[redacted]

DETAINED

Pro Bono Counsel

[redacted]

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	:	
	:	
[redacted]	:	In Removal Proceedings
A[redacted]	:	

BRIEF IN SUPPORT OF APPEAL and
MOTIONS TO TAKE ADMINISTRATIVE NOTICE and TO REMAND

Statement of the Case

Respondent [redacted] ("Respondent" or "Mr. R[redacted]") requests that the Board of Immigration Appeals ("Board" or "BIA") remand this case for a full and fair hearing and, in the alternative, appeals from the decision of the Immigration Judge to deny his applications for asylum and withholding of removal under the Immigration and Nationality Act ("INA") and the United Nations Convention Against Torture ("CAT").

Facts

On October 21, 2018, [redacted], the brother of [redacted] ("Ms. V[redacted]"), the Respondent's domestic partner and Co-Respondent herein, was brutally murdered by the Jinestrozas. That night, the murderers texted Ms. V[redacted]' parents a photo of the bloodied corpse of her brother with the caption, "This is your son." (V[redacted] Form I-589, p. 5) Shortly afterward, Ms. V[redacted], the Respondent and other V[redacted] Family members started receiving death threats. Ms. V[redacted], the Respondent and other members of the V[redacted] Family reluctantly fled for their lives. Initially, Mr. R[redacted] and Ms. V[redacted]

attempted to remain in Honduras by moving from [redacted] to [redacted], but when the threats continued, they had to leave. (Tr. 65, line 25) Two of Ms. V[redacted] sisters also fled Honduras. The two sisters who remained feel constantly threatened. Respondent and Ms. V[redacted] arrived in Tijuana, Mexico, in early May 2019. They presented themselves at the San Ysidro port of entry to seek asylum and were returned to Mexico under the Migrant Protection Protocols. More than 5 months later, on October 22, 2019, they appeared at their first hearing in San Diego. The case was continued to November 18, 2019.

On November 18, 2019, the Respondent and Ms. V[redacted] appeared for their second hearing. At the hearing, the Immigration Judge ("IJ") explained that he would determine if the charges against the respondents were correct and, if so, if there were "any forms of relief from removal available to [the respondents]." The IJ explained that in all cases, the charges against the respondents were that they had applied for admission into the United States at a port of entry without the proper documents for such admission. He told the respondents that "They may tell the Court anything that is relevant to [their] case." When the case against Mr. R[redacted] and Ms. V[redacted] was called, they related that they had called the organizations on the list provided by the court and some of the numbers were unanswered and some of the organizations said that they could not represent them because they were awaiting their hearing in Mexico. However, they had reached Al Otro Lado, and they had a letter from that organization requesting a continuance so that Mr. R[redacted] and Ms. V[redacted] could attend a workshop in December. Their request for a continuance was granted and the case was continued to January 9, 2020. At the January 9, 2020 hearing, the case against Mr. R[redacted] and Ms. V[redacted] was set for hearing on February 7, 2020. Although the respondents are not legally married the Judge consolidated the proceedings and designated Mr. R[redacted] the lead.

On February 7, 2020, Mr. R[redacted] and Ms. V[redacted] appeared at their hearing *pro se*. Each Respondent at the common hearing gave the IJ a packet of documents. As will be discussed later, the documents included information that was not developed in the record and supported the Respondent's asylum claim. The hearing began when the IJ called Ms. V[redacted] to the stand to be cross-examined by the government attorney. The Respondents did not have the opportunity to affirmatively present their case.

> IJ: "All right to both respondents, the government attorney's going to ask you some questions. I may or may not ask you any questions. Please do not interrupt any of our questions." (Tr. 56, lines 11-13)

The IJ failed to advise the Respondents that they could object or how to do so. Indeed, the Judge instructed Mr. R[redacted] not to interrupt Ms. V[redacted] while she was testifying. (Tr. 57, Line 15)

The IJ found that the Respondents were both removable and that they had not proved that they had "suffered any past persecution and you've failed to establish a well-founded fear of persecution if you return to Honduras." He also found that they had "failed to establish more likely than not that you would be tortured if removed to Honduras." (Tr. 80, lines 1-6)

Standard of Review

The standard of review in appeals before the Board is set out in 8 CFR §1003.1(d)(3) which "states that "the Board will not engage in *de novo* review of findings of fact determined by an immigration judge" unless the findings are "clearly erroneous." The Board may "review questions of law, discretion and all other issues in appeals from decisions of immigration judges *de novo*." In this case, the Board must review the IJ's credibility determination under the clearly erroneous standard. The Board can review the issues of past persecution and well-founded fear,

which are mixed questions of law and fact, *de novo*. Under Rule 1003.1(d)(3), the Board may also take "administrative notice of commonly known facts such as current events." Finally, Rule 1003.1(d)(3) grants the Board the authority to remand the proceeding to an IJ if it finds that it cannot properly resolve an appeal without further factfinding.

Argument

Remand is Necessary to Develop A Sufficient Factual Record

Since the IJ's factual determinations are accorded great deference, it is imperative that the factual record developed by the IJ be full and fair. The proceedings in this case were neither full nor fair. Mr. R[redacted] and Ms. V[redacted] appeared *pro se* at the hearing on February 7, 2020. Other than being allowed to submit documents, neither Mr. R[redacted] nor Ms. V[redacted] were given the opportunity to testify for themselves or for each other in a narrative or question and answer form. Instead, the IJ commenced the hearing by calling Ms. V[redacted] to the stand to be cross-examined by the government attorney.

> IJ: "All right to both respondents, the government attorney's going to ask you some questions. I may or may not ask you any questions. Please do not interrupt any of our questions." (Tr. 56, lines 11-13)

"The Fifth Amendment guarantees that individuals subject to deportation proceedings receive due process. (citations omitted) Due process requires that an alien receive a full and fair hearing. (citations omitted) In addition to constitutional protections, there are statutory and regulatory safeguards as well. (citations omitted) For example, individuals in deportation proceedings are entitled to present personal testimony in their behalf. See 8 C.F.R. § 240.10 (4) (1999) (respondent has a reasonable opportunity to present evidence in his or her behalf)." *Jacinto v. INS,* 208 F.3d 725 (9th Cir 2000) (IJ failed to tell respondent she could present her own affirmative testimony in narrative form.) The facts in *Jacinto* bear a startling similarity to the

hearing in this case. The IJs before whom these Respondents appeared failed to adequately explain their rights. Neither IJ explained how hearings were conducted or what the Respondents had to prove (persecution or a well-founded fear of persecution based upon race, religion, nationality, membership in a particular social group or political opinion) in order to prove their eligibility for asylum or for relief under the Convention Against Torture. As previously mentioned, at the hearing the IJ failed to inform them or give them the opportunity to present affirmative testimony in narrative form. *Id*. Their hearing was reminiscent of the proceedings in *Jacinto* that the 9th Circuit found denied that respondent a "'reasonable opportunity' to present her evidence," Here, IJ Law told Ms. V[redacted] to take the stand and immediately tendered her to the government for cross examination. The Respondents did not even have the opportunity to decide which of the two of them would be the primary witness! (Tr. 56 Lines 8-9) Moreover, just as in *Jacinto*, Ms. V[redacted]' testimony was "the product of an examination conducted by parties somewhat adverse to her position." *Id*.

Apparently, in an effort to mitigate the unfairness of the proceeding, the IJ asked Ms. V[redacted] if she had told him "everything that she had wanted to tell him today." (Tr. 72, lines 22-23 and page 74, lines 19-20) Her affirmative response is meaningless in light of the IJ's failure to tell her what she was required to prove at her hearing. After Ms. V[redacted]' testimony concluded, IJ Law asked Mr. R[redacted] if he had heard her testimony and if there was anything he wanted to add to it. (Tr. 75, Lines 2-13) Mr. R[redacted] was denied the opportunity to present his testimony affirmatively in his own words. Specifically, he did not get the opportunity to describe his own experiences, fears, and reactions to the murder of Ms. V[redacted]' brother and what repercussions he suffered. He did take the opportunity to present some evidence of his political activity, but this evidence could only be described as cursory. Mr. R[redacted] testified

to his participation in political protests and to being tear gassed and that the protestors "started being harassed even though what we were doing was Okay." (Tr. 76, lines 7-9). The IJ did not ask even one follow up question. Importantly, the IJ did not ask any questions about the information contained in Mr. R[redacted]' application for asylum. Specifically, Mr. R[redacted] wrote that he participated in protests every day in December 2017 until "some of my friends were sent to prison for protesting, others were disappeared by the police." (R[redacted] I-589, p. 6) The IJ failed to develop this highly relevant information.

"When a claimant appears at a hearing without counsel, the ALJ must "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts. He must be especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited."" *Key v. Heckler*, 754 F.2d 1545, 1551 (9th Cir. 1985). As the *Jacinto* court noted, "applicants for asylum often appear without counsel and may not possess the legal knowledge to fully appreciate which facts are relevant. Yet a full exploration of all the facts is critical to correctly determine whether the [noncitizen] does indeed face persecution in their homeland. Thus, in such circumstances, the immigration judge is in a good position to draw out those facts that are relevant to the final determination." *Jacinto* 208 F3d. 725, 734. Absent development of the record by the IJ, "information crucial to [a noncitizen's] future" will remain[] undisclosed." *Id*. at 733. This is not to say that the IJ needed to take on the role of defense counsel. The role of the IJ is to remain impartial and to ensure full development of the record. 8 C.F.R. § 1003.10(b).

One particularly troubling line of inquiry that the IJ failed to explore was Ms. V[redacted]' description of the events surrounding the murder of her brother.

She identified her brother's murderers as follows:

V[redacted]: "They're very well-known as the Jinestroza."
Government: "What does that mean?"
V[redacted]: "It's their last name or how they're well-known."

The IJ then asked how the "last name" was spelled, but it's not clear from the transcript that Jinestroza is a last name of a family or what she meant when she said that is how "they're well-known" and that is never clarified on the record. (Tr. 62, lines 19-23)

The reason Ms. V[redacted]' brother was murdered is not in evidence.

Government: Why did they kill your brother?
V[redacted]: Because he had a conflict with them.
Government: What kind of conflict?
V[redacted]: He went to a party and they were all drinking and there was a misunderstanding and then they start hitting each other.
(Tr. 63, lines 12-19)

It is clear from the record that Ms. V[redacted] understood the question "What kind of conflict?" to mean how it physically occurred. The record is silent as to the underlying cause of the "conflict" or "misunderstanding". The IJ failed to ask what the conflict or misunderstanding was about, and that information was potentially highly relevant to the Respondent's asylum claim.

Later in her testimony, Ms. V[redacted] testified that "they" started to threaten "us" after her brother's friend filed a report about the murder with the police at the request of the V[redacted] Family (R[redacted] I-589, p. 5). Death threats accompanied by other confrontations, vandalism or other actions can be persecution. *Duran-Rodriguez v. Barr,* 918 F.3d 1025 (9th Cir.). No one asked her whether there were confrontations or acts of vandalism, who threatened them, who was threatened, when they were threatened, where they were threatened, what was said or done, how the threat was communicated. In addition, the IJ did not ask Mr. R[redacted] any questions about how the members of the Jinestroza targeted Ms. V[redacted]' mother when she was hospitalized. (R[redacted] I-589, p. 5) These are facts that would be critical to

determining if the nature and severity of the threats constituted persecution, whether the Respondents were targeted on account of their relationship to Ms. V[redacted]' brother, and if they had a well-founded fear of persecution if they were returned to Honduras. And, despite the clear implication that the Respondents were targeted on account of their familial relationship, the IJ did not ask a single question aimed at ascertaining whether the family was socially distinct within their community. *Matter of L-E-A-,* 27 I & N 581 (AG 2019); *Matter of M-E-V-G-,* 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-,* 26 I & N Dec. 208 (BIA 2014).

Similarly, when Mr. R[redacted] was on the witness stand, the IJ made no attempt to develop the record regarding his political activities. Mr. R[redacted] explained the political situation in Honduras as a result of the presidential election and his participation in protests, but other than asking "Anything else?", the IJ did nothing to develop the record regarding the nature and extent of Mr. R[redacted]' political activities. The IJ failed to ask any questions regarding whether he was persecuted as a result of those activities or had a well-founded fear of persecution if he was returned to Honduras. (Tr. 76, line 11) This was prejudicial since Mr. R[redacted] wrote in his application that some of his friends who were protestors were "sent to prison for protesting, others were disappeared by the police." (R[redacted] I-589, p. 6) As the Board recognizes, IJ assistance in developing the record is "particularly appropriate "where [a noncitizen] appears *pro se* and may be unschooled in the deportation process." *Matter of J-F-F-,* 23 I&N 912, 922. "An IJ does not fulfill his duty to develop testimony on a particular issue "by simply asking the [noncitizen] whether he has 'anything to add in support of his claim.'" *Pangilinan v. Holder,* 568 F.3d 708, 709 (9th Cir 2009).

Indeed, Mr. R[redacted]' response to the question: "That's—just that" is not surprising. He did not know what else to add. The IJ had failed to provide him with any information about the

relief he was seeking. IJ's should provide noncitizens information about what they need to prove in order to demonstrate their eligibility for relief from removal and the types of information that they may need to present. See *Agyeman v. INS*, 296 F.3d 871, 883-84 (9th Cir. 2002) (noting the "importance of explaining to [noncitizens] what evidence will demonstrate their eligibility for relief from deportation"); See also *Matter of L-A-C-,* 26 I&N Dec 516, 521 n.3 (BIA) (noting that it is "good practice," especially in *pro se* cases, to "remind an applicant for asylum or withholding of removal of his burden to establish his claim and to provide corroborating evidence where it is reasonable to do so" and that "it is beneficial for the Immigration Judge to remind the applicant at the master calendar hearing of the general type of evidence needed to corroborate a claim").

Remand is Necessary to Provide the Respondent with a Fair Hearing

The Immigration Court hearing lacked fairness. Regulation 240.10(4), 8 C.F.R. § 240.10 (4) provides that the Respondents have the right to object to the evidence against them. At the hearing, the IJ neither advised nor explained this right to the respondents, instead, he told them, three times, not to interrupt him, the interpreter, the government attorney or the witness. He failed to advise the witness to pause to allow time for an objection to be made. (Tr. 56, lines 11-15 and Tr. 57, line 15). Even if the Respondents understood that they had the right to object and what that meant, they could reasonably understand from the IJ's admonitions that they were not allowed to speak while the Judge or the government attorney was asking questions, the interpreter was speaking or the witness was responding.

The inability to object prejudiced the Respondents. For instance, the government attorney asserted, "So people killed your brother, killed him because of an argument." Neither

Mr. R[redacted] nor Ms. V[redacted] objected that the question was addressed to someone who was not present at the murder (a non-witness), mis-stated the evidence and assumed facts not in evidence. Ms. V[redacted] had testified that "the Jinestroza" not "people" murdered her brother over a "misunderstanding"—with no mention of what the misunderstanding was about or that it was an "argument." If the government's preferred understanding of "misunderstanding" was that her brother was murdered in the course of an argument, the government attorney should have asked a clarifying question, but instead she chose to characterize the murder as being the result of an argument when it could have just as easily been something else. The record is silent as to the cause of her brother's murder or if Ms. V[redacted] even knows why her brother was murdered.

The IJ followed up with one line of questioning potentially relevant to the asylum claim but objectionable.

> IJ: "Do you know if your partner is afraid of anyone else in Honduras other than the Jinostroza's?"
> V[redacted]:"He used to visit different groups, like government groups, and he was part of government groups."
> IJ: "Okay, but was he afraid of anyone else other than the Jinostroza's?"
> [redacted]V: "Well, no." (TR. 72, lines 4-12)

It is objectionable to ask one witness what another person was feeling unless there is some proof in the record that she has personal knowledge of the matter. See Federal Rule 602 which, while not binding on the Immigration Court, *Matter of D- R-,* 25 I&N Dec 445, 458 n.9 (BIA 2011), does capture the common law principle that evidence should come from the most reliable source—in this case, Mr. R[redacted]. This is a matter of fundamental fairness, which is the test for admissibility in administrative hearings. *Id*. at 458. She was only competent to testify about her observations. The questions were objectionable, and Mr. R[redacted]' failure to object

also demonstrated his lack of understanding of how these proceedings should be conducted. (Tr. 76, line 11)

Mr. R[redacted] was prejudiced by this line of questioning because it is the only evidence in the record, other than the Application for Asylum (Form I-589) which the IJ failed to consider, regarding his fear of persecution and from that it can be inferred that the IJ relied upon this testimony in finding that the Respondent had failed to prove a well-founded fear of persecution if he were returned to Honduras. (Tr. 83, line 2) Courts have held that "…prejudice may be shown where the IJ's inadequate explanation of the hearing procedures and failure to elicit pertinent facts prevented the [noncitizen] from presenting evidence relevant to their claim." *Agyeman*, 296 F3d at 884-5.

In order to prove that he was prejudiced by the IJ's failure to explain his rights or to develop the facts at the hearing fully, Mr. R[redacted] does not have to explain what evidence he would have presented if he had the opportunity at the hearing. In *Agyeman*, the Court noted that it can "infer prejudice in the absence of any specific allegation as to what evidence [respondent] would have presented had the IJ adequately explained what he needed to prove to demonstrate his eligibility for relief. *Id*.

The Respondent Should be Granted Asylum

Credibility

Immigration Judge Law found the testimony of Ms. V[redacted] and Mr. R[redacted] to be credible. (Decision, p. 2) As previously stated, unless this finding is clearly erroneous, the Board should not review this finding. Consequently, the Board should treat the testimony of Ms. V[redacted] and Mr. R[redacted] as truthful.

There is Credible Evidence that Mr. R[redacted] has Suffered Persecution in the Past and has a Well-Founded Fear of Persecution in the Future

"An applicant for asylum has the burden of establishing that he or she is a refugee within the meaning of section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2006)." *Matter of S-E-G-, et al.,* 24 I&N Dec 579, 581 (BIA 2008). The deficiencies in the manner in which the IJ conducted the hearing and how that prevented the Respondents from fully presenting their case have already been discussed herein. Nevertheless, by taking the highly truncated testimony of the Respondents as truthful, one can make out the essentials of a viable claim. The testimony shows that Ms. V[redacted]' brother was murdered by a group of people known as "the Jinestroza" during a conflict in October 2018. (Tr. 62, line 9---Tr. 63, line 6) The police were aware of the murder and did nothing about it. The police were in "cahoots" with the Jinestroza. (Tr. 69, line 25) Merriam-Webster defines cahoots as meaning an alliance or partnership. The police were either allies of the Jinestroza or partners with them. Ms. V[redacted] did not report the murder to the police because she was afraid of retaliation. (Tr. 64, line 7) Indeed, the person who reported the murder to the police, at the request of the V[redacted] Family, in October 2018 was forced to leave Honduras and only returned because his mother had become seriously ill. (Tr. 64, lines 9-19; Tr. 70, lines 7-15) Ms. V[redacted] testified that they were threatened shortly after her brother's murder was reported to the police and then again before she and Mr. R[redacted] left Honduras. (Tr. 67, lines 7-18)

The asylum applicant "must demonstrate that he or she has suffered past persecution or has a well-founded fear of future persecution on account of one of the five enumerated grounds in section 101(a)(42) which include race, religion, nationality, membership in a particular social group or political opinion." *Id*. Non-physical forms of harm may amount to persecution. *Matter*

of T-Z-, 24 I&N Dec 163 (BIA 2007). At the time of her brother's murder, Ms. V[redacted] lived an hour from the village where the murder occurred and started being harassed after the police report was filed. (Tr. 65, line 22- Tr. 66, line 10) She and Mr. R[redacted] moved to [redacted], another place in Honduras near Mr. R[redacted]' family, and continued to be threatened. (Tr. 65, lines 24-25) Two of her sisters moved to other locations in Honduras where they live in fear. "…they always live in fear because it is such a small country." Her other two sisters left Honduras and are now in Mexico seeking asylum. (Tr. 68, line 24-Tr. 69, line 8) While her parents remain in Honduras, the record shows that they have been terrorized by the murderers who shortly after they murdered their son, sent them a photo of the bloodied body with the caption "This is your son." (V[redacted] I-589, p. 5) Later, when her mother was hospitalized, she was threatened by the Jinestroza. (R[redacted] I-589, p. 5) This evidence shows that the Respondents and other members of the V[redacted] Family suffered past persecution and have a well-founded fear of future persecution.

The IJ also under-developed the record in regard to the whether the basis of the Respondent's fear of persecution falls into one of the five enumerated categories, but there is evidence that Respondents are members of a particular social group, the V[redacted] Family. Furthermore, there is evidence in the record that supports the requirements of social visibility and particularity. *In the Matter of S-E-G- et al.,* 24 I&N Dec 579, 582 (BIA 2008). The persecutors are known as "the Jinestroza". While the record is unclear as to what type of group the Jinestroza are, at various places in the record it refers to them as family, possibly a crime family, (Tr. 62, line 18-23), in other places they appear to be an international criminal organization. (R[redacted] I-589, p. 5) Either way, it is clear that whatever it is, the Respondents fall into another particular social group, the V[redacted] Family, which is a distinct group from the

Jinestroza. Family is "the quintessential particular social group." *Flores-Rios v. Lynch,* 807 F.3d 1123, 1128 (9th Cir. 2015)[1]. In *Cruz v. Sessions*, 853 F3d 122, 127 (4th Cir. 2017) the court found:

> Membership in "a particular social group" is a protected ground if that group consists of people who "share a common, immutable characteristic." *Crespin-Valladares v. Holder,* 632 F.3d 117, 124 (4th Cir. 2011). *See Hernandez-Avalos,* 784 F.3d at 949 ("[M]embership in a nuclear family qualifies as a protected ground for asylum purposes."). Persecution occurs "on account of" membership in an immediate family when that relationship is "at least one central reason for' the feared persecution." *Crespin-Valladares,* 632 F.3d at 127 (quoting 8 U.S.C. § 1158(b)(1)(B)(i)).

Regarding the Jinestroza, Ms. V[redacted] testified, "it's a small village [redacted]) and everyone knows each other, and they know themselves, so they---because it's so small then, they can try and hurt us." (Tr. 70, lines 4-5) In [redacted], there is particularity and social visibility between the Jinestroza and the V[redacted] Family sufficient to satisfy the standard laid out in *Matter of L-E-A,* supra. The Ninth Circuit has noted that "the essence of the particularity requirement therefore is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized in the society in question, as a distinct class of persons." *Id*. at 584. In regard to social visibility, the Board has recognized that "the shared characteristic of the group should generally be recognizable by others in the community." *Id.* at 586. The record supports findings of particularity and social visibility.

The IJ's failure to develop the record regarding Mr. R[redacted]' political activities, leaves many questions unanswered. The record shows that Mr. R[redacted] was a member of political organizations that opposed the government. As an opponent of the government, Mr. R[redacted]

[1] *But see, Matter of L-E-A-,* 27 I&N Dec. 58, 590 (A.G. 2019) where the Attorney General criticizes the *Flores-Rios* decision which in the opinion of the Attorney General relies upon outdated dicta from BIA decisions. Under *L-E-A,* this case should, at the very least, be remanded to give Respondent the opportunity to present facts that support his asylum claim.

was teargassed and harassed after the November 2017 election. The Respondents left Honduras in February 2019 (Tr. 67, line 12) just before a government crackdown on its political opponents. Rule 1003.1(d)(3) allows the BIA to take administrative notice of current events.

Amnesty International's 2019 report about Honduras (Exhibit A) states:

> …the Honduran security forces brutally repressed protests between April and June. Human rights defenders continued to be subjected to attacks, including killings and the misuse of criminal proceedings against them. This raised further concerns over the shrinking space for civil society in the country.

Conditions in Honduras support Mr. R[redacted]' claim for asylum and show that their fears of further persecution if they return are well-founded.

The State Department Country Report on (Honduras Exhibit B) notes that

> There were several reports that the government or its agents committed arbitrary or unlawful killings. In general, the killings took place during law enforcement operations or were linked to other criminal activity by government agents.

This is consistent with Mr. R[redacted]' Asylum Application in which he reported that friends of his who were involved in protests have been imprisoned or have disappeared. (R[redacted] I-589, p. 6) Mr. R[redacted] reasonably fears bodily harm as the result of his political activities. Copies of the Amnesty International and State Department Country Report are attached as Exhibits A and B, and the Respondent asks that the Board take administrative notice of the conditions in Honduras that show that conditions in Honduras support his fear of persecution based upon his political activities.

Conditions in Honduras Support Mr. R[redacted]' Claim under the Convention Against Torture

The Convention Against Torture – CAT Withholding of Removal and Deferral of Removal

In the alternative, the Respondents respectfully submit that the evidence of record is sufficient to establish eligibility for withholding of removal under the Convention Against Torture.

Article III of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits signatory States from expelling, returning or extraditing "a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture." In order to bring U.S. law into accord with our obligations under international law, on October 21, 1998 Congress passed (and the President signed into law) the Foreign Affairs Reform and Restructuring Act of 1998, P.L. 105-227 ["FARRA"]. Section 2242 of the FARRA implements Article III of the Torture Convention:

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

FARRA §2242(a)

Thereafter, the Department of Justice promulgated regulations implementing §2242 of the new legislation. Those regulations confer jurisdiction upon the IJ's and the Board to consider protection claims under the Torture Convention. 8 CFR §§208.16-18. In short, the regulations provide that, when an applicant establishes that it is more likely than not that he would be tortured by or with the "consent or acquiescence of a public official" if returned to the country of

proposed removal, the U.S. may not effect that removal. 8 CFR §208.16(c)(2); 8 CFR§208.18(a)(1). In other words, to prevail in a CAT claim, the applicant must demonstrate that it is more likely than not that he will be tortured by or with the acquiescence of a public official upon return to his country.

In this case, the evidence and testimony support two grounds upon which Mr. R can make this claim. First, he fears severe bodily harm or death at the hands of the Jinestroza with the acquiescence of the police because of his membership in the V Family, and second, he fears severe bodily harm or worse at the hands of the government based upon his political activities. Proposed group membership does not have to be the sole or dominant motivation for the persecution. *Cruz v. Sessions,* 853 F.3d at 127.

The credible testimony and written evidence show that Mr. R and other members of the V Family have been persecuted by virtue of their membership in the V Family either as part of a vendetta or to intimidate them. At best, the police are corrupt (Country Report on Honduras; Tr. 69, line 25) and acquiesce in the behavior of the Jinestroza. While the record was not fully developed by the IJ, there is enough to show that Mr. R fears bodily harm if he is returned to Honduras.

The record also supports a second basis for Mr. R ' fear of persecution. According to his application for asylum, he has participated in political protests between 2014-2018 (R I-589, p. 6) and that he protested every day in December 2017 until government forces suppressed the protests and imprisoned some protestors while others "were disappeared by the police." *Id*. This evidence was not controverted by the Government. It supports Mr. R testimony that he fears bodily harm if he is returned to Honduras.

Neither the CAT nor the FARRA define the term "torture." The implementing regulations define it simply as, "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person…" 8 CFR §208.18(a)(1); *Matter of J-E-*, 23 I & N Dec. 291, 297 (BIA 2002) (*en banc*). Consequently, Mr. R[redacted] did not have to remain in Honduras until he was physically harmed to qualify for relief under CAT. Severe mental suffering is sufficient. Death threats addressed to Mr. R[redacted] and other members of his family inflict severe mental and emotional distress—particularly in light of the murder of his brother-in-law.

A noncitizen who meets the burden of proof for CAT protection is entitled to mandatory relief from removal in the form of either "withholding of removal" or "deferral of removal." 8 CFR §1208.16(c)(4).

Conclusion

For all the reasons stated above, the Respondent, [redacted], requests that this Board reverse the decision of the IJ and grant him asylum or in the alternative that the Board remand this matter to a different Immigration Judge to give the Respondent the opportunity to fully present his claim of asylum. Finally, if the Board finds that the Respondent must be ordered removed, that the order be deferred or withheld under CAT.

Respectfully submitted,

/s/ [redacted]
Pro Bono Counsel on behalf of
[redacted]

CERTIFICATE OF SERVICE

On August 3, 2020, I, [redacted], mailed by US Postal Service Priority Express a copy of the brief and exhibits thereto to DHS Chief Counsel at the following address:

DHS/ICE Office of Chief Counsel SND
880 Front Street, Room 2246
San Diego, CA 92101-8834

/s/ [redacted] Date: August 3, 2020