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UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

In The Matter Of:	)	
[redacted]	)	**File No.:** [redacted]
In Removal Proceedings	)	

RESPONDENT'S OPENING BRIEF

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INTRODUCTION

Respondent [redacted] ("Respondent" or "Ms. [redacted]") submits this brief in response to the Attorney General's invitation. *Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018). In 2014, Ms. [redacted] fled El Salvador following fifteen years of physical, sexual, and emotional violence at the hands of her now former husband. The Board of Immigration Appeals (Board) found that Ms. [redacted] qualified for asylum and remanded solely for completion of background checks. The Immigration Judge disregarded the Board's instructions and, more than a year later, the Attorney General directed the Board to refer Ms. [redacted] s case to him and invited the parties to address a question never raised or considered in her case—whether "victims of private criminal activity" may constitute a "particular social group"—injecting significant uncertainty into a well-settled area of the law and Ms. [redacted] s future safety.

Not only does the Attorney General's question lack clarity and conflate distinct elements of asylum claims, but procedural irregularities following remand from the Board preclude the Attorney General from considering Ms. [redacted] s case in its current posture. If the Attorney General was to consider the merits of Ms. [redacted] s case, he would be compelled to find, like the Board, that Ms. [redacted] is eligible for asylum based on the extensive abuse she suffered at the hands of her former husband, who has vowed to kill her if she ever returns to El Salvador.

BACKGROUND

I. Ms. [redacted] Flees El Salvador After Fifteen Years of Domestic Violence

A. Ms. [redacted] Is Orphaned as a Child

Ms. [redacted] was born in El Salvador in 1971. Exhibit (Exh.) 3-D, Birth Certificate.[1] Her long history of trauma began during childhood. Appendix (App.)-A, Supplemental Declaration ("Supp. Decl.") ¶¶6-9. She never met her father, who was killed in the country's civil war, and became an orphan around age 12 when her mother was killed in a fatal accident. Exh. 2-B, Form I-589 Part A.III.5.; Supp. Decl. ¶¶6, 8. She was separated from her siblings and abused physically and verbally by her new caregiver, a family friend she referred to as her "aunt." Supp. Decl. ¶9. During the year Ms. [redacted] lived with her "aunt," the "aunt's" adult son attempted to rape her. *Id*. After being taken in by her godmother, Ms. [redacted] attempted to move forward in life and pursued an education. However, she had to cut short her studies when she met her future husband. Transcript (Tr.) 38; Supp. Decl. ¶5.

B. Ms. [redacted] Suffers Brutal Abuse by Her Husband

In around 1995, Ms. [redacted] met [redacted] while living in [redacted] a town outside of San Salvador. Exh. 2-C, Respondent's Declaration ("Decl.") ¶3. She gave birth to the first of their three children soon thereafter. *See* Exh. 3-F, Birth Certificates. The nightmare began the year following the couple's formal marriage in 1998. Tr. 48; Exh. 3-I, Marriage Certificate; Decl. ¶4; Supp. Decl.

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[1] Exhibits refer to those marked by the Immigration Judge at the 2015 hearing and Appendices refer to Ms. [redacted] s supplemental submission to the Attorney General.

¶19. For the next fifteen years, Ms. [redacted]'s husband subjected her to relentless physical, sexual, and emotional abuse. Tr. 41-62; Decl. ¶¶3-17; Exh. 3-G, Psychological Evaluation ("Psych. Eval.").

The violence inflicted on Ms. [redacted] took many forms. Her husband beat her repeatedly, bashing her against the wall and kicking her, including while she was pregnant. Decl. ¶7; Supp. Decl. ¶23. He raped her on countless occasions. Tr. 50; Decl. ¶11; Supp. Decl. ¶29. He also frequently threatened to kill her, at times holding a knife to her neck and at others brandishing a gun or, while she was pregnant, threatening to hang her from the ceiling by a rope. Decl. ¶¶5, 7; Supp. Decl. ¶¶21, 23, 25; Exh. 3-J, Sworn Statements of Ms. [redacted] s Neighbors in El Salvador.

Ms. [redacted] s husband controlled, humiliated, and isolated her from others. Decl. ¶6. He insulted her "constantly," calling her a "slut" or "dog." Supp. Decl. ¶21. He did not want her to work outside the house and believed "a woman's place was in the home like a servant." *Id*. ¶17. When he came home in the middle of the night, he forced her out of bed to serve him food, saying things like "Bitch, feed me." *Id*. ¶22. Although Ms. [redacted] s husband frequently slept with other women, he falsely accused her of infidelity, at times removing her undergarments to inspect her genitals. Decl. ¶10; Supp. Decl. ¶22. He also beat their children in front of her, causing her serious psychological damage. Supp. Decl. ¶31.

This kind of domestic violence is common in El Salvador, where "[m]achismo is the way of life" and "everyone believes that women deserve the treatment they get." Supp. Decl. ¶50; *see also* 2014 U.S. Dep't of State Human Rights Report ("State Dep't

2014") (documenting that "[v]iolence against women, including domestic violence, was a widespread and serious problem" and "[a] large portion of the population considered domestic violence socially acceptable").[2]

C. The Government Provides Ineffective Protection to Ms. [redacted]

Ms. [redacted] sought government protection to no avail. She received two restraining orders, but the police did nothing to enforce them. Tr. 56; Decl. ¶8; Exh. 3-H, Protection/Restraining Orders; App.-B, Corrected English Translation. The police even required her to hand deliver the order to her abuser—putting her at incalculable risk; her abuser simply crumpled it up. Supp. Decl. ¶¶26, 28. After Ms. [redacted]'s husband threatened her with a gun, police booked him into jail but released him after a few days with no further consequences. *Id.* ¶25. After Ms. [redacted] s husband attacked her with a large knife, the police told her they could not help her, adding: "If you have any dignity, you will get out of here." *Id.* ¶33; Decl. ¶14.

Ms. [redacted] s experience with the police is the norm in El Salvador, where authorities discriminate against women and do not take seriously their complaints. State Dep't 2014 at 16 ("Laws against domestic violence were not well enforced and cases were not effectively prosecuted."); App.-H, Expert Declaration of Cecilia Menjivar ("Menjivar Decl.") at ¶31 ("Very few women are given protection orders … and it is rare that these are enforced."); App.-I, Expert Declaration of Aracely Bautista Bayona ("Bayona Decl.") ¶58 ("Even in the unusual situation where a

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[2] The Immigration Judge took administrative notice of the State Department report current at the time of the hearing, but he did not mark it into evidence. Tr. 31.

woman successfully acquires an order of protection from her aggressor, law enforcement officials do not enforce such orders.").

D. Ms. [redacted] Attempts to Leave

Heeding authorities' advice, Ms. [redacted] in 2008 moved with her children to San Sebastian, a town about two hours from [redacted] Tr. 46; Decl. ¶14. But the abuse did not end. Ms. [redacted] s husband continued to rape and threaten her over the next several years, telling Ms. [redacted] she "would always be his woman" and he would kill her if he ever saw her with another man. Supp. Decl. ¶37; Decl. ¶14. In November 2013, Ms. [redacted] divorced her husband in hopes of ending his belief that he had the right to abuse her. Exh. 3-I, Divorce Paperwork; Supp. Decl. ¶38. She was mistaken. The divorce further enraged Ms. [redacted] s husband, who said, only minutes after the divorce was finalized, "Just because we're divorced and you think you're free, you're wrong." Supp. Decl. ¶39; Decl. ¶17; Bayona Decl.¶69 (explaining that Ms. [redacted] "may be at more risk of lethal violence [following the divorce] for having stood up to her husband's authority"); Menjivar Decl. ¶43 (explaining that divorce would "serve to infuriate the abuser and would not change the view of the woman as 'his'"); App.-J, Expert Declaration of Nancy Lemon ("Lemon Decl.") ¶54 ("Since the batterer is driven by his unwavering belief that the woman is and should be under his complete control, any attempts to divorce him, move out of the house, or seek assistance from friends and family can cause the batterer to retaliate with even more violence."). As a condition of the divorce, Ms. [redacted] s husband demanded custody of their children to maintain control. Decl. ¶16; Supp. Decl. ¶38; Lemon Decl. ¶84.

A month after the divorce, on the day before Christmas, Ms. [redacted]

encountered her now ex-husband and his brother [redacted] a police officer, who said that the divorce did not free her of her husband's grip and that her life was in danger, saying that he "didn't know where the bullets were going to land." Tr. 42; Supp. Decl. ¶40. She received many threats following this incident on her phone and through her children. Tr. 45; Supp. Decl. ¶43. Fearing the worst, she began making arrangements to flee El Salvador. Supp. Decl. ¶44. The week before she left in June 2014, her ex-husband physically assaulted her, grabbing her hair and pushing her, and again threatened to kill her. Tr. 44, 47; Decl. ¶17; Supp. Decl. ¶44. Her husband and dangerous men with whom he associated told Ms. [redacted] that "they were going to kill [her], put [her] in a body bag, and dump [h]er in the river." Supp. Decl. ¶42; Tr. 47. Aware that killings of women by male partners occur with alarming regularity in El Salvador, Ms. [redacted] "knew time was running out." Supp. Decl. ¶44; *see also* Bayona Decl. ¶41 (discussing the rise of femicides—gender motivated killings—in recent years, around 40 percent of which are estimated to be the result of domestic violence); App.-N, Walsh and Menjivar Article on Violence Against Women in El Salvador (reporting that El Salvador has the highest rate of femicide in the world).

E. Ms. [redacted]s Fear Continues

Having made the agonizing decision to leave behind her three children, Ms. [redacted] migrated to the United States to seek protection. Form I-589, Part C.2.; Supp. Decl. ¶45. An Asylum Officer found Ms. [redacted] had a credible fear of persecution based on the years of brutal domestic violence and placed her in removal proceedings. Exh. 1, Credible Fear Determination. Ms. [redacted] believes her life would be in danger in El Salvador, where her ex-husband, supported by his police officer brother, has

vowed to kill her. Decl. ¶17; Supp. Decl. ¶44. She does not believe there is anywhere in El Salvador she could find safety. Tr. 46; Supp. Decl. ¶¶50-51; Menjivar Decl. ¶42 ("A woman in Ms. [redacted] s situation would have nowhere safe to go to avoid her abuser, and no ability to support herself."); Bayona Decl. ¶71 ("Ms. [redacted] would not be able to relocate in El Salvador and be safe from her abuser."). Ms. [redacted] continues to suffer from severe psychological distress as a result of the years of violence. Supp. Decl. ¶¶2, 56; Psych. Eval. 32; Supp. Psych. Eval. at 83.

II. Ms. [redacted] Seeks Asylum in the United States

A. The Immigration Judge Denies Ms. [redacted] s Application

Ms. [redacted] applied for asylum, withholding of removal ("withholding"), and protection under the Convention Against Torture ("CAT"). Exh. 2-B, Form I-589. She testified in support of her applications before Immigration Judge V. Stuart Couch ("Judge Couch"). Tr. 38-62. On December 1, 2015, Judge Couch issued a written decision denying Ms. [redacted] s applications. Judge Couch first found that Ms. [redacted] did not testify credibly. He found that she provided no persuasive explanation for the perceived discrepancy between her written statement and her credible fear interview over when her ex-husband began beating her. I.J. at 5. In addition, he found she did not adequately explain why her brief three-page written statement appended to her Form I-589 failed to mention being raped by her ex-husband following their divorce as she testified at the hearing. *Id*. Finally, he found that she did not adequately explain why her written statement failed to mention receiving anonymous threats by telephone after changing her phone number as her testimony described. *Id*.

Judge Couch next found that the documentary evidence failed to independently

corroborate Ms. [redacted] claim, noting that a translated version of one of the protective orders contained a discrepancy regarding her ex-husband's age,[3] that her maiden rather than married name appeared on her children's birth certificates, that the written statements provided by affiants in El Salvador were not prepared contemporaneously with the abuse, and that a psychological examination was (ostensibly) conducted in English rather than Spanish. I.J. at 6-7.

On the merits, Judge Couch did not explicitly address whether the violent abuse Ms. [redacted] suffered in El Salvador was sufficiently severe to qualify as "persecution." Judge Couch found, however, that any persecution Ms. [redacted] suffered was not on account of a protected ground. He found that Ms. [redacted] s proposed social group—"El Salvadoran women who are unable to leave their domestic relationships where they have children in common"—was not cognizable under the Act. I.J. at 9-13. Judge Couch conceded that gender is an immutable characteristic, but found that Ms. [redacted] s relationship was not immutable because she separated from her ex-husband in 2008, divorced him in 2013, and fled to the United States in 2014. I.J. at 9, 11.

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[3] Judge Couch noted that the translated version of the first protective order Respondent received against her ex-husband stated that she was 30 years old and he was 20 years old, while their marriage certificate reflected that Respondent was only one year older than her ex-husband. I.J. at 6. In truth, the original Spanish version of the protective order states that her ex-husband was 29 years old but was mistranslated. App.-B, Corrected English Translations.

Judge Couch further found that even if Ms. [redacted] s proposed social group was cognizable, she failed to establish that her membership in the group was at least "one central reason" for the persecution she suffered. I.J. at 13-15. Judge Couch concluded that her ex-husband's abuse "was related to his violent and jealous nature, and frequent intoxication from alcohol," and was "intended to intimidate and threaten her to comply his own selfish and criminal demands for sex." I.J. at 13.

With respect to Ms. [redacted]'s fear of future persecution, Judge Couch stated that he did not doubt that Ms. [redacted]'s fear of returning to El Salvador was subjectively genuine. I.J. at 14. Judge Couch concluded that her fear of persecution was not objectively reasonable, however, given that she obtained protective orders against her ex-husband. I.J. at 14-15. Judge Couch stated that he was "left to speculate if the respondent's efforts to obtain law enforcement assistance in the future will be ignored or otherwise ineffective," and stated that "[s]peculation does not satisfy the burden of establishing a well-founded fear of future persecution that is objectively reasonable." I.J. at 15.

After finding that Ms. [redacted] failed to establish her eligibility for asylum, Judge Couch found that she failed to meet the higher standard required for withholding. I.J. at 15.

Finally, Judge Couch found that Ms. [redacted] did not qualify for protection under the CAT, stating, without further explanation, that he "[did] not attribute to the Salvadoran government the actions or inaction of the respondent's former brother-in-law, who she claims is a corrupt local police officer." I.J. at 16.

B. The Board Reverses and Remands for Completion of Background Checks

Ms. [redacted] appealed Judge Couch's decision, which was unanimously reversed in a decision by a three-member panel. The Board first found that Judge Couch's adverse credibility determination was clearly erroneous. Board at 1. The Board acknowledged the inconsistencies cited in his decision but found that documentary evidence corroborated Ms. [redacted] s account. Board at 1-2. In particular, the Board noted that the protective order from 2001 and the affidavits from Ms. [redacted]'s former neighbors confirmed that her ex-husband began abusing her in the late 1990s. Board at 1-2. The Board noted that the affiants had no reason to document the abuse Ms. [redacted] suffered until she requested that they do so, and that even Judge Couch acknowledged that she was physically and emotionally abused by her ex-husband. Board at 2 & n.1.

On the merits, the Board found that Ms. [redacted] s proposed social group was substantially similar to the one recognized in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), and that the group was sufficiently particular and socially distinct in Salvadoran society. Board at 2. The Board found that Judge Couch clearly erred in finding that Ms. [redacted] was able to leave her ex-husband, given that: he continued to physically abuse her after they separated; he raped her after they divorced; his brother continued to refer to Ms. [redacted] as his sister-in-law after the divorce, told Ms. [redacted] she would "always" be in a relationship with her ex-husband, and threatened Ms. [redacted]; and one of her ex-husband's friends said he would help her ex-husband kill her and dispose of the body. Board at 3.

The Board also reversed Judge Couch's determination that Ms. [redacted] failed to demonstrate that her membership in her proposed social group was at least "one central reason" for the abuse she experienced in El Salvador. Board at 3. The Board found that her ex-husband abused Ms. [redacted] based on his position of perceived authority as her ex-husband and the father of her children, as was confirmed by the comments of his brother. Board at 3.

Finally, the Board found that the government of El Salvador was unwilling or unable to protect Ms. [redacted]. Board at 3. While the Board acknowledged that Ms. [redacted] had received two protective orders against her ex-husband, it noted that police were called at least ten times but declined to intervene unless they caught her ex-husband "in the act or saw blood," and that Ms. [redacted] s former brother-in-law was himself a local police officer. Board at 3.

Having found that Ms. [redacted] was subject to past persecution on account of a protected ground, the Board found that she was entitled to a presumption of a well-founded fear of persecution on the same ground, and that the Department of Homeland Security (DHS) had not shown a fundamental change in circumstances or that Ms. [redacted] could relocate internally. Board at 4. The Board thus sustained Ms. [redacted]'s appeal of the denial of asylum and declined to address her applications for withholding or protection under the CAT. Board at 4.

The Board remanded the record solely for the completion of background checks pursuant to 8 C.F.R. 1003.1(d)(6) and for the entry of an order granting or denying the relief sought pursuant to 8 C.F.R. 1003.47(h).

C. The Immigration Judge "Administratively Returns" the Case to the Board

Following remand, the Charlotte Immigration Court did not schedule a hearing to confirm whether the background checks had been completed. After six months elapsed with no action taken on her case, Respondent asked Judge Couch to schedule a master calendar hearing for DHS to update the background checks and for Judge Couch to grant her asylum application. Motion to Calendar for a Master Hearing (filed May 12, 2017). Judge Couch took nearly one month to adjudicate Respondent's motion and then scheduled her case for an individual hearing more than two months later. Hearing Notice (dated June 5, 2017).

At the outset of the hearing, DHS confirmed that the background checks were clear. App.-D, Remand Transcript at 1-2. In lieu of granting Ms. [redacted] s asylum application, as required under 8 C.F.R. 1003.47(h), Judge Couch announced that he was "recertifying" the case to the Board for further consideration. *Id*. at 3. After a brief recess, Judge Couch provided the parties with a written order in which he "observed" that *A-R-C-G-* "may not be legally valid" in light of the Fourth Circuit's recent decision in *Velasquez v. Sessions*, 866 F.3d 188 (4th Cir. 2017)[4]—which itself

[4] The applicant in *Velasquez* fled El Salvador after being threatened by the mother of her late husband, who wanted the applicant to relinquish custody over her minor child. 866 F.3d at 191-92. The applicant claimed that she was persecuted on account of her membership in a particular social group consisting of her nuclear family, but the Court rejected the claim, holding that substantial evidence supported the agency conclusion that her family membership was not a central for the persecution. *Id*. at 194-96. The Court also rejected the applicant's reliance on *A-R-C-G-*, noting that the validity of the social group in that case "is not at issue" and "does not bear on our nexus analysis." *Id*. at 195 n.5.

was decided nearly eight months after the Board's remand order. I.J. Order at 3-4. Judge Couch "certified and administratively returned" Ms. [redacted] s case to the Board for it to reconsider whether she was eligible for asylum. I.J. Order at 4.

Despite Judge Couch's attempt to return Respondent's case to the Board, the record of proceedings does not reflect that her case was sent to the Board. The Board did not issue a filing receipt, notice of certification, or any other document evidencing that it had accepted jurisdiction over Respondent's case.

D. The Attorney General Refers the Case to Himself

On March 7, 2018—nearly seven months after Judge Couch attempted to return Ms. [redacted]'s case to the Board—the Attorney General directed the Board to refer her case to him pursuant to 8 C.F.R. 1003.1(h)(1)(i). *A-B-*, 27 I&N Dec. 227. The Attorney General invited the parties and interested *amici* to address "[w]hether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal." *Id*. The Attorney General instructed the parties to submit briefs by April 6, 2018. *Id*.

On March 14, 2018, Respondent submitted a request for a six-week extension of the briefing deadline. On March 16, 2018, DHS filed a motion requesting that the Attorney General: (1) suspend the briefing schedule to allow the Board to rule on Judge Couch's certification order; (2) clarify the question presented and specify any precedential Board decision whose validity he intended to consider; and (3) in the alternative, extend the briefing deadline by six weeks. On March 21, 2018, Respondent submitted a reply expressing non-opposition to DHS's first and second

requests and specifically requesting that the Attorney General advise the parties if he was considering overruling *A-R-C-G-*.

On March 30, 2018, the Attorney General issued an order addressing all pending requests. *Matter of A-B-*, 27 I&N Dec. 247 (A.G. 2018). First, the Attorney General denied DHS's request to suspend the briefing schedule and remand the case to the Board to address Judge Couch's certification order. *Id.* at 247-49. The Attorney General stated that there was no need to allow the Board to address the order because the case was "not properly pending before the Board." *Id.* at 248. The Attorney General stated that in light of the limited scope of the remand and DHS's confirmation that the background checks were clear, Judge Couch was obliged to issue an order granting or denying Respondent's asylum application. *Id.* (citing 8 C.F.R. 1003.47(h)). The Attorney General noted that the regulations only permit immigration judges to certify a case after a "decision" has been made and found that Judge Couch had failed to issue a "decision" that could be certified to the Board. *Id.* The Attorney General stated that because Judge Couch failed to issue a "decision" on remand, his attempt to certify the case back to the Board was "procedurally defective." *Id.* at 248-49.

The Attorney General next denied the parties' request to clarify the primary briefing question. *Id.* at 249-50. He stated that "several Federal Article III courts have recently questioned whether victims of private violence may qualify for asylum under section [8 U.S.C. 1158(b)(1)(B)(i)] based on their claim that they were persecuted because of their membership in a particular social group," and that the

briefs should address when, if ever, "being a victim of private criminal activity qualifies a petitioner as a member of a cognizable 'particular social group.'" *Id*. at 249. He did not list any precedential Board decisions that he wished to revisit.

Finally, the Attorney General extended the deadline for the parties' opening briefs only by two weeks to April 20, 2018, and stated that no further extension requests would be considered. *Id*. at 250.

STANDARD OF REVIEW

The Attorney General applies *de novo* review when reviewing a decision of the Board. *Matter of J-F-F-*, 23 I&N Dec. 912, 913 (A.G. 2006). The Attorney General also possesses "full authority to receive additional evidence and to make de novo factual determinations." *Matter of A-H-*, 23 I&N Dec. 774, 779 n.4 (A.G. 2005) (internal quotation and citation omitted). In light of this authority, Respondent has submitted additional evidence with this brief in support of her applications.

SUMMARY OF ARGUMENT

The Attorney General does not have authority to review Ms. [redacted] s case in its current posture because the Board never reacquired jurisdiction following the remand to Judge Couch. Therefore, he should refrain from taking further action on this case unless and until Judge Couch issues an order granting or denying Ms. [redacted]'s asylum application. Even if the Attorney General reaches the merits, he should decline to address the briefing question posed given its lack of clarity and irrelevance to the case at hand or, alternatively, reaffirm the long-standing principle that applicants may qualify for asylum based on persecution by private actors whether or not those acts constitute crimes and/or that "victims of private criminal

activity" could potentially constitute a particular social group. With respect to Ms. [redacted]'s own application, the Attorney General should find that she qualifies for asylum and withholding because she has more than met her burden to prove she was subject to past persecution on account of her membership in a particular social group defined by her gender and other immutable characteristics. Finally, if reached, the Attorney General should remand for the Board to consider Ms. [redacted] s CAT claim in the first instance or reverse Judge Couch's determination that she did not qualify for such protection.

ARGUMENT

I. The Attorney General May Not Review Ms. [redacted]'s Case in Its Current Procedural Posture

Respondent's case is not properly before the Attorney General. As the Attorney General previously recognized, Judge Couch's attempt to recertify Ms. [redacted] s case to the Board was "procedurally defective" because he failed to issue a decision granting or denying her asylum application, as required under the regulations and the Board's remand order. 27 I&N Dec. at 248-49. Because Judge Couch never issued a "decision" that he could certify, the Board never reacquired jurisdiction over the case. And because the Board never reacquired jurisdiction over Respondent's case, it was powerless to refer the case to the Attorney General. Thus, any decision the Attorney General renders would be "without observance of procedure required by law." 5 U.S.C. 706(2)(D).

To cure this procedural problem, the Attorney General should instruct Judge Couch to issue an order granting or denying Respondent's asylum application. If

Judge Couch's decision is appealed or properly certified to the Board, the Attorney General may then direct the Board to refer the case to him.

A. The Board Was Powerless to Refer Ms. [redacted] s Case to the Attorney General Because It Never Reacquired Jurisdiction Following Remand to the Immigration Judge

In his order of March 30, 2018, the Attorney General recognized that Judge Couch's attempt to return Ms. [redacted] s case to the Board was "procedurally defective" because he failed to issue a decision granting or denying her asylum application—as required under 8 C.F.R. 1003.47(h)—that was capable of being certified to the Board. 27 I&N Dec. at 248-49. Ms. [redacted] agrees that Judge Couch did not act within his authority and that her case was therefore not properly pending before the Board when the Attorney General directed the Board to refer her case to him. *Id.* at 248. In her view, however, the Board's failure to reacquire jurisdiction over her case means that it lacked authority to refer her case to the Attorney General in the first place.

When the Board "remands a case to an immigration judge for further proceedings, it divests itself of jurisdiction of that case unless jurisdiction is expressly retained." *Matter of Patel*, 16 I&N Dec. 600 (BIA 1978). Likewise, "when a case is remanded to an Immigration Judge for the appropriate background checks pursuant to 8 C.F.R. 1003.47(h), the Immigration Judge reacquires jurisdiction over the proceedings." *Matter of M-D-*, 24 I&N Dec. 138, 141 (BIA 2007). There is thus no dispute that Judge Couch reacquired jurisdiction over Respondent's case when the Board remanded the record for the completion of background checks. Nor is there any dispute that the Board never reacquired jurisdiction. As the Attorney General recognized, Judge Couch did not issue a "decision" on remand that he could certify to

the Board. 27 I&N Dec. at 248. And even if Judge Couch's order qualified as a "decision" capable of certification, the Board never agreed to accept it for review.[5] 8 C.F.R. 1003.7 ("The Board in its discretion *may* elect to accept for review or not accept for review any such certified case.") (emphasis added).

Just as Article III courts' jurisdiction is limited by Congress, so too is the Board's jurisdiction limited by federal regulations. *See*, *e.g.*, *Matter of G-N-*, 22 I&N Dec. 281, 287 (BIA 1998) ("The Board's appellate jurisdiction is defined by the regulations, and unless the regulations affirmatively grant us review power in a particular matter, we have no appellate jurisdiction over it."). Because the Board never reacquired jurisdiction over Respondent's case, it necessarily lacked authority to refer her case to the Attorney General. In his order of March 20, 2018, the Attorney General appeared to dismiss this concern by stating that he directed the Board to refer its *decision*—as distinct from Respondent's case—for further review. 27 I&N

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[5] After Judge Couch purported to certify the case to the Board, the Board did not issue a notice of certification, briefing schedule, or any other documentation indicating that it accepted the case for review. Indeed, according to information provided by two members of the Clerk's office, the Board had no record of Judge Couch's attempt to return the case to the Board before the Attorney General ordered the Board to refer Respondent's case to him. App.-C, Correspondence of Respondent's Counsel. According to the Clerk's office, the Charlotte Immigration Court neglected to "close out" Respondent's case after Judge Couch issued his order, leaving the Board unaware that Judge Couch had "administratively returned" the case to the Board. *Id.* Given that Respondent's case was not under active consideration by Judge Couch or the Board at the time of the Attorney General's referral order, it is not clear how the Attorney General became aware of Respondent's case. On March 26, 2018, Respondent filed an expedited Freedom of Information Act request to the Department of Justice for information pertaining to the decision to certify her case, but her request for expedited processing was not adjudicated in the 10-day statutory window, and her request for information apparently placed on an extended timeframe. App.-E, FOIA Request and Response.

Dec. at 249 ("It is [the Board's] December 8, 2016, decision that I directed the Board to refer to me for my review."). Under federal regulations, however, the Attorney General may not review a Board decision unless the Board has referred the underlying case in which it was issued. 8 C.F.R. 1003.1(h)(1)(i) (requiring the Board to "refer to the Attorney General for review of its decision all *cases* that [t]he Attorney General directs the Board to refer to him") (emphasis added). Accordingly, Ms. [redacted] case is not properly before the Attorney General in its current procedural posture, and any decision rendered by the Attorney General would constitute agency action "without observance of procedure required by law." 5 U.S.C. 706(2)(D).

B. The Attorney General Should Remand the Case with Instructions That the Immigration Judge Enter a Final Decision That Can Be Appealed or Certified to the Board, in Accordance with Due Process and Prudential Considerations

To cure this procedural problem, the Attorney General should instruct Judge Couch to issue an order granting or denying Respondent's asylum application. Once Judge Couch issues a decision, the losing party may appeal, or Judge Couch may certify the decision to the Board. Once the Board reacquires jurisdiction, the Attorney General could then direct the Board to refer its decision to him for review.

Returning the case to the immigration court is also required given that improper certification in this case contravenes due process. It is well-established that individuals in removal proceedings have due process rights. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Reno v. Flores*, 507 U.S. 292, 306 (1993). The regulations disregarded here ensure fairness and regularity in agency review, implicating those rights. *See Rhoa-Zamora v. INS*, 971 F.2d 26, 35-36 (7th Cir. 1992) (applying due

process protection to agency appellate review); *Vargas-Garcia v. INS*, 287 F.3d 882, 886 (9th Cir. 2002) (same). Moreover, irregularities around certification of Respondent's case, *see* note 5, *supra*, reflect prejudgment of her claim and lack of impartiality, in contravention of her right to a full and fair hearing by a neutral adjudicator. *See Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) ("[A]n impartial decision maker is essential."); *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (agency adjudicator may not prejudge or appear to prejudge a case); *Rusu v. INS*, 296 F.3d 316, 321-22 (4th Cir. 2002) (due process requires "a full and fair hearing" on asylum claims). *See also* Section II.A., *infra*. Lack of transparency around the certification process, as well as the apparent absence of internal protections against irregular use, also raises due process concerns, especially given the risk of erroneous determinations and the weighty harms faced by respondents. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Bridges v. Wixon*, 326 U.S. 135, 159 (1945) (Murphy, J., concurring).

Even if the Attorney General disagrees with Respondent's contention that the Board may not refer a case over which it lacks jurisdiction or that certification contravenes due process, prudential considerations favor the course above. Returning the case to the immigration court promotes judicial efficiency and consistency and clarity of decision-making. If the Attorney General decides this case in its current procedural posture, one or more federal circuit courts may find that he lacked authority to do so. *See*, *e.g.*, *N.C. Growers' Ass'n v. UFW*, 702 F.3d 755, 764 (4th Cir. 2012) ("[W]e must be strict in reviewing an agency's compliance with procedural

rules.") (internal quotation marks). The Attorney General's decision would then no longer apply nationwide, perhaps requiring him—or a future predecessor—to revisit the issue in a future case. *See*, *e.g.*, *Matter of Silva-Trevino*, 26 I&N Dec. 550, 553 (A.G. 2015) (vacating decision of Attorney General Mukasey after it had been overruled by five circuits). To avoid such a scenario, the Attorney General should, in an abundance of caution, allow Judge Couch to issue a formal decision in compliance with the terms of the Board's original remand.

II. The Attorney General Need Not Answer the Specific Briefing Question, but if He Elects to Do So, He Should Hold That Victims of Private Criminal Activity May Qualify as a Particular Social Group

The Attorney General has directed the parties to address "[w]hether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal." 27 I&N Dec. at 227. The Attorney General denied the parties' mutual request to clarify the question. *Id*. at 249-50.

In Respondent's view, the Attorney General should not answer this question for two distinct reasons: (1) Respondent has never contended that she is a member of such a group, and (2) the question itself is simply unclear. To the extent the Attorney General wishes to reach the question, he should hold that victims of private criminal activity could potentially form a cognizable particular social group and qualify for asylum if, like all other applicants, they meet the necessary requirements, and should affirm the long-standing principle that persecution may be perpetrated by private actors that the government is unable or unwilling to control regardless of whether or not those acts constitute crimes.

A. The Attorney General Should Not Reach the Question Because It Is Unnecessary For the Resolution of Ms. [redacted] s Case And Because the Question Itself Is Simply Unclear, in Contravention of Due Process and Prudential Considerations

The first reason the Attorney General should decline to answer the briefing question is that doing so is not necessary to resolve Respondent's own case. Ms. [redacted] has never claimed that "victims of private criminal activity" is a cognizable particular social group or sought to qualify for asylum on that basis. While Ms. [redacted] was the victim of criminal activity carried out by a private actor (*i.e.*, her ex-husband), she has never claimed that her status as a victim was itself a central reason why she was persecuted. In Ms. [redacted] s view, it would be an abuse of discretion to adopt a rule of general applicability that has no bearing on the outcome of her case and in response to a question that neither party raised during the course of the case. 5 U.S.C. 706(2)(A). *See also Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 501 (4th Cir. 2016) (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974)).

The second reason the Attorney General should decline to answer the briefing question is that the question itself is simply unclear. By referring to "private criminal activity," it is unclear whether he is referring to crimes committed by private actors, to crimes committed in the privacy of one's home, to crimes committed by one family member against another, or to something else altogether. If the Attorney General is asking whether criminal acts committed by private (non-State) actors may constitute persecution, a contrary ruling would fly in the face of decades of precedent, the plain language of the statute, and the clear intent of Congress. *See, e.g.*, *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950-53 (4th Cir. 2015); *Matter of S-A-*, 22 I&N Dec. 1328 (BIA

2000); *Matter of Acosta*, 19 I&N Dec. 211, 222-23 (BIA 1985); *see also* UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶65 (1979, rev. 1992); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987) (recognizing UNHCR view guides judicial interpretation of the "refugee" definition under the Act). Likewise, the briefing question appears to impermissibly conflate up to three distinct inquiries: whether criminal activity may qualify as "persecution," whether an asylum applicant is a member of a particular social group, and whether the government is unwilling or unable to control persecutors who are private actors.

Given that Respondent herself has never advanced the claim referenced in the briefing question, and that the briefing question is itself unclear, certification of Respondent's case to resolve this question violates due process. Notice and opportunity to be heard are the "elementary and fundamental requirement[s]" of due process. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Here, the unclear question, combined with the denial of Respondent's request that the Attorney General identify precedent he is considering overruling, fails to provide adequate notice to Respondent or other affected parties. In addition to violating the Administrative Procedure Act, using Ms. [redacted] s case as a vehicle to resolve an issue not presented in her own claim is fundamentally unfair, and strips her of a meaningful opportunity to be heard on her own case. *See Rusu*, 296 F.3d at 321 (4th Cir. 2002) ("[T]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (quoting *Mathews*, 424 U.S. at 333); *Anim v. Mukasey*, 535 F.3d 243, 258 (4th Cir. 2008) (finding violation

of petitioner's "right to a fundamentally fair proceeding"). In addition, even assuming the various errors in certifying Respondent's case do not amount to constitutional violations standing alone, their cumulative impact violates due process. *See Tun v. Gonzales*, 485 F.3d 1014, 1026 (8th Cir. 2007) (considering combined impact of multiple errors in finding due process violation); *see also* Section I.B., *supra*.

The Attorney General should thus wait for a future case squarely presenting the precise question he wishes to answer—and invite the parties to address that precise question—before providing an answer.

B. Victims of Private Criminal Activity Could Constitute a Particular Social Group and Qualify for Asylum if They Were Subject to Persecution Because They Had Been the Victim of a Crime

If the Attorney General nonetheless wishes to address the briefing question, he should hold that "victims of private criminal activity" could potentially qualify as a particular social group, and that members of such a group could qualify for asylum if, like any applicant, they satisfied all statutory criteria. (For purposes of this discussion, Respondent assumes that "private criminal activity" refers to crimes committed by private actors.)

Under current Board precedent, a particular social group must (1) be composed of members who share "a common immutable characteristic," (2) have social distinction "within the society in question," and (3) be defined with "particularity." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014). Being the victim of a crime would unquestionably satisfy the immutability requirement because it is a "shared past experience" that members of the group "cannot change." *Acosta*, 19 I&N Dec. at

233. A group consisting of crime victims is also defined with particularity, because the sole criteria for group membership—*i.e.*, having been the victim of a crime as defined in the society's criminal laws—"provide[s] a clear benchmark for determining who falls within the group." *Matter of W-G-R-*, 26 I&N Dec. 208, 214 (BIA 2014). Finally, while social distinction depends on the country in question, crime victims would almost certainly be "perceived as a group." *M-E-V-G-*, 26 I&N Dec. at 240. In the United States, for instance, the National Center for Victims of Crime has existed for more than three decades,[6] and there is a bipartisan Victims Rights Caucus consisting of more than 80 members of Congress.[7] "Victims of private criminal activity"—or subsets of particular crimes, such as victims of rape or trafficking—could as such potentially be a cognizable, if oddly phrased, social group.

To qualify for asylum, of course, applicants must do more than demonstrate that they are member of a cognizable particular social group. As set forth more fully *infra*, they must also show that they were previously persecuted or have a well-founded fear of persecution, and that such persecution would occur on account of their group membership. Respondent can conceive of at least one instance in which being the "victim of private criminal activity" could itself subject an individual to further persecution. In some countries, when a woman is the victim of rape, members of her

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[6] Our History, NATIONAL CENTER FOR VICTIMS OF CRIME, http://victimsofcrime.org/about-us/our-history (last visited April 20, 2018).
[7] VRC Members, CONGRESSIONAL VICTIMS' RIGHTS CAUCUS, https://vrc-poe.house.gov/vrc-members (last visited April 20, 2018).

family may wish to kill her to restore the family's "honor."[8] Women fleeing honor killings in such circumstances could validly claim to be members of a particular social group consisting of rape victims. To qualify for asylum, applicants would have to further demonstrate that they would be persecuted on account of their group membership, and that authorities would be unwilling or unable to prevent them from being killed or otherwise persecuted. If applicants could satisfy these requirements, they would merit a grant of asylum.

While other examples may exist in which victims of private criminal activity could qualify as a cognizable particular social group, Respondent respectfully declines to comprehensively address a question whose answer is unnecessary to the resolution of her case. In the following section, she will instead address why she qualifies for asylum based on her membership in a group defined by her gender and other immutable characteristics.

III. Ms. [redacted] Qualifies for Asylum Because She Was Persecuted on Account of Her Membership in a Particular Social Group

A. Overview of Requirements for Obtaining Asylum

Under the Act, noncitizens who fear persecution in their native countries may apply for two similar but distinct forms of protection: asylum, 8 U.S.C. 1158, and withholding of removal, 8 U.S.C. 1231(b)(3). To qualify for asylum and withholding, applicants must satisfy multiple requirements involving the harm they fear; the reason they were or would be harmed; and, in cases involving harm inflicted by

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[8] Pascale Harter, *Libya rape victims 'face honour killings'*, BBC NEWS (June 14, 2011), http://www.bbc.com/news/world-africa-13760895 (last visited April 20, 2018).

private rather than government actors, the inability or unwillingness of authorities to prevent such harm. Moreover, applicants must demonstrate that no safe or reasonable internal relocation alternatives exist; that the statutory bars do not apply; and that they warrant asylum in the exercise of discretion (not required for withholding, which is mandatory where eligibility is established).

B. Ms. [redacted] Testified Credibly and Adequately Corroborated the Domestic Violence Inflicted by Her Husband

An asylum applicant's credible testimony may be sufficient to carry her burden of proof. 8 U.S.C. 1158(b)(1)(B)(ii). Credibility is evaluated on the "totality of the circumstances," including consistency of the applicant's written and oral submissions as well as plausibility of the claims, consistency with country conditions, and demeanor and responsiveness. *Ilunga v. Holder*, 777 F.3d 199, 206-07 (4th Cir. 2015). The trier of fact may require additional corroboration so long as it is "reasonably" available. 8 U.S.C. 1158(b)(1)(B)(ii).

Judge Couch based his adverse credibility finding on three perceived discrepancies between Ms. [redacted] s written statement and in-court testimony that he found she failed to adequately explain. I.J. at 5. Judge Couch also found that Ms. [redacted]'s corroborating documentation did not overcome the infirmities in her testimony. I.J. at 6-7. As held by the Board, Judge Couch's findings in this regard were clearly erroneous. Board at 1-2. Notably, on remand, Judge Couch did not appear to question the correctness of the Board's reversal of his credibility finding and focused only on his disagreement with the Board's decision on the merits of Ms. [redacted]'s claim. I.J. Order at 2.

Ms. [redacted] provided consistent and detailed testimony regarding the years of domestic violence she experienced in El Salvador. Moreover, she persuasively explained that she may have omitted certain details from her short written statement because she has difficulty remembering past abuse in a coherent and complete manner due to the impact of trauma on her memory and the coping mechanisms she uses to avoid painful reminders. Tr. 52, 56; Supp. Decl. ¶2 ("The trauma I have endured has made it very difficult for me to remember and share my history even with my attorneys."). Dr. Stuart Lustig, a renowned psychological expert on trauma and asylum seekers, explains in his declaration that Ms. [redacted] s omissions comport "with her psychiatric disorders resulting from her trauma." App.-G, Expert Declaration of Stuart Lustig ("Lustig Decl.") ¶¶11, 16; Psych. Eval. at 31-32; Supp. Psych. Eval. at 95-96.[9]

Further, Ms. [redacted] corroborated her testimony with ample supporting evidence, including protective orders issued against her husband; official birth, marriage, and divorce certificates; witness statements; and psychological evaluations diagnosing her with trauma-related psychological disorders resulting from her domestic abuse. Judge Couch erroneously discounted some of Ms. [redacted] s documentation, for example, finding that the children's birth certificates do not

[9] Judge Couch gave "limited probative weight" to the initial psychological evaluation of Ms. [redacted] by questioning the psychologist's methodology with no apparent basis in fact or discussion of best practices in the field. *Lin-Jian v. Gonzales*, 489 F.3d 182, 189 (4th Cir. 2007) (credibility findings may not be based on "speculation, conjecture, or an otherwise unsupported personal opinion") (internal quotation and citation omitted).

corroborate Ms. [redacted] s claim she married her husband in 1998 because they list her maiden rather than her married name. I.J. at 6. In so doing, Judge Couch ignored other official documents submitted by Ms. [redacted] that confirm the date of marriage and use her married name, including her marriage certificate itself. Exh. 3-I, Marriage Certificate and Divorce Records. *See Ilunga*, 777 F.3d at 207 (explaining that totality of the circumstances standard does not permit judges to "'cherry pick' facts or inconsistencies to support an adverse credibility finding that is unsupported by the record as a whole"). Moreover, Judge Couch discounted the State Department report documenting widespread and uncontrolled domestic violence in El Salvador, consistent with Ms. [redacted]'s testimony, because it did not corroborate her specific claim of persecution. I.J. at 7. In truth, as the Fourth Circuit has explained, country reports "are important background evidence that the immigration judge and BIA should consider when evaluating both credibility and the merits of the case." *Kourouma v. Holder*, 588 F.3d 234, 242 (4th Cir. 2009).

The Attorney General should afford full weight to Ms. [redacted] s credible testimony and supporting documentation.

C. The Abuse Ms. [redacted] Suffered in El Salvador—Including Being Repeatedly Beaten, Raped, and Threatened with Death—Qualifies as Persecution

Asylum applicants must first establish that they were subject to past persecution or have a well-founded[10] fear of future persecution in the country of

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[10] For a fear of persecution to be "well-founded," applicants need only establish a "reasonable possibility" that they will be persecuted in the country of removal. 8 C.F.R. 1208.13(b)(2)(i)(B). *See also Li v. Gonzales*, 405 F.3d 171, 176 (4th Cir. 2005).

removal. 8 U.S.C. 1101(a)(42)(A); 8 C.F.R. 1208.13(b). The term "persecution" is not defined by statute or regulation. Its meaning has instead evolved through case law. The Board and federal appellate courts have long held that severe beatings constitute persecution. *See, e.g.*, *Matter of Y-T-L-*, 23 I&N Dec. 601, 607 (BIA 2003); *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 26 (BIA 1998); *Matter of Laipenieks*, 18 I&N Dec. 433, 459 n.18 (BIA 1983); *Li v. Gonzales*, 405 F.3d 171, 177-78 (4th Cir. 2005). The Board and federal courts have also widely recognized rape as a form of persecution. *See, e.g.*, *Matter of D-V-*, 21 I&N Dec. 77 (BIA 1993); *Nakibuka v. Gonzales*, 421 F.3d 473, 477 (7th Cir. 2005); *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9th Cir. 1996). And they have recognized persecution as encompassing non-physical harms. *See, e.g.*, *Matter of A-K-*, 24 I&N Dec. 275, 278 (BIA 2007) (recognizing that emotional harm alone may constitute persecution). The Fourth Circuit "has repeatedly and expressly held that the threat of death qualifies as persecution." *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 247 (4th Cir. 2017) (internal quotation marks omitted). *See also Crespin-Valladares v. Holder*, 632 F.3d 117, 126 (4th Cir. 2011). When evaluating whether harms constitute persecution, adjudicators must view the cumulative effect of multiple incidents of harm. *O-Z- & I-Z-*, 22 I&N Dec. at 26.

The physical attacks, rapes, and death threats Ms. [redacted] faced in El Salvador constitute persecution when taken individually and, undeniably, when viewed cumulatively. Ms. [redacted]s former husband terrorized her for over a decade, beating

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A fear of persecution may be well-founded even if there is only a ten percent chance that the applicant would be persecuted. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

and raping her on so many occasions she lost count. He also threatened to kill her on multiple occasions in a menacing manner—with weapons and with assistance of his police officer brother and other accomplices—that demonstrated his willingness and ability to carry out his threats. (*See supra* Background Section I.)

The deleterious impact of these traumatic events on Ms. [redacted] s mental health additionally supports a finding of persecution. Ms. [redacted] has been diagnosed with Posttraumatic Stress Disorder (PTSD), Major Depressive Disorder, and Generalized Anxiety Disorder as a result of her domestic violence. Psych. Eval. at 37; Supp. Psych. Eval. at 83. Her symptoms include "nightmares, flashbacks, sleep disturbance, mood disorders, suicidal ideation, avoidance, and hyper-arousal in response to trauma-related stimuli." Psych. Eval. At 32. *See also* Supp. Psych. Eval. at 83 (documenting Ms. [redacted]'s symptoms have exacerbated of recent).

D. Ms. [redacted] Was Persecuted on Account of Her Membership in a Particular Social Group Defined by Her Gender and Other Immutable Characteristics

Second, applicants must establish that persecution was or would be on account of one of five protected grounds: "race," "religion," "nationality," "political opinion," or "membership in a particular social group." 8 U.S.C. 1101(a)(42)(A). Claims involving the final ground require multiple showings: that the protected group exists in society; that the applicant is a member of the group; and that group membership is at least one central reason for the persecution. Ms. [redacted] has demonstrated that she suffered persecution on account of her membership in a cognizable particular social group defined by her gender, nationality, and relationship status—"Salvadoran

women in domestic relationships they are unable to leave"—as well as proposed alternative formulations of "Salvadoran women in domestic relationships they are unable to leave where they have children in common," "Salvadoran women viewed as property by virtue of their status in a domestic relationship," or "Salvadoran women."

1. Ms. [redacted] Is a Member of a Cognizable Particular Social Group

As set forth above, the Board has held that to qualify as a "particular social group," a group must be (1) defined by an immutable characteristic(s); (2) socially distinct; and (3) sufficiently particular. *M-E-V-G-*, 26 I&N Dec. at 237. An immutable characteristic is one that group members "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Acosta*, 19 I&N Dec. at 233. To be socially distinct, the group "must be perceived as a group by society." *M-E-V-G-*, 26 I&N Dec. at 240. And to have sufficient particularity, the group must "be defined by characteristics that provide a clear benchmark for determining who falls within the group." *W-G-R-*, 26 I&N Dec. at 214 (citations omitted). While all circuits recognize the immutability requirement, two circuits have rejected or questioned the basis for the social distinction and particularity requirements. *Valdiviezo-Galdamez v. Att'y Gen. of the U.S.* ("*Valdiviezo-Galdamez II*"), 663 F.3d 582, 603-08 (3d Cir. 2011); *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009). The Fourth Circuit has deferred to the Board's particularity requirement but has not squarely considered the validity of the social distinction requirement (which Respondent rejects). *Zelaya v. Holder*, 668 F.3d 159, 165 n.4 (4th Cir. 2012).

In *A-R-C-G-*, the Board recognized that women fleeing domestic violence may qualify for asylum, finding cognizable a particular social group defined by gender, nationality, and relationship status—"married women in Guatemala who are unable to leave their relationship." 26 I&N Dec. at 392. Neither party has asked the Attorney General to overrule *A-R-C-G-*, and he has not notified the parties of any intent to revisit that decision, which has been reaffirmed and applied by the Board in dozens if not hundreds of subsequent decisions as well as numerous federal courts of appeals. Ms. [redacted] will thus proceed under the assumption that the Attorney General has no intention of overruling *A-R-C-G-*.[11]

In his latest order, Judge Couch questioned whether *A-R-C-G-* is still "legally valid" following *Velasquez v. Sessions*, 866 F.3d 188 (4th Cir. 2017). I.J. Order at 3-4. In fact, nothing in *Velasquez* undermines the validity of *A-R-C-G-*. As mentioned *supra*, note 4, the petitioner in *Velasquez* sought asylum based not on domestic violence but threats arising from a custody dispute with the mother of her late husband. 866 F.3d at 191-92. Although the petitioner sought to rely on *A-R-C-G-*, the Court said the validity of the social group in that case was "not at issue" and "does not bear on our nexus analysis." *Id*. at 195 n.5. Further, *Velasquez* did not establish any categorical rule that intra-familial disputes are beyond the reach of our asylum laws. Nor could the Court have done so given the long-standing principle that asylum claims are to be evaluated on a case-by-case, record-specific basis. *M-E-V-G-*, 26 I&N

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[11] If the Attorney General nonetheless overrules *A-R-C-G-*, Ms. [redacted] requests an opportunity to supplement her evidentiary record and brief the viability of her claim under any newly applicable precedent.

Dec. at 251 (reiterating that "[s]ocial group determinations are made on a case-by-case basis").

Like in *A-R-C-G-*, Ms. [redacted] s proposed group of "Salvadoran women in domestic relationships they are unable to leave" possesses the characteristics necessary to establish a valid particular social group under the Board's existing framework. Moreover, through her declaration and supporting personal and country conditions evidence, and as the Board correctly found, Ms. [redacted] has established that she is a member of the group.

a. Immutability is satisfied

The defining characteristics of Ms. [redacted] s proffered social group(s) are unchangeable or fundamental and therefore immutable. Gender and nationality have been repeatedly held to be immutable characteristics that can define a group for asylum purposes. *A-R-C-G-*, 26 I&N Dec. at 392; *Matter of Kasinga*, 21 I&N Dec. 357, 366 (BIA 1996); *Acosta*, 19 I&N Dec. at 233; *Haoua v. Gonzales*, 472 F.3d 227, 232 (4th Cir. 2007); *Cece v. Holder*, 733 F.3d 662, 672 (7th Cir. 2013) (en banc); *Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (Alito, J.); *see also* UNHCR, *Guidelines on International Protection: Gender-Related Persecution* ¶30 (May 7, 2002). The Board explained in *A-R-C-G-* that a domestic relationship may also be immutable where a woman is "unable to leave" the relationship. 26 I&N Dec. at 393.

In evaluating the immutability of a domestic relationship, adjudicators should look to an applicant's "own experiences, as well as more objective evidence, such as

background country information." *Id*. This includes evaluating not only a woman's ability to legally terminate a relationship—for example divorce where married—but also whether an abuser would see a woman's attempts to end a relationship as ending his right to abuse and control her, taking into account the societal context that supports these views. App.-U, DHS Supplemental Brief, *Matter of L-R-* at 16 (BIA April 13, 2009).[12] In *A-R-C-G-*, the Board found that the asylum seeker was in an immutable relationship with her husband based on evidence establishing her failed attempts to leave him, her inability to find State protection, and the high rates of violence against women in Guatemala. 26 I&N Dec. at 395.

Ms. [redacted] has similarly established that her relationship with her former husband is immutable. She attempted to leave her abuser on multiple occasions, including moving two hours away and obtaining a divorce, but he continued to pursue her and escalated his threats on her life, demonstrating his view that she was still his property and forever bound to him. (*See supra* Background Section I.D.) That Ms. [redacted] shares children in common with her abuser further impedes her ability to leave the relationship. Ms. [redacted] s ex-husband told her in no uncertain terms that she was wrong to think that she was "free" after they divorced and that she "would always be connected to him because of [their] children." Supp. Decl. ¶39. *See also* Lemon Decl. ¶48 (describing how abusers use children as a means to maintain control

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[12] The *L-R-* case was litigated during the protracted legal battle in the well-known case of Rody Alvarado. DHS filed a supplemental brief to the Board in *L-R-* setting forth the agency's analytical approach to domestic violence claims, and the applicable social groups that it argued could meet the Board's test. The Board later adopted DHS's approach in *A-R-C-G-* highlighting the brief's importance.

and to "force the mother to return to the relationship after a period of separation"). His views are supported by patriarchal cultural norms in El Salvador that do not recognize a woman's right to end a relationship due to women's subservient status, making her relationship status and perception as property immutable. Menjivar Decl. ¶43 ("Even after having been away for some time and even if she has formally divorced her abuser, a woman who was once her abuser's partner is understood socially as never having extinguished his right to exercise dominance over her.").[13]

b. Social distinction is satisfied

Ms. [redacted] social group is viewed as distinct in Salvadoran society. The Board and federal courts have described a range of evidence that can be considered when evaluating social distinction, including high rates of violence or other differential or worse treatment against group members, the enactment of laws designed to protect victims or punish perpetrators, and lack of effective enforcement of those laws. *A-R-C-G-*, 26 I&N Dec. at 394; *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013) (en banc). Ms. [redacted] has provided ample evidence of the ever-increasing rates of violence against women in El Salvador, the pervasive "machismo" culture that discriminates against women, the enactment of laws and programs aimed at protecting women in domestic relationships, and the failures of

[13] Ms. [redacted] has similarly established her membership in the alternate proposed particular social groups of Salvadoran women in domestic relationships they are unable to leave where they have children in common, Salvadoran women viewed as property by virtue of their status in a domestic relationship" and "Salvadoran women." The validity of these groups, defined by various combinations of gender, nationality, and relationship status, is established by the same evidence that demonstrates the validity of the principally highlighted group.

the Salvadoran police to protect women from domestic violence, which together support an indisputable finding of distinction. State Dep't 2014 (documenting that domestic violence is a serious problem in El Salvador and that laws to protect women are rarely enforced); App.-H-I, K-T, Expert Testimony and Country Conditions.

c. Particularity is satisfied

Just as in *A-R-C-G-*, the proffered group is comprised of terms with commonly accepted definitions in El Salvador that, combined, establish that the group has meaningful boundaries. Beyond question, the terms "Salvadoran" and "women" have clear definitions. The terms "domestic relationships" that women are "unable to leave," and also sharing "children in common," are also clearly defined in the context of Salvadoran society and culture. Salvadoran law defines the various domestic relationships protected under its provisions, delineating the meaning of the term "domestic relationship." App.-T, Excerpt of Salvadoran Law on Domestic Violence (recognizing a range of relationships as protected including spouses and ex-spouses); Menjivar Decl. ¶23 (explaining that ex-spouses "are clearly recognized as falling within a commonly understood definition, including relevant legal definitions, of 'domestic relationships'"). Additionally, Ms. [redacted] has provided evidence demonstrating societal expectations regarding gender, the subordination of women, high rates of violence perpetrated against them, refusal of Salvadoran authorities to intervene in domestic violence cases, and the resulting—and widely understood—inability of women to leave domestic relationships. Menjivar Decl. ¶23 ("In my expert opinion, both 'Salvadoran women unable to leave their domestic relationships' and

'Salvadoran women who are treated as property by virtue of their positions in their domestic relationships' are clearly defined groups recognized by Salvadoran society, which includes the public and the government.") (internal quotation marks omitted).

d. The Attorney General should eliminate the "particularity" and/or "social distinction" requirements if he finds that Ms. [redacted] s groups do not satisfy either requirement

Although Ms. [redacted] maintains she has established the cognizability of her claimed particular social group(s) under the Board's test, were the Attorney General to decide otherwise, she challenges the validity of the test insofar as it requires social distinction and particularity. Those requirements are inconsistent with what is required to prove the other grounds for asylum (race, religion, nationality, political opinion), and so violate the principle of *ejusdem generis*. *Acosta*, 19 I&N Dec. at 233. Moreover, the social distinction and particularity additions import evidentiary requirements that relate to *other* elements of the refugee definition (*e.g.*, State inability or unwillingness to protect), impermissibly conflating and muddying the asylum elements and violating the canon against surplusage. *Paek v. Att'y Gen. of the U.S.*, 793 F.3d 330, 337 (3d Cir. 2015) (citation omitted). Contrary to the Board's purported justification of these requirements in *M-E-V-G-* and *W-G-R-*, the requirements represent an unacknowledged and unexplained departure from twenty years of precedent. They have generated significant confusion among adjudicators, resulting in arbitrary and capricious decision-making. *See Oliva v. Lynch*, 807 F.3d 53, 61 n.4 (4th Cir. 2015) (recognizing the convoluted social group standard and difficulties applicants face navigating it). The Attorney General should eliminate the

requirements and return to the *Acosta* immutability standard for cognizability.

2. Ms. [redacted] s Social Group Membership Was At Least One Central Reason Why She Was Persecuted

Asylum applicants bear the burden of establishing that one of the five protected grounds was or would be at least "one central reason" why they were or would be persecuted. 8 U.S.C. 1158(b)(1)(B)(i). The protected ground need not "be *the* central reason or even a dominant central reason for persecution." *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009) (emphasis in original); *see also Cruz v. Sessions*, 853 F.3d 122, 127 (4th Cir. 2017). Thus, reasons for persecution may be mixed, including protected and non-protected bases. Applicants can prove nexus by direct or circumstantial evidence. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

Nexus between Ms. [redacted] s group membership and her persecution finds extensive support in the submitted and supplemental record. Her abuser's own statements and actions—taken in the societal context of pervasive gender violence and lack of accountability for perpetrators—establish that his abuse stemmed from the fact that Ms. [redacted] was a woman in a domestic relationship with him and that he therefore had a right to control and abuse her. From early in their marriage, Ms. [redacted]'s husband sought to exert power over her and repeatedly expressed his belief that she was "his woman" who existed to serve him. Supp. Decl. ¶37. He escalated his threats when Ms. [redacted] sought to assert her autonomy in the relationship by refusing to have sex with him and attempting to leave. *Id.* ¶¶29, 37.

Professor Nancy Lemon, a renowned expert on domestic violence, explains that

the tactics used by Ms. [redacted]s former husband "reflect a fundamental belief that men are superior and that a woman's role in the household is to serve and obey the man." Lemon Decl. ¶81. Put another way, Professor Lemon explains "gender was the primary motivating factor of [Ms. [redacted] s] batterer's abuse." *Id.* Ms. [redacted] s husband's use of their children to hurt her further demonstrates the gender-based motivations. *Id.* ¶84 (opining that "Ms. [redacted] s husband's abuse of their children is additional evidence that he views himself as the absolute head of the household"). Expert testimony and significant country conditions evidence submitted by Ms. [redacted] regarding the normalization of domestic violence in Salvadoran society provide additional circumstantial evidence of nexus.

In finding Ms. [redacted] failed to establish nexus, Judge Couch pinned the cause for the abuse on her husband's substance abuse. I.J. at 13. However, as Professor Lemon explains, this is a "misconception." Lemon Decl. ¶69. While alcohol may be an excuse for violence or may trigger disputes that fuel the violence, alcohol is not a direct cause of the abuse. Rather, it is the abuser's attitudes and beliefs about gender roles and expectations for women "that determine whether the relationship will be violent." *Id.* ¶71.

E. Authorities in El Salvador Were Not Willing or Able to Protect Ms. [redacted]

Third, asylum applicants must demonstrate that the persecution in question was or would be inflicted either by agents of the government or by private persons that the government is "unwilling or unable" to control. *Hernandez-Avalos*, 784 F.3d at 950-53. Importantly, applicants need not demonstrate that the government's

inability or unwillingness to protect them is itself motivated by a protected ground. *Doe v. Holder*, 736 F.3d 871, 878 (9th Cir. 2013); *Valdiviezo-Galdamez v. Att'y Gen.*, 502 F.3d 285, 288-89 (3d Cir. 2007). Nor need applicants report incidents of persecution to authorities if doing so would have been futile or dangerous. *Lopez v. Att'y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007) (citing *S-A-*, 22 I&N Dec. 1328); *see also Hernandez-Avalos*, 784 F.3d at 950-54 (finding the applicant eligible for asylum where she did not report). Prosecution of persons who engage in similar acts of persecution does not necessarily demonstrate a government's ability and willingness to protect when sentences imposed are unduly lenient. *Sarhan v. Holder*, 658 F.3d 649, 658 (7th Cir. 2011).

Ms. [redacted] established that the Salvadoran government was—and is—unable and unwilling to protect her, as she has shown a complete lack of access to meaningful and effective State protection. Ms. [redacted] reported her husband to the police on multiple occasions, but the police not only failed to protect her but also placed her in increased danger. For example, the police required Ms. [redacted] to hand deliver her protection order to her husband and took no action to enforce the order. Supp. Decl. ¶¶26, 28. The police once arrested her abuser but released him after only a few days without charges. *Id.* ¶25. On one occasion, the police all but admitted they could not protect Ms. [redacted] and advised her to leave if she had any dignity. *Id.* ¶33. That Ms. [redacted]'s former brother-in-law is a member of the police only further hampers her ability to obtain protection. *Id.* ¶¶21, 40. Despite the adoption of specialized legislation intended to address violence against women in El Salvador, enforcement

mechanisms have been underfunded and utterly lacking, exacerbated by the patriarchal culture reflected in all actors in the justice system. Menjivar Decl. *passim*; Bayona Decl. *passim*; App.-K-T, Country Conditions. The Salvadoran government does not protect women from violence, consistently failing to arrest, prosecute, or convict perpetrators under the special laws.

F. DHS Has Not Rebutted the Presumption That Ms. [redacted] Would Be Persecuted on Account of Her Original Claim

Having established past persecution on account of a protected ground, Ms. [redacted] is presumed to have a well-founded fear of future persecution on that same ground. 8 C.F.R. 1208.13(b)(1). It is DHS's burden to prove by a preponderance of the evidence that she no longer has a well-founded fear because either (1) she can internally relocate in El Salvador or (2) country conditions have fundamentally changed so as to eliminate her individualized fear. 8 C.F.R. 1208.13(b)(1)(i)(A)-(B). DHS cannot meet its burden in either regard.

1. Ms. [redacted] Cannot Internally Relocate in El Salvador

Relocation alternatives must be both safe *and* reasonable in light of all circumstances. 8 C.F.R. 1208.13(b)(3); *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 34-36 (BIA 2012). Internal relocation for Ms. [redacted] would be neither. The record makes clear that Ms. [redacted] could not safely escape her former husband elsewhere in El Salvador. When Ms. [redacted] attempted to move away from and divorce her husband, he followed and continued to abuse and threaten her. He has vowed to do the same, or worse, in the future. In El Salvador, abusers can easily track women's movements, especially where the couple shares children in common and the abuser has

connections to the police. Bayona Decl. ¶71 ("El Salvador is a small country and depends on family and community networks for survival, so it is easy for abusers to track down their partners, especially where they have children together and where the abuser, like Ms. [redacted] s ex-husband, has connections in the police force or with other government authorities."); Menjivar Decl. ¶40.

Even if Ms. [redacted] would be safe from her abuser elsewhere in El Salvador, requiring her to move where she has no family or other connections would be unreasonable. 8 C.F.R. 1208.13(b)(3); *Knezevic v. Ashcroft,* 367 F.3d 1206, 1214 (9th Cir. 2004) (finding it not only unreasonable but also "exceptionally harsh" to expect asylum applicants to start their lives over with no family, home, or available employment prospects). Expert testimony establishes that it is extremely difficult, if not impossible, for Salvadoran women, especially without significant resources, to relocate to an area without family support where they face social stigma from living alone and the accompanying risk of sexual or other violence. Bayona Decl. ¶71 (opining "it would be extremely difficult if not impossible for Ms. [redacted] to move somewhere else in the country and be able to support herself and stay safe"); Menjivar Decl. ¶41 (stating "it would be almost impossible for many returning women to find work, rent a dwelling, and establish themselves in another city independently of their family and existing support networks").

2. Circumstances Have Not Fundamentally Changed

DHS provided no evidence in the underlying proceedings, nor can it now, that undermines Ms. [redacted]'s claim to protection on an individualized basis. Ms. [redacted] s personal circumstances have not changed. Her abuser swore to pursue her if she left

him and he did not make empty threats. And there is no evidence that suggests Ms. [redacted]'s former husband would now abandon his threats to find and kill her if she were removed to El Salvador. Indeed, Salvadoran attorney Aracely Bayona explains that Ms. [redacted] "may be at more risk of lethal violence for having stood up to her husband's authority [by obtaining a divorce]." Bayona Decl. ¶69. Moreover, the high levels of violence against women, entrenched social attitudes that exhibit bias towards women, and the impunity for perpetrators of domestic violence in El Salvador persist. App.-K-T, Country Conditions.

G. Ms. [redacted] Merits a Grant of Humanitarian Asylum

Even if the Attorney General were to find the presumption rebutted, Ms. [redacted] would still be entitled to relief due to both the severity of her past persecution as well as the reasonable possibility that she would suffer other serious harm in El Salvador. 8 C.F.R. 1208.13(b)(1)(iii)(A)-(B).

Certainly being repeatedly raped and beaten over a period of more than a decade qualifies as "more than the usual amount of ill-treatment." *Matter of Chen*, 20 I&N Dec. 16, 21 (BIA 1989). Although ongoing disability is not required to meet the severity standard, *see Lal v. INS*, 255 F.3d 998, 1003 (9th Cir. 2001), *as amended by* 268 F.3d 1148 (9th Cir. 2001), the years of abuse had serious impacts on Ms. [redacted] s physical and mental health that persist to this day. Supp. Psych. Eval. at 82. Taking into consideration relevant factors, such as the length of time the persecution was inflicted and the resulting psychological harm, Ms. [redacted] has demonstrated the requisite severity of past persecution for a grant of humanitarian asylum. *Matter of*

L-S-, 25 I&N Dec. 705, 715 (BIA 2012) (explaining relevant considerations for assessing severity).

For the second prong, the Board has explained that "other serious harm" need *not* be inflicted on account of a protected ground but must "equal the severity of persecution," and may include "civil strife, extreme economic deprivation beyond economic disadvantage, or situations where the claimant could experience severe mental or emotional harm or physical injury." *Id.* at 714. Applicants must only show a "reasonable possibility" that the "other serious harm" will occur. *Id.*

If returned to El Salvador, Ms. [redacted]s testimony, supported by expert testimony and country conditions establishes that she—as a Salvadoran woman living alone—will be at heightened risk of violence, including physical or sexual violence. Supp. Decl. ¶51 ("As a woman living alone with no family, there is no place that is safe for me [in El Salvador]."); Menjivar Decl. ¶42; Bayona Decl. ¶71; App.-K-T, Country Conditions. In addition, returning to El Salvador will exacerbate Ms. [redacted]'s fragile psychological state. As a result of the years of domestic abuse, she suffers from PTSD and other psychological disorders, which have produced several debilitating symptoms such as nightmares, sleep disturbance, and intrusive thoughts. Supp. Psych. Eval. at 84. It is recommended she receive sustained therapy to address her worsening symptoms. *Id.* at 95. However, such psychological care is "nearly nonexistent in El Salvador, particularly for those without the financial resources to pay for it." Bayona Decl. ¶70. Therefore, Ms. [redacted]has established a significant risk of other serious physical or psychological harms—which rise to the

level of persecution—if returned to El Salvador.

H. Ms. [redacted] Merits a Favorable Exercise of Discretion

A favorable exercise of discretion is warranted here. *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987). Ms. [redacted] fled years of horrific abuse in El Salvador and has expressed her fear of being further brutalized or killed at the hands of her former husband. She has no criminal history anywhere in the world and does not pose a danger to national security. There are no negative factors in this case counter-balancing a grant of asylum. *See id*. at 474 (holding that "the danger of persecution should generally outweigh all but the most egregious of adverse factors"). The Attorney General should thus exercise his discretion favorably and grant her application.

IV. Ms. [redacted] Is Entitled to Withholding of Removal Because Her Life or Freedom Would Be Threatened in El Salvador on Account of Her Membership in a Particular Social Group

A. Ms. [redacted] Qualifies for Withholding of Removal for the Same Reasons that She Qualifies for Asylum

Following the analysis of Ms. [redacted] s eligibility for asylum, Section III., *supra*, she also qualifies for withholding of removal under the Act ("withholding"). To qualify for withholding, applicants must demonstrate that their life or freedom would be threatened in the country of removal because of one of the same five protected grounds—*i.e.*, "race," "religion," "nationality," "political opinion," or "membership in a particular social group." 8 U.S.C. 1231(b)(3)(A). As with asylum, it is presumed that applicants who were previously persecuted on account of a protected ground would have their life or freedom threatened on account of the original claim. 8 C.F.R.

1208.16(b)(1)(i). Because Ms. [redacted] was persecuted on account of her social group membership, she enjoys a presumption that her life or freedom would be threatened in El Salvador on the same grounds. *Id*. Moreover, as corroborated by multiple experts and country conditions described above, she can independently establish she is more likely than not to suffer persecution in the future.

As in asylum cases, DHS may rebut this presumption by showing changed circumstances or the availability of safe and reasonable relocation. 8 C.F.R. 1208.16(b)(1)(i)(A)-(B). For the same reasons that DHS did not rebut the presumption with respect to Ms. [redacted]s asylum claim (*see* Section III.D.), it did not rebut the presumption with respect to her withholding claim.

B. If the Attorney General Finds That Ms. [redacted] Failed to Satisfy the "One Central Reason" Requirement, He Should Overrule *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010)

If the Attorney General finds that Ms. [redacted] s membership in a particular social group was not at least "one central reason" for the persecution she suffered, he should overturn the Board's decision in *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010), which erroneously held that the "one central reason" requirement also applies to applications for withholding of removal. The Ninth Circuit has already held that *C-T-L-* conflicts with the clear intent of Congress, *Barajas-Romero v. Lynch*, 846 F.3d 351, 357-60 (9th Cir. 2017), and other circuits will inevitably reach the same conclusion given the plain text of the relevant statutes. As the Ninth Circuit recognized, *C-T-L-* was based on a "false premise"—*i.e.*, that Congress was "silent" on whether the "one central reason" requirement applied to applicants for withholding. *Id*. at 359. By inserting the "one central reason" requirement into the statutory

provision governing asylum claims, 8 U.S.C. 1158(b)(1)(B)(i), and by conspicuously declining to incorporate the requirement into the statutory provision governing withholding claims, 8 U.S.C. 1231(b)(3)(C), Congress clearly did not intend for the requirement to apply to withholding claims. *Barajas-Romero*, 846 F.3d at 358-59. Consistent with Congress' clear intent, the Attorney General should hold that applicants for withholding need only demonstrate that a protected ground would be "a reason" for any persecution they faced or would face in the country of removal. *Id.* at 360.

V. The Attorney General Should Remand for Further Consideration or Reverse the Denial of Ms. [redacted] s Request for Protection Under the Convention Against Torture

If the Attorney General denies Ms. [redacted] s applications for asylum and withholding, he must remand the record for the Board to consider her CAT claim in the first instance. If the Attorney General reaches the merits of the claim, he should reverse Judge Couch's determination that Ms. [redacted] did not qualify for protection.

A. The Attorney General Must Allow the Board to Consider Ms. [redacted]'s CAT Claim in the First Instance

In his initial decision in this case, Judge Couch found that Ms. [redacted] did not qualify for withholding of removal under the CAT. I.J. at 15-16. Because the Board found that Ms. [redacted] qualified for asylum, it did not address Ms. [redacted] s CAT claim in its prior decision. Board at 4. The Attorney General thus must remand the case to the Board for it to consider Ms. [redacted] s appeal of the denial of her CAT claim in the first instance.

While the Attorney General may possess authority to receive new evidence and make new factual findings, *A-H-*, 23 I&N Dec. at 779 n.4, he may not reach claims the Board has yet to even consider. Federal regulations authorize the Attorney General to "review" decisions of the Board, 8 C.F.R. 1003.1(h)(1), and, "[a]s a legal term, 'review,' even de novo review, customarily denotes an appellate-style review for error of the proceedings conducted by an underlying adjudicative body." *Matter of Herrera Del Orden*, 25 I&N Dec. 589, 593 (BIA 2011). By addressing Ms. [redacted] s CAT claim, the Attorney General would thus purport to "review" an issue on which the Board has not spoken.

Even if the Attorney General is not precluded from deciding Ms. [redacted] s CAT claim, decisions of his predecessors suggest that a remand to the Board would remain the more prudent course. *See*, *e.g.*, *Matter of Silva-Trevino I*, 24 I&N Dec. 687, 709 (A.G. 2008) *vacated on other grounds*, 26 I&N Dec. 550 (A.G. 2015) (remanding for Board to consider adjustment application in first instance); *Matter of Farias*, 21 I&N Dec. 269, 281 (A.G. 1997) (remanding for Board to consider effect of intervening law passed by Congress); *Matter of N-J-B-*, 22 I&N Dec. 1057 (A.G. 1999). Just as the Supreme Court "[o]rdinarily … do[es] not decide in the first instance issues not decided below," *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (internal quotation and citation omitted), the Attorney General should allow the Board to first address Ms. [redacted] s CAT claim.

B. Alternatively, the Attorney General Should Reverse the Immigration Judge's Decision

If the Attorney General reaches the merits of Ms. [redacted]s CAT claim, he should reverse Judge Couch's denial of her application. To qualify for CAT protection, applicants must demonstrate that it is more likely than not that they would be subject to "torture" in the country of removal. 8 C.F.R. 1208.16(c)(2). To qualify as torture, an act must satisfy two basic requirements. First, it must be an "act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person." 8 C.F.R. 1208.18(a)(1). Second, the pain or suffering must be "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." *Id.* Acquiescence requires the public official to either have awareness that the torture will take place, 8 C.F.R. 1208.18(a)(7), or to exhibit "willful blindness" to the fact that such torture will take place. *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 246 (4th Cir. 2013). Evidence of past torture "shall" be considered in assessing the likelihood of future torture. 8 C.F.R. 1208.16(c)(3)(i).

The record establishes that much of the abuse inflicted by Ms. [redacted]'s ex-husband qualifies as "torture." On countless occasions, Ms. [redacted]s ex-husband raped her and subjected her to repeated and brutal beatings. Supp. Decl. ¶¶23, 29. On at least one occasion, Respondent's ex-husband held a knife to her neck. *Id.* ¶21. On another, he pointed a loaded gun at her. *Id.* ¶25. Federal regulations define torture to include not only severe physical pain and suffering, 8 C.F.R. 1208.18(a)(1), but also "prolonged mental harm caused by or resulting from … [t]he intentional infliction or threatened infliction of severe physical pain or suffering," or "[t]he threat

of imminent death." 8 C.F.R. 1208.18(a)(4)(i), (iii). According to Dr. Peña-Cabana, who has now evaluated Ms. [redacted] on multiple occasions, Ms. [redacted] suffers from severe PTSD and other psychological disorders that are a direct result of the harms inflicted on her by her ex-husband. Psych. Eval.; Supp. Psych. Eval. Nor can there be any serious dispute that Ms. [redacted] s ex-husband "specifically intended to inflict severe physical or mental pain or suffering," 8 C.F.R. 1208.18(a)(5), when he held a knife to her neck, pointed a loaded gun at her, or raped and beat her. While the infliction of past torture does not create a presumption of future torture, any reasonable adjudicator would find it more likely than not that Ms. [redacted] would again be raped, threatened with death, or actually killed by her ex-husband if she is removed to El Salvador.

The record further establishes that any future acts of torture committed by Ms. [redacted]'s ex-husband would occur "with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. 1208.18(a)(1). Ms. [redacted] s ex-husband's brother [redacted] is a police officer in El Salvador. Yet rather than use his position to prevent his brother from abusing Ms. [redacted] [redacted] abetted his brother in terrorizing Ms. [redacted], and her ex-husband exploited his brother's position of authority to further his abuse. Supp. Decl. ¶39 (when threatening Ms. [redacted] with harm, her abuser warned "Don't forget my brother is a police officer."). When Ms. [redacted] ran into her ex-husband and former brother-in-law on the day before Christmas in 2013, [redacted] threatened to kill her. Supp. Dec. at ¶40 ("[redacted] said that I should be careful because he 'didn't know where the bullets were going to

land.'"). Moreover, as described above, country experts have documented high rates of impunity coupled with historical discrimination and bias against women in El Salvador which serve as tacit encouragement of continued battering and killing of women, tantamount to acquiescence. *See, e.g.*, *Gomez-Zuluaga v. Att'y Gen. of the U.S.*, 527 F.3d 330, 351 (3d Cir. 2008) (considering relevant to acquiescence evidence that "authorities have been especially slow to end abuses against women or bring perpetrators to justice"); *Ali v. Reno*, 237 F.3d 591, 598 (6th Cir. 2001) (noting where "authorities ignore or consent to severe domestic violence, the [CAT] appears to compel protection for a victim").

In denying Ms. [redacted] s claim for protection under the CAT, Judge Couch did not dispute that her former brother-in-law was a police officer in El Salvador or that he levied such a threat against Ms. [redacted] Instead, he stated, without further elaboration, that he "[did] not attribute to the Salvadoran government the actions or inaction of the Ms. [redacted]'s former brother-in-law." I.J. at 16. In so doing, Judge Couch wrongly focused on whether Ms. [redacted] s torture would be sanctioned by Salvadoran authorities as a whole rather than by any one official acting in his or her official capacity. This was clear error under the regulations, which require only the latter. 8 C.F.R. 1208.18(a)(1) (relevant standard looks to "*a* public official or other person acting in an official capacity") (emphasis added). Federal courts have recognized that the entire government need not consent or acquiesce in torture. *See*, *e.g.*, *N.L.A. v. Holder*, 744 F.3d 425, 443 (7th Cir. 2014) ("[I]t is not inconsistent for some parts of a government to be involved in efforts to reduce private persecution,

while others continue to turn a blind eye, or worse yet, aid in that persecution."). So, too, has the Board. *Matter of L-G-H-*, 26 I&N Dec. 365, 374 (BIA 2014) (vacating denial of CAT claim where immigration judge found respondent would not be tortured by "the present government of Venezuela"). Judge Couch thus erred in disregarding the threats by Ms. [redacted]s former brother-in-law simply because he was not speaking for the Salvadoran government as a whole. As importantly, he also erred in ignoring country conditions that further demonstrate acquiescence. State Dep't 2014 16 (documenting case where authorities were aware of domestic violence and granted a protection order, but provided no further protection to the woman who was killed by her partner a few days later).

In sum, even if the Attorney General finds that Ms. [redacted]s fear of abuse in El Salvador is not on account of a protected ground, the record establishes that she would again be raped, threatened with imminent death, or actually killed by her ex-husband, and that such torture would occur with the consent or acquiescence of her former brother-in-law if not the Salvadoran government more generally. If he reaches the merits of her claim, the Attorney General should thus grant her request for protection under the CAT.

CONCLUSION

For the foregoing reasons, the Attorney General should instruct Judge Couch to issue an order granting or denying Ms. [redacted]'s asylum application before taking any further action on this case. If the Attorney General reaches the merits, he should decline to address the specific briefing question or, at minimum, reaffirm well-settled U.S. law holding that persecution by private actors may present a valid asylum claim,

whether or not those acts are also crimes, and should uphold the Board's finding that Ms. [redacted] qualifies for asylum because she was subject to past persecution in the form of brutal domestic violence on account of her membership in a particular social group.

Dated: April 20, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the instructions of the Attorney General's referral order dated March 7, 2018 because the brief contains 14,859 words per the Word Count feature of Microsoft Word, excluding the cover page, Table of Contents, Table of Authorities, signature block, Certificate of Compliance, and Certificates of Filing and Service.

Dated: April 20, 2018

Blaine Bookey

CERTIFICATE OF FILING

On April 20, 2018, I, Blaine Bookey, submitted a copy of the foregoing electronically to AGCertification@usdoj.gov, and mailed in triplicate to:

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On April 20, 2018, I, Blaine Bookey, mailed a copy of the foregoing to:

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