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DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:

[Respondent]

In removal proceedings

File No.: [#]

RESPONDENT'S BRIEF IN SUPPORT OF
AFFIRMING THE DECISION OF
THE IMMIGRATION COURT

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

[Respondent], by and through counsel, submits this brief in support of affirming the decision of the Immigration Court to grant withholding of removal pursuant to INA § 241(b)(3).

The Department of Homeland Security’s (“DHS”) stated reasons for its appeal are plainly contradicted by the decision below and the factual record in this case. Viewed in light of [Respondent]’s testimony—which the Immigration Court deemed credible and consistent—and the voluminous supporting materials corroborating his claims, the Immigration Court reached the only legally and factually sound conclusion under the circumstances: that [Respondent] is entitled to withholding of removal under the INA.

First, DHS posits that [Respondent] is not entitled to the protections of clearly-applicable Third Circuit precedent recognizing withholding claims by individuals who publicly testified against violent criminal gangs because the specific gang leader he testified against is in prison—even though [Respondent] testified, and the Immigration Court *agreed*, that he was persecuted not by the gang leader himself, but rather that leader’s *associates* and corrupt police officers who had taken bribes from the gang. *See infra* at 18-21.

And second, DHS asserts that there is “no testimony or other form of evidence” to support the Immigration Court’s conclusion that the police officers who arbitrarily detained and tortured [Respondent] were working on the gang’s behalf. This claim is flatly disproven by the record below, including the Immigration Court’s decision, [Respondent]’s testimony, and the supporting materials submitted to the Court. *See infra* at 21-23. DHS’ appeal is baseless and should be denied.

In [Year], [Respondent] testified in the RICO prosecution of [Gang Leader]—a drug kingpin with close ties to the Dominican Republic—describing in open court in [Jurisdiction] how [Gang Leader] had beaten him nearly to death and threatened his family if he told the authorities.

I.J.¹ at 2-4. Despite helping secure [Gang Leader's] conviction, [Respondent] was ordered removed to the Dominican Republic in [Year] based on a guilty plea to a single count of misprision of a felony in an unrelated case in [State]. *Id.* at 4.

As the Immigration Court later found, upon removal to the Dominican Republic, [Respondent] was repeatedly persecuted by associates of the gang that he had testified against, as well as corrupt law enforcement officers, who targeted him for violent reprisals, threats, and harassment on account of his testimony. *Id.* at 5-6. Fearing for his life, [Respondent] fled the Dominican Republic in [Year] to return to the United States. *Id.* at 6.

In [Month], [Respondent] was arrested on a since-dismissed misdemeanor charge in New Jersey and transferred to ICE custody when DHS sought reinstatement of the prior removal order against him. Notice of Disposition, Tab D at 15.² While there, [Respondent] expressed his fear that he would be persecuted on account of his prior testimony if forced to return to the Dominican Republic. Record of Reasonable Fear Interview, Tab B at 4-13. He was referred for a reasonable fear interview, in which he detailed the persecution he had faced prior to his return. *Id.* at 7-10. Following the interview, the Asylum Officer determined that [Respondent]'s testimony was credible, and that he had established a reasonable fear of persecution if removed. Record of Determination/Reasonable Fear Worksheet, Tab A at 3. [Respondent] sought withholding of removal under the INA and relief under the Convention Against Torture ("CAT"). I.J. at 2.

[Respondent]'s withholding hearing took place [Date] before the [Local Immigration Court]. *Id.* at 1. The Immigration Court considered all evidence entered into the record before it,

¹ All citations to "I.J." refer to the page numbers in the Immigration Judge's corrected oral decision included with the briefing schedule.

² All citations to Supporting Materials submitted to the Immigration Court in support of [Respondent]'s application refer to the relevant exhibit's lettered tab labels (as referenced by the Immigration Judge during the withholding hearing) and consecutively-paginated "Bates Numbers" in the lower-right corner.

inter alia: [Respondent]’s reasonable fear documentation; his application for withholding; his testimony; the Department of State’s Country Report for the Dominican Republic; and over 140 pages of supporting documentation, including legal documents detailing his past testimony, supporting affidavits, and additional country condition reports prepared by journalists, scholars, and analysts. *Id.* at 2.

At the hearing, the court found that [Respondent]’s testimony was “credible[,]” “candid[,]” “responsive to the questions that were asked of him,” and “consistent [with] the documents in the record[.]” *Id.* at 6. The court also concluded that [Respondent] “provide[d] adequate corroboration through the evidence that he submitted in the record to corroborate his claim [] and to meet his burden.” *Id.* at 7.

Considering [Respondent]’s testimony, the Immigration Court found that he “did suffer harm rising to the level of past persecution[,]” *Id.* at 7, due to his membership in the “legally cognizable” particular social group of “individuals who have publicly testified against a violent criminal gang[.]” *Id.* at 8. It further found that “there is a nexus between the harm suffered by the applicant in the Dominican Republic and his testimony in the trial of [Gang Leader] for racketeering[.]” *Id.* at 9. In light of all this, it held that [Respondent] “established that he has suffered past persecution on account of a protected ground” and “is entitled to a presumption of a well-founded fear of future persecution.” *Id.* at 12. And because “DHS ha[d] not established that internal relocation would be reasonable in this case, or that there is a fundamental change in circumstances” in the Dominican Republic, the Immigration Court granted [Respondent]’s application for withholding of removal under the INA. *Id.* at 12. This appeal followed.

STATEMENT OF FACTS

Except where explicitly indicated otherwise, all of the following facts are undisputed in this appeal and reflected in the Immigration Court’s decision, the transcript of [Respondent]’s withholding hearing, and/or the record before the Immigration Court.

[Respondent] was born [Date] in [City], Dominican Republic. Tr. at 50; Declaration of [Respondent] (“R. Dec.”), Tab G at 30. He immigrated to the United States as a child, where he lived with his parents in the [Neighborhood] and attained Permanent Resident status in [Year]. Tr. at 50-51; R. Dec., Tab G at 30.

A. [Respondent] was brutally assaulted by Dominican drug kingpin [Gang Leader] and coerced into silence.

While [Respondent] was still a teenager, he sold small amounts of marijuana for [Gang Leader]—a leader in a local Dominican street gang in [neighborhood] called the [Gang]. The [Gang] “owned” several blocks in the neighborhood (i.e. dealt marijuana on them), including [Street]. I.J. at 2-3; Tr. at 51-54; R. Dec., Tab G at 31. When [Gang Leader] learned that [Respondent] had taken a bag containing a small amount of marijuana from him, he and another gang member confronted [Respondent] on the street. I.J. at 3; Tr. at 54-55; Brief of the United States of America, *United States v. [Gang Leader]* (“[Gang Leader] Brief”), Tab E at 19.

The two men beat [Respondent] nearly to death. I.J. at 3; Tr. at 53-55; R. Dec., Tab G at 31; *see also* [Gang Leader] Brief, Tab E at 19 (“[I]n [Month], [Gang Leader] and a co-conspirator nearly beat [Respondent], one of [Gang Leader]’s workers, to death for stealing an ounce of marijuana[.]”). They struck [Respondent] in the forehead with a blunt weapon, causing multiple skull fractures requiring surgery to install a titanium plate in his forehead and approximately 100 staples to close his wounds. I.J. at 3; Tr. at 53; [Gang Leader] Brief, Tab E at 19 (“The assault resulted in multiple, severe fractures to his skull, requiring the placement of a titanium plate in

[Respondent]’s head and approximately 100 staples.”); R. Dec., Tab G at 31. For several minutes, [Gang Leader] and his associate continued their brutal assault on [Respondent] until he was bleeding from his nose, mouth, and eyes. I.J. at 3; Tr. at 54-55; R. Dec., Tab G at 31. After his attackers finally relented, [Respondent] was covered in so much blood that he could not find a taxi driver willing to transport him to a hospital, and a friend called an ambulance for him. I.J. at 3; Tr. at 55; R. Dec., Tab G at 31.

While [Respondent] was in the hospital, his mother, [Mother], traveled from the Dominican Republic to New York to see her ailing son. I.J. at 3; Tr. at 55; [Gang Leader] Brief, Tab E at 19, R. Dec., Tab G at 31, Declaration of [Mother] (“[Mother] Dec.”), Tab I at 38. [Mother] went to the [Street] neighborhood, confronted [Gang Leader] and demanded to know why he had beaten her son. I.J. at 3; Tr. at 55; [Gang Leader] Brief, Tab E at 19; [Mother] Dec., Tab I at 38. He replied that if [Respondent] told the authorities about the assault, she would have even “bigger” problems and that [Gang Leader] knew where [Mother] and her daughters lived both in the United States and in the Dominican Republic. I.J. at 3; Tr. at 55; [Gang Leader] Brief, Tab E at 19. [Respondent] left New York afterward in fear for his life. Tr. at 56; R. Dec., Tab G at 31.

B. [Respondent] testified in federal court about [Gang Leader’s] assault and threats against him.

In [Month], [Gang Leader] was indicted in the [Jurisdiction] on charges of racketeering and narcotics conspiracy. I.J. at 3-4; Tr. at 57; Department of Justice, (“[Gang Leader] Press Release”) Tab F at 29. At the time, [Respondent] was detained in [State] on unrelated nonviolent charges. I.J. at 3-4; Tr. at 56-57.

[Gang Leader] went on trial later that year, and [Respondent] was transported to [Jurisdiction] where he, along with his mother, testified against [Gang Leader] in open court on behalf of the government. I.J at 3-4; Tr. at 57-59; [Gang Leader] Brief, Tab E at 19. He detailed the brutality of [Gang Leader's] assault, and both he and his mother testified to the gang leader's attempts to threaten and intimidate him out of testifying. I.J at 3-4; Tr. at 58; [Gang Leader] Brief, Tab E at 19. Despite his fear, [Respondent] testified while [Gang Leader] sat at the defendant's table, "look[ing] at him like [Gang Leader] wanted to kill him[.]" I.J. at 4; *see also* Tr. at 58 ("I felt very scared. He was looking at me like he wanted to kill me."). [Gang Leader's] associate who participated in the assault of [Respondent] was also present in the courtroom, along with [Gang Leader's] family. Tr. at 58.

Following trial, [Gang Leader] was convicted on both counts and given a 20 year sentence. [Gang Leader] Press Release, Tab F at 29. The U.S. Attorney announced the conviction in a press release, *id.*, and the Government found [Respondent]'s testimony to be of sufficient import that it *specifically* cited his account of the assault and subsequent intimidation in an appellate brief defending the conviction in the [Jurisdiction]. [Gang Leader] Brief, Tab E at 19.

[Respondent] pled guilty to a single charge of misprision of a felony in [State] federal court in [Year]. I.J. at 3-4; Tr. at 57-59; R. Dec. 31-32; Criminal Conviction Chart, Tab C. As a result, [Respondent] was removed to the Dominican Republic in [Year] despite his cooperation with the prosecution of a notorious gang leader and drug trafficker who had directly threatened him and his family with retribution should he testify. I.J. at 4; Tr. at 59; R. Dec., Tab G at 32.

C. [Respondent] was persecuted in the Dominican Republic by [Gang Leader’s] associates and corrupt law enforcement officials because of his testimony against [Gang Leader].

1. [Gang Leader’s] associate attempted to murder [Respondent] outside a nightclub because of his testimony against [Gang Leader].

After being removed to the Dominican Republic, [Respondent] initially lived with his mother. I.J. at 4; Tr. at 59-60. While out with friends at a nightclub in Santo Domingo one evening,³ [Respondent] noticed he was being watched by men who were pointing at him and making gang signs indicating their affiliation with the [Gang]. I.J. at 4; Tr. at 61; R. Dec., Tab G at 32. When he left via the rear exit, an armed man followed him into the alley and called out in Spanish, saying “This is from [Gang Leader]!” (a reference to [Gang Leader’s] nickname, *see* [Gang Leader] Press Release, Tab F at 29) before shooting at [Respondent] as he ran away. I.J. at 4; Tr. at 61 (“So, when he shot at me, I felt the graze of like the gunpowder or the bullet graze me by the right side, but—and I started running.”); R. Dec., Tab G at 32. [Respondent] contacted the official at DHS who helped arrange his testimony against [Gang Leader], told the official he was being targeted in retribution for his testimony, and implored him for help—his pleas were rebuffed. I.J. at 4; Tr. at 61; R. Dec., Tab G at 32.

2. Corrupt Dominican law enforcement officials arbitrarily detained and tortured [Respondent] because of his testimony against [Gang Leader].

In its notice of appeal, DHS indicated that it disputes certain aspects of the record basis for the following facts regarding [Respondent]’s arbitrary detention and torture at the hands of Dominican law enforcement on account of his testimony against [Gang Leader]. *See* Attachment to DHS’ Form EOIR-26. As with all substantive factual claims in this brief, the details recounted

³ The transcript as prepared states that [Respondent] testified he was “in a nightclub called [Nightclub] in Venezuela.” Tr. at 61. Upon information and belief, this is the result of a misunderstanding or error on the part of the transcriber: [Nightclub] was located on “*Avenida Venezuela*”—a major thoroughfare in Santo Domingo, D.R.

below regarding [Respondent]’s detention and torture are accompanied by appropriate citations to the Immigration Court’s decision, the transcript of [Respondent]’s withholding hearing, and the record before the Immigration Court.

The year following the nightclub shooting, [Respondent] attended a party at a public pool. I.J. at 5; Tr. at 62; R. Dec., Tab G at 32. While at the party, he heard the DJ “shouting out” different gang members associated with [Street] in [Neighborhood]—the territory that [Gang Leader’s] [Gang] “owned” in [Neighborhood]. I.J. at 5 (“[Respondent] described an incident that occurred in [Year] at a pool party in which the DJ shouted out about the people from the [Street]. The applicant believed it was a clear reference to [Gang Leader]’s people.”); Tr. at 62 (“The DJ shouts out, a couple of people from [Street], and we said, oh, this is for the people that [untranslated] about, talking about [Gang Leader’s] people, [Gang Leader]’s people. So, when I heard this, I already knew something was wrong. And I’m like, oh, here comes trouble.”); R. Dec., Tab G at 32 (“I heard the D.J. ‘shout out’ to members of the ‘[Street] crew,’ which I recognized as a reference a [Gang Leader’s] old gang territory in [Neighborhood].”).

He left the pool and went to the bathroom, where a plainclothes police officer and several uniformed officers approached him. I.J. at 5 (“He got out of the pool to go use the restroom, and he was followed into the restroom, and he stated three to four police officers came in[.]”) Tr. at 62 (“I go walk to the bathroom ... I notice this guy followed me in, in like plain clothes. But I see him all day like, kind of like watching me and following me. When I went in the bathroom, he followed me in, and after he came in, three or four police officers came in.”) R. Dec., Tab G at 32.

The officers attempted to place cocaine on his person and claimed to be arresting him on narcotics charges. I.J. at 5 (“[P]olice officers came in, and tried to plant drugs on him.”); Tr. at 62-63 (“They tried to []plant drugs on me, and they were talking about it, right in front of me, when

they handcuffed me[.] ... He took out a bag from his pocket, and tried to []plant drugs on me[.]”); R. Dec., Tab G at 32 (“The plainclothes officer pulled out a small bit of cocaine and tried to place it on me.”).

While the police officers were arbitrarily detaining [Respondent] and attempting to fabricate narcotics charges against him, one officer freely discussed the payment he expected to receive in exchange for his actions: 50,000 Dominican pesos. I.J. at 5 (“One individual discussed with the police a monetary transaction, involving 50,000 [Dominican pesos] that would be given to law enforcement.”); Tr. at 63 (“So, the [plainclothes officer asked] the police officer ... like asking him, like how much is it for him. And the police guy told him, 50, gave him the number 50, meaning like 50,000 pesos ... equivalent to \$1,000.”); R. Dec., Tab G at 32 (“I believe [the officers] were paid a bribe by local [Gang].”).

When [Respondent] protested that he was being framed, the officers began to torture him. I.J. at 5 (“The applicant was handcuffed and beaten up. He stated that the drugs were not his. His lip was split open.”); Tr. at 63 (“I really got scared, and they handcuffed me, and they beat me up. And I’m screaming for my life, and I’m telling them, that’s, that’s not mine. Why are you doing this to me? And they said, oh, shut up, if you don’t want us to kill you right here[.] ... They put the guns to my head. I’m screaming for my life. I’m crying. I’m begging them for mercy. I’m, I’m on the floor. They, they hit me here, and they split my lips.”); R. Dec. at 32 (“When I protested, they beat me until my lip split open and my face was covered in blood[.]”).

Afterwards, the officers shuttled [Respondent] between different police stations before he was able to contact his mother, who secured his release. I.J. at 5 (“The first precinct that he was taken to refused to take him, and then he was brought to a different precinct. His mother was contacted to pick him up.”); Tr. at 63-64 (“[T]hey take me to [t]his precinct ... when I get there,

all bled up and everything, they never took me to the hospital, nothing. I guess [one officer's] supervisors didn't want to accept me there in that precinct, so I guess they knew what they were trying to do to me. They were trying to plant drugs on me, and do stuff that's not right. So, he took me to another precinct, I guess one of his friend's. And he left me there. ... I called my mother, and she came and picked me up.”) R. Dec., Tab G at 32 (“They moved me between multiple stations before my mother heard what had happened, found me, and convinced them to release me.”). [Respondent]’s mother helped him seek needed medical attention for his injuries at a nearby emergency room. I.J. at 5; Tr. at 64; R. Dec., Tab G at 32; [Mother] Dec., Tab I at 38.

As additional corroboration of [Respondent]’s arbitrary detention and torture by corrupt Dominican law enforcement officials, the Immigration Court took notice of the 96 pages of additional country condition reports [Respondent] submitted as part of the record. I.J. at 2; *see also*, Supporting Documentation, Tabs L-V at pp. 47-143. These record documents detailed, *inter alia*: how the Dominican Republic has become a major international transit point for drug trafficking and how “corruption remains endemic” among the Dominican police and judiciary; (U.S. Dep’t of State, “International Narcotics Control Strategy Report, Drug and Chemical Control,” Mar. 2019, Tab M at 117-119); how there has been a “surge” in “murder for hire[,] kidnappings, score settling, gang confrontations and drug hijacking” as a result of drug cartels’ newfound power, (Lilian Bobea, “Organized and Disorganized Crime, Muertos Legales and Ilegales in the Caribbean,” *ReVista: Harvard Review of Latin America*, Winter 2012, Tab O at 122); and how “[c]orruption among the highest ranks of the Dominican Republic’s security forces and government officials has historically helped criminal actors [] facilitate their operations and evade capture[,]” (Parker Asmann, “Arrests Thrust Dominican Republic’s Top Drug Lord Into Spotlight,” *InsightCrime*, Sept. 13, 2019, Tab T at 134-35).

3. [Gang Leader's] associates and corrupt Dominican law enforcement officials threatened [Respondent] and his family because of his testimony against [Gang Leader].

The day after [Respondent]'s arbitrary detention and torture, he and his mother filed a complaint with police internal affairs. I.J. at 5; Tr. at 64; R. Dec., Tab G at 32; [Mother] Dec. Tab I at 38. Later, his mother received a call about the complaint they had filed, threatening her and her son if they pursued it further. I.J. at 5 (“[T]he next day an officer called, spoke to the applicant’s mother, and asked why a report was made with Internal Affairs, and stated that they would have a bigger problem.”); Tr. at 64-65 (“[P]olice officers call my house. And my mother picked up, and she’s like, hello, who’s this, and they say, oh, it’s the police officers ... [asking] why did we go do the report with Internal Affairs; that we should have never done that; that it was going to get worse, if we keep going to Internal Affairs. And that we’re going to have a lot of bigger problems, like threatening her and threatening my life.”); R. Dec., Tab G at 32; [Mother] Dec., Tab I at 38.

Afraid of further retribution, [Respondent] and his mother dropped the complaint. I.J. at 5 (“This scared the applicant. As a result, he did not go back to Internal Affairs as a result of this officer calling.”); Tr. at 64-65 (“[M]y Mom told me what happened, and she got scared and she said that, oh, we’re not doing this no more.”); R. Dec., Tab G at 33 (“After that call from internal affairs, my mother was terrified. She told me that it had been a mistake to report the incident and we should move on as though nothing happened. We dropped the complaint because we both understood that if we continued to push the issue with the police, we risked being killed in retribution.”); [Mother] Dec., Tab I at 38. After this incident, unmarked vehicles began driving by his mother’s house and photographing it. I.J. at 5; Tr. at 65; R. Dec., Tab G at 33.

Again seeking to relocate out of fear for his safety, [Respondent] moved in with an individual he thought was his friend—[Friend]. I.J. at 5-6; Tr. at 66 (“Then I moved with—well,

supposedly, supposedly was supposed to be my friend, called [Friend][.]”). While living together, [Friend] invited to his home an individual [Respondent] knew as “[Gang Member],” who had affiliations with [Gang Leader]. I.J. at 6 (“[A]n individual named [Gang Member], who the applicant believed was affiliated with [Gang Leader], came to [Friend]’s house[.]”); Tr. at 67 (“So, [Friend] brang [Gang Member] around me, and [Gang Member] is family members with [Gang Leader]’s family[.]”).

While intoxicated, [Gang Member] carelessly admitted that he had once attempted to lure [Respondent] to an area controlled by [Gang Leader’s] cousin in order to have him killed. I.J. at 6 (“[A]n individual named [Gang Member], who the applicant believed was affiliated with [Gang Leader] ... stated that the [Gang] would kill the applicant, and discussed how [Gang Leader]’s cousin ran the [Gang] in the Dominican Republic.”); Tr. at 67 (“When [Gang Member] was drunk ... he said that the [Gang], they’re going to kill me, because [Gang Leader]’s cousin ... is a head of the [Gang] over there in the Dominican Republic. And he said that, that they know where I was at, and he tried to lure me in to go with them one time. Me, we ran in, and [Gang Member], they were trying like to trick me to go over there ... they plotting on me to kill me. And when he was drunk he told me that if I would have went with them that day, that I wasn’t going to come out of there alive.”).

[Respondent] realized that [Friend] had “sold [him] out” him to [Gang Leader’s] associates, and that he could not even trust a man he had thought of as a friend to keep him safe. Tr. at 66-67 (“I was in his house for two or three months, and like he sold me out to [Gang Leader]’s family[.] ...[A]ll this time I thought [Friend] was my friend. He, he was telling [Gang Member] everything, all about me, where—what I was doing, where I was at, and stuff like that.”). Understanding that his life was in danger so long as he remained in the Dominican Republic,

[Respondent] found a new residence and lived in hiding until he could plan his return to the United States in [Year]. I.J. at 6; Tr. at 66-68 (“I can’t do this anymore, you know. I’m frustrated. I’m, I’m fearing for my life. ... I got my passport, and I got ready to leave, and I lived in that little apartment for a couple of months, hiding, by myself, in fear for my life.”). He left the Dominican Republic in [Time Period]. I.J. at 6; Tr. at 68.

D. Even after returning to the United States, [Respondent] has been threatened with violent reprisals should he be removed to the Dominican Republic.

Following his return to the United States, [Respondent] has continued to receive threats from individuals acting on [Gang Leader’s] behalf, threatening his safety if he is forced to return to the Dominican Republic. After learning about these removal proceedings, [Friend] contacted [Respondent]’s girlfriend in the United States to ask for details about [Respondent]’s possible arrival in the Dominican Republic if removed; he understood this to be an obvious threat against him. I.J. at 6 (“The applicant stated that [Friend] has been calling the applicant’s girlfriend here in the United States, [Girlfriend], to see what is going on with the applicant, and when he will be going back to the Dominican Republic.”) Tr. at 67 (“And now, [Friend] has been calling my girlfriend, [Girlfriend][.] ... And then he kept calling now to see, supposedly, how I’m doing, and when I’m going to get deported, and when I’m going to go back. He’s trying to get information to tell them when I’m going to go back, so they can wait for me.”).

ISSUES PRESENTED FOR REVIEW

In its notice of appeal, the Department of Homeland Security identified two issues as the basis of its appeal. Both of these issues are addressed in detail below, along with other factors addressed the Immigration Court’s decision to grant withholding.

1. Whether the Immigration Court erred in applying Third Circuit precedent recognizing withholding claims by those who testify against violent criminal gangs

because the specific individual [Respondent] testified against, [Gang Leader], is currently incarcerated in the United States; and

2. Whether the Immigration Court committed clear error in finding a factual nexus between [Respondent]’s arbitrary detention and torture at the hands of corrupt Dominican police and [Respondent]’s testimony against [Gang Leader].

STANDARD OF REVIEW

The Board does “not engage in de novo review of findings of fact determined by an immigration judge.” 8 C.F.R. § 1003.1(d)(3)(i). “Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.” *Id.* The Board reviews questions of law de novo. § 1003.1(d)(3)(ii).

SUMMARY OF ARGUMENT

The Board should affirm the decision of the Immigration Court to grant withholding of removal to [Respondent] under INA § 241(b)(3). The Immigration Court’s decision drew factual conclusions and inferences that were rooted in the record before it, and properly applied binding statutes, regulations, and Third Circuit precedent to determine that [Respondent] falls within the mandatory withholding provisions of § 241(b)(3). DHS has identified no error in the Immigration Court’s opinion that would warrant reversal.

Every basis for appeal in DHS’ Form EOIR-26 is premised upon a demonstrably false claim about the record below. First, DHS’ argument that [Respondent] does not fall within the ambit of Third Circuit decisions granting protections to witnesses who testify against violent criminal gangs because his “alleged persecutor” (in DHS’ account) is currently incarcerated in the United States is contradicted by the Immigration Court’s decision, [Respondent]’s testimony, and his supporting documentation. [Respondent] has never claimed that his persecution in the

Dominican Republic was carried out by [Gang Leader] *personally*. Rather, he has consistently maintained that it was [Gang Leader's] associates and corrupt Dominican law enforcement officials who had taken bribes from the [Gang] that carried out his persecution. Moreover, the suggestion that [Respondent] is unlikely to face persecution because the *particular* organized crime boss he testified against is in prison—regardless of how many of that boss' associates, family members, and corrupt allies in government continue to operate unimpeded in the Dominican Republic—is absurd.

And second, DHS argues that the Immigration Court erred in finding that a specific incident of persecution—[Respondent]'s arbitrary detention and torture by Dominican police—was on account of his prior testimony. DHS posits that this conclusion is supported by “no testimony or other form of evidence” in the record. DHS' claim is clearly contradicted by the evidence in the record below. The Immigration Court specifically relied upon record evidence establishing that, shortly before [Respondent] was detained and beaten by police at a pool party in the Dominican republic, the DJ had “shouted out” members of the “[Street] Crew”—the specific [Gang] in [Neighborhood] which [Gang Leader] had led—and that the police officers who persecuted [Respondent] openly discussed having received a bribe in exchange for their actions. The record has no shortage of evidence establishing the requisite factual nexus, but DHS omits any acknowledgement of that evidence in its notice of appeal.

ARGUMENT

An applicant is entitled to withholding of removal if he “establish[es] that his or her life or freedom would be threatened in the proposed country of removal on account of ... membership in a particular social group[.]” 8 C.F.R. § 1208.16(b). An applicant meets this burden by showing “it is more likely than not that [his] life or freedom would be threatened if returned to [his] country due to [his] race, religion, nationality, membership in a particular social group, or political

opinion.” *Kaita v. Attorney General*, 522 F.3d 288, 296 (3d Cir. 2008) (internal quotation marks omitted). “If an applicant meets that standard, the Attorney General must grant withholding of removal.” *Id.* (citing INA § 241(b)(3)). As discussed in detail below, the Immigration Court properly applied these principles and other controlling law to determine that [Respondent] is entitled to withholding of removal under the INA.

I. THE IMMIGRATION COURT PROPERLY HELD THAT [RESPONDENT] IS ENTITLED TO WITHHOLDING OF REMOVAL UNDER THE INA.

A. The Immigration Court properly held that [Respondent] suffered past persecution in the Dominican Republic because of his membership in a particular social group.

The Immigration Court found that [Respondent] “did suffer harm rising to the level of past persecution.” I.J. at 7. Considering the “gunshot at the applicant that grazed him; the police beating of this applicant at the pool party that resulted in the applicant requiring stitches to his lip and required the applicant to be hospitalized overnight; in addition to the threat that was received by the applicant from [Gang Member], that the applicant would be killed by the [Gang]; the Court [found] that put together cumulatively, that that would all rise to the level of harm necessary to find that the applicant has suffered past persecution.” I.J. at 7-8; *see also, Gomez Zuluaga v. Attorney General*, 527 F.3d 330, 341 (3d Cir. 2008) (Persecution “generally includes treatment like death threats, involuntary confinement, torture, and other severe affronts to the life or freedom of the applicant.”)

The Immigration Court also concluded that [Respondent], due to his testimony in open court against the leader of a violent criminal gang that operates in the Dominican Republic, belonged to a “legally cognizable” social group under applicable law. I.J. at 8-9. [Respondent]’s claim for relief falls clearly within Third Circuit precedent recognizing that “witnesses who have the ‘shared past experience’ of assisting law enforcement against violent gangs that threaten

communities” constitutes a cognizable particular social group. *Radiowala v. Attorney General*, 930 F.3d 577, 583 (3d Cir. 2019) (quoting *Garcia v. Attorney General*, 665 F.3d 496, 504 (3d Cir. 2011)). As the Immigration Court recognized, *see* I.J. at 8-9, the Third Circuit has explained that testifying in open court against a violent criminal gang meets all of the requisite criteria for a particular social group: The “shared experience of having testified against violent gang members is a common, immutable characteristic,” it “has definable boundaries and is equipped with a benchmark for determining who falls within it[,]” and it “also lends itself to societal recognition” because “speaking in open court means that all are readily aware of the group and its members[.]” *Radiowala*, 930 F.3d at 583 (citing *Garcia*, 665 F.3d at 504). *See also*, *Guzman Orellana v. Attorney General*, 956 F.3d 171, 180 (3d Cir. 2020)⁴ (“We thus hold that a group consisting of witnesses who have publicly provided assistance to law enforcement against major Salvadoran gangs meets all three criteria for being a particular social group.”).

The Immigration Court held that [Respondent] fell squarely within this particular social group because he “testified in open court in front of the defendant, [Gang Leader],” a fact “that is adequately corroborated by the evidence contained within the record[,]” including the U.S. Attorney for [Jurisdiction’s] brief in [Gang Leader’s] appeal, which specifically cited and described [Respondent]’s testimony at trial. I.J. at 9.

Finally, the Immigration Court found “a nexus between the harm suffered by the applicant in the Dominican Republic and his testimony in the trial of [Gang Leader] for racketeering.” *Id.* The Court explained how [Respondent] “testified to direct mentions of [Gang Leader] when these incidents [of persecution] occurred[,]” such as “a mention of [Gang Leader]” and [Gang] “gang signs [directed at] the applicant” shortly before he was shot at outside the nightclub. *Id.* It took

⁴ DHS’ notice of appeal misstates both the reporter citation and year of the Third Circuit’s decision in *Guzman Orellana*. The decision was handed down in 2020—not 2008.

further note of the police attack at the pool, which was immediately preceded by “a shout out in reference to [Gang Leader]’s followers, people from the [Street]” and “the threat from [Gang Member], which specifically referenced [Gang Leader].” *Id.* In light of these numerous facts indicating why [Respondent] was being violently targeted, the Court determined that his persecution had been on account of his testimony against [Gang Leader].

1. DHS’ assertion that Third Circuit precedent protecting individuals who testify against organized crime does not apply to [Respondent]’s case is without merit.

DHS claims that the Immigration Court erred in relying upon Third Circuit decisions holding that individuals who publicly testify against violent criminal gangs are part of a legally-cognizable particular social group. This argument reflects a misunderstanding of both the applicable law, and the facts established in the record below.

As an initial matter, it is unclear what, precisely, DHS is arguing. It contends that [Respondent]’s “case is distinguishable from the cases cited by the IJ because the persecutors were in their respective home countries and not in the United States.” Attachment to DHS’ Form EOIR-26. The basis for DHS’ claim, however, is not apparent from the Immigration Court’s decision and the cited precedent. The Immigration Court did not rely upon those cases because their particular circumstances were factually analogous to [Respondent]’s situation. Rather, the Court cited them as recitations of established Third Circuit precedent recognizing that individuals who testified against gangs active in the country from which they seek withholding of removal belong to a cognizable particular social group. I.J. at 8 (“In *Radiowala*, the Third Circuit noted that *the Third Circuit had previously held* that a group consisting of witnesses who have shared past experiences of assisting law enforcement against violent gangs who threatened communities in Guatemala is a legally cognizable group.” (emphasis added)). The Immigration Court simply cited the relevant

decisions as standing for a general legal proposition that clearly applied to [Respondent]’s situation, rather than specific factual analogy to the circumstances of those individual cases.

And to the extent that DHS argues that [Respondent] has not shown a likelihood of future persecution based on his past persecution because his “alleged persecutor is currently incarcerated in the United States”—regardless of how many associates, allies, friends, and family [Gang Leader] may have in the Dominican Republic who remain loyal to him and the [Gang]—this too has no basis in the record below.

[Respondent] has *never* claimed that his “alleged persecutor” is [Gang Leader] *himself*. Rather, [Respondent]’s persecutors (i.e., those responsible for the acts of persecution in the Dominican Republic giving rise to his withholding claim) are [Gang Leader’s] *criminal associates* in the [Gang] and corrupt Dominican law enforcement officials acting on behalf of the gang—not [Gang Leader] *personally*.

[Respondent] has consistently identified his persecutors throughout the entire withholding process below. In his Reasonable Fear Interview, he indicated he feared persecution by members of [Gang Leader’s] criminal “family” and Dominican police if forced to return. Record of Reasonable Fear Interview, Tab B at 12 (“Q: Who would cause you severe mental or physical pain or suffering? A: Police officers and the [Gang Leader] family.”). In his prehearing declaration, [Respondent] stated “[i]f I am forced to return to the Dominican Republic, [Gang Leader’s] *criminal associates* and *corrupt police* on their payroll will continue their efforts to track me down, torture me, and kill me as revenge for helping lock up their former leader[.]” R. Dec., Tab G at 30 (emphasis added). His prehearing brief in support of withholding further explained that “[u]pon removal to the Dominican Republic, [Respondent] was repeatedly persecuted by *associates of the*

gang that he had testified against, as well as corrupt law enforcement officers[.]” Respondent’s Prehearing Brief at 1 (emphasis added).

At the withholding hearing, [Respondent] testified that “I definitely know that I will be tortured and killed, if I go back. They are waiting for me. ... They paid *police officers*, and the [Gang] *gang* is after me.” Tr. at 69 (emphasis added). And the Immigration Court similarly identified [Respondent]’s persecutors as [Gang Leader’s] associates and corrupt police officers. I.J. at 9 (“At the incident of the nightclub when he was shot at, there was a mention of [Gang Leader] through the gang signs[;] ... at the pool party in which there was a shout out in reference to [Gang Leader]’s followers ... then the applicant was beaten by law enforcement officers directly after[;] ... and then the threat from [Gang Member], which specifically referenced [Gang Leader].”).

Indeed, DHS’ failure to account for this record evidence is particularly notable in light of DHS counsel’s *own* acknowledgments during cross-examination of [Respondent] that he had testified he was being hunted down by [Gang Leader’s] gang associates and family, before engaging him in a back-and-forth to specifically identify several individuals looking for him. Tr. at 86-87 (“[DHS Counsel:] Now, you testified on direct that [Gang Leader]’s family is looking for you. ... What specific family members do you believe are looking for you? [Respondent:] His two daughters, ... his girlfriend, ... his mother, and his associates, like his cousins[.] ... The head of the [Gang], that’s his cousin[.]”).

The record is indisputably clear: [Respondent] never argued that his persecution in the Dominican Republic was carried out by [Gang Leader] *himself*—rather, his consistent account is that [Gang Leader’s] family, associates, and corrupt police acting on behalf of the [Gang]

persecuted him *on account of* his testimony against [Gang Leader]. DHS' claims to the contrary are baseless and should be rejected.

2. DHS' assertion that there is no evidence showing a nexus between [Respondent]'s detention and torture by Dominican police and his testimony against [Gang Leader] is contradicted by numerous sources of record evidence, and the Immigration Court's decision.

DHS also challenges the Immigration Court's *purely factual* determination that [Respondent]'s arbitrary detention and torture by corrupt Dominican law enforcement was on account of his testimony against [Gang Leader]. Specifically, DHS claims "no testimony or other form of evidence exists in the record to support the contention that the police in the DR were acting on behalf of [Gang Leader] or his gang" and that "[t]he record is *void* of evidence to establish the requisite nexus requirement." Attachment to DHS' Form EOIR-26 (emphasis added).

DHS' description of the record could not be further from the truth. The record is replete with facts establishing that [Respondent]'s persecution by Dominican police was directed by [Gang Leader's] associates on account of his testimony. DHS acknowledges this evidence nowhere in its notice of appeal.

To begin with, the Immigration Court took specific note in its decision of "an incident that occurred in [Year] at a pool party in which the DJ shouted out about the *people from the [Street]*" and that [Respondent] "believed it was a *clear reference to [Gang Leader]'s people.*" I.J. at 5 (emphasis added). The Immigration Court also noted how one of the officers who detained and beat [Respondent] in the bathroom immediately after the "shout out" discussed "a monetary transaction, involving 50,000 [Dominican pesos] that would be given to law enforcement" in connection with their persecution of the defendant. *Id.* And in its analysis concluding that [Respondent] had been persecuted on account of his testimony, the Immigration Court cited "the pool party in which there was a *shout out in reference to [Gang Leader]'s followers, people from*

the [Street] and then the applicant was beaten by law enforcement officers *directly after* that occurred[.]” I.J. at 9 (emphasis added).

In addition, [Respondent] directly testified to these facts at the withholding hearing. Tr. at 62-63 (“The DJ shouts out, a couple of people from [Street], and we said, oh, this is ... talking about [Gang Leader]’s people, [Gang Leader]’s people. So, when I heard this, I already knew something was wrong. And I’m like, oh, here comes trouble. ... So, the [plainclothes officer asked] the police officer ... like asking him, like how much is it for him. And the police guy told him, 50, gave him the number 50, meaning like 50,000 pesos ... equivalent to \$1,000.”). [Respondent] similarly testified to these facts in his prehearing declaration. R. Dec., Tab G at 32 (“While at a party held there, I heard the D.J. ‘shout out’ to members of the ‘[Street] crew,’ which I recognized as a reference a [Gang Leader]’s old gang territory in [Neighborhood]. ... I believe [the officers] were paid a bribe by local [Gang].”).

As if the above were not enough, [Respondent] submitted—and the Immigration Court specifically referenced—11 different country condition reports spanning nearly 100 pages of supporting documentation corroborating his testimony, detailing rampant corruption among Dominican police, and documenting their extensive cooperation with local organized crime. I.J. at 11 (“The Court would also specifically reference the evidence that was submitted by the applicant in this case within [the supporting materials] that documents the culture of police abuse and corruption within the Dominican Republic[.]”); *see generally*, Respondent’s Supporting Documents, Tabs L-V at 47-143.

In sum, the record reflects that while at a pool party in the Dominican Republic, [Respondent] was arbitrarily detained and tortured by members of the Dominican police, who openly discussed receiving a bribe for their actions. This followed immediately after the DJ at the

party made an announcement referring to [Gang Leader's] old gang and its territory. The record also reflects that the U.S. Department of State, academics, analysts, and journalists have all concluded that Dominican law enforcement doesn't just tolerate the activities of organized crime—it actively facilitates and participates in criminal behavior. The Immigration Court reached an entirely reasonable conclusion based upon the evidence before it: that there is a factual nexus between [Respondent]'s persecution by police and his past testimony against [Gang Leader]. DHS' attempts to deny that *any* such evidence is present in the record is flatly contradicted by the record itself. The Board should reject this argument.

B. The Immigration Court properly held that [Respondent]'s persecution was at the hands of forces that the government is unable or unwilling to control.

An applicant for withholding of removal must show persecution by the government of the country to which he would be removed, or by forces that government is either unable or unwilling to control. *E.g., Sheriff v. Attorney Gen.*, 587 F.3d 584, 589 (3d Cir. 2009). In [Respondent]'s case, he was persecuted by both the government, and forces the government was unable or unwilling to control: [Gang Leader's] criminal associates in the Dominican Republic, and corrupt law enforcement officers themselves.

In particular, the Immigration Court found that [Respondent]'s and his mother's "testimony regarding going to Internal Affairs, and then an officer calling the next day to tell his mother that they took umbrage with that report, and that the applicant and his mother would have bigger problems, is significant" to its finding, and that this incident "goes to the authorities in the Dominican Republic being unable or unwilling to ... protect this applicant." I.J. at 10.

And as already discussed above, [Respondent]'s testimony on this issue was corroborated by 96 pages of additional country condition reports, which, in the Immigration Court's own words, "document[ed] the culture of police abuse and corruption within the Dominican Republic[.]" *Id.*

at 11; *see also* Respondent’s Supporting Documents, Tabs L-V at 47-143. After considering these materials, the Court determined that despite modest efforts at reform, “these issues continue to persist, including issues of police being involved in contract killings within the Dominican Republic” and that these and other issues “only go further to demonstrate the concern of the unwillingness or inability to protect someone such as this applicant by the authorities in the Dominican Republic.” I.J. at 11. There is no basis to disturb the Immigration Court’s well-founded conclusion on this issue.

C. The Immigration Court properly held that [Respondent] is entitled to a presumption of future persecution and is not otherwise barred from withholding.

The Immigration Court concluded that [Respondent] “established that he has suffered past persecution on account of a protected ground” and as a result “[h]e is entitled to a presumption of a well-founded fear of future persecution.” I.J. at 12. In so doing, the Immigration Court properly applied the controlling regulations. *See* 8 C.F.R. § 1208.16(b)(1)(i) (where an applicant has “suffered past persecution in the proposed country of removal on account of ... membership in a particular social group ... it shall be presumed that [his] life or freedom would be threatened in the future in the country of removal on the basis of the original claim.”). DHS failed to show the existence of any other legal bars to withholding of removal, and the Immigration Court identified no such bar. *E.g.* Tr. at 40 (Immigration Judge stating that there is not a “particularly serious crime issue” in “this particular matter before [] the court”).

The Immigration Court also recognized that DHS “ha[d] not established that internal relocation would be reasonable in this case, or that there is a fundamental change in circumstances[,]” as required to rebut the presumption of future persecution. I.J. at 12. Indeed, DHS did not even attempt to carry its burden of proof on these questions. *See* § 1208.16(b)(1)(i)(A)-(B) (rebutting presumption of future persecution requires DHS carry its

burden to show “a fundamental change in circumstances such that the applicant’s life or freedom would not be threatened” or the ability to avoid persecution “by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so”). And based upon the voluminous record evidence corroborating the continued existence of rampant gang violence and police corruption in all areas of the Dominican Republic, DHS *could* not have made such a showing. *See* I.J. at 10-11 (specifically citing no fewer than six different country condition reports attesting to the ongoing problem of gang violence and police corruption in the Dominican Republic).

CONCLUSION

[Respondent] respectfully requests that the Board of Immigration Appeals affirm the decision of the Immigration Court below.

[Signature block on following page.]