

Non-Detained

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[City, State]**

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In the Matter of:)	
)	
XYZ-DOE, Juan)	
AKA Juan DOE)	File No.: A xxx-xxx-xxx
)	
)	
Respondent,)	
)	
In Removal Proceedings)	
_____)	

Immigration Judge X

Next hearing: FH 07/XX/XX 1PM

**RESPONDENT'S PRE-HEARING STATEMENT REGARDING
ELIGIBILITY FOR ASYLUM AND PROTECTION UNDER
THE CONVENTION AGAINST TORTURE (CAT)**

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
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[City, State]**

In the Matter of:)
)
DOE, Juan)
AKA Juan E. Doe)
)
Axxx-xxx-xxx)
)
In Removal Proceedings)

**Pre-Hearing Brief Regarding Eligibility of Juan Doe for Asylum, Withholding of
Removal and Protection Under the
Convention Against Torture**

Juan, a 23-year old young man from ABC, El Salvador, submits the following pre-hearing statement in support of his application for Asylum, Withholding of Removal and protection under the Convention against Torture. Juan was persecuted by the Mara Salvatrucha (MS-13) and Mara 18 (M-18), transnational criminal organizations that the government of El Salvador is unwilling and unable to control, on account of his actual and imputed anti-*Mara* political opinion and, alternatively, on account of his membership in the particular social group of his family. He also fears persecution by the Sombra Negra death squad on account of his familial relationship to active gang members.

Juan is eligible for protection under the Convention against Torture (CAT) because it is more likely than not that if returned to El Salvador Juan will be tortured

by the *Maras*, *Sombra Negra*, or members of the Salvadoran security forces at the acquiescence of the Salvadoran government.

Summary of the Facts and El Salvador Country Conditions

Juan grew up in XXX X, a poor area of the city of ABC, El Salvador, with his mother, Dominga Doe and his siblings. Juan's father abandoned the family while Juan was still young, leaving Juan, his siblings and mother to fend for themselves. Juan has a large extended family in XXXX, including maternal aunts, uncles, and cousins. The majority of his maternal family is comprised of active members of the *Mara Salvatrucha* (MS), known locally as *La Familia Doe*, a surname that many of the family members share.

Despite this, Juan was determined to live a life antithetical to the aims of the Mara. Juan hoped to become the first in his family to attend college, and was successful in achieving his dream. After graduating from secondary school, Juan attended the Instituto Nacional de Y for two years, in what would be equivalent to community college in the U.S. In 2012, Juan applied to the Universidad X, where he was admitted and offered a full academic scholarship through the Salvadoran government through its XXX. Tab H at 26. He was an active member of the Diosceses of Y since childhood, where he dedicated substantial time to the youth ministry. Tab X at 87.

Juan was also active in local *ADESCOs*—local associations for community development that operate at the community level. See Tabs V and W. *ADESCOs* are crucial institutions of Salvadoran community development and organizing

infrastructure. See Tab U. Recognized as the “legal voice of the community, ADESCOs have the capacity to organize groups of people whose main objective is to improve and develop their community and its inhabitants.” Id. [Credicampo doc] at x. Salvadoran ADESCOs, or community development associations, are also specifically designed to “facilitate interpersonal and intergroup relations, serve as training for community leaders, and strengthen community spirit and the principle of mutual aid.” Tab U at 168. In short, ADESCOs democratic, grassroots approach to community activism represents complete opposition to the political view of the *Mara*, whose de facto rule governance on the use of assassination and terror.

Juan was most active in ADESCOS during his years as a University student in his early twenties, in 20XX and 20XX. Through ADESCOs, Juan participated in building community power and autonomy. ADESCO President, [NAME JZ], wrote in a letter of support that Juan—consistent with the community organizing and development model of ADESCOs—was dedicated to “working for the community, for example: projects regarding potable water, community housing, [building and repairing] schools, and other [projects].” Tab V at 182. ADESCOs, antithetical to the *Mara* agenda, have long faced opposition and violence by the *Maras*. In [MONTH] 2016, another local ABC ADESCO President, from the XXX, [NAME JG], and his two sons, [SON 1] and [SON 2], were gunned down in an alleyway “by gang members with firearms and a nine millimeter pistol.” Tab AA at 201. Given the political threat that community groups such as ADESCO represent to *Mara*’s political agenda, Juan fears that his prior participation in ADESCOs places him at risk of meeting a similar fate.

During this same period in 2014 and 2015, Juan began to receive threats from his maternal cousin, Cousin X (AKA “Nickname”). Cousin X was the local head, or *palabrero* (“shot-caller”) of the MS in their neighborhood. Cousin X regularly approached Juan to remind him that he had a “family obligation” to join the Mara Salvatrucha, or suffer the consequences. Tab A at 1. Given Juan’s intimate knowledge of his family’s criminal activities, it was likely important for them to have him on their side, as opposed to working against them.

Determined to avoid *Mara* life, Juan consistently rejected Cousin X, and attempted to avoid contact with him and Juan’s other MS-affiliated maternal cousins and uncles. Id. However, after several threatening run-ins with Cousin X, Juan realized that remaining safely in his neighborhood was no longer possible. He moved across town to live with his paternal uncle, who lived 30-45 minutes away by bus in an area of XXX not governed by the MS. Id. Juan’s attempt at relocation brought about new risks.

After a few months of relative safety, Juan was accosted by several members of the rival gang, Mara 18. Noting that Juan was not a longtime resident of the area, the M18 members put a gun to Juan’s head, threatened to kill him, and barked questions about who he was and where he came from. Tab A at 1. After pushing and kicking Juan, they told Juan to leave their territory or face death. Id. Juan escaped that encounter, but later that day was followed and chased by members of the same gang. When Juan relayed the encounter to his paternal uncle, XYZ, Mr. XYZ urged him to go to the police to report the death threat. Juan and his uncle went to the local police station, but the police refused to take a statement and told Juan they “couldn’t help

[him]”— because Juan did not have the names and addresses of the men who had threatened to kill him. *Id.*; see also Tab E at 13. Fearful that members of the M18 would kill him for being unknown to them—or worse, that they would find out that he was a part of *La Familia Doe*—Juan returned to live with his mother in XXX X.

Juan’s return to his mother’s house was quickly noticed by MS members, who came by, asking questions about his absence and suggesting that perhaps he had become a part of M18 while away. Tab A at 1-2. While Juan spent much of his time indoors, in late [MONTH] 2015 he went to play soccer with a childhood friend, [FRIEND L], a fellow activist and community worker for a local NGO as a *promotor social* (“community social promoter.”) While on the neighborhood soccer field, [FRIEND L] saw young men approaching who appeared to be from the MS. He yelled to Juan to run away, as the Mara members appeared to be coming for him. Tab A at 2. [FRIEND L] had heard rumors that MS members, including Juan’s cousin Cousin X, “wanted to harm” Juan to punish Juan’s refusal to collaborate with MS and Juan’s recent unexplained absence from the neighborhood, which made MS suspicious that Juan had collaborated with M18 or the police. Tab F at 18. *The mareros* began shooting at them. *Id.* Juan and [FRIEND L] ran and escaped, but later, gang members approached [FRIEND L] and interrogated him about Juan’s whereabouts and warned [FRIEND L] that being associated with Juan put him at risk. *Id.*

Directly after the shooting, Juan fled to a roadside hotel, certain that the MS would be waiting for him at his mother’s house. He called his mother to tell her what had happened. Tab B at 3. He then contacted a University classmate, [CLASSMATE

F], who lived in a different area, to see if [CLASSMATE F]’s family could offer him safe harbor, albeit temporary. Id. [CLASSMATE F] knew that the Maras had been targeting Juan, and allowed Juan to come to his home. Tab G at 22.

Juan remained in hiding at [CLASSMATE F]’s home for nearly three months. Shortly after Juan fled ABC, Cousin X and another member of MS were kidnapped and executed, reportedly by members of a “rival gang,” in the neighborhood next to XXX X. Tab H at 27; see also Tab D at 11. Given the MS’s suspicions that Juan had become affiliated with M18 while living with his uncle, and the timing of Cousin X’s death—only days after Juan disappeared—Juan fears that MS believed he was involved in Cousin X’s death and will be punished accordingly. Juan fled El Salvador as soon as he was able.

Political and Historical context

Juan was born in [DATE], 1993, just one year after the signing of the Peace Accords between the Salvadoran government and rebel forces, producing a tenuous ceasefire between the factions after more than a decade of Civil War. In the ensuing years—with a decimated economy, and a large portion of its civilian population displaced—El Salvador became a power vacuum: weak and corrupt central governments—both right-wing and left-wing—have characterized the country throughout Juan’s lifetime. While both sides of the Civil War supposedly went through a disarmament period as a result of the Peace Accords, a large number of extralegal executions of ex-guerilla members were carried out by the Sombra Negra, or “Black Shadow,” a paramilitary death squad, many whom were known ex-

Salvadoran military who were trained assassins during the Civil War. At the same time, Salvadoran gang-affiliated criminal deportees in the 1990s and 2000s from the U.S. took advantage of El Salvador's weak, corrupt, and sometimes non-existent government to establish territorial control and influence within the government. In other words—despite an end to formal war, El Salvador continued to be plagued by a weak state and rampant extralegal violence. Despite various strategies employed by the State—*Mano Dura*, or “Strong Arm” laws and policies which criminalized gang membership and purported to harshly punish gang-related crime, and more recently a temporary gang truce brokered by the Salvadoran government and others—the *Maras* and other transnational criminal organizations (TCOs) have thrived. ABC, the city where Juan grew up, is located in XXX El Salvador, an area where the Mara Salvatrucha and Mara 18 are warring for territory and governing power, largely supplanting the state.

XXX, Senior Fellow at the XXX and El Salvador security and country conditions expert, notes that the Mara Salvatrucha and 18th Street Maras have in recent years grown in “sophistication and political awareness” boasting “vast territorial control, growing military power, and rapidly expanding criminal enterprises.” Tab R at 139. From the post-War power vacuum has emerged a country where “some group exercises real political and military control,” but “the authority is less and less often the state.” Tab K at 33. The U.S. State Department notes in its most recent Human Rights Report on El Salvador that the country suffers from “widespread corruption” and “weaknesses in the judiciary and the security forces” which has lead to “a high level of impunity and abuse.” Tab P at 63. By 2015, Mara

violence in El Salvador had, in the words of XXX, turned El Salvador into a “free fire zone,” with a homicide rate that in August 2015 made “El Salvador the most violent nation in the world that is not at war.” Tab K at 39.

The Salvadoran government’s recent negotiations with the Maras and revelations about the level of their infiltration in Salvadoran governmental institutions and security forces has only emboldened El Salvador’s Maras, demonstrating that they are able political actors with the ability to supplant the Salvadoran state and to act with impunity. See generally Tabs K, L, N. The “misnamed” gang truce, XXX asserts, only strengthened the *Maras* rule, allowing them to negotiate as equals with the State and “develop a political and economic strategy, bring in advisors, and begin a profound metamorphosis from street gangs to criminal organizations with territorial and political control.” Tab S at 141. It was during the 2012-2013 gang truce brokered by the Salvadoran government and others that the Maras “came to understand their true political strength” and nature, and develop concrete political and economic strategies. Id.

In addition to the proliferation of the Maras as de facto governments within parts of El Salvador, other groups, such as the paramilitary death squad the *Sombra Negra*, associated with or involving the government have recently begun to abdicate the rule of law and assassinate suspected Mara members, their families, and perceived collaborators. According to Salvadoran and Spanish newspapers, and reports from the El Salvador’s Attorney General for the Defense of Human Rights, there have recently been “30 massacres that have resulted in 100 presumed gang members dead.” Tab S

at 143. These death squads, according to [DIRECTOR NAME], director for the XXXX, is believed to be connected with the police. Id.

I. Juan has been persecuted and fears persecution by groups that the Salvadoran government is unwilling and unable to control

In order to establish a well-founded fear of persecution, an asylum applicant must have suffered persecution in the past, or possess a subjectively genuine and objectively reasonable fear of persecution in the future on account of a protected ground. INS v. Cardoza-Fonseca, 480 U.S. 421, 438 (1987) (noting in the context of asylum a “well founded fear of being the victim of persecution . . . ’ means that a person has either been actually a victim of persecution or can show good reason why he fears persecution” on account of a protected ground). Courts have long found that a one-in-ten chance that an asylum seeker will be harmed to may establish a well-founded fear.” Id. at 440 (asserting that “[t]here is simply no room in the United Nations’ definition [for determining refugee status] for concluding that, because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, he or she has no ‘well founded fear’ of the event’s happening”); see also Al-Harbi v. INS, 242 F.3d 882, 888 (9th Cir. 2001); see also Halim v. Holder, 590 F.3d 971, 977 (9th Cir. 2009).

While the definition of “persecution” has been interpreted diversely by adjudicators, it includes threats to life or freedom, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom. Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985), see also INS v. Cardozo-Fonseca, 480 U.S. 421, 444 (1987) (noting that asylum applicants are entitled to a discretionary grant of

asylum and mandatory suspension of deportation where “his or her life or freedom ‘would be threatened’ if deported”). When an applicant has suffered past persecution, there is an automatic presumption that that person has a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1). This automatic finding of well-founded fear of future persecution requires that the Department show by clear and convincing evidence that a *reasonable* expectation of relocation or other fundamental changes to country conditions would undercut the applicant’s reasonable fear of future persecution. 8 C.F.R. § 1208.13(b)(1)(i)-(ii). Notably, a finding of reasonable relocation cannot require an applicant to live in hiding indefinitely, and that factors such as family ties, economic needs, age, gender and health must be taken into account to show that relocation is indeed “reasonable.” 8 C.F.R. § 1208.13(b)(3)

Whether an applicant has suffered past persecution that give rise to a presumption of future persecution must be made on a case-by-case basis, and the incidents in question must be considered cumulatively. See Matter of O-Z- & I-Z-, 22 I&N Dec. 23, 25-26 (BIA 1998) (finding that four physical attacks, numerous threats, and other mistreatment in the aggregate rose to the level of persecution); Nakibuka v. Gonzales, 421 F. 3d 473, (7th Cir. 2005) (“A death threat, especially one that is accompanied by an attacker pressing a gun to the victim's head, is a serious factor supporting a finding of persecution”); Boykov v. INS, 109 F.3d 413, 416 (7th Cir.1997) (threats “of a most immediate and menacing nature” may constitute past persecution); Mitev v. INS, 67 F.3d 1325, 1331 (7th Cir.1995) (noting severity of death threat “emanating directly from the secret police”); see also Lim v. INS 224, F. 3d 929 (9th Cir. 2000) (finding that the BIA erred in failing to find past persecution

where petitioner endured death threats for several years, where the applicant was an “active opponent of a political group that specializes in murder” and where the murder of other colleagues similarly threatened occurred, even where petitioner himself was never physically harmed).

As record evidence demonstrates, the mistreatment Juan suffered at the hands of both MS and M18—multiple death threats, physical assault, attempted murder, and attempts to locate Juan in order to harm him after he fled—considered cumulatively, rises to the level of past persecution. In considering whether the death threats against Juan by both the MS and M18 constitute past persecution, an adjudicator should ask whether the threats were must be “imminent,” “concrete,” or “so menacing as to cause significant actual suffering or harm.” Ci Pan v. U.S. Att’y Gen., 449 F.3d 408, 412 (2d Cir. 2006); see also Guan Shan Liao v. U.S. Dep’t of Justice, 293 F.3d 61, 70 (2d Cir. 2002). The death threats Juan received, by transnational criminal actors who were fully capable and willing to carry out those threats, and were often followed or preceded by a physical violence or attempted murder, are clear examples such types of death threats. Accordingly, Juan argues that the facts, taken as a whole, strongly support a conclusion that he suffered past persecution, automatically giving rise to a well-founded fear of future persecution.

An applicant’s feared future or past persecution must be carried out by a group or groups that the Salvadoran government is “unwilling or unable to control” in order to qualify for protection under asylum law. Acosta, 19 I&N Dec. at 222; see also Pavlova v. INS, 441 F.3d 82, 91 (2d Cir. 2006). Here, the groups that Juan most fears are the Mara Salvatrucha and the Mara 18 (also called Barrio 18)—the two primary

gangs in El Salvador. Additionally, he fears future persecution by the *Sombra Negra*, or other death squad that operates with the participation of or acquiescence of the Salvadoran state. Record evidence shows that the Salvadoran state is unable to control these groups, has actively collaborated and negotiated with them, and that these groups have infiltrated the Salvadoran security forces and municipal governments. See generally, Tabs K, L, M, N, O, P.

[NAME], former assistant secretary of state for the Western Hemisphere and former ambassador to the [ORGANIZATION] notes that the Salvadoran government negotiated in secret with MS-13 promising “cash payments and special privileges for imprisoned [MS] gang members” during the recent and controversial gang truce negotiated by the Salvadoran government. Tab N at 49. Meanwhile, while the *Maras* continue to commit massive human rights violations in El Salvador, “insufficient government funding,” “corruption” and “criminality” amongst Salvadoran police contributing to near-total impunity. Tab P at 67.

The state openly refused to provide Juan protection when he went to the ABC police to report death threats against him by the M18 because he did not have the precise names and addresses of his attackers. Tab A at 2. This ludicrous requirement would require a victim to ask his attackers for identity documents before being allowed to avail himself of police protection. At a minimum this demonstrates that the Salvadoran police are impotent to provide protection to Mara victims, Record evidence of corruption and collusion, suggests that they indeed acquiesce to the Mara’s practice of killing or banishing their enemies from Mara-controlled territories. Thus, record evidence strongly supports a conclusion that the Salvadoran state is

unable and unwilling to prevent or redress the persecution that Juan has suffered and will suffer if returned.

Governments are not expected to provide the highest level of security to every citizen at all times, but protection must be meaningful if we are to expect trauma survivors to rely on their home government for protection from their persecutors. The Second Circuit and the Board have made clear that nominal police action in the face of imminent harm simply does not stand on its own to support a finding that the government is willing and able to control a persecutor. Aliyev v. Mukasey, 549 F.3d 111 (2d Cir. 2008) (finding that a government is unwilling and unable to protect where they did nothing more than send Petitioner for medical treatment and send a sheriff out to his home after explosion); Delgado v. Mukasey, 508 F.3d 702, 709 (2d Cir. 2007) (notes that the police took down a complaint but did not give it much importance); Matter of O-Z- & I-Z-, 22 I&N Dec. 23, 26 (BIA 1998) (police did nothing more than take down a report and say they would look into it). In a recent unpublished decision, the Second Circuit found that the Honduran government was unwilling or unable to protect the petitioner where they had arrested some, but not all, of the gang members involved in the murders of his family members and the gang continued to persecute the petitioner despite these arrests. Celedon-Herrera v. Holder, No. 13-2404 (2d Cir. 9-11-2015).

However, where a government consistently demonstrates high levels of corruption, collusion and impunity with transnational criminal groups, it is derelict in its duty to provide meaningful protection to its citizens against such groups. As record evidence demonstrates, this is the case with the Maras and other transnational criminal organizations (TCOs) in El Salvador. As recently as May 2016, the Second Circuit in an

unpublished decision, *DeCeron v. Lynch*, remanded a case where the BIA “refused to consider record evidence” in “finding that the Salvadoran police can control gang violence,” noting that there—as here—record evidence overwhelming showed that it cannot. 13-3208-ag (2d. Cir. 2016)¹. As emphasized in *DeCeron* and supported by ample record evidence, here, the Salvadoran government is unwilling and unable to protect Juan from persecution by the Maras or other groups such as the paramilitary deaths squads (*Sombra Negra*).

II. Juan fears persecution on account of an protected ground: his imputed and actual anti-Mara political opinion

The United Nations High Commissioner on Refugees defines “political opinion” as “any opinion on any matter in which the machinery of State, government, society, or policy may be engaged”.² The meaning of “political opinion” is broader than electoral politics. *Castro v. Holder*, 597 F.3d 93 (2d. Cir. 2010)(Guatemalan policeman who denounced official corruption expressed a political opinion); *Serna-Arbelaez v. Mukasey*, 278 Fed. Appx. 9, 11 (Colombian’s refusal to give list of paramilitaries to the ELN could give rise to anti-ELN political opinion); *Delgado v. Mukasey*, 508 F.3d 702 (2d Cir. 2007)(refusal to offer technical assistance to the FARC can give rise to imputed political opinion); *Yueqing Zhang v. Gonzales*, 426 F.3d 540 (2d Cir. 2005)(opposition to endemic corruption may have a political dimension when it transcends mere self-protection and represents a challenge to the

¹ Decision on file with author and available online at <https://www.courtlistener.com/opinion/3200374/deceron-v-lynch/> (last accessed 07/10/16)

² **UNHCR**, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A2 of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, <http://www.unhcr.org/refworld/docid/3d36f1c64.html>, para. 32.

legitimacy or authority of the ruling regime); Osorio v. INS, 18 F.3d 1017, 1029-31 (2d Cir. 1994)(Union activity can be a political activity).

Determining whether statements or actions are “political” requires a fact specific, context specific analysis. Rodas Castro, 579 F.3d at 106 (Board must avoid “an impoverished view of what political opinions are, especially within a country where...certain democratic rights have only a tenuous hold.”); Ruqiang Yu v. Holder, 693 F.3d 294, 298 (2d Cir. 2012)(analysis requires a “complex and contextual factual inquiry into the nature of the asylum applicant’s activities in relation to the political context in which the dispute took place”); see also Yan Chen, 417 F.3d at 273 (“Reviewing courts have found it particularly troubling when immigration courts overlook country condition reports submitted by petitioners.”). As in Castro v. Holder and Ruqiang Yu v. Holder, in the case at hand, the court must consider whether in the context of El Salvador, at the time of these events, Juan’s actions reflect, or were perceived to reflect, political opposition to a governing regime? Were his persecutors simply rogue actors, or were they part of a broader more systematic agenda such that his defiance of their demands represented a challenge to that authority? Juan asserts that both of these questions should be answered in the affirmative.

As record evidence demonstrates, *Maras*—both the Mara Salvatrucha (“MS”) and Mara or Barrio 18 (“M18”) are in many parts of El Salvador the surrogate government, or actively competing with the state for territorial control. A 2016 United Nations Human Rights Commissioner’s report notes that Salvadoran Maras “pursue a strategy of exclusive control over their home territories, using violence to repel other gangs or challengers” including the State. Tab Q at 101. As para-State entities, Maras have been

known to “install[] gates at the entrance to neighborhoods where they review the documents of passers-by to control who is to enter,” amongst other means of exercising complete dominion—again, often with impunity and non-action by the State. Id. at 103. As XXX notes, as transnational criminal organizations, the Mara’s goals are to become the “true authority on the ground”—an aim that has been realized in many parts of El Salvador, according to XXX. Tab K at 34. The result of this shift in power from the state to *de facto* governance by the Mara has been “catastrophic, both for the people of El Salvador and the rule of law in the region.” Id.

The Salvadoran Maras, XXX argues, were politically emboldened by their position as equals during the 2012-2013 truce negotiations, during which time—with the express permission of the Salvadoran State—the Maras only gained in strength. Indeed, XXX emphasizes that the “misnamed” gang truce “proved to be a tipping point in the gangs’ political and criminal evolution,” allowing them to “rearm, reorganize, and build closer ties” to other transnational criminal organizations in the area. Tab R at 141. The United Nations High Commissioner on Refugees notes that as the truce began to fragment, “B-18 [or M-18] and MS gang leaders simultaneously started to prepare for a return to war, directing their members to prioritize the purchasing of firearms and to increase extortion demands” such that “by late 2015, [the Maras] were reportedly more armed than ever.” Tab Q at 107. UNHCR notes that “one of the most remarkable changes occasioned by the truce has been the dramatically increasing political sophistication” that the Maras now use to “assert their increasingly overt political ambitions.” Tab Q at 108. Indeed, both Maras openly claim to influence current elections in El Salvador. Id. In other words, if they weren’t before, post-Truce Salvadoran Maras have become fully-

fledged political actors, more akin to terrorist groups in the Middle East or Colombia's FARC than to the street gangs they once were. Tab R at 142.

In El Salvador, to dare to defy the Mara through refusal to comply with specific demands, engagement in community and political activities, or reporting crimes committed by the Mara to the police is rare and sharply noted, both by Salvadoran society and by the MS itself. See, generally Tab M. To engage in such activities is considered an act of political defiance to the Maras' *de facto* governing authority and therefore may be the basis of both actual and imputed political opinion. According to UNHCR's legal assessment of potential risk profiles for Salvadoran asylum seekers in need of international protection under Article 1A of the 1951 Convention, "it would frequently be appropriate for . . . applicants who flee gang-related forms of persecution to be analysed in relation the ground of (imputed) political opinion." Tab Q at 119. Indeed, UNHCR notes, "in El Salvador, expressing objections to the activities of gangs may be considered as amounting to an opinion that is critical of the methods and policies of those in control, and thus, constitute a 'political opinion' within the meaning of the refugee definition." Id. at 119-120. Outlining several different "risk profiles" which may give rise to a claim of asylum based on (imputed) anti-Mara political opinion and/or belonging to a particular social group. See, generally, Tab Q. Amongst the risk profiles the UNHCR outlines appear "persons perceived by a gang as contravening its rules or resisting its authority," "informants, witnesses and victims of crimes committed by the gangs," and "family members. . . of gang members." Id. Juan falls into all three of these risk profiles.

Juan not only openly refused to join the Mara, but he lived his life in contrast to their agenda. As a community activist, he worked to build community autonomy,

strength, economic viability, and political strength through ADESCOs, local community development structures, through work in his church's youth ministry, and build the Salvadoran economy through his dogged pursuit of a University degree. In all of these efforts, Juan actively contravened the Mara's aims to organize Salvadoran political, social, and economic life around the Maras' exclusive control of money, property, and drug routes throughout El Salvador. Further, Juan's refusal to engage—despite great pressure and even threats of death—with the gangs marked him as antithetical Mara's desire to enforce total compliance and authority with their “law,” and a political enemy to be controlled or eliminated.

The instant case fits squarely within Delgado v. Holder, in which the petitioner was originally targeted by the FARC (a guerrilla group in Colombia) for her computer skills, but feared future persecution because of her subsequent refusal to cooperate with them. In Delgado, this Court held that such a betrayal, “when coupled with the government's unwillingness to control the FARC, could well qualify as persecution for an imputed political opinion (opposition to the FARC).” 508 F.3d at 706. Like Delgado, Juan initially refused recruitment attempts by his cousin, Cousin X, because he was politically and morally opposed to Mara activities—extortion, recruitment of minors, murder, and human and drug-trafficking. Juan was determined to build his life and community through peaceful means—community activism, church youth ministries, education and gainful employment. However, like Delgado, Juan's refusals and attempted evasion of the MS's demands that he join their ranks are what prompted his persecution. Punishment and retribution for refusal to join the MS—amplified by his heightened expectation of loyalty to the MS as a member of “La Familia Doe,” —is the

basis for his fear. The motivation for this persecution is not the desire for Juan to *join* the gang, but rather to punish his staunch and repeated refusal to do so.

Juan further expressed his anti-Mara political opinion, and his support for the rule of law, when he went to the police to report the M18's crimes against him. Tab A at 2. As record evidence makes clear, reporting Mara crimes to authorities clearly contravenes the central "law" of the *Mara* in El Salvador: "hear, see, and remain silent" ("*oír, ver, y callar*"). Tab Q at 103. Juan's refusal to remain quiet amounted to public defiance of MS and M18's *de facto* authority, and, instead, an appeal to the rule of law. This open defiance, in the view of the Mara, is a crime punishable by death, and frequently so. In the face of aforementioned "widespread corruption" within the police and "high level of impunity" for crime in El Salvador, hovering around 95% or greater, Juan knew that reporting such a crime might risk his life and that of his family. Tab P at 63; Tab M at 44.

Where the intent to harm an individual may at first have been motivated by a non-persecutory desire—for example, recruitment to the gang—but then shifts to something at odds to the initial desire to harm—i.e. punishment by death for refusal to acquiesce to Mara demands—an adjudicator must engage in a mixed-motive analysis. Since the passage of the REAL ID Act, which requires that a protected ground be "at least one central reason for persecuting the applicant," 8 USC § 1158(b)(1)(B)(i); Archaya v. Holder, 2014 U.S. App. LEXIS 15070, 21, 23-4 (2d Cir. 2014) (IJ committed reversible legal error in finding that Archaya was targeted "based on his employment as a police officer *rather than* his political opinion,"); Rodas Castro, 597 F.3d at 103 (holding that "even if recruitment were *one* reason for Rodas Castro's persecution, that would not be conclusive, for he need show only that his political

opinion, actual or imputed, was “one central reason” for his persecution, not that it was the sole reason for it”); Aliyev v. Mukasey, 549 F.3d 111, 117-18 (2d Cir. 2008) (the BIA, having failed to consider material statements made by Aliyev’s persecutors referencing Aliyev’s ethnicity, failed to engage in the required mixed-motive analysis); Uwais v. Mukasey, 478 F.3d 513, 515 (2d Cir. 2007) (BIA committed significant errors in ignoring undisputed record evidence that Uwais was targeted at least in part on account of her imputed political opinion); Osorio v. INS, 18 F.3d 1017, 1028 (2d Cir. 1994) (illogical to assume that “if a dispute is characterized as economic, it cannot be characterized as political).

Juan does not argue that attempts by the Mara Salvatrucha to persuade him to join the MS constitute persecution, but rather that he fears persecution as a result of his explicit rejection of their efforts and his work to grow community cohesion and power, evidencing a political opinion antithetical to that of the Maras. In short: Juan fears death, not recruitment. Courts have recognized, in the military recruitment context, that such disproportionate “punishment” is indicative of persecutory intent. See Vumi v. Gonzales, 502 F.3d 150, 158 (2d Cir.2007) (holding that “interrogation and punishment” that is “disproportionate to the crime would indicate persecution on grounds of political opinion); see also Long v. Holder, 620 F. 3d 162 (2d. Cir. 2010) (noting that initial non-persecutory acts, such as arrests or detention, may be shown on a case-by-case basis to be simply “pretextual” in order to punish “opposition or resistance to the . . . underlying policy” which would constitute persecution on account of the applicant’s imputed political opinion). While Juan may have initially have been targeted by the Maras—specifically the Mara Salvatrucha—in order to

recruit him, when he repeatedly demonstrated his resistance to the Mara's aims, the Mara's own actions shifted: they did not seek to recruit him, but to kill him. Indeed, a dead recruit is of no value to the military or the Mara.

Juan's political and community activism through ADESCOs, involvement in church youth ministries offering alternatives to at-risk youth who often have no other choice than to seek out the protection offered by the Maras, commitment to obtaining a University education and becoming a meaningful part of Salvadoran civil society are all a part of his political opposition to MS and M18's *de facto* governance and dominance in El Salvador. Further, Juan's persistent refusal to abandon his moral and ethical values and acquiesce to the MS's insistence that he join, as well as his attempt to file a police report against M18's death threats against him, further evince his opposition to the Maras political goals of dominance—defiance that is frequently punished by death. For these reasons, Juan has a well-founded fear of persecution on account of his actual and imputed anti-Mara political opinion.

II. Juan has a well-founded fear of persecution on account of his membership to a particular social group, namely “Family members of Cousin X Doe” or “Family members in *La Familia Doe*”

Based on the same set of facts, nexus can also be found in Juan's membership in the particular social group of his kinship ties of “Family members of Cousin X Doe,” Juan's cousin and local Mara Salvatrucha leader, or alternately phrased “Family members in *La Familia Doe*.” Juan faces persecution on account of his

kinship ties by several parties: the Mara Salvatrucha, the 18th Street (M18), as well as the newly re-activated Sombra Negra—or “Black Shadow”—a heavily-armed paramilitary death squad, which often operates with the participation of current or former Salvadoran security forces officers.

The Board has set out a three-pronged test for determining whether a proposed particular social group (PSG) is cognizable. It must be (1) composed of members who share a common immutable characteristic; (2) the group must be socially distinct within the society in question, and (3) the group must be defined with particularity. See Matter of W-G-R-, 26 I&N Dec. 208, 210-212 (BIA 2014), see also Matter of M-E-V-G-, 26 I&N Dec. 227, 237 (BIA 2014).

In the seminal case Matter of Acosta, the Board of Immigration Appeals noted that the family or kinship ties are a prototypical example of a particular social group of individuals who share a common and immutable characteristic. 19 I&N Dec. 439 (BIA 1987), see also Matter of H-, 21 I&N Dec. 337, 342 (BIA 1996) (Somali sub-clan is a particular social group in part because “membership is a highly recognizable immutable characteristic . . . acquired at birth and . . . inextricably linked to family ties.”) The Courts of Appeals have followed suit. See Crespin-Valladares v. Holder, 632 F.3d 117, 125 (4th Cir. 2011) (family members of witnesses testifying against MS-13 gang members constitutes a particular social group); Ayele v. Holder, 564 F.3d 862, 869-70 (7th Cir. 2009) (“Our circuit recognizes a family as a cognizable social group under the INA, as do our sister circuits.”) (citations omitted); Al-Ghorbani v. Holder, 585 F.3d 980, 995 (6th Cir. 2009) (“a family is a ‘particular

social group’ if it is recognizable as a distinctive subgroup of society.”); than that of the nuclear family.”).

In the instant case, members of the proposed social group of “Family members of Cousin X Doe” or, alternately worded, “Family members in *La Familia Doe*,” meet the standards set forth by the Board for immutability, social distinction, and particularity. The proposed describes Juan’s maternal family members—most of whom share the common surname “Doe,” and live in the same XXX, or small neighborhood, within the Salvadoran city of ABC. In El Salvador, each citizen is issued and often carries on his person a “Unique Identity Document,” (DUI) which bears his full name, his parents’ names, his place of resident or birth, and other biographical information. See Tab BB at 103 (a photocopy of Juan’s *DUI*, which notes his surname as “XYZ Doe,” his place of birth as ABC, and his mother’s surname as “Doe XXX”). These national identity cards serve as visual reminders of one’s common immutable characteristic of family—Juan cannot, for example, omit his surname “Doe” on his DUI or otherwise.

Juan’s family, *Las Does*, is prominent in their XXX, or neighborhood, and most well-known in recent years as the main players in the local faction of the Mara Salvatrucha—so much that Juan’s family surname, *La Familia Doe*, has in recent years become shorthand in their neighborhood for the MS. Tab A at 1-2, see also Tabs Y and Z. As Juan’s paternal cousin, [NAME], notes, the Does “are well-known [MS] gang members of the area” and that everyone in the area is “very scared of them.” Tab Y at 85. Juan’s older brother, [OLDER BRROTHER NAME]—also with the surname Doe—notes that his “cousins, the Does” also attempted to force him to

do their bidding and to join MS, and that he was only able avoid doing so by “leav[ing] the country quickly.” Tab Z at 190. [OLDER BRROTHER NAME] notes that on account of his familial ties, Juan is at great danger for harm by the Doe family, as well as the Mara 18, “who knows that everyone with the last name *Doe* are MS13 gang members” and that Juan may also be harmed by the *Sombra Negra* or the police on account of his familial ties. Id. The facts here satisfy the Board’s test showing that the boundaries of the family are clear, that within the society in question, members of the Cousin X Doe’s family—or, *La Familia Doe*— are viewed as distinct, and that there is a clear benchmark for knowing who is in and who is out—family members, specifically with the surname *Doe*, or those with clear familial relationships to Cousin X Doe, are members.

According to country conditions expert XXX, “in addition to killing with impunity,” Maras “often check the ID cards of strangers in their neighborhoods, and deny access to those they don’t like.” Tab K at 34. In Juan’s encounter with the M18, while living with his paternal uncle—not part of the Doe family—M18 interrogated Juan about who he was and where he had come from. Tab A at 2. Had they found Juan’s DUI—which at the time was buried in the bag he was carrying—they would have clearly seen that he was a member of *La Familia Doe*, or Doe family, and that he was from another area of ABC. Tab BB at 203-204. If they had discovered that Juan was a *Doe*, it is likely that these heavily-armed M18 members would have executed Juan—as they told him they would do if they ever saw him again—in order to punish him for his familial ties to powerful members of a rival gang. Notably, in the Mara wars for power and territory in ABC, a number of Juan’s cousins in *La*

Familia Doe, including Cousin X and, more recently, in [MONTH] 2016, another cousin, [ANOTHER COUSIN NAME], were murdered—in both cases by “rival gang members.” Tab D at 11 and CC at 205.

Juan also fears future persecution on account of family ties by the *Mara Salvatrucha*. As described in detail, Cousin X and members of the MS claimed that Juan was obligated to become a member of the *Mara Salvatrucha* on account of his family ties. Juan does not claim that this recruitment constitutes persecution. However, when Juan repeatedly refused to join the MS, and relocated to live with his paternal uncle in an attempt to avoid recruitment—the MS then attempted to kill Juan in order to punish his refusal. Tab A at 2. Juan’s family membership is inextricably linked to the heightened expectation of loyalty that his refusal has violated. See Hernandez-Avalos v. Lynch, 784 F.3d 944, 950 (4th Cir 2015) (noting that when one is chosen as the victim because of one’s “family connection” to an identifiable family member, this is sufficient to establish nexus because it is why he “and not another person, was threatened with death” by the Mara).

Finally, Juan fears future persecution by the *Sombra Negra* or similar paramilitary death squads who actively seek out suspected gang members and family members of gang members for summary execution. Ample country condition evidence corroborates the re-emergence of the *Sombra Negra*—originally a paramilitary death squad that emerged after the Peace Accords in the 1990s—with strong ties to current and past Salvadoran military and police. See, generally, Tab S at 143. The *Sombra Negra* boasts of their kills online, posting gruesome photos of dead bodies of gang “rats,” male and female, and actively solicits addresses of any

suspected gang members or families of gang members on social media. See Tab S at 147-154. This is no small presence; the Anti-Mara Sombra Negra Facebook page has over 7,500 “likes.” Id. The page’s “About” section ominously and directly notes that “the End of the gangs has arrived. Leave a message with the address where we can find gang members. Thank you.” Id. Indeed, on a popular ABC-city themed Facebook page “Only Here in ABC,” a photo in [MONTH] 2014 was posted, asking XXX “are you in agreement with the return of the Sombra Negra?” Tab S at 156. It garnered 454 “likes” and 30 “comments,” including enthusiastic responses such as “yes they should come back so we can be done with all of these fucking gang members” and “it’s about time, I hope that this is for real that they’re coming back.” Id. The violence of the *Sombra Negra* has been so pronounced—and with such clear participation of the Salvadoran security state—that the Salvadoran Attorney General of Human Rights, [DIRECTOR NAME], has felt he has to speak out to “denounce the appearance of these death squads and their connection with the police.” Tab S at 143. Morales laments that the “state cannot be the same or worse than criminals” and notes that “it is worrying that there are cases we see where murders have been done by extralegal actors.” Id.

It takes little imagination to appreciate the risk that the *Sombra Negra*—active across El Salvador—presents to Juan, a known family member of the powerful Mara Salvatrucha family, *La Familia Doe*. A simple message, sent by anyone with a vendetta—M18, the MS, or anyone who seeks to punish Juan—could result in Juan’s imminent death at the hands of the *Sombra Negra*. Salvadoran police—increasingly militarized and given the green light to kill suspected gang members—are likely to be

involved or to collaborate with the *Sombra Negra* and other paramilitary forces. See Tab T (evidence documenting the sharp increase in extralegal assassinations of suspected gang members by Salvadoran police). Given that the *Sombra Negra* operates with varying degrees of direct State involvement, and at a minimum, clear acquiescence of the Salvadoran state, there would be no possibility of availing himself of the protection of the State, who itself condones or participates in such vigilante violence. Id. Thus, Juan has a well-founded future fear of persecution—namely death—on account of his immutable familial ties by the *Sombra Negra*.

III. Juan is eligible for protection under the Convention Against Torture

Juan is eligible for protection under the Convention against Torture if he can show that it is more likely than not that he would be tortured if removed to El Salvador. Juan’s credible testimony alone may be sufficient to satisfy this burden. 8 C.F.R. § 208.16(c)(2). There is no nexus requirement for CAT relief. “Torture” is “an extreme form of cruel and inhuman treatment,” defined, in part, as the intentional infliction of severe pain or suffering by, or at the instigation of, or with the consent or acquiescence of a public official. 8 C.F.R. §§ 1208.18(a)(1)-(2); see also Pierre v. Gonzales, 502 F.3d 109, 121 (2d Cir. 2007). There is little doubt that extralegal assassination—murder—would fall within the definition of “torture” defined by 8 C.F.R. § 208.18(a)(1). No fewer than two groups—MS and M18—have specifically promised to kill Juan if they see him again. See Tab A at 1-2. Two others—the *Sombra Negra* death squads and the Salvadoran State itself—regularly practice

extrajudicial assassination and summary execution of suspected gang members. See, generally, Tabs S, T.

To qualify for protection under the Convention against Torture, Juan will have to prove that such torture would occur with the acquiescence of a public official. This requires that a public official has awareness of or would remain “willfully blind” to the activity constituting torture prior to its commission, and thereafter breach his or her legal responsibility to intervene to prevent such activity. 8 C.F.R. § 1208.18(a)(7); Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004). The Second Circuit, in which this case arises, uses a “willful blindness” standard to establish “acquiescence.” Delgado v. Mukasey, 508 F.3d 702, 708-709 (2d Cir. 2007)(reversing BIA’s denial of CAT where it implied a standard different than “willful blindness” and ignored testimony and human rights reports suggesting acquiescence by the government). To qualify for CAT protection, Juan also must establish that the torture will be carried out “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” 8 C.F.R. § 208.18(a)(1). “Acquiescence” requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.” 8 C.F.R. § 208.18(a)(7)

Record evidence regarding the Maras, discussed at length above and particularly in light of the government-brokered truce, show that they often exercise de facto State power in El Salvador, and operate with impunity. Further, ample record evidence shows that that the Sombra Negra (Black Shadow) and the Salvadoran state itself currently participates in extralegal assassinations of imputed gang members, as

well as members of gang members' families. See generally Tabs S and T. Given the strong public support of extralegal punishment of the Maras, who presently torment the Salvadoran civilian population, a recent 2016 Associate Press article regarding Salvadoran police and soldiers using "excessive force and execut[ing] presumed street gang members" is particularly notable; reporting on human rights violations against gang members or even suspected gang members—as is manifest in public support for extralegal death squad murders of suspected gang members—is highly underreported in El Salvador. Tab T at 164.

Juan has submitted sufficient evidence of police and government involvement with the Mara Salvatrucha and M-18, which rises to the level of acquiescence to Juan's torture. Further, Juan has submitted evidence that the Salvadoran government itself participates and condones torture in the form of extralegal executions of suspected gang members. The Salvadoran government's acquiescence to the criminal activities of the Maras and paramilitary death squads such as the *Sombra Negra*, as well as its own participation in torture, satisfies the "willful blindness" standard of acquiescence for protection under the Convention Against Torture set forward by the Second Circuit in Delgado. See also De La Rosa v. Holder, 598 F.3d 103, 107 (2d Cir. 2010) (noting that "where a government contains officials that would be complicit in torture, and that government, on the whole, is admittedly incapable of actually preventing that torture" that acquiescence should be found even if some government officials would not be complicit in the applicant's torture). Accordingly, Juan merits protection under the Convention Against Torture.

IV. Conclusion

For the above reasons, this Court should grant Juan asylum based on his well-founded fear of persecution on account of his imputed and actual political opinion or his membership in the particular social group of namely “Family members of Cousin X Doe” or “Family members in *La Familia Doe*.”

In the alternative, this court should find that Juan has shown that it is more likely than not that he would be subjected to torture with the acquiescence of the government should he be removed to El Salvador and granted relief under the Convention Against Torture.

Respectfully submitted,

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Counsel for the Respondent

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Juan E. XYZ-Doe
A xxx-xxx-xxx

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On ____ [DATE] 2016 __, I, [Attorney Name], served a copy of this pre-hearing statement to the Office of Chief Counsel at the following address:

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Date

____ [Attorney Name] _____
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