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**DETAINED**

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

In the Matter of: )  
 )  
 )  
 [REDACTED] ) File No.: [REDACTED]  
 )  
 Respondent. )  
 )  
 In Removal Proceedings )  
 \_\_\_\_\_ )

Before the Hon. Delia I. Gonzalez

Next Hearing Date: N/A

**RESPONDENT’S MOTION TO RESCIND *IN ABSENTIA*  
ORDER OF REMOVAL AND REOPEN REMOVAL PROCEEDINGS BASED ON  
INEFFECTIVE ASSISTANCE OF PRIOR COUNSEL, LACK OF NOTICE,  
EXCEPTIONAL CIRCUMSTANCES,  
MOTION TO REOPEN BASED ON CHANGED COUNTRY CONDITIONS AND  
IN THE ALTERNATIVE MOTION TO REOPEN *SUA SPONTE***

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

**AUTOMATIC STAY OF REMOVAL PER INA § 240(b)(5)(C)**

## **I. INTRODUCTION**

Respondent, [REDACTED] (“Mr. [REDACTED]”), moves this Court to rescind his *in absentia* order of removal, reopen his case, and allow him to pursue his application for asylum, withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (“INA”) and protection under the Convention Against Torture before the Baltimore Immigration Court.

Mr. [REDACTED], a native and citizen of Guatemala, who was a business owner in Guatemala and volunteered with the PAN political party, faced ongoing extortion by corrupt police, and when he refused to pay and expressed his opposition to the corruption, the police threatened him and his family. In retaliation for his political views, the Guatemalan police arrested Mr. [REDACTED] on false criminal charges and imprisoned him for 8 months to show they were in power and could carry out their threats. Seeking safety and better opportunities, he fled to the United States.

When Mr. [REDACTED] first arrived in the United States in 2004, the Department of Homeland Security (“DHS”) detained and held him in Texas for approximately five hours before releasing him to live with his father in Maryland. Despite DHS releasing Mr. [REDACTED] to go live in Maryland, DHS filed his Notice to Appear (“NTA”) in Harlingen, Texas, hundreds of miles from where Mr. [REDACTED] was going to reside.

Despite Mr. [REDACTED]’ language barrier, lack of resources, and lack of sophistication about the U.S. legal system, Mr. [REDACTED] did what he reasonably could to address the pending issues with the immigration court. He sought advice from everyone he knew who might have knowledge about the immigration court system, including family members, roommates,

fellow churchgoers, and even an immigration lawyer. Each one of them gave him the same bad advice: do nothing.

Unfortunately, that bad advice was just the beginning of Mr. [REDACTED]' problems. Nearly one year ago, Mr. [REDACTED], who has long worked as a mechanic, most recently at [REDACTED], was pulled over in [REDACTED] Maryland, while he was test driving a customer's car following repairs. The officer learned that Mr. [REDACTED] had a removal order from years prior, and as a result referred Mr. [REDACTED] to ICE who detained him in [REDACTED] Maryland. Mr. [REDACTED]' wife spoke with and consulted with many attorneys. Mr. [REDACTED]' wife hired a lawyer, [REDACTED], to represent Mr. [REDACTED] in reopening his proceedings. [REDACTED] failed to discharge his professional responsibilities to Mr. [REDACTED]: among other failures, he only spent less than ten minutes in total meeting with Mr. [REDACTED] and failed to investigate the facts of his case, and he caused Mr. [REDACTED] to sign a blank paper without ever informing him of the contents of the paper. Indeed, [REDACTED] only further complicated Mr. [REDACTED]' immigration case by filing a two-page boilerplate motion to reopen that showed an obvious lack of investigation of the facts, was devoid of legal argument, and failed to raise several viable legal arguments. [REDACTED] plainly rendered ineffective assistance of counsel that prejudiced Mr. [REDACTED] by leading to a denied motion to reopen. Because [REDACTED] rendered incompetent counsel, the numerical limitation on motions to reopen must be equitably tolled and Mr. [REDACTED] must be able to now raise all of his legal arguments that show his case merits reopening.

Now, Mr. [REDACTED] faces imminent deportation and separation from his immediate family here in the United States, including his wife and four children. Mr. [REDACTED] is a church-going family man who simply wants to work as a mechanic and provide for his family. If

he is deported to Guatemala, he fears he will be harmed or tortured by corrupt police who previously threatened him repeatedly, arrested him on fake charges after he expressed his opposition to government corruption, and thwarted his efforts to earn a living.

This Court should grant Mr. ██████████' Motion to Rescind and Reopen proceedings following his *in absentia* order of removal for each of the following reasons:

*First*, Mr. ██████████ did not receive proper notice of the consequences of failing to appear and therefore his proceedings must be reopened.

*Second*, due to exceptional circumstances, Mr. ██████████ did not appear for his hearing, and he is entitled to equitable tolling of his motion to reopen due to his reasonable exercise of diligence in connection with his immigration proceedings, along with the exceptional circumstances created by the ineffective counsel and other contributing factors.

*Third*, due to changed country conditions arising in Guatemala that make it more dangerous for Mr. ██████████ to be deported to his home country compared to 2004 when he was ordered removed, Mr. ██████████ must be given an opportunity to present his applications for asylum, withholding of removal and protection under the Convention Against Torture.

*Fourth*, Mr. ██████████' circumstances establish a truly exceptional situation worthy of this Court's exercise of *sua sponte* authority. 8 C.F.R. § 1003.23(b)(1).

## **II. RELEVANT STATEMENT OF FACTS AND STATEMENT OF THE CASE<sup>1</sup>**

### **A. Problems in Guatemala and Travel to the United States**

Mr. ██████████ is a 44-year-old native and citizen of Guatemala. Exhibit ("Exh.") A (Mr. ██████████' Declaration); Exh. B (Mr. ██████████' Birth Certificate). In Guatemala,

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<sup>1</sup> Undersigned counsel has not received the entire Record of Proceedings or audio recordings from the *in absentia* hearing. See Exh. P (Mendez Declaration). Undersigned counsel requested

Mr. ██████ did an apprenticeship at the Mazda auto dealer in Guatemala City. Exh. A (Mr. ██████' Declaration). With training as an automobile mechanic, he opened and began operating his own business, an auto repair shop named "██████████" in 1999. *Id.*; see also Exh. E (Commercial Business License). His business was attached to his home in ██████ ██████ Guatemala, which is just south of Guatemala City, the capital. Exh. A (Mr. ██████ ██████' Declaration). This is where his wife, children, and mother also lived. *Id.*

Mr. ██████' mother, ██████, was very well-known in the community, as she worked for the Ministry of Education, founded two public schools, and served on the election board. *Id.*; see also Exh. D (Declaration of ████████████████████). Inspired by his mother's work and his own beliefs about the importance of fair elections, Mr. ██████ also volunteered during the campaign season for the PAN political party. Exh. A (Mr. ██████' Declaration). For example, on one occasion, he worked at a polling place at the school ████████████████████, and while working, wore the party's t-shirt. *Id.* He considered "poll work important work that [he] believed in . . . because it is important for Guatemalans should have their voice heard and [he] think[s] most Guatemalans want to have leaders who are not corrupt and will not turn a blind eye to corruption." *Id.* During the campaign season, Mr. ██████ also volunteered for PAN by promoting the party through flyer distribution. *Id.*

As Mr. ██████ tried to manage his business, he was continually extorted and threatened by corrupt Guatemalan police officers. *Id.* Mr. ██████ describes how a few months after he opened his auto repair shop, an undercover police officer, Officer ██████ started

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the audio files, NTA, and IJ orders from the Harlingen Immigration Court and did receive a copy of part of the file, including among other items, the NTA and IJ *in absentia* order of removal, but did not yet receive the audio recordings. *Id.* Respondent, through undersigned counsel, reserves the right to supplement this motion, amend this motion, and raise additional arguments after a review of the complete record of proceedings, including the audio recordings.

extorting him. *Id.* “At first, the police officer asked for 500 quetzales per week. Then 4,000 quetzales. Then 6,000 quetzales.” *Id.* Along with these demands for money, the officer threatened both Mr. [REDACTED] and his family. *Id.* Mr. [REDACTED] “tried to keep Office [REDACTED]’s extortion and threats from [his] mother because [he] did not want to worry her and have that affect her health, but [his] mom eventually found out” and she “would pay these extortion demands to keep [Mr. [REDACTED]] safe.” *Id.*; *see also* Exh. D (Declaration of [REDACTED] [REDACTED]) (“I can also confirm that a police officer by the last name of “[REDACTED]” extorted my son and that I helped my son pay these extortion fees once I found out that my son was being extorted.”). While the police were extorting him was during the same period he had volunteered at the election polls for PAN. Exh. A (Mr. [REDACTED]’ Declaration).

When Mr. [REDACTED] refused to make payments and expressed his opposition to this government corruption, the officers became angry. *Id.* After refusing to pay the extortion demands, these officers arrested Mr. [REDACTED] on fake criminal charges. *Id.* As Mr. [REDACTED] explains:

A young man brought his car to my shop. After I repaired the car, I test drove it. As I was driving around the block, an undercover police officer stopped me. He told me that the car had been reported as stolen. I told him who I was, why I was driving the car, and that I had not stolen the car. I asked the police officer to allow me to go back to my shop so that I could show him the paperwork for the car. We went to my shop and when I showed him the paperwork, he demanded 20,000 quetzales. I refused. He ripped up the papers and said that those papers were no good and arrested me.

*Id.* Mr. [REDACTED] explains that he later learned the officer’s name was Officer [REDACTED]. *Id.*, After being arrested, Mr. [REDACTED] was imprisoned for 8 months until the owner of the car, who was in the United States, returned to Guatemala and confirmed to the police that his nephew had stolen the car and taken it to Mr. [REDACTED]’ shop. *Id.*; *see also* Exh. D (Declaration of

██████████). While detained for 8 months, Mr. ██████████' shop remained closed. Exh. A (Mr. ██████████' Declaration).

Upon his release from custody, Mr. ██████████ reopened the auto repair shop, but two weeks later, the same officer who had arrested him, accompanied by Officer ██████████, "came to my shop demanding 20,000 quetzales and carrying firearms." *Id.* Mr. ██████████ was terrified as his very young children were with him during this incident. *Id.*

The officers told me that they could kill me and my children at any moment and that my children's lives were not worth anything. Officer ██████████ was holding an AK-47 and Officer ██████████ had a handgun in his holster that he had his hand on while he threatened me.

*Id.* Mr. ██████████' mother ended up giving them money. *Id.* "When both Officers ██████████ and ██████████ showed up with guns to threaten [him] in front of my children, [he] knew then that they had set [him] up . . . on fake charges and jail time so that [he] would be scared into giving in to their extortion more easily. *Id.*

Mr. ██████████' mother, who lived with her son next to his auto repair shop, explains that she received a phone call on the home landline from Officer ██████████, who threatened that if her "son did not pay the money he demanded he was going to kill" Mr. ██████████. Exh. D (Declaration of ██████████). Approximately a month after Ms. ██████████ received this threat, the family moved to ██████████, about 30 minutes away by car, to escape the extortion and threats. *Id.*; *see also* Exh. A (Mr. ██████████' Declaration).

After working for a period in someone else's shop and laying low, Mr. ██████████ and his father decided to open a restaurant in Guatemala City named "██████████," and commuted to the restaurant from ██████████. Exh. A (Mr. ██████████' Declaration). "Again, undercover police began extorting and threatening" them, stating if they did not make the payments, "they would kill one or both of [them]." *Id.* They ultimately "closed the restaurant because of the

extortion and a burglary that took practically everything from the restaurant and left [them] with nothing.” *Id.*

Faced with continuous threats and extortion by police, and fearing that he could be unlawfully arrested again or beaten or killed, Mr. ██████████ decided to flee Guatemala for his safety. *Id.* Mr. ██████████ knew that he could not continue to live or work in Guatemala safely. *Id.* Mr. ██████████ first went to ██████████ Mexico, where he stayed for approximately a year and a half and worked as a mechanic, but was undocumented. *Id.* In early 2004, Mr. ██████████ traveled to the United States, on foot, through the U.S.-Mexico border. *Id.* After arriving in Texas, immigration officials detained Mr. ██████████ for approximately 5-6 hours. *Id.* Mr. ██████████ explains that “[t]he immigration official who was trying to talk to me did not speak any Spanish” and Mr. ██████████ “did not speak any English,” which made it difficult to communicate with these officials. *Id.* He describes how another detainee did some translating for the immigration official. *Id.* While detained, Mr. ██████████ remembers being asked for a phone number of a family member, and he had both his father and half-brother’s phone numbers. *Id.* Mr. ██████████ also informed the immigration officials that he was headed to Maryland to live with his father. *Id.* The detainee did not convey any information about when or where Mr. ██████████ needed to appear for a hearing or what would happen if he didn’t appear at a future hearing. *Id.*

The officials attempted to contact his father by phone, but they received no answer. Exh. A (Mr. ██████████’ Declaration). Mr. ██████████ was told that he would not be released unless contact could be made with a person in the United States to assume responsibility for Mr. ██████████. *Id.* Mr. ██████████ was then allowed to contact his half-brother, ██████████, who is a U.S. citizen and member of the U.S. Marine Corps living in California, and had

just returned from the war in Iraq. *Id.* ██████ spoke to the immigration officials and then spoke with Mr. ██████. *Id.* ██████ explained to Mr. ██████ that he had told the immigration officials that their father would be responsible for Mr. ██████ while he was in the United States, and Mr. ██████ also believes ██████ provided the officials with his father's address. *Id.* Immigration officials accepted ██████'s representation without ever speaking directly to their father, and they released Mr. ██████ to live with his father in Maryland. *Id.*

While detained, Mr. ██████ was given some paperwork by immigration officials in English, but “[n]o one translated any of the immigration paperwork.” Exh. A (Mr. ██████' Declaration). The Notice to Appear (“NTA”) indicates it was personally served on Mr. ██████ on February ██████ 2004, and was filed with the immigration court over two months later, on April ██████ 2004. Exh. R (NTA). Though the NTA says “failed to provide” for the address, Mr. ██████ explains that he believes his brother gave their father's address in Maryland. *Id.*

While Mr. ██████ was still detained, ██████ also informed him, based on his conversation with the immigration official, that Mr. ██████' immigration court hearing would take place in Texas. Exh. A (Mr. ██████' Declaration). This confused Mr. ██████, as he had already informed the DHS officers that he was going to be living with his father in Maryland. *Id.* Mr. ██████ was never informed that it was possible to file transfer papers seeking to move his hearing to Maryland, and did not have the information to find the papers or how he could complete such paperwork by himself in Spanish. *Id.* Mr. ██████, being unfamiliar with U.S. courts, laws, or procedures (and unable to read or speak English), was unaware that he could file transfer papers on his own without an attorney. *Id.* As detailed in

Section II.C, *infra*, he made numerous attempts to get information and assistance with his removal hearing, all of which were unsuccessful.

**B. Moving to and Resding in Maryland**

After DHS released him from detention, Mr. [REDACTED] then took a bus to Maryland with the plan of living with his father and his father's wife ("[REDACTED]"). Exh. A (Mr. [REDACTED]' Declaration). But shortly after Mr. [REDACTED] arrived in Maryland, his father and [REDACTED] were involved in a domestic altercation that resulted in their separation. *Id.* This separation further resulted in Mr. [REDACTED]' father leaving the residence, and Mr. [REDACTED] was told that he could no longer stay there. *Id.*

On his own, unable to speak English and with limited options, Mr. [REDACTED] went to live with a Guatemalan family in [REDACTED] Maryland. Exh. A (Mr. [REDACTED]' Declaration). At that point, his father had effectively abandoned him. *Id.* Mr. [REDACTED]' father died in 2016. Exh. F (Father's Death Certificate).

Since 2004, Mr. [REDACTED] has led a law-abiding, upstanding, responsible, and productive professional and family life in Maryland. *See* Exhs. A, G-K. He is a solid member of the community. Beginning in 2006, he became a devoted churchgoer. Exh. A (Mr. [REDACTED]' Declaration); *see also* Exh. J (Letter from Pastor [REDACTED]). Using his skills, he worked as an auto mechanic, assisting people within his community who had car troubles and earning an honorable living. Exh. A (Mr. [REDACTED]' Declaration). In 2016, he began working for [REDACTED]. *Id.* He also is a father and stable provider to his wife and their four children, the younger two of whom (ages 10 and 7) are U.S. citizens. *Id.*; *see also* Exh. G (Birth Certificate of [REDACTED]); Exh. H (Birth Certificate of [REDACTED]). Other than the May [REDACTED] 2018 traffic stop citations that led to Mr. [REDACTED] being placed in [REDACTED]

ICE custody, described below, Mr. [REDACTED] has no criminal record within the United States.<sup>2</sup> Exh. A (Mr. [REDACTED]' Declaration)

**C. Repeated Efforts to Get Assistance with his Immigration Case**

While living in Maryland, Mr. [REDACTED] made numerous attempts to get information and/or assistance concerning his removal hearing. In particular, Mr. [REDACTED] has sought assistance from individuals on at least the following occasions:

- Shortly after arriving in Maryland, he asked his father's wife, [REDACTED], a tax preparer who spoke English and who he perceived to have knowledge about the U.S. government, about transferring his hearing to Maryland. She told him that nothing could be done. Exh. A (Mr. [REDACTED]' Declaration).
- He asked his Guatemalan host family, who were lawful permanent residents and had gone through immigration proceedings, how to transfer his hearing. They told him to leave the issue alone. *Id.*
- He spoke with a friend from church in 2007, who told him that he should speak with an attorney. The friend drove Mr. [REDACTED] to an attorney's office in Virginia for a free consultation. The attorney told Mr. [REDACTED] that it was likely that he had a removal order, that nothing could be done in his case, and that he should wait for new laws that could benefit him. *Id.*

Having been advised by several individuals that he should *do nothing*, and without other knowledgeable sources whom he could trust, Mr. [REDACTED] missed the opportunity to transfer his removal proceedings. In addition, because he no longer lived at the address that was on file, he never received any notice that he had been ordered removed *in absentia*. Exh. A (Mr. [REDACTED]' Declaration). Mr. [REDACTED] trusted the attorney he spoke to in 2007, and believed that there was no action he could take in his immigration proceedings so he went about raising his family. *Id.*

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<sup>2</sup> These traffic citations led to "Failure to Appear" dispositions on October [REDACTED] 2018. However, Mr. [REDACTED] was still in ICE custody on this date.

On or about June █ 2004, Mr. █ was ordered removed after an *in absentia* hearing in Harlingen, Texas. *See* Exh. R (IJ Order, June █ 2004). The only evidence undersigned counsel believes was submitted by DHS in support of removability was the Form I-213. *See* Exh. S (Form I-213).<sup>3</sup>

**D. A May 2018 Traffic Stop, ICE Detention, and █'s Representation on the Motion to Reopen**

As described above, Mr. █ has led an upstanding life in the United States, without any problem with the law. On May █ 2018, because of an expired emissions inspection on a client's car he was driving while working as an auto mechanic, Mr. █ was pulled over by an █ police officer. Exh. A (Mr. █' Declaration). The police officer turned Mr. █ over to ICE, who detained him at the Adult Detention Center in █, Maryland. *Id.*

As soon as ICE detained Mr. █, his wife, █ (“Ms. █”) “started calling attorneys and asking for recommendations for attorneys,” calling up to four or five attorneys. Exh. A (Mr. █' Declaration). Ms. █' boss's brother recommended an attorney, and after making a payment of \$750, the attorney visited Mr. █ with his interpreter and interviewed him for a short amount of time, but said there was nothing they could do in Mr. █' case. *Id.* Another attorney named █ also visited Mr. █, but did not charge him any money, but told him said she could not do anything in his case. *Id.* Mr. █ also met with an attorney from the

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<sup>3</sup> Note that the Form I-213 has some internally inconsistent information. Exh. S (Form I-213). The Form I-213 says Mr. █ “left Guatemala on or about June 07, 2003 and travelled alone to Mexico where he entered illegally through █, Mexico on July 07, 2002,” a date earlier in time than when he left Guatemala, which is obviously erroneous, and thus undermines the reliability of this document with regard to the “failure to provide” address statement that formed the basis for that allegation on the NTA.. *Id.*

Capital Area Immigrants' Rights ("CAIR") Coalition named ██████, who indicated she would check Mr. ██████' immigration paperwork, but she did not initially return calls from Mr. ██████ or his wife.

Ms. ██████ visited the law firm of ██████ and met with a man named ██████, who she thought was an attorney. Exh. A (Mr. ██████' Declaration). He spoke native Spanish, and explained the case. *Id.* Ms. ██████ paid the firm \$1,500 to represent her husband on a Motion to Reopen. *Id.*; see also Exh. M (Receipt).

██████, an attorney from ██████, visited Mr. ██████ once in detention for ten minutes or less, and the two did not speak on any other occasion. Exh. A (Mr. ██████' Declaration). ██████ did not bring an interpreter with him, and "his Spanish was so-so, a mix of English and Spanish." *Id.* The language that Mr. ██████ understands best is Spanish. *Id.* During his only conversation with Mr. ██████, ██████ asked only about why Mr. ██████ did not attend his immigration court hearing in Texas, and did not seek any additional background information from Mr. ██████. *Id.* ██████ explained that he would be asking the immigration judge to reopen his case, which would be very difficult. *Id.* He also advised Mr. ██████ that his lack of a criminal record would not matter in immigration proceedings, but did not advise Mr. ██████ of what factors could be considered. *Id.* ██████ discussed nothing else with Mr. ██████ during their short meeting, never asked additional background information, and never informed Mr. ██████ that he would have only one chance at filing a motion to reopen. *Id.* Nevertheless, at the conclusion of the meeting, ██████ told Mr. ██████ to sign a *blank* piece of paper. *Id.* ██████ said the signature was for a document he was giving to the immigration judge, but never explained that it would be part of a declaration. *Id.* Mr. ██████ was unaware of the

contents of the declaration that was later submitted. *Id.* Mr. ██████ signed the paper because he trusted that his attorney had his “best interests in mind.” *Id.*

On May ██████ 2018, ██████ submitted a Motion to Reopen an *In Absentia* Order of Removal (“First Motion to Reopen”), which was received by the court on June ██████ 2018. *See* Exh. U (First Motion to Reopen); Exh. W (IJ Order, June ██████ 2018) (stating date motion was received). The First Motion to Reopen comprised only a two-page memorandum, a one-page declaration that was purportedly authored and signed by Mr. ██████, and supporting exhibits that were neither explained nor cited in the two-page supporting memorandum. Exh. U (First Motion to Reopen). The two-page memorandum focused on the contention that “it does not appear that Respondent was advised of the date and time of the removal hearing,” but provided no supporting facts. *Id.* Aside from that contention, the memorandum contains only brief reference to the facts of Mr. ██████’ arrival in the United States and detainment in 2004, contact between Mr. ██████’ brother and the immigration officers, and Mr. ██████’ travel to Maryland to live with his father. *Id.* ██████ made no mention of Mr. ██████’ estrangement from his father, his efforts to secure advice and counsel relating to transfer of his immigration proceedings, or Mr. ██████’ activities and upstanding record while living within the United States. Inexplicably, there is no request in the First Motion to Reopen for the Court to find exceptional circumstances or use its *sua sponte* authority to reopen the case.

The one-page “affidavit” included in the First Motion to Reopen adds little factual support beyond that which was provided in the two-page memorandum. *See* Exh. U (Aff. in supp. of First Motion to Reopen). Mr. ██████ never signed that “affidavit;” rather, Mr. ██████ only signed a blank sheet of paper. Exh. A (Mr. ██████’ Declaration). Mr. ██████ now believes that the blank piece of paper that he signed was used as the signature

page attached to his declaration, and the signature page was notarized by [REDACTED] himself.

*Id.* The affidavit contained inaccurate statements, such as the fact that Mr. [REDACTED] moved with his father to [REDACTED] Maryland, when in fact, he had moved to [REDACTED] alone to live with another Guatemalan family. *Compare* Exh. U (Aff. in supp. of First Motion to Reopen) with Exh. A (Mr. [REDACTED]' Declaration).

In its Opposition to the First Motion to Reopen, DHS asserted that the record of Mr. [REDACTED]' removal proceeding shows that he was personally served with his Notice to Appear on February [REDACTED] 2004, and that his fingerprint was on the certificate of service. Exh. V (Dept. of Homeland Security's Opposition to Resp.'s Mot. to Reopen ("DHS Opposition")). DHS further argued that Mr. [REDACTED] was notified in Spanish of the time and place of his removal hearing and warned of the consequences of failing to appear. *Id.* Finally, although [REDACTED] never raised a *sua sponte* argument, DHS argued that the Court should decline to exercise its *sua sponte* authority to reopen Mr. [REDACTED]' removal proceedings, because such authority "is not intended to be used as a method by which aliens can circumvent regulations."

*Id.*

The Immigration Court denied Mr. [REDACTED]' First Motion to Reopen on June [REDACTED] 2018. Exh. W (IJ Order, June [REDACTED] 2018). This Court found that Mr. [REDACTED] was personally served with a Notice to Appear on February [REDACTED] 2004, and "received actual and proper notice of his June [REDACTED] 2004 removal hearing" and therefore held the proceedings should not be reopened. *Id.* This Court further declined to reopen the case *sua sponte* despite [REDACTED] not including or developing a *sua sponte* argument in his minimal motion to reopen. *Id.*

Mr. [REDACTED] first learned that the First Motion to Reopen had been denied by calling the immigration court hotline from detention. Exh. A (Mr. [REDACTED]' Declaration). Mr.

██████████ called his wife, Ms. ██████████ to notify her, and she in turn called ██████████'s office. *Id.* Ms. ██████████ went to the law firm office, and met with ██████████, who she had since learned was a paralegal, and he explained that it was not worth it to appeal the adverse ruling by the court. *Id.* ██████████ further stated that if they chose to appeal, it would be as though he was “taking [their] money for fun.” *Id.* ██████████ then told Ms. ██████████ that if Mr. ██████████ remained detained for 90 days or more, ██████████ would get him released from detention. *Id.* After 90 days had passed, Ms. ██████████ spoke to ██████████ again, who told her at that time that ██████████ could get Mr. ██████████ released after 180 days. *Id.* After 180 days, Ms. ██████████ again tried calling ██████████'s office, but no one from the office answered or returned her calls. *Id.*

Even after learning that the Motion to Reopen was denied, Ms. ██████████ sought additional legal opinions about Mr. ██████████' options. Exh. A (Mr. ██████████' Declaration). She arranged for a phone consultation with “the attorney who appears on a popular show on Spanish television, ██████████,” but he advised Mr. ██████████ “there was nothing [he] could do to stop [his] deportation. *Id.* Ms. ██████████ met with another attorney on her husband's behalf, and he said if Mr. ██████████' “father was a Lawful Permanent Resident that could help stop [the] deportation,” but Ms. ██████████ was not able to obtain proof of that and was unable to reach that attorney again when she tried. *Id.* Another attorney who had previously met with Mr. ██████████ reviewed the case again, but again said there was nothing he could do. *Id.*

In February 2019, Ms. ██████████ first communicated with undersigned counsel, who was at that time “simply trying to determine the procedural posture of Mr. ██████████' case, by attempting to contact his deportation officer and his prior attorney ██████████.” Exh.

P (Declaration of Michelle Mendez (“Mendez Declaration”)). On February 27, 2019, Ms.

██████████ shared by text with undersigned counsel some photos of what ██████████ had filed, and upon review undersigned counsel had concerns of ineffective assistance of counsel, but was seeking to get the full file to review. *Id.* Undersigned counsel met with Mr. ██████████ on March 17, 2019 in custody and expressed that she had some concerns about ██████████’s representation, and Mr. ██████████ may have a basis to reopen, in part based on ineffective assistance of counsel. *Id.*

It was not until March ██████████ 2019 that ██████████ shared the file with understand counsel. Exh. P (Mendez Declaration). Undersigned counsel then met with Mr. ██████████ on a couple of occasions and communicated with his wife to gather additional facts related to his case. *Id.* Upon reviewing the prior attorney file and investigating the facts, undersigned counsel advised Mr. ██████████ that ██████████ had ineffectively represented him in the prior motion to reopen, but that he had several arguments to reopen his case. *Id.*

Upon learning about the deficiencies in the First Motion to Reopen, which were the result of ineffective counsel, Mr. ██████████ authorized the undersigned counsel to file a second motion to reopen on his behalf. Exh. A (Mr. ██████████’ Declaration). On April 12, 2019, undersigned counsel provided ██████████ notice pursuant to *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) and on April 17, undersigned counsel mailed a complaint to the Office of the Bar Counsel, Attorney Grievance Commission of Maryland. Exh. N (Email and Letter to ██████████); Exh. O (Letter to Maryland Bar).

**E. Mr. ██████████ Is Even More Afraid to Return to Guatemala Due to Recent Country Condition Developments**

At this time, Mr. ██████████ remains in detention separated from his immediate family who are in the United States. Mr. ██████████ worries about his family, including his two

minor children, who depend on his financial support and fatherhood. Exh. A (Mr. ██████████' Declaration). At any moment, he faces deportation to Guatemala—a forced return to the threats of violence that he fled more than 15 years ago, crushing the promising hope of a stable and free life in the United States.

Mr. ██████████ is even more afraid of returning to Guatemala, a country where police corruption has exploded, and is even worse than 2004. *See* Exh. A (Mr. ██████████' Declaration); *see also* Exhs. L, FF-OO. In fact, with respect to Mr. ██████████ in particular, just in the last two years, Mr. ██████████' brother ██████████, who is a truck driver in Central America, was stopped at a police check point in Guatemala and the police told him they were “waiting for [Mr. ██████████] to come back,” and this threat made Mr. ██████████ very afraid. Exh. A (Mr. ██████████' Declaration).

In addition, very recent developments in the country conditions impact Mr. ██████████' case. As Guatemalan expert, Hector Silva Avalos<sup>4</sup> explains:

One of the most fundamental changes I have researched and reported on is the January 7, 2019 termination of the mandate for the International Commission Against Impunity in Guatemala, or “CICIG” based on its acronym in Spanish. The CICIG is a UN-backed entity funded by multiple countries that acts in conjunction with the country's Public Ministry (MP) and other institutions to investigate and prosecute serious crime in Guatemala.

Exh. L (Statement from Hector Silva Avalos). Mr. Avalos states, “termination of the CICIG mandate is a fundamental change that already has and will continue to have a devastating effect on Guatemala and its citizens. It has emboldened police corruption and hindered the

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<sup>4</sup> Mr. Avalos is “a graduate of Universidad Centroamericana José Simeón Cañas (UCA) in El Salvador, and received a Master's degree in journalism from the University of Barcelona, Spain, and Columbia University.” Exh. L (Statement from Hector Silva Avalos). He was “a Senior Research Fellow at the Center for Latin American and Latino Studies at American University in Washington, DC, and [he has] over 20 years of experience researching and reporting on and in El Salvador and Guatemala.” *Id.* Mr. Avalos' CV with his credentials is also attached. *Id.*

Government’s ability to keep its people safe, particularly those who oppose corruption.” *Id.* After Guatemala expelled the CICIG, U.S. Congresswoman Norma Torres, stated that commission’s “abrupt departure would be a major setback for Guatemala’s fight against corruption,” noting that “[c]omplex cases involving organized crime, drug trafficking, and human smuggling would fall apart. Powerful criminals and corrupt politicians would get away with serious crimes.” Exh. JJ (Elizabeth Malkin, Guatemala Expels U.N.-Backed Anti-Corruption Panel, Claiming Overreach, NY Times, Jan. 7, 2019); *see also* Exhs. FF - II..

The motion follows.

### **III. STATEMENT OF ISSUES**

Whether Mr. ██████████’ motion to reopen is subject to equitable tolling of the number limitations where he was ineffectively represented by prior counsel who failed to investigate the facts, filed a motion to reopen that failed to raise numerous compelling legal arguments, and submitted a declaration from Mr. ██████████ with inaccurate facts that Mr. ██████████ never had the opportunity to review, and thereby prejudiced Mr. ██████████’ case.

Whether Mr. ██████████’ removal case merits reopening where: (1) Mr. ██████████ did not receive proper notice of all the consequences of failing to appear as required by the INA; (2) Mr. ██████████ missed his hearing due to exceptional circumstances, including ICE filing his NTA in Texas, despite knowing he was residing in Maryland, and receiving misinformation from a series of individuals about his case, most recently an attorney who ineffectively represented Mr. ██████████ and warrants equitable tolling of the 180-day filing deadline; (3) Mr. ██████████ presents changed country conditions in Guatemala material to his applications for asylum, withholding of removal and protection under the Convention Against Torture, relief

for which he is *prima facie* eligible; and (4) Mr. [REDACTED] presents a truly exceptional situation worthy of this Court's exercise of *sua sponte* authority.

#### IV. LEGAL STANDARDS

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)).

An *in absentia* order may be rescinded upon a motion to reopen filed within 180 days after the date of the order of removal if the respondent demonstrates that the failure to appear was because of exceptional circumstances; or upon a motion to reopen filed at any time if the respondent demonstrates: (1) that he or she did not receive notice in accordance with INA §§ 239(a)(1)-(2) or (c), or; (2) the respondent demonstrates that he or she was in federal or state custody and the failure to appear was through no fault of the respondent. INA § 240(b)(5)(C). There is also a limit of one motion to rescind and reopen. However, the number limitation, as well as the 180-day deadline for reopening based on exceptional circumstances, can be equitably tolled. *See infra* Sec. V.C.

There is no time or number limit on the filing of a motion to reopen if the basis is for asylum, withholding of removal or CAT and is based on changed country conditions in the country of nationality, and such evidence is material and not previously available at the time of the previous proceeding. *See* INA § 240(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii). For a motion to reopen, the applicant must also show *prima facie* eligibility for the underlying substantive relief requested. *See* 8 C.F.R. § 1003.2(c)(1); *INS v. Wang*, 450 U.S. 139, 145 (1981) (per curiam); *Matter of J-G-*, 26 I&N Dec. 161 (BIA 2013). Motions to reopen filed for the purpose of submitting applications for relief must also be accompanied by the proper application for relief

and its supporting materials. 8 C.F.R. § 1003.23(b)(3). The motion to reopen must establish that the “evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing.” *Id.*; see also *Matter of L-O-G-*, 21 I&N Dec. 413, 420 (BIA 1996) (an immigration court may reopen proceedings when the new facts alleged, together with facts already in the record, “indicate a reasonable likelihood of success on the merits.”). Moreover, the BIA has held that the requirements for rescission of an *in absentia* order under INA § 240(b)(5)(C) need not be satisfied to reopen proceedings based on changed country conditions. *Matter of J- G-*, 26 I&N Dec. 161 (BIA 2013).

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).

## V. ARGUMENT

Mr. ██████████ should not be subject to the numeric limitations on Motions to Rescind and Reopen because his prior counsel provided ineffective counsel on the First Motion to Reopen submitted to this court on June 1, 2018. This Court should rescind and reopen these proceedings because Mr ██████████ did not receive adequate notice of the consequences of failing to appear, and such motion is not subject to any time limitation. Moreover, Mr. ██████████ also presents evidence of exceptional circumstances for failing to appear, and equitable tolling of the exceptional circumstances 180-day deadline.

Mr. ██████████ also demonstrates his case should be reopened based on changed country conditions in Guatemala, which is not subject to the general time or numeric limitations for motions to reopen. He submits his I-589 application and supporting evidence showing his

*prima facie* eligibility for asylum, withholding, and protection under the Convention Against Torture.

Finally, Mr. [REDACTED] alternatively requests *sua sponte* reopening and presents compelling evidence in support of that request.

**D. This Court Should Reopen Mr. ██████████' Case Because Mr. ██████████ Has Demonstrated Changed Country Conditions in Guatemala and *Prima Facie* Eligibility for Asylum, Withholding of Removal and CAT Protection**

This Court should grant this motion due to changed country conditions arising in the country of nationality. INA §§ 240(c)(7)(A)-(C). There is no time or number-limit on the filing of a motion to reopen if the basis is for asylum, withholding of removal or CAT and is based on changed country conditions in the country of nationality, and such evidence is material and not previously available at the time of the previous proceeding. *See* INA § 240(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii). For a motion to reopen, the applicant must also show *prima facie* eligibility for the underlying substantive relief requested. *See* 8 C.F.R. § 1003.2(c)(1); *INS v. Wang*, 450 U.S. 139, 145 (1981) (per curiam); *Matter of J-G-*, 26 I&N Dec. 161 (BIA 2013).

This Court should reopen Mr. ██████████' case even if it declines to rescind his removal order under INA § 240(b)(5)(C) so that Mr. ██████████ may pursue asylum, withholding of removal and protection under the Convention Against Torture, the latter two

forms of relief that are mandatory under the INA. The BIA has held that the requirements for rescission of an *in absentia* order under INA § 240(b)(5)(C) need not be satisfied to reopen proceedings to apply for asylum and withholding of removal based on changed country conditions. *Matter of J- G-*, 26 I&N Dec. 161 (BIA 2013). In *Matter of J-G-*, the BIA remanded the record for consideration of the respondent's asylum application, notwithstanding the fact that she did not meet the requirements for rescission of the *in absentia* order. *Id.* at 170. This Court, therefore, may reopen Mr. ██████████' proceedings for consideration of his attached Form I-589, Application for Asylum, Withholding of Removal and protection under the Convention Against Torture, without first rescinding the *in absentia* order of removal. *See* Exh. C (I-589). This Court should reopen Mr. ██████████' case because he demonstrates changed country conditions relevant to his fear of return, and that he is *prima facie* eligible for asylum, withholding of removal and protection under the Convention Against Torture.

Mr. ██████████ originally fled Guatemala for his own safety. Exh. A (Mr. ██████████'s Declaration). In Guatemala, he had volunteered with the PAN political party and was a business owner who faced ongoing threats by the police in two different parts of Guatemala because of his refusal to pay extortion demands, and because of his opposition to police corruption. *Id.* He was falsely imprisoned for 8 months by police officers as a result of his refusal to pay their extortion demands and opposition to their corruption. *Id.*; *see also* Exh. D (Declaration of ██████████). More recently, approximately two years ago, Mr. ██████████' brother ██████████, who is a truck driver in Guatemala, was stopped at a police check point as he was entering ██████████. Exh. A (Mr. ██████████'s Declaration). The police recognized ██████████ as Mr. ██████████' brother, and they told ██████████ they were "waiting for [Mr. ██████████] to come back," a threat that gravely concerns Mr. ██████████

about his safety if he were deported to Guatemala. *Id.* Mr. [REDACTED] is more afraid than ever to return to Guatemala because the country conditions have significantly changed and are substantially worse than at the time of his last hearing in 2004. *Id.*

1. The Country Conditions in Guatemala Have Substantially Changed from 2004 to Today.

As the Fifth Circuit explains, “[s]howing changed country conditions requires making a meaningful comparison between the conditions at the time of the removal hearing and the conditions at the time the alien filed her motion to reopen.” *Nunez v. Sessions*, 882 F.3d 499, 508 (5th Cir. 2018). A comparison of the country conditions in Guatemala in 2004 to present demonstrates such a change.

In 2004, the evidence makes clear that there was some police corruption in Guatemala. *See, e.g.*, Exhs. L, NN, OO. In Mr. [REDACTED]’ case specifically, he was repeatedly threatened and extorted by corrupt police officers. Exh. A (Mr. [REDACTED]’s Declaration). As Hector Silva Avalos (“Mr. Avalos”), an expert on country conditions with 20 years of experience researching and reporting on and in Guatemala, explains, “Mr. [REDACTED]’ account of what happened to him is consistent with the country conditions in Guatemala at the time.” Exh. L (Statement from Hector Silva Avalos). While police corruption has been an ongoing problem in Guatemala, in 2004, the government was attempting to address these issues. As one report describes:

In 2004 the anti-corruption prosecutor (a US Embassy-supported program) brought cases against 383 individuals, including many high-ranking former government officials, army officers and police.

In 2004 [t]he Director General of the police established a "zero tolerance" policy on corruption. During 2004, more than 2,000 cases were opened against police officers, including 23 command-level officers. Half of the 650-person criminal investigative division was fired.

See Exh. NN (“Guatemala-Corruption,” Global Security); *see also* Exh. OO (Associated Press, Guatemala’s New President Pledges to Fight Corruption, LA Times, Jan. 15, 2004) (reporting that newly-elected President Oscar Berger “said his administration would be austere, but he also pledged to launch a major anti-corruption campaign to clean up the government and the national police force.”).

Country conditions expert Mr. Avalos explains how corruption in Guatemala is worse now than it was in 2004. Exh. L (Statement from Hector Silva Avalos). He states, “[f]undamental changes in Guatemalan domestic policy have exacerbated the institutional failures that generate the types of abuses Mr. ██████████ experienced.” *Id.* Mr. Avalos describes “[o]ne of the most fundamental changes I have researched and reported on is the January 7, 2019 termination of the mandate for the International Commission Against Impunity in Guatemala, or ‘CICIG,’” “a UN-backed entity funded by multiple countries that acts in conjunction with the country’s Public Ministry (MP) and other institutions to investigate and prosecute serious crime in Guatemala.” *Id.* He warns that the types of “bad behaviors” like “extrajudicial executions, police corruption and deadly privations of due process similar to that of which Mr. ██████████ was victim ... are bound to increase in light of these new developments, which signal that the Guatemalan government is letting corruption fester and are less likely to hold bad actors accountable.” *Id.*

Mr. Avalos further explains:

More recently, the CICIG accused President Jimmy Morales of illegally financing the election campaign that brought him into power. This latest action sparked outrage in Morales’ administration, who pushed the country to the brink of a constitutional crisis, violating court orders and illegally using security forces to oust the Commission unilaterally. In light of these recent events, the United States House of Representatives has openly branded President Morales as corrupt, and has warned that they will suspend aid to his country should his administration continue

to unlawfully obstruct the CICIG's mission for the remainder of its current mandate.

It is my expert opinion that the termination of the CICIG mandate is a fundamental change that already has and will continue to have a devastating effect on Guatemala and its citizens. It has emboldened police corruption and hindered the Government's ability to keep its people safe, particularly those who oppose corruption. In fact, the termination of the CICIG is a clear and loud statement of the Guatemalan government's unwillingness to provide protection to its citizens who openly oppose corruption. Therefore, the relevant country conditions in Guatemala regarding corruption have indeed worsened since 2004.

*Id.* The Organization of American States notes that Guatemalan "government's constant actions to undermine the CICIG's operations are incompatible with states' obligations to fight corruption and impunity, as established in their international commitments, and thus threaten the essence of the rule of law." Exh. GG (Organization of American States, IACHR Expresses Concern Over Measures That May Hamper the Fight Against Impunity and Corruption in Guatemala, July 10, 2019); *see also* Exh. JJ (Elizabeth Malkin, "Guatemala Expels U.N.-Backed Anti-Corruption Panel, Claiming Overreach," NY Times, Jan. 7, 2019) (reporting that a U.S. Congresswoman stated that CICIG's "abrupt departure would be a major setback for Guatemala's fight against corruption."); Exh. II (Press Release, Sen. Leahy, "REAX Of Appropriations Vice Chair Senator Leahy (D-Vt.) To The Guatemalan Government's Termination Of The Mandate Of The International Commission Against Impunity In Guatemala (CICIG)," Jan. 8, 2019) (stating that "President Morales, and those who have participated in or supported this flagrant abuse of power, have made their choice. It is a choice of self-interest over the public interest. Of impunity over justice."). As two professors explain, "The current constitutional crisis is also important because it threatens the stability of Guatemala's post-war democracy." Exh. FF (William D. Stanley and Charles T. Call, "UN-Backed Anti-Corruption Efforts Provoke a Backlash in Guatemala," IPI Global Observatory, Feb. 5, 2019); Exh. HH (Tom Phillips, "Guatemalan

president condemned after ejecting UN anti-corruption group,” The Guardian, Jan. 8, 2019) (reporting that a Central America specialist from the University of Scranton stated that this recent move, “pushed the Central American country one step closer to becoming ‘a full-on autocracy.’”). It is clear that these recent events in 2019 constitute a significant change in country conditions.

Mr. ██████████ has demonstrated that country conditions in Guatemala have changed since the last hearing in 2004, and as described below, it is clear that this evidence compels the conclusion that Mr. ██████████ has demonstrated *prima facie* eligibility for asylum, withholding of removal, and protection under the Convention Against Torture, and thus provides grounds to reopen his removal proceedings at this time in order to present his claim at a full hearing.

2. Mr. ██████████ Has Demonstrated *Prima Facie* Eligibility for Asylum.

To establish eligibility for asylum, a respondent must meet the definition of refugee at INA § 101(a)(42)(A):

Any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person habitually resided, and who is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

“The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.” 8 C.F.R. § 1208.13(b). Even a ten percent chance of persecution may establish a well-founded fear. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (asserting that “[t]here is simply no room in the United Nations’ definition [for determining refugee status] for concluding that, because an applicant only has a

10% chance of being shot, tortured, or otherwise persecuted, he or she has no ‘well founded fear’ of the event’s happening”); *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001).

While the definition of “persecution” has been interpreted diversely by adjudicators, it includes threats to life or freedom, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom. *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *see also INS v. Cardozo-Fonseca*, 480 U.S. 421, 444 (1987) (noting that asylum applicants are entitled to a discretionary grant of asylum and mandatory suspension of deportation where “his or her life or freedom ‘would be threatened’ if deported”). When an applicant has suffered past persecution, there is an automatic presumption that that person has a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1). This automatic finding of well-founded fear of future persecution requires that the Department show by a preponderance of the evidence that a *reasonable* expectation of relocation or other fundamental changes to country conditions would undercut the applicant’s reasonable fear of future persecution. 8 C.F.R. § 1208.13(b)(1)(i)-(ii).

Here, Mr. [REDACTED] has suffered past persecution in Guatemala. He faced ongoing threats, including police officers pointing guns at him and his young children, when the police made threats to his family. Moreover, he was falsely imprisoned by police for 8 months in retaliation for his refusal to pay extortion fees and expressed opposition to their corruption. Such pretextual arrest, and eight months of detention, which is plainly excessive, amounts to persecution. *See Jiannong Jiang v. Holder*, 400 F. App'x 859, 866 (5th Cir. 2010); *Abdel-Masieh v. U.S. I.N.S.*, 73 F.3d 579, 584 (5th Cir. 1996).

One central reason for this persecution was on account of Mr. [REDACTED]’ political opinion and membership in a particular social group, including being a successful small business owner, and as a result of family ties to his mother, a civil servant for the past 26 years and a

former member of the Elections Board of ██████████ Guatemala.<sup>13</sup> Only when he refused to make extortion payments and expressed his opposition to the police corruption, and was involved in making sure the local elections were fair, did the police threaten him and falsely arrest and imprison him. Because Mr. ██████████' suffered past persecution, he is entitled to a presumption of future persecution.

Additionally, the evidence here also demonstrates he has a well-founded fear of future persecution, especially in light of the current country conditions. As Guatemalan country conditions expert Mr. Avalos describes:

Worse corruption in Guatemala and government officials feeling emboldened to act without impunity means that the police will more likely than not target and harm Mr. ██████████. It is reasonable to expect that the police remember and will target Mr. ██████████ given his past political involvement furthering political participation and fair elections, anti-corruption opposition, successful small business ownership, and family ties to his mother, a civil servant for the past 26 years and a former member of the Elections Board of ██████████ Guatemala.

Exh. L (Statement from Hector Silva Avalos). Mr. ██████████ explains that he is fearful for his life in light of the fact “the current government in Guatemala has taken recent steps that allow for even more corruption and abuse of power by the police.” He also expresses fear about the fact that there are now “gangs everywhere in Guatemala and the corrupt police now work with the gangs.” *Id.* His fear is well-founded, as corruption exists throughout Guatemala, and “is especially prevalent in rural areas where police and judicial officials have close contact with gangs and narco-trafficking groups, increasing the likelihood of impunity for violence by these groups.” Exh. MM (“Neither Security nor Justice: Sexual and Gender Based Violence and Gang Violence,” Kids in Need of Defense, May 4, 2017); *see also* Exh. LL (“Amnesty International

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<sup>13</sup> This is a non-exhaustive list of possible “particular social groups.” In the event the case is reopened, Mr. ██████████ retains the right to propose additional “particular social groups.”

Report 2017-18, the State of the World’s Human Rights,” Amnesty International, Feb. 22, 2018) (“[i]mpunity and corruption persisted, undermining public trust in local authorities and hindering access to justice.”); Exh. KK (“Guatemala: Events of 2018,” Human Rights Watch) (“Guatemala suffers from high levels of impunity.”). Mr. ██████████ is “afraid that the corrupt police will ask the gangs to kill [him] so that [his] death looks like random crime.” *Id.*

In light of the past threats Mr. ██████████ received, coupled with the fact that the corrupt police in Guatemala are now even more emboldened to target individuals like Mr. ██████████ with impunity, it is clear he is at great risk of harm or death if deported to Guatemala.

*a. Though Mr. ██████████ is Filing his I-589 More Than One Year After His Entry to the United States, He Has Established Changed Circumstances That Materially Affect His Application for Asylum.*

Generally, those seeking asylum within the United States must demonstrate, “by clear and convincing evidence that the application has been filed within 1 year after the date of the alien’s arrival in the United States.” INA § 208(a)(2)(B). However, an asylum applicant can prevail, even after missing the one-year filing deadline, if he or she “demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances that materially affect the applicant’s eligibility for asylum or extraordinary circumstances relating to the delay in filing the application.” INA § 208(a)(2)(D). “The term ‘changed circumstances’ in section 208(a)(2)(D) of the Act shall refer to circumstances materially affecting the applicant’s eligibility for asylum,” including “[c]hanges in conditions in the applicant’s country of nationality.”<sup>8</sup> CFR § 208.4(a)(4)(i).

Here, the changed country conditions that give rise to this motion also give rise to an exception of the one-year filing deadline. As described above, there have been significant changes in country conditions directly and materially relevant Mr. ██████████’s fear of return.

3. Mr. [REDACTED] Has Demonstrated *Prima Facie* Eligibility for Withholding of Removal.

INA § 241(b)(3) states that “the Attorney General **may not** remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” (Emphasis added). A respondent seeking withholding of removal must show that he or she has suffered past persecution or has a well-founded fear of future persecution on account of a protected ground. 8 C.F.R. § 208.16(b). “If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant’s life or freedom would be threatened in the future in the country of removal on the basis of the original claim.” 8 C.F.R. § 208.16(b)(1)(i). As set forth in greater detail above, and as shown by Mr. [REDACTED]’ I-589 application and declaration, he experienced past persecution on account of his actual and imputed political opinion and membership in a particular social group. Thus, there is a presumption of future persecution. Moreover, the attached country conditions demonstrate he is at even greater risk of persecution now. The evidence makes clear that Mr. [REDACTED] has shown prima facie eligibility for withholding of removal.

4. Respondent Has Demonstrated *Prima Facie* Eligibility for CAT Protection.

Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment absolutely prohibits states from returning anyone to another state where he or she may be tortured.

The regulations define “torture” as:

[REDACTED]

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 208.18(a)(1). “In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, **all evidence** relevant to the possibility of future torture shall be considered.” 8 C.F.R. § 1208.16(c)(3) (emphasis added). If it is determined “that the alien is more likely than not to be tortured in the country of removal, the alien is **entitled to protection** under the Convention Against Torture.” 8 C.F.R. § 1208.16(c)(4) (emphasis added).

Here, Mr. ██████████ has already been jailed in Guatemala for pretextual reasons when he refused to be extorted by the police and expressed opposition to their corruption. Thereafter he continued to express his opposition to the corruption of the police, and was threatened by armed police officers. Mr. ██████████ fears he may be not only physically harmed, but killed by police if deported to Guatemala. Since the time he left, corruption within the Guatemalan police force has gotten worse. As such, the evidence is clear that it is more likely than not that Mr. ██████████ will be tortured if deported to Guatemala.

As the evidence plainly demonstrates, Mr. ██████████’ case warrants reopening under INA § 240(c)(7)(C)(ii), which allows reopening based on changed country conditions arising in the country of nationality. *See* INA § 240(c)(7)(C)(ii). This case should be reopened so that Mr. ██████████ may have an opportunity to have a full hearing on his applications for asylum, withholding of removal and CAT protection.

**E. The Court Should Exercise its *Sua Sponte* Authority to Reopen Mr. ██████  
██████' Removal Case**

Even if this Court declines to grant rescission and reopening based on ineffective counsel or exceptional circumstances resulting in lack of notice and declines to reopen based on changed country conditions, Mr. ██████ requests that the Court *sua sponte* reopen his removal case 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).

There are several factors which, in their totality, make the circumstances surrounding Mr. ██████' removal extraordinary. First, Mr. ██████ escaped Guatemala where corrupt police extorted him, threatened him and his family, and falsely imprisoned him. He is at grave risk of persecution and torture if forced to return to his birth country, especially given the worse country conditions that exist today. Moreover, Mr. ██████ has never presented his compelling case against removal before any judge or court. Our laws guarantee that noncitizens in the United States the right to seek protection from persecution and torture. The Immigration Courts, and the government in general, have an interest in the lawful disposition of removal proceedings, and in allowing noncitizens to exercise their right to seek asylum in the United States. *See Matter of S-M-J-*, 21 I&N Dec. 722, 727 (BIA 1997) (“[A]s has been said, the

government wins when justice is done.”). This motion presents the only legal mechanism by which Mr. [REDACTED] can seek legal protection from the grave harm and torture he faces in Guatemala.

Second, Mr. [REDACTED] received exceptionally poor advice from several people—including ineffective representation by [REDACTED] and other people whom he trusted—as he tried to understand and comply with the law. Third, removal of Mr. [REDACTED] would result in separation from his family in the United States, to whom he is a loving and providing husband and father of four. Exh. A (Mr. [REDACTED]’ Declaration); *see also* Exhs. G-K. Other than the traffic citations in 2018 that led to his current ICE detention, Mr. [REDACTED] has never faced criminal charges during the fourteen years that he has lived in the United States, and he lives as a productive member of society who not only helps others through his skills in automobile repair, but also is active within his church community, even while in detention. Exh. A (Mr. [REDACTED]’ Declaration); *see also* Exhs. J-K.

Given the aforementioned extraordinary circumstances, this Court should exercise its statutory discretion to grant *sua sponte* reopening of Mr. [REDACTED]’ case.

## **VI. CONCLUSION**

For the foregoing reasons, Mr. [REDACTED] asks the Court to rescind his *in absentia* order of removal and reopen his case to allow him to pursue his applications for asylum, withholding of removal under INA § 241(b)(3) and protection under the Convention Against Torture.

Dated: April 18, 2019

Respectfully submitted,

[REDACTED]

Michelle N. Mendez, Pro Bono Counsel for  
the Respondent

**U.S. DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE OF IMMIGRATION REVIEW  
IMMIGRATION COURT  
HARLINGEN, TEXAS**

In the Matter of: [REDACTED] [REDACTED]

**ORDER OF THE IMMIGRATION JUDGE**

Upon consideration of the find **Respondent's Motion to Rescind *In Absentia* Order of Removal and Reopen Removal Proceedings Based on Ineffective Assistance of Prior Counsel, Lack of Notice, Exceptional Circumstances, Motion to Reopen Based on Changed Country Conditions and in the Alternative Motion to Reopen *Sua Sponte***, IT IS HEREBY ORDERED that said motion be

\_\_\_\_\_ **GRANTED** \_\_\_\_\_ **DENIED** because:

\_\_\_\_\_ DHS does not oppose the motion.

\_\_\_\_\_ A response to the motion has not been filed with the court by opposing party.

\_\_\_\_\_ Good Cause has been established for the motion.

\_\_\_\_\_ The Court agrees with the reasons stated in the opposition.

\_\_\_\_\_ Motion is not timely.

\_\_\_\_\_ Other \_\_\_\_\_

or Motion requires further briefing/action and the following DEADLINES SHALL APPLY:

Dated:

\_\_\_\_\_  
Hon. Delia I. Gonzalez  
Immigration Judge

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By: Court Staff \_\_\_\_\_