[redacted]

NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
[redacted]	)	A [redacted]
Respondent	)	
In Removal Proceedings.	)	

RESPONDENT'S MOTION TO REOPEN, REMAND, AND FOR STAY OF REMOVAL

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I. INTRODUCTION

Respondent [redacted] ("Respondent"), through undersigned counsel, respectfully requests that the Board of Immigration Appeals ("BIA" or "Board") reopen proceedings pursuant to Section 240(c)(7) of the Act, remand this case to the Immigration Judge for further proceedings [redacted] On [redacted] 2013, the Board dismissed Respondent's appeal of the Immigration Judge's denial of the application for cancellation of removal under section 240A(b) of the INA. Exh. A. This is Respondent's first motion to reopen of the Board's [redacted] 2013, decision and it is timely. 8 C.F.R. § 1003.2(c)(2). As Respondent now files a motion to reopen and to remand, his voluntary departure period was deemed terminated and thus the penalties for failing to depart shall not apply. 8 C.F.R. § 1240.26(b)(iii). Lastly, Respondent is not the subject of any pending criminal proceedings.

II. FACTUAL AND PROCEDURAL HISTORY

Respondent is a forty-two (42) year old Salvadoran national who has continuously resided in the United States since [redacted] 1995. I.J. at 4. Since arriving in the United States, Respondent has lived and worked in [redacted] Maryland. I.J. at 4. Respondent and his spouse, [redacted] ("Mrs. [redacted]"), an undocumented Salvadoran national, have three U.S. citizen children together. *Id.* Their children include a six-year old son, [redacted] and twin daughters, [redacted] nearly two years in age. I.J. at 5; *See also*, Exh. A, Sworn Statement of [redacted]

On [redacted] 2008, Respondent's spouse, Mrs. [redacted] was arrested by [redacted] Sheriff's Deputies, while eating lunch at a pond behind her place of employment, and was subsequently transferred to Immigration and Customs Enforcement (ICE) custody where she remained in custody for forty-six (46) days prior to her release on humanitarian grounds. Tr. at 25, 32; Resp. Exhs. CC to HH. The legality of the arrest became the subject of a one-million dollar federal civil rights lawsuit brought by Mrs. [redacted] through pro bono counsel. Tr. at 33; Resp. Exhs. CC to HH. The filing of the lawsuit was widely publicized in the Washington, D.C. area, and the local media included the family's names and family photos in both the English and Spanish media. Resp. Exhs. CC to HH.

Respondent applied for cancellation of removal under section 240A(b) of the INA based on his long-time residence in the United States, good moral character, and hardship to his U.S. citizen children. Respondent and his expert witness Dr. [redacted] ("Dr. [redacted]") testified that they believed the publicity of the lawsuit filing reached El Salvador as well as the gang networks operating in the Washington, D.C. area. Tr. at 33-34; Resp. Ex. W. at ¶63. Respondent based his argument for exceptional and extremely unusual hardship in part on his spouse's pending and publicized civil rights lawsuit and the likely possibility that gang networks

and other criminal entities in El Salvador had learned of the lawsuit and would target the family for kidnapping and ransom. Tr. at 31-32. The Immigration Judge denied the application because the Respondent's fears are "speculative" as "there is not indication that individuals in El Salvador are aware of respondent's wife's legal suit, and if they were, they would be aware that the suit initially has been dismissed." Tr. at 13. The Immigration Judge also cited the lack of requisite exceptional and extremely unusual hardship hardship because the Respondent testified that his wife and twin daughters would be returning to El Salvador with him if he did not prevail. *Id.*

At the time of the hearing before the Immigration Judge, the U.S. District Court for the District of Maryland had dismissed the civil rights case, which left Mrs. [redacted] with an appeal pending at the U.S. Court of Appeals for the Fourth Circuit. Tr. at 85. Following the Immigration Judge's decision and the filing of the Respondent's Brief to the Board on [redacted] 2013, the Fourth Circuit issued a published decision favorable to Mrs. [redacted] claims and remanding the case back to the U.S. District Court for the District of Maryland. [redacted] Following this precedential decision from the Fourth Circuit, which relied heavily on the U.S. Supreme Court's decision in *Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012), nationwide and international publicity ensued.[1] Exhs, E-G, Local, National and International Newspaper Articles. The defendants in that case have sought leave to

[redacted]

appeal to the U.S. Supreme Court, and the U.S. District Court action is stayed pending the U.S. Supreme Court review of defendant's petition of certiorari. Following the Immigration Judge's decision and the filing of the Respondent's Brief to the Board on [redacted] 2013, Immigration and Customs Enforcement granted Mrs. [redacted] an extension of her stay of removal until Octoberer of 2014. Exh. B, Approval of Stay of Removal dated [redacted] 2013.

III. STANDARD TO REOPEN PROCEEDINGS

An alien may file a motion to reopen with the BIA to present evidence that was unavailable at the time of removal proceedings. INA § 240(c)(7)(B). The Board may reopen any case in which it has rendered a decision. 8 C.F.R § 1003.2(a). The Board may also reopen a case when a new question has arisen that requires a hearing. 8 C.F.R. §§ 1003.2(c), 1003.23(b)(3); *Matter of Ku*, 15 I&N Dec. 712 (BIA 1976).

A motion to reopen "shall state the new facts that will be proven if the motion is granted, and shall be supported by affidavits or other evidentiary material." INA § 240(c); 8 C.F.R. § 1003.2(c)(1). Evidence may be submitted in support of a motion to reopen if it is "material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(c)(1).

A motion to reopen should be granted if the movant establishes *prima facie* eligibility for relief, i.e., "'a realistic chance' that [s]he will be able to establish eligibility." *Matter of S-Y-G-*, 24 I&N Dec. 247, 252 (BIA 2007) *citing Poradisova v. Gonzales*, 420 F.3d 70, 78 (2d Cir. 2005); *see also Fadiga v. Att'y Gen. of the U.S.*, 488 F.3d. 142, 157-63 (3d Cir. 2007) (rejecting "clear probability" as the standard for a *prima facie* showing).

To make such a showing, the movant "'must present evidence of such a nature that the [Board] is satisfied that if proceedings before the [IJ] were reopened, with all attendant delays,

the new evidence offered would likely change the result in the case.'" *Ali v. U.S. Att'y Gen.*, 443 F.3d 804, 813 (11th Cir. 2006). Evidence is "new" if it was unavailable or could not have been presented at the prior hearing before the Immigration Judge. *Verano-Velasco v. U.S. Att'y Gen.*, 456 F.3d 1372, 1377 (11th Cir. 2006).

A motion to reopen to apply for asylum must also reasonably explain the alien's failure to apply for asylum earlier in the proceedings. 8 C.F.R. § 1208.4(b)(4).The immigration court has jurisdiction to hear the asylum claim of a respondent in proceedings. 8 C.F.R. § 1208.4(b)(3)-(4); *Matter of R-R-*, 20 I&N Dec. 547 (1992). To reopen a case based on asylum, an applicant must 1) establish the *prima facie* case and 2) persuade the court not to deny the motion on discretionary grounds. *Haftlang v. INS*, 790 F.2d 140 (D.C. Cir. 1986). Such an applicant need only submit an asylum application with an affidavit with reasonably specific facts that is not "inherently unbelievable" and that if true would establish the claim. *Id.* The purpose of this rule is to ensure the respondent has "his day in court." *Id.(citing Reyes v. INS,* 673 F.2d 1087, 1090 (9th Cir.1982)).

Motions to reopen are timely if they are filed within 90 days of the date of entry of a final administrative order of removal. INA § 240(c)(7)(C)(i). Motions to reopen based on asylum or withholding of removal must also meet the 90-day time limit if based on a change in personal circumstances. INA § 240(c)(7)(C)(ii); *Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007).
The Fourth Circuit's decision, the subsequent national and international media coverage, and the government's grant of his spouse's stay of removal all qualify as new and material evidence that was previously unavailable to the Immigration Judge at the prior hearing. *See* 8 C.F.R § 1003.2 (c)(1).

IV. ARGUMENT

A. The Fourth Circuit's Decision Regarding Respondent's Spouse's Lawsuit is Material to His Application for Cancellation of Removal and Requires Evaluation by the Immigration Judge

Respondent moves the Board to reopen his case for further proceedings because Respondent presents evidence that was previously unavailable to the Immigration Judge that is material to the hardship analysis of his application for cancellation of removal under Section 240A(b). Specifically, two, new, previously unavailable, and material facts have emerged since Respondent's hearing before the Immigration Judge.

1. Favorable Precedential Fourth Circuit Decision in [redacted]

The first new fact that directly affects this case is the Fourth Circuit's [redacted] 2013, decision in [redacted] In [redacted], the Fourth Circuit in a precedential decision ruled largely in favor of Mrs. [redacted] on the question of whether the [redacted] County government violated her Fourth Amendment rights. [redacted] This new evidence is "material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(c)(1).

In the instant case, the Board acknowledged the decision in passing but failed to consider the significance or the impact it would have had it been available on the proceedings below. *See* BIA Decision at 2. This approach was proper because regulations and case law make it clear that except for "taking administrative notice of commonly known facts or the contents of official documents, the Board will not engage in fact-finding in the course of deciding appeals." 8 C.F.R. §1003.1(d)(3)(iv); *Matter of Adamiak,* 23 I&N Dec. 878, 880 (BIA 2006). Indeed, the proper

course of action in cases where further fact-finding is required is to remand the case to the Immigration Judge. 8 C.F.R. §1003.1(d)(3)(iv).

The Fourth Circuit's decision that Mrs. [redacted] civil rights were violated was an important new factor in Respondent's argument that his three young U.S. citizen children would suffer exceptional and extremely unusual hardship if they returned to El Salvador. The lawsuit, which had requested one million dollars in damages, already drew publicity in both local Spanish and English media in the heavily Salvadoran populated Washington, DC as the case was pending. After the Fourth Circuit held that Mrs. [redacted] was unconstitutionally seized, the international media coverage, especially the confirmed media coverage in Salvadoran news media, that ensued created an even higher risk that his three U.S. citizen children would be kidnapped or killed by gangs in El Salvador due to assumptions that the family had a lot of money to extort. Ex. E, Newspaper Article featured on [redacted].com: [redacted]

Mrs. [redacted] lawsuit had been dismissed at the time the Immigration Judge rendered his decision, and the reinstatement of the suit—and the publicity generated by the Fourth Circuit's decision—fundamentally undermines the Immigration Judge's findings regarding the likelihood that people in El Salvador are not aware of the suit or only know of its preliminary dismissal. Thus, the Fourth Circuit decision materially affects the hardship analysis in regards to Respondent's three U.S. citizen children, and the Immigration Judge should re-evaluate Respondent's application for cancellation of removal in light of this new and previously unavailable evidence.

2. DHS Granted [redacted] a Stay of Removal

The second new fact emerged on [redacted] 2013, when Hugh Spafford, Assistant Field Director of the ICE Office of Enforcement and Removal Operations in Baltimore granted Respondent's wife, Mrs. [redacted] a one-year stay of removal. Exh. B, Approval of Stay of Removal dated [redacted] 2013. The required evidence for this new fact is the stay itself. *Id.* This new evidence also meets the standard for new fact under the regulations and case law because it too is "material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(c)(1). This fact is material because in its decision, the Board relied on the Immigration Judge's analysis that Respondent's children, the qualifying relatives, were "young and it would not be as difficult to adjust to a new culture." BIA Decision at 2. As a result of the stay of removal granted to Respondent's wife, Respondent's U.S. citizen children, the qualifying relatives, will now be staying longer in the United States than the Immigration Judge thought—which directly affects the analysis of how their age, length of residence, and Respondent's position in his community contribute to a finding of "exceptional and extremely unusual hardship." *See Matter of Monreal*, 23 I&N Dec. 56, 63 (BIA 2001). It also means that if Respondent is removed from the United States, the family will be separated as Respondent will go to El Salvador and his wife will remain in the United States pursuant to an approved stays of removal as she pursues her civil rights lawsuit. Exh. A, Sworn Statement of [redacted]. This outcome of family separation is a different one than Respondent foresaw and presented to the Immigration Judge. Indeed, the Immigration Judge based his decision to deny Respondent's application for Cancellation of Removal pursuant to Section 240A(b) of the INA in large part on the family's plans to remain together if Respondent were ordered removed. I.J. at 13.

In addition, the decision to grant Mrs. [redacted] a stay of removal reflects the ICE Field Office Director's acknowledgement of the changed and compelling equities that now exist in this case because Field Office Directors are instructed to grant stays only in cases "involving compelling humanitarian factors or a case where a stay is deemed to be in the best interest of the government." *See* Immigration and Customs Enforcement, "Toolkit For Prosecutors" (August 9, 2011).[2] Furthermore, this extended stay of removal signals that Mrs. [redacted] is not a removal priority for ICE meaning that her stay of removal may be renewed indefinitely and until at least her civil rights lawsuit concludes, the timing for which is unclear.

The Immigration Judge did not have the benefit of being able to analyze this decision on the hardship analysis.

B. Respondent is Now Entitled to Asylum or Withholding of Removal Based on His Family Ties and to Protection under the Convention Against Torture

Based on the same new facts, Respondent now meets the definition of refugee and now moves the Board to reopen proceedings for consideration of the attached asylum application. Both the Board and the Fourth Circuit have recognized family ties as a valid basis for membership in a particular social group, and the Respondent is now eligible for asylum or withholding on account of his familial relationship to his wife.

1. Standard for Asylum

To establish *prima facie* eligibility for asylum and withholding of removal, an applicant must fit the definition of a refugee pursuant to Section 101(a)(42) and establish eligibility pursuant to Section 208. Section 101(a)(42) defines refugee as "any person who is outside the country of such person's nationality…who is unable or unwilling to avail himself of the protection of that country because of persecution or a well-founded fear of persecution on

[2] *See* http://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf (last accessed February 1, 2014).

account of race, religion, nationality, membership in a particular social group, or political opinion." An asylum applicant may establish eligibility for relief by showing that he has a reasonable fear of future persecution based on one of the listed grounds if he is returned to his home country. 8 C.F.R. § 208.12(b); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987).

An applicant who bases an asylum application on a well-founded fear of future persecution must demonstrate both a subjectively genuine and an objectively reasonable fear. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-1 (1987); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 413 (9th Cir. 1991). The subjective component is satisfied by the applicant presenting credible testimony of a genuine fear of persecution. The objective component can be established by presenting good reason to fear future persecution through credible, direct, and specific testimony and evidence that would support a reasonable fear of persecution. *See generally, Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir. 1999). A well-founded fear may exist even when there is as little as a one-in-ten chance of future persecution. *Cardoza-Fonseca*, 480 U.S. at 431; *Arteaga v. INS*, 836 F.2d 1227, 1233 (9th Cir. 1988). More plainly, if a reasonable person in similar circumstances would fear persecution upon return to the native country, the standard is satisfied. *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

Both adverse and favorable factors should be considered in determining whether a favorable exercise of discretion is warranted. *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987). Humanitarian factors, such as age, health, or family ties should be considered in the exercise of discretion. *Matter of H-*, 21 I&N Dec. 337, 347-348 (BIA 1996) (citing *Matter of Pula*, 19 I&N Dec. 467). The danger of persecution should outweigh all but the most egregious adverse factors. *Matter of Pula*, 19 I&N Dec. at 474.

A claim for withholding of removal derives from the same facts an asylum claim, but an applicant bears a heavier burden of proof to merit relief. For withholding, the applicant must demonstrate that, if returned to the applicant's country, the applicant's life or freedom *would be* threatened on account of one of the protected grounds. INA § 241(b)(3). To make this showing, an applicant must establish a "clear probability" of persecution, meaning that it is "more likely than not" that he will be subject to persecution on account of a protected ground if returned to the country from which he seeks withholding of removal. *Cardoza-Fonseca*, 480 U.S. 421. The applicant's credible testimony alone may be sufficient to sustain this burden of proof. 8 C.F.R. § 1208.16(b).

2. Respondent Qualifies for an Exception to the One-Year Filing Deadline

Foreign nationals are required to apply for asylum within one year of their date of arrival in the United States pursuant to INA § 208(a)(2)(B), unless the foreign national demonstrates changed circumstances which materially affect his or her eligibility for asylum or extraordinary circumstances relating to the delay in filing a timely application. INA § 208(a)(2)(D). The Fourth Circuit's decision in [redacted] constitutes "changed circumstances" in Respondent's situation that materially affect his eligibility for asylum. 8 C.F.R. § 1208.4(a)(4)(i); [redacted] In addition, the application was filed within a reasonable period, just over six months, given the changed circumstances. *See* 8 C.F.R. § 1208.4(a)(4)(ii).

Prior to the Fourth Circuit decision, Respondent did not have a viable asylum claim. Even though the media had widely covered his wife's case, the pending results of the litigation created mere speculation as to the possible outcome and whether news of the holding would reach potential persecutors in El Salvador. When the Fourth Circuit ruled in favor of Mrs. [redacted]

constitutional claim, the subsequent national and international publicity not only alerted gang members of the success of a million-dollar lawsuit but also provided them with a concrete reason to harm Respondent – to extort him based upon the perceived large amount of money that his wife and him possess due to the maintenance or outcome of the lawsuit.

Given the changed circumstances, Respondent is filing for asylum within a "reasonable period." 8 C.F.R. § 1208.4(a)(4)(ii). This motion to reopen is being filed just over six months after the Fourth Circuit reached the decision in [redacted] on [redacted] 2013. [redacted]; *see Taslimi v. Holder*, 590 F.3d 981 (9th Cir. 2010) (holding that filing asylum within seven months after conversion is not unreasonable). Undersigned counsel was also out of the country on sabbatical when the Fourth Circuit issued the *Santos* decision and did not return to the United States until September. Following the decision, Respondent has actively fought his case in accordance with administrative procedures, such as timely filing a motion to reconsider to the Board of Immigration Appeals on [redacted] 2013.

3. Respondent Has a Well-founded Fear of Future Persecution Based on His Membership in a Particular Social Group

Respondent now meets the definition of refugee required to establish a *prima facie* case for asylum based on his membership in a particular social group.

a. Standard for Membership in a Particular Social Group

Membership in a particular social group consists of those individuals who hold a "common, immutable, characteristic." *Matter of Acosta*, 19 I&N Dec 211, 233-34 (BIA 1985); *Crespin-Valladares v. Holder*, 632 F.3d 117, 124-28 and n. 5 (4th Cir. 2011). The characteristic must be one that "cannot change or should not be required to change because it is fundamental to their individual identities or consciences." *Id.* The group must also be "particular" which means the group can be defined "in a manner sufficiently distinct that the group would be recognized, in

the society in question, as a discrete class of persons. *Id.* at 584; *Zelaya v. Holder*, 668 F. 3d 159, 166-67 (4th Cir. 2012). The group must also be "socially distinct within the society in question." *Matter of M-E-G-V-*, 26 I&N Dec. 227, 237 (BIA 2014).

The Fourth Circuit follows the BIA formula for particular social group that requires (1) its members share common immutable characteristics, (2) these common characteristics give members social visibility, and (3) the group is defined with "sufficient particularity to delimit its membership." *Lizama v. Holder*, 629 F.3d 440, 447 (4th Cir. 2011). Like other circuits, the Fourth Circuit has recognized family relationships—standing alone—as a valid basis for membership in a particular social group. *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) ("[E]very circuit to have considered the question has held that family ties can provide a basis for asylum."); *Torres v. Mukasey*, 551 F.3d 616, 629 (7th Cir. 2008) ("Our prior opinions make it clear that we consider family to be a cognizable social group within the meaning of the immigration law."); *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1028 (9th Cir. 2004) ("Like our sister circuits, we recognize that a family is a social group."); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) ("There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family."). Specifically, the Fourth Circuit held that family ties are "a prototypical example of a 'particular social group" because the family unit "possesses boundaries that are at least as 'particular and well-defined' as other groups." *Crespin-Valladares*, 632 F.3d at 125.

b. Respondent Meets the Particular Social Group Standard

Respondent now meets the definition of refugee because he has a well-founded fear of persecution on account of his familial relationship to his wife, who is now known in El Salvador

as the plaintiff in an ongoing, prominent civil rights lawsuit. *See Crespin-Valladares*, 632 F.3d at 125, As proven below, this fear is both subjective and objectively reasonable.

i. Respondent Subjectively Fears Future Persecution if Forced to Return to El Salvador Based on His Membership in this Particular Social Group.

Respondent's has a subjective fear of future prosecution if forced to return to El Salvador based on his familial relationship to his wife. Exh. A, Sworn Statement of [redacted] When Respondent's wife's counsel held a press conference upon filing the lawsuit for one-million dollars, Respondent believed news of the lawsuit's filing had made it back to El Salvador. *Id.* With the recent Fourth Circuit decision, new and much more far reaching media than the previous local media ensued including the documented proof that El Salvador media had reported on the decision and included Mrs. [redacted] by name. Respondent described that when he learned of this, "[His] stomach turned." He does not doubt that the gangs in El Salvador know about his wife's case and assume they have a lot of money because of it:

> Gangs in El Salvador will think that because we won the case, let alone simply filing a case in a federal court, we have a lot of money when in reality it took nothing because the attorneys took the case for free and didn't charge us for anything. The gangs already think that if you live in the United States, then you have money so my wife not just living in the United States but also confronting the powerful U.S. government can only mean that we have a lot more money than the rest of the Salvadoran who live in the United States. There are so many Salvadorans who live in the United States and are not able to escape deportation, but here my wife—a woman—was able to escape deportation and also get a judge to say she was right and the U.S. government was wrong. That is the type of result that in El Salvador only the rich see and no one in El Salvador is going to assume that we are normal people of limited income. I am worried that the gangs in El Salvador are already waiting for us. Exh. A, Sworn Statement of [redacted]

Respondent's position as the husband of a woman won such a case and who stands to win a $1 million judgment will likely draw unwanted attention to him, especially in light of his own political activism alongside his wife, which includes being photographed for media alongside his wife. Exh. A, Sworn Statement of [redacted], Exh. G, Newspaper Article featured in El

Tiempo Latino: [redacted]

[redacted]

ii. Respondent's Fear of Returning to El Salvador is Objectively Reasonable Based on his Membership in this Particular Social Group.

Respondent also has an objectively reasonable fear of future persecution in El Salvador based on his familial relationship to his wife.

Extortion in El Salvador is on the rise.[3] The Department of State points out that "extortion is a particularly serious and very common crime in El Salvador."[4] In addition, the Department of State ominously warns that, "recent reports show that there is an increase in the level of violence associated with extortion cases, including media reports of extortion victims and witnesses being killed." *Id.* The Department of State also acknowledged cases in which people have been kidnapped in El Salvador for ransom extorted from family members in the United States. *Id.* Expert witness Dr. [redacted] who submitted an affidavit for Respondent's case before the Immigration Judge discussed extortion and violence as common gang tactics and the Salvadoran government's inability or unwillingness to control the gangs and their brutal tactics. Resp. Exh. W at ¶¶14-30, 40, 48. As a result, El Salvador has one of the highest per capita murder rates in the world at 69 per 100,000 people. *Id.* Most serious crimes in El Salvador are never solved. *Id.* Of the crimes that are solved, the criminal conviction rate is just 5%. *Id.*

Respondent's fear is objectively reasonable. Respondent's wife has been a high-profile and persistent challenger of U.S. law enforcement practices both in court and at public political demonstrations. Exh. A, Sworn Statement of [redacted]. She previously made local headlines

[3]Rising Extortion Signals Trouble for El Salvador's Gang Truce. *InsightCrime* (March 18, 2013) http://www.insightcrime.org/news-briefs/rising-extortions-trouble-salvador-gang-truce

[4] United States Department of State. Travel Warning. El Salvador (August 9, 2013). http://travel.state.gov/travel/cis_pa_tw/tw/tw_5871.html

by filing a $1 million lawsuit against the [redacted] Board of Commissioners based on her unconstitutional arrest. Before the Immigration Judge, Dr. [redacted] stated that in his opinion Respondent's belief that news of the lawsuit's filing had made it back to El Salvador was realistic despite the lack of documented proof. Exh. W at ¶63. However, it is now established that news of her recent legal success in the Fourth Circuit spread across the United States, into Mexico, Nicaragua, and, most importantly, El Salvador.[5] Exhs, E-F, National and International Newspaper Articles. Dr. [redacted], Respondent's expert witness, recently concluded that it is a "veritable certainty" that news of the Fourth Circuit ruling has reached El Salvador and that he is prepared to testify on this and other points should the case be remanded to the Immigration Judge. Exh. D, Letter from [redacted], PhD. Respondent is a man whose wife has a well-publicized chance to prevail—or who may be already perceived to have prevailed—in a $1 million lawsuit, and in light of the documented extensive gang extortion activity in the country, any reasonable person would fear persecution, if not at least threats to life or freedom.

Because of these factors, it is objectively reasonable that Respondent would fear the gangs in El Salvador will be well aware of his situation and will target him based because of his familial relationship to his wife.

4. Discretionary Factors Warrant a Grant of Asylum

The evidence in this case establishes that Respondent is entitled to a grant of asylum because he has a well-founded fear of future persecution. *See* 8 C.F.R. § 208.13(b); *INS v. Cardoza-Fonseca*, 480 U.S. 421,428 (1987). Respondent is a hard-working, tax-paying, family

[5] [redacted]

man who has resided in the United States for almost nineteen years. Exh. A, Sworn Statement of [redacted]

This "danger of persecution should outweigh all but the most egregious adverse factors. *Matter of Pula*, 19 I& N Dec. 467, 474 (BIA 1987). Any adverse factors in this case are outweighed not only by Respondent's subjective and reasonable objective fear but also by additional factors that the Board has acknowledged including the financial hardship, emotional hardship, crime situation that is a real problem in El Salvador. BIA Decision at 3. Based on this new evidence and light of the other compelling factors in this case, the Board should use its discretion to reopen and remand this case for review of his asylum application.

5. Alternatively, Respondent is Entitled to Withholding of Removal or Protection pursuant to the Convention Against Torture

If the court denies Respondent's application for asylum, he is entitled to withholding of removal and protection under the Convention Against Torture (CAT) pursuant to INA § 241(b)(3) and 8 C.F.R. § 1208.16.

The Attorney General "may not remove an alien to a country" if "the alien's life or freedom would be threatened in that country" on account of race, religion, nationality, membership in a particular social group or political opinion. INA § 241(b)(3). "Would be threatened" requires a showing that it is "more likely than not" the applicant will be subject to persecution upon removal. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). Once an applicant makes this showing, withholding of removal is mandatory. *Id.* at 443-44.

Respondent has a greater than fifty percent chance that he will be harmed based on his familial relationship to his wife. Gangs are ubiquitous throughout El Salvador and involved in a range of criminal activities including robbery, extortion, kidnapping, prostitution, murder, and trafficking in drugs, stolen vehicles, weapons and persons. Resp. Exh. W at ¶ 14. Respondent

will be particularly targeted by these gangs because Mrs. [redacted] lawsuit and the amount of money involved was widely publicized in English and Spanish. According to expert witness Dr. [redacted], the Washington D.C. metro area is home to one of the largest Salvadoran communities in the U.S., and that community is in continual contact with family and friends in El Salvador. Resp. Exh. W at ¶ 63. If Respondent were deported, the gangs in El Salvador would perceive him and his wife to have large cash resources as a result of the lawsuit. *Id.* According to Dr. [redacted], "to conclude otherwise would be unrealistic." *Id.*

In order to qualify for relief under the CAT, an alien must establish that if he is removed, it is more likely than not that he will be subject to torture in the country of removal. 8 C.F.R. § 1208.16(c). The severe pain or suffering, which can be physical or mental, must be inflicted by or with the consent or acquiescence of a public official. 8 C.F.R. § 1208.18(a).

If Respondent is deported, it is more likely than not that he will be tortured by gang members in their efforts to extort money from him. Due to their perception that he has a large amount of money as a result of his wife's lawsuit or his living in America, gangs may threaten or kill Respondent to obtain the money. In addition, besides physical harm to Respondent, gangs will likely inflict mental torture through violence toward his young U.S. citizen daughters, [redacted] El Salvador has the highest homicide rate for women, making it the most dangerous country in the world for women. Resp. Exh. W at ¶ 52. In El Salvador's patriarchal society in which females are viewed essentially as property, women are frequent victims of gender-based killing and victims of femicide are often mutilated to the point that they cannot be identified without forensic analysis. *See id.* at ¶ 54-55. Police in El Salvador are aware and rarely respond to such violence or to criminal gang activity in general. *See id.* at ¶ 19-20, 56. As such,

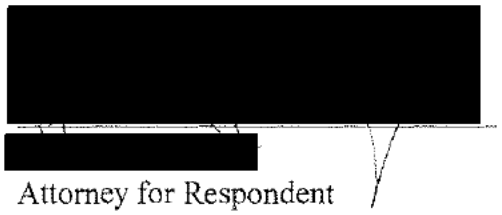
Respondent is entitled to Withholding of Removal or protection pursuant to the Convention Against Torture.

V. CONCLUSION

For the reasons stated above, which establish the Board should grant Respondent's motion to reopen and to remand proceedings.

Dated: [redacted] 2014

Respectfully submitted,



[redacted]
Attorney for Respondent

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
	)	
[redacted]	)	A [redacted]
	)	
Respondent	)	
	)	
In Removal Proceedings.	)	
	)	

EXHIBIT LIST IN SUPPORT OF RESPONDENT'S MOTION TO REOPEN AND TO REMAND

TAB **PAGE**

A. Sworn Statement of [redacted], explaining how the Fourth Circuit decision in [redacted] his family's future plans should Mr. [redacted] be removed as well as the reason he fears returning to El Salvador. **21-25**

Evidence of Mr. [redacted] ***new, material evidence that "could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1)***[1]

B. Approval of Stay of Removal for Mr. [redacted] **spouse** [redacted] stating that her stay of removal has been extended from [redacted] 2014 to [redacted] 2014. The request for an extension of the stay of removal was based on her active civil rights case, her status as the mother and primary caregiver of three U.S. citizen children, and her not posing a threat to the community or national security. **26**

Evidence that Mr. [redacted] ***is eligible for asylum, withholding of removal, and relief under the Convention Against Torture***[2]

C. Form I-589, Application for Asylum and Withholding of Removal, duly executed and signed by Mr. [redacted] **27-36**

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[1] The case of [redacted] is a new, material fact, but it is not included as an exhibit as it was a published case.

[2] The articles selected as exhibits are a sampling of the international, national, and local media coverage on Mr. [redacted]'s spouse's case. Should the case be remanded to the Immigration Judge, all of the articles will be submitted as evidence.