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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
HOUSTON, TEXAS

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

IJ [redacted] Next Hearing Date: N/A

RESPONDENT'S MOTION TO RESCIND *IN ABSENTIA* ORDER OF REMOVAL AND REOPEN REMOVAL PROCEEDINGS

NO FEE REQUIRED PER 8 C.F.R. § 1003.24(b)(2), 1003.24(b)(5)(C)(ii) AS MOTION BASED ON LACK OF NOTICE AND ON AN APPLICATION FOR ASYLUM

AUTOMATIC STAY OF REMOVAL PURSUANT TO 8 C.F.R. § 1003.23(b)(4)(ii)

I. INTRODUCTION

Respondent [redacted] ("[redacted]"), a now eleven-year-old child who was forcibly separated from his father upon his entry to the United States pursuant to the Zero Tolerance policy, moves this Court to (1) rescind his *in absentia* order of removal; (2) reopen his proceedings; and (3) dismiss or alternatively administratively close proceedings so that he may pursue applications for parole-in-place for separated families, Special Immigrant Juvenile Status (SIJS), and asylum and related relief before U.S. Citizenship and Immigration Services (USCIS).

As this motion is based on lack of notice and on an application for asylum, no fee is required per 8 C.F.R. § 1003.24(b)(2), 1003.24(b)(5)(C)(ii).

Additionally, because this motion concerns an *in absentia* order, [redacted] removal is automatically stayed upon this motion's filing with the Immigration Court. INA § 240(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii).

II. FACTS

A. [redacted] mother abandons and neglects him.

[redacted] was born in [redacted] on [redacted] to his parents, [redacted] and [redacted] Exh. 6, Decl. of [redacted] at ¶ 8. [redacted] left [redacted] and his father, Mr. [redacted], when [redacted] was just a baby, and started dating another man. Exh. 6, Decl. of [redacted] at ¶ 8. [redacted] lived with his mother and the other man for only a few months. *Id.* at ¶ 8. During this time, his father sent money to his mother to care for [redacted] *Id.* at ¶ 9. But [redacted] did not care for [redacted], her boyfriend was unkind to him and [redacted] no longer wanted to keep [redacted] with her. *Id.* at ¶ 9. [redacted] then went to live with his paternal grandmother, as his father worked long hours on the

coffee farm that he managed. *Id.* at ¶ 9. During this time, Mr. [redacted] visited and regularly sent money to help with [redacted] care. *Id.* at ¶ 9. In contrast, [redacted] mother rarely visited him or sent money. *Id.* at ¶ 9.

B. [redacted] and his father flee Honduras after gang members severely beat [redacted] father and leave him for dead.

[redacted] father met [redacted], his current wife and [redacted] stepmother, in Honduras. *Id.* at ¶ 13. [redacted] moved in with Mr. [redacted] in 2018. *Id.* at ¶ 13.

However, Mr. [redacted] relationship with [redacted] put the entire family in danger because [redacted] former partner ordered the gang to attack the family. [redacted] former partner, [redacted] is a powerful gang member. *Id.* at ¶¶ 3, 11. [redacted] had lived with [redacted] and had a child with him, but he had abused her for many years. *Id.* at ¶¶ 11, 13. Fearing for her life, [redacted] attempted to leave [redacted] and took their child, [redacted], to live with her mother. *Id.* at ¶ 12. She hid from [redacted] as he searched for her. *Id.* at ¶ 12. [redacted] threatened [redacted], and she feared [redacted] would kill her if he ever found her. *Id.* at ¶ 12, 16.

[redacted] soon discovered [redacted] and Mr. [redacted] were romantically involved and living together. *Id.* at ¶ 13. Shortly after [redacted] moved in with Mr. [redacted], gang members attacked Mr. [redacted] while he was walking home from work. *Id.* at ¶ 14. They struck Mr. [redacted] in the head and knocked him unconscious, leaving him there to die. *Id.* at ¶ 14.

Shortly after the attack, a man arrived at Mr. [redacted] home, threatening that if he did not leave, the gang members would kill him and his family. *Id.* at ¶ 17. Fearing for his life and the safety of his family, Mr. [redacted] fled Honduras with [redacted] around May 2018. *Id.* at ¶¶ 17, 19.

C. DHS officials forcibly separate seven-year-old [redacted] from his father pursuant to the Zero Tolerance policy.

[redacted] and his father arrived at the U.S.-Mexico border in June 2018. Exh. 6, Decl. of [redacted] at ¶ 19; Exh. 7, [redacted] Form I-213 Page 1; Exh. 10, [redacted] Notice to Appear (NTA). DHS officials detained them and separated then seven-year-old [redacted] from his father. Exh. 6, Decl. of [redacted] at ¶ 19; Exh. 7, [redacted] Form I-213 Page 2; Exh. 23, Separated Families: A Legacy Biden Has Inherited From Trump at Page 4. The government placed [redacted] into Office of Refugee Resettlement (ORR) custody after designating him as an unaccompanied alien child (UAC). Exh 1, Form I-589 Application for Asylum at Pages 7-8 (ORR Placement Form). His father, Mr. [redacted], was not even allowed to speak with his son over the phone for 15 days. Exh. 6, Decl. of [redacted] at ¶ 20. After a month of detention and separation, [redacted] was released and reunited with his father, as a result of federal litigation. *Id.* at ¶ 22; Exh. 23, Separated Families: A Legacy Biden Has Inherited From Trump. Mr. [redacted] and [redacted] still suffer from the effects of their month-long separation. Exh. 6, Decl. of [redacted] at ¶ 25; Exh. 23, Separated Families: A Legacy Biden Has Inherited From Trump. Mr. [redacted] struggles with mental health and memory issues and [redacted] still struggles with the memories of the separation. Exh. 6, Decl. of [redacted] at ¶¶ 25, 28[1]; Exh. 23, Separated Families: A Legacy Biden Has Inherited From Trump at Page 4.

D. [redacted] never receives notice of the one-year-filing deadline for asylum.

Although [redacted] was released from DHS custody after government officials found he had a credible fear, [redacted] did not receive individualized notice of the one-year filing deadline for asylum and did apply for asylum within one year of his entry to the United States. Exh. 6,

[1] These psychological effects of family separation are largely consistent with what experts have observed in other families separated under the Trump Administration's Zero Tolerance policy. *See, e.g.*, Exh. 17, Suzanne Gamboa, Trump's border separations left children, parents with severe trauma, study finds.

Decl. of [redacted] at ¶ 26; Exh. 1, Form I-589 Application for Asylum. Based on these facts, [redacted] filed a Notice of *Mendez Rojas* Class Membership with USCIS. Exh. 1, Form I-589 Application for Asylum. He also now concurrently files a notice of class membership with the immigration court.

E. [redacted] never receives proper notice of his hearing.

1. Mr. [redacted] provided the family's correct and complete address to DHS.

Although Mr. [redacted] informed DHS of the family's complete and correct address in [redacted] at the time of his release from DHS custody, [redacted] and his father never received any mail from DHS or EOIR because DHS failed to include the apartment number. *Id.* at ¶ 23. DHS failed to include any address for [redacted] on the NTA. Exh. 10, [redacted] NTA.

2. The NTA lacked the date, time, and location of the hearing and lacked [redacted] address.

Upon receiving the FOIA results, counsel learned that [redacted] NTA lacked the date, time and location of the hearing. Exh. 6, Decl. of [redacted] at ¶ 23; Exh. 10, [redacted] NTA. It also had no address for the respondent. Exh. 10, [redacted] NTA.

3. EOIR sent the hearing notice to the to the detention center where [redacted] was reunited with his father, even though DHS released [redacted] and his father and knew the address where they had been released to in [redacted].

EOIR sent the hearing notice to [redacted] Exh. 11, [redacted] Notice of Hearing. This is the address of the [redacted], the adult detention center where [redacted] was reunited with his father. Exh. 6, Decl. of [redacted] at ¶ 23; Exh. 11, [redacted] Notice of Hearing. DHS knew they were releasing [redacted] and his father and knew the address where they had been released to in [redacted], yet still sent the hearing notice for a child to the [redacted]. Exh. 6, Decl. of

[redacted] at ¶ 23; Exh. 11, [redacted] Notice of Hearing. Interestingly, Mr. [redacted] NTA lists their correct [redacted] address, and even the Form I-213 from his initial entry has the correct address where [redacted] and Mr. [redacted] went to live. Exh. 8, Mr. [redacted] Form I-213. It is therefore unclear why the address on [redacted] Notice of Hearing is [redacted]

F. The family was confused about the procedural posture of their cases after an NTA was filed for [redacted], but no NTA was filed for his father, Mr. [redacted].

[redacted] and his father's cases proceeded in very different ways from a procedural standpoint, which created significant confusion. Mr. [redacted] failed his credible fear interview while he was detained, but an immigration Judge ultimately reversed the decision as he found credible fear had been established in this case. Exh. 6, Decl. of [redacted] at ¶ 19; Exh. 9, Mr. [redacted] Form I-869 and Order of the Immigration Judge. Then, Mr. [redacted] NTA was never filed with EOIR. In contrast, DHS did file [redacted] NTA. Exh. 12, [redacted] Removal Order. The family was confused by the separate proceedings and did not realize [redacted] was in removal proceedings. Exh. 6, Decl. of [redacted] at ¶ 24.

G. [redacted] and his father make sincere efforts to resolve their immigration case.

Mr. [redacted] ce learned of [redacted] master calendar hearing in Texas just days before it was set to take place when a volunteer with a nonprofit organization that assisted families separated under the Zero Tolerance policy called to inform him of the upcoming hearing. Exh. 6, Decl. of [redacted] at ¶ 24. But by then, it was too late for him to make plans to travel all the way from [redacted] to Texas, so [redacted] was ordered removed *in absentia* on November 14, 2018 by an immigration judge in [redacted] Texas. Exh. 6, Decl. of [redacted]

[redacted] at ¶ 24; Exh. 12, [redacted] Removal Order; Exh. 23 Separated Families: A Legacy Biden Has Inherited From Trump at Page 4.

However, [redacted] and his father diligently took the necessary step to resolve their immigration case. Exh. 13, Decl. of Att'y Rebekah Niblock. [redacted] and his father got in contact with CLINIC in January 2021, and by March 2021, they began working with Charlotte Center for Legal Advocacy to try and figure out their procedural postures of their case and how to resolve them. Exh. 13, Decl. of Att'y Rebekah Niblock at ¶ 3. Rebekah Niblock of Charlotte Center for Legal Advocacy filed FOIA requests for [redacted] and Mr. [redacted] [redacted] with EOIR and USCIS, as well as an ORR Records Request for [redacted] Exh. 13, Decl. of Att'y Rebekah Niblock at ¶¶ 7-9; Exh. 14, EOIR FOIA Correspondence; Exh. 15, USCIS FOIA Correspondence; Exh. 16, ORR Request Correspondence. [redacted] has already affirmatively filed an affirmative asylum application with USCIS and [redacted] and his father are diligently working on his SIJS case. Exh. 1, Form I-589 Application for Asylum; Exh. 5, Verified Complaint for Child Custody. [redacted] and his family have also submitted applications for parole in place for separated families and submitted a request for prosecutorial discretion to DHS asking for a joint Motion to Reopen and Reconsider, as well as a joint Motion to Dismiss. Exh. 3, Receipt Notice for Form I-131 Application for Travel Document; Exh. 4. Form I-131 Application for Travel Document (Parole-in-Place); Exh.24, Prosecutorial Discretion Request.

III. STANDARD FOR REOPENING

A "motion to reopen is an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings." *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1 (2008)). In *Kucana*, the Supreme Court noted that by "[e]nacting [the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)] in 1996, Congress

'transform[ed] the motion to reopen from a regulatory procedure to a statutory form of relief available to the alien.'" *Kucana v. Holder*, 558 U.S. at 249 (quoting *Dada*, 554 U.S. at 14); *see also Dada*, 554 U.S. at 15 (stating that the law "guarantees to each [noncitizen] the right to file" a motion to reopen proceedings).

There is no filing deadline for a motion to rescind and reopen an *in-absentia* motion to reopen where the respondent did not receive proper notice. 8 C.F.R. § 1003.23 (b)(4)(ii). Alternatively, an *in absentia* order may be rescinded where a motion to reopen is filed within 180 days after the date of the entry of the order of removal if the respondent demonstrates that the failure to appear was because of exceptional circumstances or that they did not receive proper notice in accordance with INA §§ 239(a)(1)-(2) or (c). The regulations also provide that Immigration Judges have *sua sponte* authority to reopen their own decisions "at any time," without regard to the time and number limitations. 8 C.F.R. § 1003.23(b)(1).

Moreover, in order for a removal order to properly be entered against a noncitizen who fails to attend a removal hearing, the government must establish "by clear, unequivocal, and convincing evidence. . . that the alien is removable." INA § 240(b)(5)(A). Where the government failed to make this required showing, the Immigration Judge should reopen proceedings. *Id*.

In the adjudication of a motion to reopen, an Immigration Judge must identify and fully explain his or her decision so that the parties will not be deprived of the opportunity to contest the Immigration Judge's determination on appeal and the Board will be able to meaningfully review the decision. *See Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994); *see also Matter of A-P-*, 22 I&N Dec. 468 (BIA 1999).

IV. ARGUMENT

A. The Immigration Judge failed to conduct a "comprehensive and independent inquiry" into the Respondent's removability and DHS

did not meet its burden to establish "by clear, unequivocal, and convincing evidence" that the Respondent is removable.

The Immigration Judge did not conduct a "comprehensive and independent inquiry" into [redacted] removability, and DHS did not meet its burden to prove that he is removable. DHS must establish "by clear, unequivocal, and convincing evidence that written notice [of the hearing] was so provided and that the alien is removable." 8 C.F.R. § 1003.26(c)(l). The purpose of *in absentia* proceedings is to determine whether the DHS met its burden to establish that the respondent, who did not appear, received proper notice and is removable as charged. *Matter of Sanchez-Herbert*, 26 I&N Dec. 43 (BIA 2012). In cases involving minors, it is especially important for the Immigration Judge to conduct a "comprehensive and independent inquiry." *Matter of Mejia-Andino*, 23 I&N Dec. 533 (BIA 2002); *accord Matter of Amaya*, 21 I&N Dec. 583, 587 (BIA 1996) (stating that the Immigration Judge "must exercise particular care" in determining the child's removability, considering the minor's age, and *pro se* and unaccompanied status and conducting a "comprehensive and independent inquiry"). Importantly, in cases involving individuals apprehended when they were minors, the Immigration Judge must take special care over the source and reliability of the information in the I-213. *Matter of Mejia-Andino*, 23 I&N Dec. at 537-38 (concurring opinion); *Matter of Amaya*, 21 I&N Dec. at 588 n.4. DHS cannot meet its burden of proof based on unreliable statements.

However, the evidence in this case was not clear, unequivocal, or convincing. DHS submitted only a Form I-213 to establish removability. But the Form I-213 is unreliable because it contains only conclusory statements based on only a child's statements made upon apprehension. *Matter of Mejia-Andino*, 23 I&N Dec. at 537-39 (concurring opinion) (discussing in detail why statements made by a child upon apprehension are often unreliable). Children being

interviewed by DHS officials, especially those with prior trauma, are often terrified and do not fully understand what is happening.

Moreover, in this case, the I-213 was prepared after DHS officials tore then *seven-year-old* [redacted] away from his father. Exh. 7, [redacted] Form I-213. [redacted] I-213 states that *seven-year-old* [redacted] told officers that he was "a citizen and national of Honduras without the necessary legal documents to enter, pass through, or remain in the United States. Exh. 7, [redacted] Form I-213. The subject also admitted to illegally crossing the international boundary without being inspected by an immigration officer at a designated Port of Entry." Exh. 7, [redacted] Form I-213. Obviously, a seven-year-old has no clear understanding of the complex concepts of citizenship and nationality and no understanding of what documents are needed to lawfully cross an international border. Many seven-year-olds cannot even read, let alone read and comprehend the laws and regulations concerning visas and parole documents.

The statements on this Form I-213 are unreliable. DHS cannot meet this burden of proof based on unreliable statements. This evidence simply is not clear, unequivocal, or convincing evidence of notice and removability. Accordingly, DHS did not meet its burden, and the Immigration Judge should rescind the improperly entered *in absentia* order of removal.

B. [redacted] never received proper notice of his hearing.

i. The NTA lacked the date and time and place of hearing, and accordingly is deficient under *Rodriguez v. Garland*.

This Court must rescind and reopen because [redacted] never received a proper NTA containing the date, time, and place of his hearing. In *Rodriguez v. Garland*, 15 F.4th 351 (5th Cir. 2021), the U.S. Court of Appeals for the Fifth Circuit held that a putative NTA that does not contain the time and date of the hearing does not satisfy the notice requirements of section 1229a. The court explained that the Supreme Court's interpretation of the section 1229(a) notice requirements in

Niz-Chavez "applies in the *in absentia* context" and went on to "require a single document containing the information in the in absentia context." *Rodriguez,* at 355. This published decision of the Fifth Circuit is binding authority in this case. Accordingly, because [redacted] never received a single document containing all of the required information,[2] this Court must rescind his *in absentia* order and reopen proceedings.

ii. [redacted] did not receive proper notice because EOIR sent the hearing notice to the [redacted] rather than to the address where DHS knew [redacted] was going upon release.

[redacted] did not receive notice of his hearing because EOIR sent his hearing notice to the [redacted] — an adult detention facility where he was not detained — rather than sending the hearing notice to the address he provided to DHS. Exh. 11, [redacted] Notice of Hearing. This Court should rescind his *in absentia* order because of this government error. *See Fuentes-Pena v. Barr*, 917 F.3d 827 (5th Cir. 2019) (concluding that rescission was appropriate because Fuentes-Pena notified ICE of her correct of address before ICE filed the NTA, and this satisfied INA § 239(a)(1)(F)). [redacted] father had no reason to think that he should file a change of address with the immigration court prior to the issuance of the hearing notice. After all, he had provided DHS with the correct address where the family would be living. Exh. 6, Decl. of [redacted] at ¶ 23. The NTA for [redacted] did not contain any address, so [redacted] father had no reason to know that the court would inexplicably use the address of an adult detention facility, rather than the address he had properly provided to DHS. Exh. 10, [redacted] NTA. This Court should therefore rescind [redacted] *in absentia* order.

C. [redacted] is prima facie eligible for relief and must apply for relief before USCIS.

[2] The Notice to Appear in this case also lacks an address for the Respondent. Exh. 10, [redacted] NTA.

[redacted] is *prima facie* eligible for relief from removal in the form of asylum, SIJS, and parole-in-place for separated families. Where ruling on a motion requires the exercise of judgment regarding eligibility for the relief sought, the Board does not require a conclusive showing that, assuming the facts alleged to be true, eligibility for relief has been established. By granting reopening the Immigration Judge does not rule on the ultimate merits of the application for relief. *Matter of L-O-G-*, 21 I&N Dec. 413, 418-19 (BIA 1996). Rather, a prima facie case is established "'where the evidence reveals a reasonable likelihood the statutory requirements for relief have been satisfied.'" *Mendez- Gutierrez v. Gonzales*, 444 F.3d 1168, 1171 (9th Cir. 2006) (quoting *Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003)); *see also Tadevosyan v. Holder*, 743 F.3d 1250, 1255 (9th Cir. 2014) (concluding the BIA abused its discretion in denying the motion to reopen and explaining that the BIA does not require a conclusive showing that relief has been established, but rather that the BIA is willing to reopen where the new facts alleged, when coupled with the facts already of record show that it would be worthwhile to develop issues further at a plenary injunction hearing on reopening). Moreover, where the adjudication of an application falls within USCIS' adjudicative authority, an Immigration Judge should generally defer to USCIS.

i. Under *J.O.P.*, USCIS has jurisdiction to adjudicate [redacted] asylum application.

USCIS has jurisdiction over [redacted] asylum application because he was designated as an Unaccompanied Child (UAC). *See* USCIS Memorandum HQRAIO 120/12a, Ted Kim, Acting Chief, Asylum Division, "Updated Service Center Operations Procedures for Accepting Forms I-589 Filed Unaccompanied Alien Children," May 28, 2013. ("Kim Memo"). Due to recent litigation, the Kim Memo is still in effect. Exh. 26, Preliminary Injunction, *J.O.P. v. DHS*, No. 19:1944 (D.Md. 2020).

Under the Kim Memo, "If CBP or ICE determined that the applicant was a UAC, and as of the date of the filing of the asylum applicant, that UAC status determination was still in place, USCIS will take initial jurisdiction over the case…" *See* Kim USCIS Memo.

In this case, [redacted] has been designated a UAC and that status determination is still in place today. Exh 1, Form I-589 Application for Asylum at Pages 7-8 (ORR Placement Form). Thus, as a UAC, he is eligible to file Form I-589 with USCIS.[3]

ii. [redacted] is *prima facie* eligible for asylum and related relief.

[redacted] fears persecution on account of his membership in the particular social groups "nuclear family members of [redacted]" and "nuclear family members of [redacted]."[4] Particular social groups based on membership in a nuclear family are cognizable. *Matter of L-E-A-*, 28 I&N Dec. 304 (A.G. 2021) ("L-E-A- III"); *see also, e.g.*, *Gonzalez Ruano v. Barr*, 922 F.3d 346, 353 (7th Cir. 2019); S.*E.R.L. v. Att'y Gen*., 894 F.3d 535, 556 (3d Cir. 2018); *Aguinada-Lopez v. Lynch*, 825 F.3d 407, 409 (8th Cir. 2016); *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (calling family the "quintessential particular social group"); *Vanegas-Ramirez v. Holder*, 768 F.3d 226, 237 (2d Cir. 2014); *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009); *Torres v. Mukasey*, 551 F.3d 616, 629 (7th Cir. 2008); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) (stating there can be "no plainer example of a social group" than the nuclear family).

[3] The injunction in *J.O.P. v. DHS* also prohibits USCIS from subjecting [redacted] to the one-year deadline in reliance on the enjoined May 31, 2019 USCIS memorandum, which permitted USCIS officers to apply the one-year deadline to individuals with previous "unaccompanied alien child" determinations if they no longer met the "unaccompanied alien child" definition at the time of first filing for asylum. Instead, pursuant to the *J.O.P. v. DHS* injunction, because [redacted] was previously determined to be an "unaccompanied alien child," USCIS must deem him exempt from the one-year deadline. *See* Exhibit D, *J.O.P. v. DHS* Class Certification and Amended Preliminary Injunction Order (Dec. 21, 2020).

[4] This is a non-exhaustive list of possible particular social groups. In the event the case is reopened, [redacted] reserves the right to propose additional particular social group formulations.

Additionally, [redacted] can prove a nexus between the harm he fears and his membership in a particular social group because the gang threatened [redacted] father, saying that if Mr. [redacted] did not leave, the gang members would kill him and his family. Exh. 6, Decl. of [redacted] at ¶ 3. Thus, as a child in the family, [redacted] is in danger precisely because of his kinship ties.

Finally, there are no bars to asylum that apply to [redacted] case. He has no criminal record, has never been firmly resettled anywhere else, and the one-year bar does not apply to him. Notably, the one-year bar does not apply for two reasons. First, he is a member of *Mendez Rojas* Subclass A.I, because:

- He was encountered by the Department of Homeland Security (DHS) upon arrival.
- He was released from DHS custody, after he was deemed to have a credible fear of persecution or torture.
- He did not receive individualized notice of the one-year filing deadline.
- He was issued a NTA in Removal Proceedings.
- He applied for asylum more than one year after his last arrival.

See concurrently filed Notice of Mendez Rojas Class Membership. Pursuant to the *Mendez Rojas* Settlement Agreement, EOIR must deem his asylum application to have been timely filed because it was filed on or before April 22, 2022.

Second, individuals who arrived in the United States as "unaccompanied alien children," like [redacted] are statutorily exempt from the one-year deadline for filing an asylum application. Through the 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Congress exempted unaccompanied children from the general requirement that an asylum applicant must file within one year of the date of their arrival in the United States,

see INA § 208(a)(2)(B), stating that this requirement "shall not apply to an unaccompanied alien child." INA § 208(a)(2)(E). Accordingly, there are no applicable bars and [redacted] is *prima facie* eligible for asylum.

iii. [redacted] is *prima facie* eligible for SIJS.

[redacted] is also *prima facie* eligible for SIJS. To be eligible for SIJS, an immigrant child must first invoke the jurisdiction of a state juvenile court to seek protection from parental abuse, neglect, abandonment, or similar circumstances. INA § 101(a)(27)(J). USCIS will grant the juvenile SIJS if the state court determines that it is not in the juvenile's best interest to return to his native country, and the Secretary of Homeland Security consents to the juvenile remaining in the United States. INA § 101(a)(27)(J) (ii)-(iii). Once USCIS grants an SIJS petition, the applicant may adjust status before the Immigration Court or before USCIS. To do so, the applicant must demonstrate that he: 1) is the beneficiary of an approved SIJS petition (or has a pending SIJS petition that if approved, would render the applicant eligible for adjustment of status); 2) has a current visa number, and 3) is admissible.

[redacted] was abandoned and neglected by his mother, [redacted]. Exh. 6, Decl. of [redacted] at ¶ 9. He accordingly is now in the process of obtaining a predicate order from a state court in [redacted] so that he may then submit an I-360 application to USCIS. Exh. 5, Verified Complaint for Child Custody.

iv. [redacted] is eligible for parole-in-place for separated families.

The Family Reunification Task Force has recently implemented a new process for previously reunified families located in the United States who were not admitted to the United States to request parole with USCIS. Exh. 21, Interim Progress Report. USCIS determined that [redacted] qualified for services through the Family Reunification Task Force because the US

government had separated him from his parent under the Zero Tolerance policy. Exh. 22, Family Reunification Task Force Correspondence. He has submitted a request for parole-in-place in accordance with the instructions provided by the Family Reunification Task Force. Exh 3. Receipt Notice for Form I-131, Exh. 21, Interim Progress Report. His parole-in-place request remains pending.

v. Once USCIS grants parole-in-place, [redacted] will no longer be removable as charged.

[redacted] was charged as being inadmissible under INA § 212(a)(6)(A)(i) (being present in the United States without admission or parole). Exh. 10, [redacted] NTA. However, he will no longer be removable as charged once USCIS grants him parole-in-place because at that point, he will be present pursuant to a grant of parole. It is therefore appropriate to rescind his *in absentia* order because the charge of removability can no longer be sustained.

D. The circumstances surrounding Respondent's failure to appear in court were exceptional and merit reopening.

The totality of the circumstances in this case, including the trauma and confusion caused by family separation, [redacted] reliance on his father to get him to his hearing, and his eligibility for relief, constitute exceptional circumstances and merit reopening under INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii). The term "exceptional circumstances" refers to exceptional circumstances "beyond the control of the alien," "such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances." INA § 240(e)(1). The statute enumerates a non-exhaustive list of examples, and other circumstances beyond those listed in the statute have been found to qualify as exceptional circumstances. Indeed, the Board of Immigration Appeals (BIA) has reopened cases for far less compelling circumstances than the circumstances present here. Exh. 25, Juan Francisco Lopez, A095 805

348 (BIA Aug. 10, 2016) (unpublished) (rescinding in absentia removal order and reopening respondent's case where the respondent had car trouble that prevented him from attending the hearing).

In determining whether exceptional circumstances excuse a noncitizen's failure to appear in court, the immigration court must assess the "totality of the circumstances" surrounding the noncitizen's case. *See Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996) (citing H.R. Conf. Rep. No. 955, 101st Cong., 2d Sess. 132 (1990)). The totality of the circumstances analysis is "grounded in due process considerations" which help "ensure that an alien is not deprived of a meaningful opportunity to be heard." *Murillo-Robles v. Lynch*, 839 F.3d 88, 91 (1st Cir. 2016) (citing *Kaweesa v. Gonzales*, 450 F.3d 62, 69-70 (1st Cir. 2006)). The BIA and courts of appeal have articulated various factors that immigration courts must consider under the totality of the circumstances test. According to the BIA, such factors include supporting documentary evidence, the noncitizen's efforts in contacting the immigration court, and the noncitizen's promptness in filing the motion to reopen. *Matter of B-A-S-*, 22 I&N Dec. 57, 58-59 (BIA 1998). Courts of appeal have articulated additional factors to be considered in the "totality of the circumstances," including the strength of the noncitizen's underlying claim, the harm that the noncitizen would suffer if the motion to reopen were denied, and the inconvenience that the government would suffer if the motion to reopen were granted. *Murillo-Robles*, 839 F.3d at 91 (citing *Kaweesa*, 450 F.3d at 68-69); *see also Singh v. INS*, 295 F.3d 1037, 1039-40 (9th Cir. 2002) (finding that if a respondent has no reason to try to delay his or her hearing and denying a motion to reopen would lead to the "unconscionable result" of deporting a noncitizen who is eligible for relief, the totality of the circumstances approach would weigh in favor of a finding of exceptional circumstances).

[redacted] case merits reopening based on the totality of the circumstances. [redacted] has strong underlying claims for relief in the forms of parole-in-place for separated families, Special Immigrant Juvenile Status, and asylum and related relief. The government would suffer minimal inconvenience if reopening were granted, as they can simply seek to dismiss proceedings so that [redacted] can proceed on his applications before USCIS. Reopening would also be hugely beneficial to [redacted] as it would allow him to lawfully remain in the United States without fear of again being torn away from his family.

Most importantly, the Court should grant reopening because [redacted] and his father were victims of the Trump administration's extraordinary policy to separate families. In April 2018, the Trump administration rolled out a "zero-tolerance" policy for families crossing the southern border wherein CBP separated parents from their children to refer the parent for prosecution, and then labeled the child as "unaccompanied," triggering placement in the custody of the Office of Refugee Resettlement (ORR), a subdivision of the Department of Health and Human Services, without a plan to reunify them with their parents or guardians. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-163, UNACCOMPANIED CHILDREN: AGENCY EFFORTS TO REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER 1, 12 (2018), https://www.gao.gov/assets/700/694918.pdf.

The administration's practice of forcibly separating parents from their minor children without a reunification plan, without effective procedures to ensure communication between parents and children, and without tools to help parents keep track of their children drew the strong criticism of human rights advocates, members of the public, press, and members of Congress alike. Exh. 17, Suzanne Gamboa, Trump's border separations left children, parents with severe trauma, study finds; Exh. 18, Katie Peeler, Forced Family Separation Isn't Just

Traumatic. It's Torture; Exh. 19, The Science is Clear: Separating Families has Long-term Damaging Psychological and Health Consequences for Children, Families, and Communities; Exh. 20, Jim Sliwa, Immigrant Family Separations Must End, Psychologist Tells Congressional Panel. Following the public outcry against the administration's policy of separating families, President Trump signed an executive order in June 2018 that replaced family separation with family detention. *See* Affording Congress an Opportunity to Address Family Separation, Exec. Order No. 1384, 83 Fed. Reg. 29435 (June 25, 2018); Exh. 23, Separated Families: A Legacy Biden Has Inherited From Trump. By then, the government estimated that it had separated at least 2,654 children from their parents or guardians. Exh. 22, Family Separation: By the Numbers, ACLU (Oct. 18, 2018).[5]

[redacted] missed his hearing because of the confusion caused by the government's cruel policy of separating children from their parents and the resulting procedural anomalies and governmental errors that occurred during that chaotic period. This circumstance is truly extraordinary, and thus reopening is warranted.

a. The 180-day filing deadline should be equitably tolled.

[redacted] moves this Court to equitably toll the 180-day deadline, which he missed as a result of extraordinary circumstances that prevented him from becoming aware of his final order of removal in absentia within 180 days of its issuance. This Court should equitably toll the

[5] Less than a week after President Trump signed the executive order ending the family separation policy, a federal judge placed a temporary injunction on family separations and ordered the administration to reunite separated families. *Ms. L. v. ICE*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018). On October 9, 2018, a federal court preliminarily approved a settlement agreement between plaintiffs and the government in the separate cases challenging the administration's policy of family separation. Preliminary Settlement Agreement, *Ms. L. v. ICE*, *M.M.M. v. Sessions*, No. 18cv0428-DMS-MDD (S.D. Cal. Sept. 12, 2018), https://cdn.vox-cdn.com/uploads/chorus_asset/file/13052057/government_agreement_in_asylum_cases.pdf (providing procedures for separated parents and children to pursue asylum together, beginning with DHS de novo good faith review of all negative credible or reasonable fear determinations made in the cases of separated parents, which would include interviews with each parent and allow submission of new evidence).

Motion to Reopen deadline because [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).

i. Extraordinary circumstances prevented [redacted] from filing a motion to reopen within 180 days of the entry of the removal order.

The exceptional circumstances that prevented [redacted] from attending his 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. Att'y Gen.*, 713 F.3d 1357, 1363, n.5 (11th Cir. 2013). [redacted] should not have been reasonably expected to quickly understand and navigate the legal process associated with his case. Under such circumstances, equitable tolling is plainly appropriate to protect [redacted] a vulnerable child who U.S. officials separated from his father. Given [redacted] diligent efforts to fight his case despite extraordinary obstacles beyond his control, this Court should equitably toll the 180-day deadline and reopen the case, particularly as he has now secured *pro bono* counsel.

ii. **[redacted] acted with reasonable diligence in pursuing his immigration case**.

[redacted] acted with reasonable diligence in pursuing his immigration case. 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); *accord Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005) ("…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."). 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." *Lugo-Resendez v. Lynch*, 831 F.3d. at 345.

[redacted] acted with reasonable diligence in light of the fact that he is a young child who was traumatized when the US government separated him from his parent at the US border. Exh. 13, Decl. of Att'y Rebekah Niblock; Exh. 23, Separated Families: A Legacy Biden Has Inherited From Trump. His case was in a confusing procedural posture, different from that of his father's. Exh. 13, Decl. of Att'y Rebekah Niblock at ¶ 5. Despite these obstacles, he and his family worked to seek out legal assistance, and then his attorneys in turn diligently requested records from the government to try to ascertain what had occurred in [redacted] case. Exh. 13, Decl. of Att'y Rebekah Niblock at ¶ 6. Despite significant delays in obtaining records, his attorneys worked diligently with [redacted] to put together applications for relief from removal and the instant motion. *Id*. at ¶ 14.

E. In the alternative, this Court should grant Respondents' motion to reopen *sua sponte*.

If this Court declines to reopen [redacted] case based on notice or exceptional circumstances, he requests that the Court reopen his removal case *sua sponte* based on the extraordinary circumstances of this case. *See* 8 C.F.R. § 1003.23(b)(1) ("An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals."). The "Board has the ability to reopen or remand proceedings when appropriate, such as for good cause, fairness, or reasons of administrative economy." *Matter of Yewondwosen*, 21 I&N Dec. 1025, 1027 (BIA 1997). The BIA has observed that *sua sponte* reopening is "reserved for truly exceptional situations," *Matter of G-D-*, 22 I&N Dec. 1132, 1134 (BIA 1999), and warranted "in unique situations where it would serve the interest of justice." *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998).

Here, rescinding the *in absentia* order and reopening proceedings is appropriate to allow [redacted] to pursue relief before USCIS. Moreover, this case must be viewed through the lens of the extraordinary events wherein [redacted] was forcibly separated from his father without being told where he was being taken or when he might see his family again. This separation compounded the trauma that Mr. [redacted] and his child were already trying to overcome. Exh. 13, Decl. of Att'y Rebekah Niblock at ¶ 12; Exh. 23, Separated Families: A Legacy Biden Has Inherited From Trump. In considering *sua sponte* reopening, the Immigration Judge must consider the trauma that the government caused when it separated [redacted] from his father. Exh. 17, Suzanne Gamboa, Trump's border separations left children, parents with severe trauma, study finds; Exh. 18, Katie Peeler, Forced Family Separation Isn't Just Traumatic. It's Torture; Exh. 19, The Science is Clear: Separating Families has Long-term Damaging Psychological and Health Consequences for Children, Families, and Communities; Exh. 20, Jim Sliwa, Immigrant Family Separations Must

End, Psychologist Tells Congressional Panel. Given the circumstances of this case, Respondent's case merits *sua sponte* reopening.

F. Respondent's removal is automatically stayed pending this Court's decision on the instant Motion to Rescind and Reopen.

The filing of a motion to reopen an *in absentia* order of removal automatically stays the removal of the noncitizen pending disposition of the motion by the Immigration Court. INA § 240(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii).

V. CONCLUSION

For the foregoing reasons, [redacted] asks the Court to rescind his *in absentia* order of removal and reopen his case. He further asks that this court terminate or administratively close proceedings to allow him to pursue his applications for parole in place, Special Immigrant Juvenile Status, and asylum before USCIS.

Date: 4/20/2022

Respectfully submitted,

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
HOUSTON, TEXAS

In the Matter of: [redacted]	**A #** [redacted]
In Removal Proceedings.	Next Hearing Date: N/A

EXHIBIT LIST

Exhibit	Description	Page No.
	Applications for Relief Pending Before USCIS	
1.	Form I-589 and supporting documents submitted to USCIS, including ORR Placement Form indicating [redacted] is an Unaccompanied Minor	26
2.	Correspondence between [redacted] Attorney and the Family Reunification Task Force, confirming that [redacted] qualifies for services provided by the Family Reunification Taskforce and explaining the process to apply for Parole in Place	66
3.	Receipt Notice for Form I-131 Application for Travel Document (Parole-in-Place)	69
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5.	Verified Complaint for Child Custody and Motion for Factual Findings in Support of Petition for Special Immigrant Juvenile Status	78
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