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UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
OFFICE OF THE IMMIGRATION JUDGE  
CHICAGO, ILLINOIS

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IN THE MATTER OF: )  
 ) File No. XXX-XXX-XXX  
 )  
[RESPONDENT] ) The Honorable Judge Robert Vinikoor  
 ) Hearing: March 23, 2015 at 10:30 a.m.  
IN REMOVAL PROCEEDINGS )  

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**BRIEF IN SUPPORT OF RESPONDENT'S  
APPLICATION FOR ASYLUM, WITHHOLDING OF REMOVAL AND RELIEF  
UNDER THE CONVENTION AGAINST TORTURE**

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*Escobar v. Holder*, 657 F.3d 537 (7th Cir. 2011)

*Giday v. Gonzales*, 434 F.3d 543 (7th Cir. 2006)

*Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013)

*INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)

*INS v. Stevic*, 467 U.S. 407 (1984)

*J-B-N & S-M*, 24 I&N Dec. 208 (BIA 2007)

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## **INTRODUCTION & PRELIMINARY MATTERS**

[Respondent], by and through his attorneys, respectfully submits this Brief in support of his application for asylum based on §208 of the Immigration and Nationality Act (INA), or alternatively, withholding of removal under INA §241(b)(3), or withholding relief under Convention Against Torture. INA § 208.17; 8 C.F.R. 208.16(c)(3).

### **Witnesses, Request for Interpreter, and Fingerprints**

[Respondent] will appear before this court on March 23, 2015. He will testify in Spanish and will require a Spanish language interpreter. His direct examination will last approximately one hour.

[Respondent]'s father, [Father], will be present at the hearing and available to testify. If called upon to testify, his direct examination will last approximately 30 minutes. He will testify in Spanish and will require a Spanish language interpreter.

[Respondent] was last fingerprinted by USCIS on February 25, 2015. His biometrics are current.

### **Summary of the Argument**

[Respondent] qualifies for asylum due to his past persecution and his well-founded fear of future persecution on account of his membership in the particular social group of Salvadorans who have reported the criminal activity of the Mara Salvatrucha (MS-13). MS-13 initially contacted [Respondent] to extort money from him. When [Respondent] refused to pay the extortion "tax" levied by MS-13, MS-13 murdered [Respondent]'s brother. [Respondent] pursued a report with police following the murder.

He viewed a photo array and identified the gang member who murdered his brother. MS-13 gang members then undertook a campaign of intimidation and threats against [Respondent] in order to compel him to recant and withdraw his accusation against them. This activity culminated in death threats made against [Respondent] by MS-13. In one telephone call, the MS-13 threatened to kill [Respondent] and stated they would kill him like they had killed his brother if he refused to withdraw his police report. Aware that his life was in peril because he was unwilling to comply with the MS-13 demand that he recant his testimony against them, [Respondent] fled El Salvador and came to the United States in order to seek asylum.

[Respondent]'s asylum claim should be granted because he belongs to the particular social group of Salvadorans who have reported the criminal activity of the MS-13. His membership in this group is at least one central reason that the MS-13 persecuted him in the past and is the basis for his well-founded fear of future persecution. [Respondent] also qualifies for withholding of removal and relief under the Convention Against Torture.

## **STATEMENT OF FACTS**

### **I. [RESPONDENT] FLED EL SALVADOR TO ESCAPE PERSECUTION BY THE MS-13 STREET GANG.**

[Respondent] is a 25-year-old man from El Salvador. *See* Tab H, *Salvadoran Identification Card*. In May 2013, he fled El Salvador to escape the past persecution and threats of future harm made by the MS-13 gangs against him in his hometown of [Hometown]. *See*, Tab B, *Affidavit of [Respondent]*, ¶ 1. [Respondent]'s family lives on a farm just outside of [Hometown], [Province], El Salvador. *Id.* at ¶ 5. Although he

remembers some gang members being present in [Hometown] when he was younger, gang problems in the community began about five years before [Respondent] fled. *Id.* at ¶ 13.

[Respondent]'s father, [Father], moved to the United States more than decade ago. [Respondent] is the oldest of his six siblings and without his father in the country; he became the man of the house. He was responsible for managing and paying their employees and supervising work on the farm. *Id.* at ¶ 3. Despite living in the United States, [Respondent]'s father stayed in regular contact with the family in El Salvador and sent money he earned as a car manufacturing worker to support them. *See*, Tab D, *Affidavit of [Father]*, ¶¶ 11-13. *See also*, Tabs O – Q, *Money Wire Receipts*.

In 2013, the MS-13 gang zeroed in on [Respondent]'s family; likely because of their apparent access to financial resources. *See*, Tab B, at ¶ 11. Most of the money sent by [Respondent]'s father had been used to pay for workers and farming supplies. *Id.* at ¶ 9. However, in 2012, the family replaced their dirt house with a brick house. *Id.* at ¶ 10. The construction was visible to those who passed by it, and this is likely why MS-13 initiated contact with [Respondent]. *Id.* at ¶ 11. At first, they wanted money. On about March 5, 2013, MS-13 left a note under the door addressed to [Respondent] demanding \$500 within one week, and threatening to kill [Respondent] or a member of his family if he did not comply. *Id.* at ¶ 16. *See also*, Tab F, *Letter from [Mother of Respondent]*.

[Respondent] did not have the money to pay the gangs what they demanded. Moreover, he was against paying the gangs since the family had to work hard to make enough money to live in El Salvador. *See*, Tab B at ¶ 17. Accordingly, [Respondent] did not pay.



On March 31, 2013 – less than a month after the family received the MS-13 extortion note – [Respondent]’s 21-year-old brother [Brother] left the house to visit his grandparents and never returned. [Brother] was shot in the chest and his body was found in an alley the next morning. *Id.* at ¶¶ 21-23. *See also*, Tabs N, K, and M *Screen Shots and Transcript of News Report on the Death of [Brother]*, *Death Certificate of [Brother]*, and *Death Report*. MS-13 took credit for the murder and [Respondent] is certain that a gang member named [Gang Member] killed [Brother] to punish the family and to satisfy the MS-13 initiation requirement.

Though police initially responded when [Brother]’s body was found, they did not identify any suspects or make any arrests in the wake of the murder. Because he wanted justice for his brother’s murder, [Respondent] went to the police and filed a complaint against [Gang Member] as his brother’s killer about five days after the crime. *See*, Tab B at ¶¶ 28-29. *See also*, Tab J, *Prosecutor’s Report*. Police showed [Respondent] a photo array and [Respondent] identified [Gang Member] as the killer. The police assured [Respondent] they would pursue prosecution. *See*, Tab B at ¶ 32. [Gang Member] was charged with homicide, but the investigation immediately stagnated and law enforcement made no real effort to locate [Gang Member].

About two weeks after [Brother]’s death, the MS-13 delivered a written threat to [Respondent] by sliding a letter beneath his door at night. *Id.* at ¶ 34. In the letter, MS-13 sought to extort [Respondent] again and also took credit for the murder of [Brother]. MS-13 stated in the letter that if [Respondent] did not comply with their demands, he would be murdered next. *Id.* On about May 3, 2013, the MS-13 gang members contacted [Respondent] again, this time by phone. *Id.* at ¶ 38. The MS-13 gang member

who called told [Respondent] that they intended to kill him if he did not comply with their demands. The caller demanded that [Respondent] retract his report to the police about [Gang Member] and cautioned [Respondent] to take the threat seriously because they had killed his brother and they would kill him next. *Id.* at ¶ 40.

Because he believed these threats to be real – particularly since his brother had been murdered following a previous threat – [Respondent] fled to the United States for safety. *Id.* at ¶¶ 42-45. [Respondent] entered the United States and was detained by the U.S. border patrol around [City], Texas on June 12, 2013. He was placed in expedited removal proceedings. [Respondent] articulated his fear of return to El Salvador and passed his credible fear interview on July 23, 2013. *See* Tab C, *Summary Transcript of Credible Fear Interview*. The Asylum Officer who interviewed him found that [Respondent] established a credible fear of torture, as well as a significant possibility for a credible claim in asylum or withholding of removal, due to his fear of being persecuted if returned to El Salvador. *Id.* [Respondent] filed his asylum application *pro se* within the one year filing deadline on July 30, 2013. He appeared for a master calendar hearing before this Court on January 21, 2015 and was assigned the date of March 23, 2015 for an individual hearing on the merits of his asylum claim.

## **II. GANGS OPERATE WITH IMPUNITY IN EL SALVADOR.**

### **a. Gang Violence is Rampant in El Salvador.**

El Salvador is the “most dangerous country in the world not engulfed in an ongoing war.” *See*, Tab S, *Trying to End Gang Bloodshed in El Salvador*, *Al Jazeera*, *Jan. 19, 2015*. According to the *2013 Global Study on Homicide* by the United Nations Office on Drugs and Crime (UNODC), in 2011 and January-February 2012, the average

monthly homicide rate was 6.0 per 100,000. *See*, Tab CC.

In 2012, the government of El Salvador brokered a truce between MS-13 and M-18, leading to a temporary decline in the monthly homicide rate to 2.8 per 100,000 from March 2012 to February 2013. *Id.* However, according to surveys in 2012 and 2013, only about 50 percent of the population felt that the truce had helped reduce crime. *Id.* Furthermore, the truce has since collapsed. In February 2014, two gang leaders said the truce was falling apart after the government stopped helping gang leaders in prison communicate with members on the street. *See*, Tab T, *El Salvador Homicides Jump 56 Percent as Gang Truce Unravels*, Reuters, Dec. 30, 2014. In 2014 there were 3,875 murders in El Salvador, a 56 percent increase from the previous year. *Id.*

Estimates of the overall number of gang members in Central America vary widely, with a top U.S. State Department official recently estimating that there may be 85,000 MS-13 and M-18 gang members in the El Salvador, Guatemala, and Honduras combined. *See*, Tab Z, *Gangs in Central America*, Congressional Research Service, Feb. 20, 2014. In 2012, the United Nations estimated total MS-13 and M-18 membership in these three countries at a more modest 54,000. *Id.* With approximately 20,000 gang members, or about 323 per every 100,000 citizens, El Salvador has the highest concentration of gang members in Central America. *Id.* This represents an almost 100% increase from the 10,500 estimated gang membership from the United Nations in 2007. *Id.*

Gangs in El Salvador are actively involved in extortion. *See*, Tab BB, *U.S. Dept. of State Crime and Safety Report*, Apr. 11, 2013. Many extortions and other crimes are not reported by victims for fear of reprisal and lack of faith in the ability of the

government to protect the victims. *Id.* While recent evidence suggests a decrease in the number of extortions reported, these same reports show that there has been an increase in the level of violence associated with extortion cases, including media reports of extortion victims and witnesses being killed. *Id.* This indicates that the decrease in the number of extortion cases is partly attributable to a decrease in reporting for fear of retribution.

Gangs have increasingly been involved in extortions of residents, bus drivers, and business owners in major cities throughout El Salvador. *See*, Tab Z. Failure to pay often results in harassment or violence by gang members. *Id.* In September 2010, to protest recently enacted anti-gang legislation, the MS-13 and M-18 gangs in El Salvador jointly issued a warning for public transportation operators to stay home for three days or face reprisals; the threats paralyzed the country's transport system. *Id.*

The *Toronto Star* reports that bus drivers are "typically obliged to make protection payments to gang members amounting to \$1,000 a month or more." *See*, Tab DD, *Violence in El Salvador Reaches New Heights 20 Years After the End of its Civil War*, *Toronto Star*, Mar. 10, 2012.

Due to a lack of security within the prisons, gangs are often able to carry out criminal activities from behind bars, sometimes with assistance from corrupt prison officials. *See*, Tab Z. The U.S. State Department's *2013 Country Reports on Human Rights Practices* indicates that gang activity inside prisons continues to be a "serious problem," and that gangs continue to exercise influence on the judicial system from prisons. *See*, Tab X.

U.S. State Department reports, UN studies, and the North American media show that gang-based violence is rampant in El Salvador. These sources also indicate that

extortion is widespread and that gangs are not afraid to resort to murder when individuals do not meet their financial requests.

**b. El Salvador is Unable or Unwilling to Provide Protection to Victims of Gang Violence.**

According to the U.S. State Department, “[i]nadequate training, lack of enforcement of the administrative police career law, arbitrary promotions, insufficient government funding, failure to effectively enforce evidentiary rules, and instances of corruption and criminality limited the National Civilian Police’s (PNC) effectiveness.” *See*, Tab X. Furthermore, the judiciary is inefficient, corrupt and prone to political interference, and that impunity remains high. The U.S. Department of State indicates that police officers, victims and witnesses are intimidated and assassinated; judges are subject to outside influence; and that the criminal conviction rate is less than five percent. *Id.*

The U.S. State Department notes, “[i]ntimidation and killing of police officers, crime victims, and witnesses create[s] a climate of fear, complicating investigation of violent crime and other alleged human rights abuses.” *Id.* Furthermore, the NGO Institute for Social Democracy stated that officials, “particularly in the judicial system, often engage[] in corrupt practices with impunity.” *Id.* Another group, the Salvadoran Foundation for Economic and Social Development (FUSADES), alleged that the “Supreme Court did not adequately deal with corrupt judges and that perceived corruption and weak application of criminal law by judges contributed to a lack of confidence in the judiciary.” *Id.*

Official statements and publications from the U.S. State Department and nongovernmental organizations indicate that the Salvadoran government is unable and

unwilling to provide protection for individuals who have been the victims of gang-based violence.

**c. Gangs Regularly Target Individuals Who Report Gang-based Violence to the Police.**

Witnesses of gang violence in El Salvador suffer from little institutional protection and are frequently the victims of retaliation from the gangs. According to the U.S. State Department, “some judges den[y] anonymity to witnesses at trial, and gang intimidation and violence against witnesses contributed to a climate of impunity from criminal prosecution.” *Id.* *La Prensa Gráfica*, a San-Salvador-based newspaper, reported that six hours after a witness had testified without a voice distorter, his home was attacked and one of his family members killed. *See*, Tab EE, *The Prosecution Did not Request Protection for Witness*, *La Prensa Grafica*, Nov. 30, 2011. According to the article, the judge did not authorize the use of a voice distorter and the prosecutors failed to intervene when the defense attorney asked the witness about his work place and work hours. *Id.* *La Página*, another San Salvador-based newspaper, reports that, according to two prosecutors and an ex-prosecutor that were interviewed by the newspaper, [translation] “at least 100 witnesses were murdered in 2010 across the country.” *See*, Tab FF, *Murdered for the Sin of Being a Witness*, *La Pagina*, Feb. 9, 2011.

Similarly, the father of a kidnapped 16-year-old girl decided to confront his daughter’s captors, only to face police arrest and retaliation from the gang members. *See*, Tab V, *For Salvadoran Family, Clash with gang Takes a Heavy Toll*, *McClatchy DC*, July 1, 2014. According to the article, the day after the confrontation, gang members killed the man’s wife, forcing the rest of his family members to flee the country. *Id.* A

former gang member who was interviewed said, “there is not a single kilometer without gang members” in El Salvador. *Id.* Jaime Rivas Castillo, a sociologist at the Central American University, affirms that police officers collaborate with local gang leaders because they fear reprisals themselves. *Id.*

Earlier this year, the local media in El Salvador reported the murder of a witness in a gang case. *See*, Tab R, *Witness is Killed in Extortion Case in La Paz*, [elsalvador.com](http://elsalvador.com), Feb. 24, 2015. According to the report, the victim was killed by gang members and in the presence of several witnesses, including a police, who fled the scene. *Id.* In a similar incident last year, a former gang member who was collaborating with the police and had reported gang violence, was killed by the MS-13 gang. *Id.*

Reports from the Salvadoran and American press, along with U.S. State Department documents demonstrate that witnesses to gang-based violence, individuals who report gang-related crimes to the police, and those who confront the gangs face intimidation, retaliation, and murder from the gangs.

## **ARGUMENT**

### **I. [RESPONDENT] IS ELIGIBLE FOR ASYLUM.**

#### **a. [Respondent] is eligible for asylum, as he meets the statutory definition and has complied with the proper procedure.**

Under INA §208(b)(1)(A), an individual who meets the definition of a refugee under INA §101(a)(42)(A) may be eligible for asylum. The statutory burden is on the applicant to demonstrate that he is a refugee. It is a statutory requirement to “establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason” motivating persecution. *Id.* In this case, [Respondent] is able to comply with that requirement by establishing he has a well-

founded fear of persecution, based on his having reported the criminal gang activities of MS-13 to the police. His membership in the particular social group of Salvadorans who report gang activity constitutes one central reason for his persecution. The Salvadoran government is unwilling and unable to control the MS-13 gang or protect [Respondent] from it.

**b. [Respondent] suffered past persecution by the MS-13.**

There is no statutory definition of persecution. However, according to the Seventh Circuit definition, persecution refers to “the use of significant physical force against a person’s body” or “nonphysical harm of equal gravity.” *Stanojkova v. Holder*, 645 F.3d 943 (7th Cir. 2011). It is not required that the harm be physical for it to constitute persecution. *Id.* According to *Stanojkova*, “credible threat to inflict grave bodily harm” is constitutive of persecution. *Id.* Moreover, the Seventh Circuit has recognized that harming one’s family can be part of a threat to an applicant. *N.L.A. v. Holder*, 744 F.3d 425 (7th Cir. 2014) at 432. Threats on their own can be rise to the level of persecution “if they are immediate, menacing, or the perpetrators attempt to follow up on them.” *Escobar v. Holder*, 657 F.3d 537, 544 (7th Cir. 2011). [Respondent] has suffered past persecution both in the form of his brother’s murder and by the gang’s credible threats against him.

The Seventh Circuit acknowledges what it describes as “persecution by proxy,” in which persons can suffer at least as much harm when seeing their loved ones harmed as when they are harmed directly. *N.L.A.*, citing *Zhou Ji Ni v. Holder*, 635 F.3d 1014, 1018 (7th Cir. 2011). Here, [Respondent]’s younger brother was murdered because [Respondent] refused to comply with the demands of the gang. [Respondent] suffered



the loss of his brother as a result of the stand he took against the gang. He thus feels responsible for his brother's death – just the gang intended – and experienced the death of [Brother] as persecution.

Moreover, the murder of [Brother] as well as the series of written and spoken threats issued against [Respondent] by MS-13 establish that [Respondent]'s life was threatened in a manner that rises to the level of persecution. In *N.L.A.*, the Seventh Circuit acknowledged that the murder of an asylum-seeker's uncle and the kidnapping of her father were part of the credible, imminent threats against that asylum-seeker. The same concept applies in [Respondent]'s case. The murder of his brother was a threat to [Respondent] and evidence that MS-13 carries out the threats they make, thus rendering them both credible and imminent. [Respondent] has seen that MS-13 does not hesitate to act on its threats, since they killed his brother less than a month after their first threat to kill either [Respondent] or members of his family. This also made their subsequent threats to kill [Respondent] credible threats of imminent death.

In *Escobar*, the respondent refused to transport goods for the Colombian terrorist group, the FARC . The FARC then burned his trucks to intimidate him and threatened to kill him. The Court found that this activity amounted to persecution. *Escobar*, 657 F.3d at 544-47. Similarly, the MS-13 perpetrators took steps that indicate they intended to follow through on their threats against [Respondent] by killing his brother. [Respondent] believes his brother was more accessible and that the gang killed [Brother] to send a message to him. *See*, Tab B at ¶ 25. The fact that the gang followed through on their previous threat speaks to the credibility of the threats [Respondent] has received since he filed the report with the police. *Pathmakanthan v. Holder*, 612 F.3d 618, 623 (7th Cir.

2010) identifies the context and circumstances surrounding threats as useful for determining whether those threats qualify as past persecution. The circumstances surrounding the threats to [Respondent] indicate MS-13 was inclined to kill him and capable of doing so. In this context, these threats rise to the level of persecution.

**c. [Respondent] has a well-founded fear of future persecution.**

*i. Based on past persecution, [Respondent] has a presumption of future persecution.*

One of the elements for asylum is a well-founded fear of persecution. INA §101(a)(42)(A). Past persecution establishes a statutory presumption that, if returned to the country of origin, the applicant will suffer future persecution on the same grounds as past persecution. 8 C.F.R. §1208.13(b)(1). This presumption is only rebuttable by evidence of changed circumstances in the country from which the applicant fled or the reasonable possibility of safe internal relocation. *Id.* The government cannot rebut that presumption in this case.

As is evident from the country conditions, it would be difficult to rebut this presumption by evidence of changed, improved circumstances in El Salvador with respect to MS-13 gang violence targeting witnesses against them.

Due to the unrelenting corruption in the Salvadoran justice system, criminal conviction rates are below five percent. *See*, Tab X. Furthermore, according to two prosecutors and an ex-prosecutor interviewed by *La Página*, "at least 100 witnesses were murdered in 2010 across the country." *See*, Tab FF. The U.S. Department of State recognizes that El Salvador has not become safe since 2010 when these statements were made. *See*, Tabs U, X.

The other way this presumption of future persecution can be rebutted is if the Government can demonstrate that the applicant would be able to safely relocate within El Salvador. Asylum-seekers cannot claim well-founded fear if they could feasibly avoid persecution by relocating within their home country; however, “we cannot require him to live in hiding.” *Mema v. Gonzales*, 474 F.3d 412, 419 (7th Cir. 2007); *N.L.A. v. Holder*, 744 F.3d 425, 442 (7th Cir. 2014). In addition to evidence that El Salvador maintains the highest per capita number of gang members in Central America, *See*, Tab Z, a former gang member asserted that, “there is not a single kilometer without gang members” in El Salvador. *See*, Tab V. Given this reality, which is supporting by findings of the U.S. Department of State (*See*, Tab X), it is clear MS-13 would be able to leverage its dense contacts throughout the country in order carry out their threats against [Respondent]. It is therefore impossible for him to relocate safely within El Salvador to escape future persecution based on his immutable identity as an individual who in the past acted as an unwavering witness against them.

*ii. Even independently of this presumption, [Respondent] satisfies both the subjective and objective components necessary to establish well-founded fear of future persecution*

An applicant need not rely on the statutory presumption in order to show a well-founded fear of persecution in the future. *Giday v. Gonzales*, 434 F.3d 543, 553-54 (7th Cir. 2006). Although [Respondent]’s past persecution creates a presumption of future persecution on the same grounds, he can also establish an independent well-founded fear of future persecution. The standard for a well-founded fear is a “reasonable possibility,” also described by a ten percent chance of persecution, falling significantly short of a preponderance of the evidence standard. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431

(1987). Under *Cardoza-Fonseca*, in order to establish an independent well-founded fear, the applicant must both demonstrate a subjective fear and satisfy the objective component, that the applicant's subjective fear is objectively reasonable, or well-founded. *Id.*

To establish subjective fear, [Respondent] must communicate by way of his "candid, credible and sincere testimony," that his fear of persecution on a protected ground is a genuine one. *Tesfu v. Ashcroft*, 322 F.3d 477 (7th Cir. 2003). This can be established either on the basis of [Respondent]'s testimony in his affidavit or through credibility judgments of his testimony in court with respect to his subjective feelings of fear. [Respondent] is in touch with his family at home, and they assure him the gang has not forgotten him. Gang members called looking for him after he fled to the U.S. *See*, Tab B at ¶48. Prior to that, [Respondent]'s mother urged her son to leave because she knew that if he stayed she would lose another son to MS-13 violence. *See*, Tab F. In addition to his mother's letter, [Respondent]'s affidavit and testimony in court will demonstrate a credible subjective fear.

In order to demonstrate the objectively reasonable nature of applicant's fear, Seventh Circuit precedent holds that an applicant must demonstrate one in ten probability of future persecution. *Tahemkov v. Gonzalez*, 495 F.3d 785, 793 (7th Cir. 2007); *Sayaxing v. INS*, 179 F.3d 515 (7th Cir. 1999); *Cardoza-Fonseca*, 480 U.S. at 440; *Useinovic v. INS*, 313 F.3d 1025 (7th Cir. 2002). Because criminal conviction rates remain low, it is not likely that [Respondent]'s persecutors will cease to be powerful in El Salvador. *See*, Tab X. And even those who are imprisoned on convictions remain active in their gangs and maintain a hold on the justice system. *Id.* It is common to not report

crimes due to both a pervasive distrust in the government's power to protect the people and due to fear that those who report gang crimes will be persecuted as a result. *See*, Tab BB. [Respondent] has an objectively reasonable well-founded fear of being persecuted for reporting the gang, since it is unlikely the justice system can protect him from the gang seeking reprisal against him.

**d. As a Salvadoran who has reported the criminal activity of MS-13, Respondent belongs to a cognizable particular social group.**

In *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), the Board interpreted the particular social group concept for establishing asylum. The *Acosta* test has since governed particular social group analysis. In *Acosta*, the Board employs the concept of *ejusdem generis*, or “of the same kind”, to determine the parameters of particular social group as compared to the other protected grounds listed in the refugee definition. Specifically, these groups share innate characteristics, such as race and nationality, or characteristics that individuals should not be required to change, such as religion or political opinion. *Matter of Acosta* at 233.

The particular social group to which [Respondent] belongs is that of Salvadorans who report the criminal activity of MS-13. This is a cognizable particular social group because it is defined by immutable and fundamental traits. *Cece v. Holder* describes the past as “immutable,” acknowledging that a past action, such as [Respondent]’s previous testimony against the gangs, is not a characteristic he could change. *Cece*, 733 F.3d at 681. And even if he could change it, he should not be required to do so. “People are not expected or required to compromise their fundamental characteristics for protection from those persecuting them. *Id.* at 669. *Cece* recognizes that a characteristic can be immutable simply because it “cannot be undone.” *Cece*, 733 F.3d at 671, citing *Acosta*,

19 I. & N., Dec. at 233. [Respondent] cannot recant his testimony at this point, nor should he be expected or required to compromise his determination to pursue justice for his brother's murder by reporting the criminal activity of MS-13.

In *R.R.D. v. Holder*, the Seventh Circuit recognized honest police officers as a social group. *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014). In that case, the respondent, R.R.D., was “willing to bring criminals to justice at substantial risk to himself,” and that willingness to speak out against criminals in the face of corruption made him vulnerable to persecution. *Id.* at 811. [Respondent] was similarly attempting to achieve justice for his brother, despite the dangers inherent in reporting gang violence to the police. Ex. A, ¶ 29. Both R.R.D. and [Respondent] took the irretrievable step of crossing criminal organizations and this characteristic forms the basis of their particular social groups.

The essence of R.R.D.'s particular social group, honest police officers, is similar in nature to [Respondent]'s social group in that both groups are defined by the act of pursuing prosecution of criminal outfits. As such, the way has been paved in this circuit to recognize [Respondent]'s particular social group as legally viable.

The Ninth Circuit has recognized particular social groups consisting of witnesses who report criminal activity and testify against gang members. *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013). In *Henriquez-Rivas*, the applicant was a woman from El Salvador whose particular social group was “people testifying against or otherwise oppos[ing] gang members.” *Id.* at 1086. She was not a direct witness to her father's murder, but testified against the gang members in court, having identified them in a line-up, and was threatened by the gang on account of her testimony against them.

*Id.* at 1085, 1086. [Respondent]'s situation is similar since he testified against the gang members by reporting [Gang Member] to the police and identified him in a photo array. *See*, Tab B at ¶ 31. Like Henriquez-Rivas, he had knowledge of who killed his brother and identified him for law enforcement.

Recanting his testimony against the MS-13 should not be required of [Respondent] and furthermore would not alleviate the threat of persecution because the gang would nonetheless seek to harm him for his past acts. The Seventh Circuit has recognized that past experiences and previous statuses may constitute immutable characteristics and form the basis of a particular social group. *Benitez Ramos v. Holder*, 589 F.3d 426, 428 (7th Cir. 2009); *Sepulveda v. Gonzales*, 464 F.3d 770, 771-72 (7th Cir.2006); *Matter of Acosta*, 19 I&N Dec. at 233. In *Benitez Ramos v. Holder*, the respondent had previously been a member of the Mara Salvatrucha gang in El Salvador and that former membership placed him in a cognizable particular social group. *Benitez Ramos v. Holder*, 589 F.3d 426, 428 (7th Cir. 2009). Likewise, in *Sepulveda v. Gonzales*, a former subordinate of the Colombian attorney general was a member of a particular social group. *Sepulveda v. Gonzales*, 464 F.3d 770, 771-72 (7th Cir. 2006). The emphases in both *Benitez Ramos* and *Sepulveda* are on the irreversibility of the past as the heart of their particular social groups. Both gang members and subordinates of corrupt government officials can resign, but they cannot change the past, and they cannot cease to know the incriminating things they have learned about their violent former companions. Similarly, [Respondent] cannot un-ring the bell of his testimony. When he reported the crimes of MS-13 and subsequently refused to retract his police complaint, he took an irretrievable step that places him squarely in a unique category of people. As

such, the particular social group he posits – Salvadorans who have reported the criminal acts of MS-13 – is cognizable.

**e. Recent Board of Immigration Appeals decisions that add additional requirements to the particular social group analysis Are not precedential in this circuit.**

Two recent BIA decisions confound prior case law regarding the particular social group analysis. See *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). The BIA renamed the social visibility requirement (which the Seventh Circuit rejected in *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009)) “social distinction” and clarified that it does not mean literal visibility. *M-E-V-G-*, 26 I&N Dec. at 228. The BIA has not yet announced through published decision that it intends to apply these unreasonable interpretations of the statute in circuits that adhere to the traditional *Acosta* formulation. Because the intervening BIA decisions do not explicitly decline to follow Seventh Circuit precedent, the Seventh Circuit’s decisions rejecting the BIA’s social visibility requirement and affirming the *Acosta* immutable characteristic test as the only requirement for establishing a particular social group remain binding precedent.

Unlike social visibility, the definition of particularity asserted by the BIA in *M-E-V-G-* and *W-G-R-* is the same definition that existed in 2009 when the Seventh Circuit held that “tattooed, former Salvadoran gang members” were a particular social group, *Benitez-Ramos*, 589 F.3d at 431 and in 2013, when the *en banc* Seventh Circuit found that “young Albanian women who live alone” were a particular social group. *Cece*, 733 F.3d 662 at 671. Significantly, the Court in *Cece* noted that the particular language used to define a group should not be over-emphasized; rather, the Court must look at the characteristics the group members share to discern particular social group viability. *Id.* at



672.

In order for the BIA's interpretation of "particular social group" to receive deference, the agency's interpretation must be based on a permissible construction of the statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Cece*, 733 F.3d at 668-669 (the BIA's reasonable interpretation of the INA receives *Chevron* deference). As an impermissible interpretation of the statute, the BIA's decisions cannot receive deference.

The BIA fails to explain how previously accepted social groups would still qualify under the new social visibility standard. *Gatimi*, 578 F.3d at 615-16. It is thus an arbitrary and unreasonable addition to add the social visibility/distinction element to the particular social group test.

Nevertheless, [Respondent]'s particular social group would be viable, even under the BIA's modified particular social group test as articulated in M-E-V-G and W-G-R. He is a member of a cognizable particular social group because the group of Salvadorans who report criminal activity of gangs is (1) comprised of members who share a characteristic that is immutable or that they should not be required to change; (2) is socially distinct; and (3) is particular.

The group is sufficiently particular, as the term has been interpreted by the Seventh Circuit. It is not defined by unspecific or amorphous terms, any more so than the groups accepted in *Benitez-Ramos*, 589 F.3d 426; *Sarhan*, 658 F.3d 649; or *Cece*, 733 F.3d 662. Additionally, the group is sufficiently distinct, since, as M-E-V-G requires, "those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it." 26 I&N Dec. at 238-41. Those who have

reported criminal gang activity in El Salvador are meaningfully distinguished. According to the Crime and Safety Report 2013, it is common practice in El Salvador to not report gang crimes out of fear. Salvadoran newspaper describes the dangers for those who witness against gangs. *See*, Tabs EE, FF. It is contrary to Salvadoran norms to report gang activity and those who do so distinguish themselves in society. [Respondent]’s credible testimony will demonstrate that those in town know the gang will kill him if he returns. This makes his particular social group of Salvadorans who report criminal gang activity a distinct one, even under the standard in M-E-V-G.

**f. [Respondent]’s well-founded fear of persecution is on account of his membership in the social group of Salvadorans who report the criminal activity of MS-13.**

A respondent seeking asylum must establish there is a nexus linking his protected ground and the persecution he faces at home. INA §101(a)(42)(A). According to Seventh Circuit precedent, an applicant can demonstrate the link between his persecution and his basis for protected grounds either by direct or circumstantial evidence. *Martinez-Buendia v. Holder*, 616 F.3d 711, 715 (7th Cir. 2010). Furthermore, “in lieu of direct evidence, an alien’s credible testimony, by itself, is generally sufficient to sustain the alien’s burden of proof.” *Torres v. Mukasey*, 551 F.3d 616, 626 (7th Cir. 2008). [Respondent] presents both direct and circumstantial evidence in support of his claim.

The protected ground upon which [Respondent] relies is his status as a witness against the gangs. This protected ground must be one of the central factors motivating the persecution in order to fulfill the nexus prong of the asylum claim. *J-B-N & S-M*, 24 I&N Dec. 208, 211 (BIA 2007). However, persecution need not be motivated exclusively by the protected grounds. *Id.* For [Respondent], he initially attracted gang attention due to an appearance of increased wealth when his family built a brick house to

replace their dirt house. *See*, Tab B at ¶ 11. However, that is not the only reason he was persecuted by the MS-13 and, indeed, served only as the instigating factor that gave rise to the events that turned [Respondent] into a witness against the gang. [Respondent]’s family’s perceived wealth was merely the impetus for the events that ensued, requiring him to eventually flee his persecution based on protected status.

*Cece* explains that the mixed-motives doctrine allows for qualification for asylum where applicants can show “by either direct or circumstantial evidence that his persecutors were motivated, at least in part, by one of the enumerated grounds. *Cece*, 733 F.3d at 672. While the gangs initially threatened [Respondent] based on their extortion of his family, the threats that caused him to flee began when he reported his brother’s gang member killer to police and then refused to withdraw his complaint from the police despite two clear and direct threats from MS-13 that he would be killed if he did not. [Respondent] cannot change the past, cannot help that the gang members view him as a Salvadoran who reported MS-13’s criminal activity, and this is the central motivation for the threats that caused him to flee.

**g. The Salvadoran Government is Unable or Unwilling to Control the MS-13 Gang.**

[Respondent]’s mother urged her son to leave El Salvador, despite his important role in the family as the head of house, preferring to send her son far away rather than keep him in harm’s way in El Salvador, where the police cannot keep him safe. *See*, Tab F.

The police have been unable to protect [Respondent]’s family from the gangs thus far. The gang members walk around [Hometown] and El Salvador freely, identifiable by their speech, dress, and tattooed skulls. They do not hide their gang membership. *See*,

Tab B at ¶ 12. The gang violence in El Salvador has worsened noticeably in the last five years. *Id.* at ¶ 13. Of those [Respondent] personally knows who have been victims of gang violence, they have not spoken out about the violence or reported it to the police because the families are too afraid of gangs to report them. *Id.* at ¶ 15. To report gang violence to the police is to put oneself in a vulnerable position from which neither the government nor the police force has managed to keep individuals in this social group safe. Furthermore, the police in [Hometown] are ineffective at keeping people safe from the gang because the police are afraid of the gang members.

The gang influence on police, witnesses, and judges preclude effective justice. See, Tab X. Because of this, witnesses testify without protection and are persecuted for their testimony. See, Tabs EE, FF. Because the Salvadoran government has not been able to protect either [Respondent]’s family or others to the extent that its citizens feel it too risky to report criminal gang violence, the MS-13 is an entity the government is both unwilling or unable to control.

**II. RESPONDENT HAS ESTABLISHED A CLEAR PROBABILITY OF FUTURE PERSECUTION, AND IS THUS ENTITLED TO WITHHOLDING OF REMOVAL, AS WELL AS RELIEF UNDER THE CONVENTION AGAINST TORTURE.**

[Respondent] also qualifies for withholding of removal because his life or freedom would be threatened due to his race, nationality, particular social group, or political opinion in El Salvador. 8 U.S.C. §1231(b)(3). Since he has established that persecution on account of a protected ground is “more likely than not” in his home country, he satisfies the statutory test and he should be granted protection. *INS v. Stevic*, 467 U.S. 407, 430 (1984); *Sarhan v. Holder*, 658 F.3d 649, 653 (7th Cir. 2011).

[Respondent] is also eligible for protection under the Convention Against Torture (CAT) as described at 8 C.F.R. §208.16(c)(2) (2011). CAT relief is mandatory where applicable and does not rely on protected grounds as the basis for the victim's torture. *Rapheal v. Mukasey*, 533 F.3d 521, 525 (7th Cir. 2008). The evidence shows it is more likely than not that MS-13 will torture [Respondent] upon his return. [Respondent] is eligible for relief under CAT and should not be deported to El Salvador.

## CONCLUSION

[Respondent] suffered past persecution while living in El Salvador. He fled and maintains a well-founded fear of the future persecution by MS-13, which has repeatedly and credibly threatened him with death. [Respondent] reasonably believes that if he returns to El Salvador, gang members will act on their threats to kill him because of his membership in the particular social group of Salvadorans who have reported the criminal activity of the Mara Salvatrucha gang. For the foregoing reasons, [Respondent] respectfully requests that this Court exercise discretion favorably and grant his request for asylum.

Dated: March 6, 2015

Respectfully submitted,

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