxxx. *Id.* at ¶ 36 ("The papers were in English, and I couldn't read them. . . . [The officer]

didn't tell me what I was agreeing to, and he never read the papers to me in Spanish."). Naturally, had Officer Xxxxxx read the I-867A/B to Ms. Xxxxxx, she would have noticed and corrected the form's numerous inaccuracies. Finally, Officer Xxxxxx did not inform Ms. Xxxxxx of the charge of inadmissibility against her or provide her the opportunity to respond in the I-867A/B. *Id.* at ¶ 37. As such, Officer Xxxxxx's issuance of the expedited removal order to Ms. Xxxxxx evinces no fewer than three violations of the prescribed regulatory procedures.

ii. In failing to refer Ms. Xxxxxx to an asylum officer prior to execution of the expedited removal order on [DATE] 20XX, CBP violated 8 C.F.R. § 235.3(b)(4), which requires the inspecting officer to refer the respondent for a credible-fear interview if she expresses a fear of persecution, torture, or removal.

DHS regulations provide that if the respondent expresses an intention to apply for asylum or a fear of persecution or torture during the expedited removal process, "the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer." 8 C.F.R. § 235.3(b)(4). Written CBP policies counsel inspecting officers to "take special care to ensure that . . . aliens who fear removal from the United States are given every opportunity to express any concerns." Exh. G, CBP Inspector's Field Manual, at 210. CBP requires its officers to "consider verbal as well as nonverbal cues" and to refer for a credible-fear interview a respondent who expresses fear of removal "in any fashion or at any time." *Id.* at 211. In addition, the regulations demand that the officer include "sufficient information in the sworn statement to establish and record that the alien has indicated such intention, fear, or concern." 8 C.F.R. § 235.3(b)(4). CBP policy similarly requires the compilation of a "complete, accurate record of removal . . . [so] that any expedited removal be justifiable and non-arbitrary." Exh. G, CBP Inspector's Field Manual, at 210.

While interviewing Ms. Xxxxxx, Officer Xxxxxx did not record her repeatedly stated fear of return to El Salvador on the I-867A/B. Exh. C, Xxxxxx Aff., at ¶ 35, 38–39; Exh. A, Form I-867A/B, at 2–5. And he did not refer Ms. Xxxxxx—during the interview or at any other time—for a credible-fear interview. Exh. A, Form I-867A/B, at 2–5. As a result, DHS removed Ms. Xxxxxx from the United States on [DATE], 20XX without providing her the opportunity to establish her eligibility for asylum—in direct contravention of the Agency's own binding regulations and published policies and procedures.

iii. CBP's violation of its own regulations during Ms. Xxxxxx's expedited removal proceedings require rescission of the [DATE], 20XX removal order.

Under circumstances similar to those of Ms. Xxxxxx's case, courts have invalidated expedited removal orders issued in violation of DHS regulations. *See Raya–Vaca*, 771 F.3d at 1211; *United States v. Grande*, 623 Fed. Appx. 858, 861 (9th Cir. 2015). In *Raya–Vaca*, the court invalidated an expedited removal order where the defendant provided a signed declaration stating that the inspecting officer did not explain the nature of the proceedings, did not inform him of the charge he faced, and "neither read to him nor permitted him to review the information in the sworn statement." 771 F.3d at 1205. Furthermore, although Raya–Vaca "initialed the Record of Sworn Statement and signed the Jurat, he did not, according to his declaration, understand what he was signing." *Id.* Like in *Raya–Vaca*, the respondent in *Grande* provided a declaration explaining that the inspecting officer did not advise him of the charge of inadmissibility and did not allow him to read his sworn statement before he signed it. 623 Fed. Appx. at 860. Relying on its decision in *Raya–Vaca*, the court held that the expedited removal order issued to Grande violated DHS regulations and was thus invalid. *Id.* at 861.

The nature of the regulatory violations in Ms. Xxxxxx's case are almost identical to those in *Raya–Vaca* and *Grande*. In all three cases, among other regulatory violations, CBP failed to

advise the respondent of the charge of inadmissibility or permit the respondent to review the sworn statement before signing it. An expedited removal order issued under such circumstances is invalid. *See Raya–Vaca*, 771 F.3d at 1211. Thus, CBP must rescind the expedited removal order it issued to Ms. Xxxxxx.

3. CBP's issuance of an expedited removal order to Ms. Xxxxxx violated her constitutional right to due process and statutory right to a credible-fear interview.

The Due Process Clause of the Fifth Amendment to the United States Constitution protects the rights of noncitizens physically present in the country. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); *United States v. Benitez–Villafuerte*, 186 F.3d 651, 656 (5th Cir. 1999) ("Aliens who have entered the United States unlawfully are assured the protection of the Fifth Amendment due process clause."). Due-process protections extend even to noncitizens subject to final orders of removal. *Zadvydas*, 533 U.S. at 693–94.

At a bare minimum, a noncitizen in a summary removal proceeding is entitled to "notice of the charges against him, a hearing before an executive or administrative tribunal, and a fair opportunity to be heard." *Benitez–Villafuerte*, 186 F.3d at 657 (citing *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597–58 (1953)). "Federal regulations exist that set forth explicitly the procedures for the expedited removal of inadmissible aliens." *United States v. Lopez–Vasquez*, 227 F.3d 476, 485 (5th Cir. 2000) (citing 8 C.F.R. § 235.3). Only when the agency complies with

these regulatory procedures do expedited removal proceedings under INA § 235(b) comport with due process. *C.f. id.* (finding that the agency did not deny the petitioner's due-process rights because it complied with 8 C.F.R. § 235.3 in issuing him an expedited removal order under INA § 235(b)); *see also Benitez–Villafuerte*, 186 F.3d at 657 (concluding that expedited removal under INA § 238(b) conforms to due process only "if INS complied with the statutory mechanism"); *United States v. Sanchez–Cervantes*, No. SA-12-CR-4(1)-XR, 2012 U.S. Dist. LEXIS 53870, at *23 (W.D. Tex. Apr. 17, 2012) (considering expedited removal under INA § 235(b) and noting that "the Government concedes that an alien is entitled to at least whatever process has been created by Congress or the Executive.").

Because CBP repeatedly violated its own regulations in issuing Ms. Xxxxxx an expedited removal order and failing to refer her to an asylum officer prior to the order's execution, the Agency necessarily also violated her due-process rights. The expedited removal regulations ensure the respondent's right to notice and an opportunity to respond, and they therefore protect "fundamental due process rights." *Raya–Vaca*, 771 F.3d at 1206. Indeed, an immigration officer's failure to advise the respondent in expedited removal proceedings of the charge against her or to permit her to review the sworn statement violates due process. *Id.* Therefore, CBP violated Ms. Xxxxxx's due-process rights during her expedited removal proceedings.

In addition to violating Ms. Xxxxxx's due-process rights, CBP's issuance and execution of an expedited removal order also denied her the statutory right to apply for asylum and for withholding of removal. Although asylum is a discretionary form of relief from removal, the Act confers on noncitizens the right to apply for it. *Haitian Refugee Center*, 676 F.2d at 1038 ("Congress and the executive have created, at a minimum, a constitutionally protected right to petition our government for political asylum."); *Matter of C–B–*, 25 I&N Dec. 888, 890–91 (BIA

2012) (discussing the respondent's "right to apply for asylum"); *see also* INA § 208(a)(1) ("Any alien who is physically present in the United States . . . irrespective of such alien's status, may apply for asylum."). Noncitizens also enjoy the "right to seek withholding of removal or protection under the Convention Against Torture." *Ramirez–Mejia v. Lynch*, 813 F.3d 240, 241 (5th Cir. 2016). And unlike asylum, withholding of removal is a statutory entitlement, the denial of which may contravene the United States's international treaty obligations. *See id.*

By failing to refer Ms. Xxxxxx for a credible-fear interview before execution of the removal order, CBP denied her the opportunity in 20XX to establish her eligibility for asylum and for withholding of removal. Ms. Xxxxxx's removal thus violated her right to apply for relief from removal under the Immigration and Nationality Act.

4. CBP's execution of an expedited removal order against Ms. Xxxxxx caused her prejudice by denying her the opportunity to seek asylum and withholding of removal, forms of relief for which she was eligible and had meritorious claims, and permanently barring her from eligibility for asylum.

A noncitizen may demonstrate that she suffered prejudice as the result of a prior erroneous removal by showing "that there was a reasonable likelihood that but for the errors complained of the [noncitizen] would not have been deported." *United States v. Estrada–Trochez*, 66 F.3d 733, 735 (5th Cir. 1995) (quoting *United States v. Encarnacion–Galvez*, 964 F.2d 402, 407 (5th Cir. 1992)). In other words, the noncitizen must show that, at the time of issuance of the order, she had "plausible grounds for relief." *Raya–Vaca*, 771 F.3d at 1206; *accord Benitez–Villafuerte*, 186 F.3d at 659 (explaining that there is no prejudice if the prior removal proceeding "could not have yielded a different result").

Here, had CBP conducted Ms. Xxxxxx's expedited removal proceedings in accordance with its own regulations, the Immigration and Nationality Act, and the Due Process Clause, Ms. Xxxxxx would almost certainly not have been removed. To the contrary, if the inspecting CBP

officer had acknowledged Ms. Xxxxxx's stated fear of return to El Salvador, he would have referred her to an asylum officer for a credible-fear interview. *See* 8 C.F.R. § 235.3(b)(4). The asylum officer would undoubtedly have concluded that Ms. Xxxxxx faced a credible fear of persecution or torture and issued a positive credible-fear finding. *See* Exh. F, Form I-899, Record of Determination/Reasonable Fear Worksheet, at 70–75. Finally, the positive credible-fear finding would have triggered issuance of a Notice to Appear for "full consideration of the asylum and withholding of removal claim in proceedings under section 240 of the Act." 8 C.F.R. § 208.30(f). In other words, if CBP had followed its own procedures and the dictates of statute and due process, Ms. Xxxxxx would have been able to present her asylum case to an immigration judge.

Not only would Ms. Xxxxxx have had the opportunity to apply for asylum if CBP had referred her for a credible-fear interview, the immigration judge would likely have granted her relief. To demonstrate eligibility for asylum, an applicant must simply show that she faces a "reasonable possibility"—that is, as low as a ten-percent chance—of future persecution on account of, *inter alia*, her membership in a particular social group. *See INS v. Cardoza–Fonseca*, 480 U.S. 421, 431, 440 (1987); *Immigr. and Naturalization Serv. v. Stevic*, 467 U.S. 407, 424–25 (1984); INA §§ 101(a)(42)(A); 208(b)(1). The applicant must also show that she merits a favorable exercise of discretion. *Cardoza–Fonseca*, 480 U.S. at 441; *Matter of Pula*, 19 I&N Dec. 467, 471 (BIA 1987).

As a transgender woman, Ms. Xxxxxx is a member of a particular social group. *See, e.g.*, *Avendano–Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015) (transgender individuals are members of a particular social group); *see also Matter of Toboso–Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990) (same for gay men). On account of her transgender identity, Ms. Xxxxxx suffered

childhood sexual and physical abuse and two violent attacks by strangers—one in which her assailants attempted to burn her to death and another in which the attackers beat her, tried to rape her with an object, and threw her from a bridge. Exh. C, Xxxxxx Aff., at ¶¶ 11–26. In each incident, Ms. Xxxxxx's assailants called her homophobic slurs, demonstrating that hatred of LGBT people motivated the attacks. *Id.* These incidents—individually, and particularly when considered cumulatively—constitute persecution. *See Matter of S–A–*, 22 I&N Dec. 1328, 1335 (BIA 2000) (repeated physical assaults are persecution); *Matter of O–Z– & I–Z–*, 22 I&N Dec. 23, 25–26 (BIA 1998) (repeated physical attacks, harassment, threats, and humiliation, considered cumulatively, constitute persecution); *see also Avendano–Hernandez*, 800 F.3d at 1079 ("Rape and sexual abuse due to a person's gender identity or sexual orientation . . . rises to the level of torture . . . .").

Based on Ms. Xxxxxx's testimony during her [DATE], 2017 reasonable-fear interview, Asylum Officer Xxxxx Xxxx also concluded that Ms. Xxxxxx had suffered past persecution on account of her membership in a particular social group. Exh. F, Form I-899, Record of Determination/Reasonable Fear Worksheet, at 70–75. Officer Xxxx found that Ms. Xxxxxx's testimony was "consistent, detailed, and plausible," and thus credible. *Id.* She determined that Ms. Xxxxxx's experience of childhood verbal, sexual, and physical abuse, public humiliation, death threats, beatings and other violent attacks, and attempted rape rose to the level of past persecution on account of her membership in a particular social group. *Id.* Officer Xxxx concluded that Ms. Xxxxxx faced "a reasonable possibility of suffering harm constituting persecution" in El Salvador. *Id.* As a result, Officer Xxxx referred Ms. Xxxxxx to the immigration judge for full consideration of her withholding claim. Exh. D, DHS Form I-863, Notice of Referral to Immigration Judge, at 25–26.

Because, as Officer Xxxx concluded, Ms. Xxxxxx has suffered past persecution, she enjoys a regulatory presumption of future persecution. *See* 8 C.F.R. §§ 208.13(b)(1); 208.16(b)(1). Moreover, country-conditions materials demonstrate that the threat to Ms. Xxxxxx's life in El Salvador is pervasive and ongoing. According to the U.S. Department of State, "public officials, including police, engage[] in violence and discrimination against LGBTI persons" in El Salvador. Exh. F-1, Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *El Salvador Country Reports on Human Rights Practices – 2016* (Mar. 3, 2017), at 137. In fact, half of transgender women in the country report receiving death threats. Exh. F-2, Office of the High Commissioner for Human Rights, United Nations, *UN Rights Office Urges Protection for Salvadoran LGBTI Community* (May 12, 2017), at 145. In 2016, 25 transgender women were murdered in El Salvador; in February 2017, three transgender women were killed over the span of just 72 hours. Exh. F-7, Renteria, *U.N. Calls for Probe*, at 163; Exh. F-8, Warren, *El Salvador's Trans Community Lives in Fear*, at 164. Nonetheless, the Salvadoran government has yet to prosecute a single person for the hate-motivated murder of an LGBT person. Exh. F-1, *El Salvador Country Reports*, at 137. In this climate of pervasive violence against LGBT people—and transgender women in particular—and impunity for their attackers, Ms. Xxxxxx would be certain to suffer future persecution if she returned to El Salvador.

In light of the overwhelming evidence that Ms. Xxxxxx would suffer persecution if removed to El Salvador, the immigration judge hearing her case in 20XX would have awarded her a discretionary grant of asylum. *See Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987) (holding that "the danger of persecution should generally outweigh all but the most egregious of adverse factors" in the discretionary determination"); *Zuh v. Mukasey*, 547 F.3d 504, 507 (4th Cir. 2008) (describing discretionary denials of asylum as "exceeding rare" and "generally based

on egregious conduct by the applicant"). The only reason that Ms. Xxxxxx did not receive asylum when she entered the United States in 20XX is that CBP erroneously and unlawfully removed her from the country without the opportunity to present her case.

Importantly, CBP's erroneous execution of the expedited removal order not only deprived Ms. Xxxxxx of the opportunity to seek relief from removal in 20XX, it effectively renders Ms. Xxxxxx permanently ineligible for asylum. When Ms. Xxxxxx, having no other choice to escape persecution, reentered the United States in 2016, CBP reinstated her 20XX expedited removal order. Exh. B, Administrative Record of 2016 Removal Order, at 8–12. Reinstatement of the removal order makes Ms. Xxxxxx ineligible for asylum. *See* INA § 241(a)(5); 8 C.F.R. § 208.31(e), (g)(2); *Garcia v. Sessions*, 856 F.3d 27, 41 (1st Cir. 2017); *Cazun v. Ag United States*, 856 F.3d 249, 261 (3d Cir. 2017); *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1082 (9th Cir. 2016*); Jimenez–Xxxxxx v. United States AG*, 821 F.3d 1307, 1310 (11th Cir. 2016); *Ramirez–Mejia v. Lynch*, 794 F.3d 485, 491 (5th Cir. 2015); *Herrera–Molina v. Holder*, 597 F.3d 128, 139 (2d Cir. 2010).

Ms. Xxxxxx's ineligibility for asylum prejudices her because "asylum affords broader benefits" than withholding of removal. *Cardoza–Fonseca*, 480 U.S. at 428 n.6. Asylum prevents altogether the issuance of a removal order, *Ramirez–Mejia*, 813 F.3d at 241, and offers a pathway to permanent residency, INA § 209(b); *Matter of Salim*, 18 I&N Dec. 311, 315 (BIA 1982). "In contrast, withholding of removal and CAT protection do not bar removal generally, but rather they bar removal to a designated country." *Ramirez–Mejia*, 813 F.3d at 241. Once granted withholding, a noncitizen is eligible for work authorization, but no other immigration benefits. *E.g.*, *Garcia*, 856 F.3d at 47 (Stahl, J., dissenting) ("[I]ndividuals in withholding of removal status are not eligible for travel documents necessary for reentry into the United States

after foreign travel . . . . Adding insult to injury, withholding of removal carries with it no options for bringing family members to the United States . . . .").

In sum, CBP's erroneous execution of an expedited removal order against Ms. Xxxxxx in 20XX caused her prejudice in two ways. First, it denied her the opportunity to seek relief from removal at that time and resulted in her removal to El Salvador, a country where she faces persecution. Second, together with CBP's decision to reinstate her removal order in 2016, it barred her permanently from seeking asylum and eventual permanent residency in the United States. Because CBP's violations of its own regulations, the Immigration and Nationality Act, and the U.S. Constitution caused Ms. Xxxxxx prejudice, the Agency must reopen her expedited removal proceedings and vacate her 20XX expedited removal order.

B. Because the [DATE], 20XX predicate removal order was unlawful and is subject to rescission, CBP must also reopen Ms. Xxxxxx's reinstatement proceedings and rescind her [DATE], 2016 reinstated removal order.

Under INA 241(a)(5), DHS may reinstate a prior removal order where an immigration officer determines (1) the noncitizen's identity, (2) that the noncitizen is the subject of a prior order of removal, and (3) that the noncitizen reentered the United States illegally. 8 C.F.R. § 241.8(a); *Ponce–Osorio v. Johnson*, 824 F.3d 502, 504–05 (5th Cir. 2016). In other words, the existence of a valid prior removal order is a necessary prerequisite to reinstatement under section 241(a)(5). Here, therefore, once CBP rescinds Ms. Xxxxxx's [DATE], 20XX expedited removal order, it must also rescind the [DATE], 2016 reinstated removal order.

IV. CONCLUSION

For the foregoing reasons, CBP should reopen Ms. Xxxxxx's expedited removal proceedings and rescind the expedited removal order it issued on [DATE], 20XX. Having

rescinded the predicate expedited removal order, CBP should also rescind the reinstated removal order it issued on [DATE], 20XX.

Dated: [DATE], 20XX

Respectfully submitted,

_____

[Attorney Name], Esq.
[Title]
[Organization/Firm Name]
[Organization/Firm Address]
[Organization/Firm Address]
(###) ###-####

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