UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No._____

Alien Registration No.: A [redacted]

_____

[redacted]**,**

Petitioner,

v.

ERIC HOLDER, Attorney General,

Respondent.

_____

EMERGENCY MOTION FOR STAY OF REMOVAL PENDING RESOLUTION OF PETITION FOR REVIEW

CUSTODY STATUS: DETAINED

_____

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in Fifth Circuit Rule 28.2.1, have an interest in the outcome of this case:

[redacted]

American Gateways (Stephanie Taylor)

Beck Redden LLP (Gretchen Sween)

Immigrant Rights Clinic, Rutgers School of Law–Newark (Anjum Gupta)

Department of Homeland Security

Board of Immigration Appeals

Immigration Judge Anibal D. Martinez

ATTORNEY OF RECORD:

/s/ Gretchen S. Sween
Gretchen S. Sween
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NATURE OF THE EMERGENCY AND RELIEF REQUESTED

Petitioner [redacted] (Ms. M[redacted]), who fled Nicaragua to escape extreme domestic violence, has filed a timely Petition for Review of a decision by the Board of Immigration Appeals (BIA), which dismissed her appeal of an Immigration Judge's (IJ's) decision. Ms. M[redacted] files this emergency motion for a stay of removal, under Fed. R. App. P. 27 and 5th Cir. R. 27.3.1.

Ms. M[redacted] has no criminal history and has been in Immigration and Customs Enforcement (ICE) custody since her arrival earlier this year. She is subject to immediate removal. *See* 8 C.F.R. § 1241.1(a) (stating that an order of removal becomes final upon dismissal of an appeal by the BIA); *see also* **TAB A** (BIA order dismissing appeal dated Dec. 9, 2014).[1] In response to repeated requests for a specific deportation date, ICE stated: "**ICE will not disclose a pending removal date for security reasons. In your filing I would suggest you use imminent as the removal date.**" *See* **TAB D** (emphasis added); *see also* Certificate of Conference.

This emergency motion is being filed on December 22, 2014 as soon as practicable after Ms. M[redacted] obtained *pro bono* appellate counsel who obtained the information required by 5th Cir. R. 27.3.1 that ICE was willing to provide.

[1] The Administrative Record in this case has not yet been filed. Therefore, citations in this motion are to: TAB A (BIA's order); TAB B (Record Excerpts "RE"); TAB C (DHS Brief in *Matter of LR* 2009).

Because her deportation is imminent, she entreats the Court to act immediately in the interest of justice. She satisfies all factors requisite to granting a stay.

STATEMENT OF FACTS AND OF THE CASE

I. THE FACTS PARTICULAR TO MS. M[redacted]S CASE SHOW SHE WILL LIKELY PREVAIL ON THE MERITS.[2]

Ms. M[redacted] is a native and citizen of Nicaragua. She is now thirty-eight years old. RE133. Five years ago, she began a domestic relationship with [redacted]. RE137; RE159. Three years into the relationship, Ms. [redacted] tried to end it and her partner responded with a sustained, relentless campaign of violence. He beat her at least weekly. He would often light into her immediately upon returning home—punching her, cursing at her, calling her "whore," and threatening to kill her. If he did not find her at home, he went to her workplace to attack her there. He stood in the street outside their home, shouting curses at her in front of neighbors. He threatened her with knives. He threw a rock at her head. He blackened her eyes. He kicked her so she bled so extensively she believes she had a miscarriage. RE159-160; RE164.

Ms. M[redacted] sought police protection, but thereafter the abuse only worsened. In September 2013, she locked him out of their house and put "a bond

[2] Because the IJ found her credible, the facts as she asserted them must be taken as true. *See, e.g.*, *Matter of R-A-*, 22 I&N Dec. 906, 942 (A.G. 2001; BIA 1999) ("As the respondent has been found credible by the Immigration Judge . . . her account is to be taken as true.").

on him"[3] with the police. RE160. But [redacted]'s harassment and assaults continued unabated. He stalked her, waited outside her workplace, then, armed with a machete, pounced—threatening to "cut [her] in two. *Id.*

The second time he attacked with his machete Ms. M[redacted] only survived because his brother, who had followed [redacted] on that occasion, intervened. *Id.*

Feeling utterly unconstrained by the police protection that Ms. M[redacted] had sought, [redacted] attacked her again in late January 2014. Arriving home from work, Ms. M[redacted] found [redacted] waiting, armed again with his machete. [redacted] told her: "This is how I wanted to catch you, this is it." [redacted] swung the machete, striking her hard with the blunt portion of the machete, bruising and terrifying her. [redacted] barely managed to escape into her house; but [redacted] stayed outside, cursing and vowing to kill her that same night. Eventually, [redacted] left, but returned a few hours later at 2 a.m. Ms. M[redacted] fled to a police station. The police then went to her house, where they found [redacted] on the roof, armed with the machete, trying to gain entry. Even though he was arrested because he was clearly attempting a home invasion armed with a deadly weapon, he was soon released. Neither the police nor any other government authority gave Ms. [redacted] any notice of the release. She only learned from her family that her abuser

[3] Neither the IJ nor the Asylum Officer clarified what putting "a bond on him" meant. She may have been referring to a restraining order, as the U.S. Department of State Human Rights Report on Nicaragua states that Nicaraguan law provides for the issuance of restraining orders; however the enforcement of the orders is tenuous and they are not effective. RE117.

was again on the loose and stalking her—because he showed up at her house within hours of his release. A member of her family phoned her at work saying: "He is here, he is out and coming to get you." Fearing for her life, Ms. M did not return home. She left for the United States the next day. To escape, Ms. passed through Honduras, El Salvador, Guatemala, and Mexico. ***pursued her all the way north to Guatemala*** before she evaded him. RE161; RE085-87.

II. FACTS ABOUT VIOLENCE AGAINST WOMEN IN NICARAGUA SHOW MS. M WILL LIKELY PREVAIL ON THE MERITS.

Violence against women and widespread corruption in the police and courts are two of Nicaragua's three "principal human rights abuses." RE096. Nicaraguan laws theoretically protect women against gender-based violence, but the government's failure to enforce the laws effectively has led to widespread impunity for perpetrators of violence against women. RE116-117.

In 2012, Nicaragua's National Police reported that only about 17% of domestic violence cases went to court. Of the cases filed in 2012, 62% were ruled petty crimes, even when the life of the victim was in danger. The Women's Network Against Violence, a non-governmental organization which the U.S. State Department cites in its 2013 Human Rights Report, noted that more than 60% of crimes against Nicaraguan women went unpunished in 2012. *Id.*

The State Department cites examples of systemic impunity for violence against women, including the case of a middle-class woman found shot to death in her home in 2010 following a domestic dispute with her politically-connected husband. Women's organizations called the case "a prime example of judicial impunity in gender-based violence cases" after the government failed to mount official investigations or make arrests for three years. The case received so much attention that the Inter-American Commission of Human Rights took it up in March 2013. RE118.

As another example of the prevalence of violence against women and girls in Nicaragua, the State Department cites the case of five National Police officers and a private security guard assigned to President Daniel Ortega's own personal security team accused of the 2012 kidnapping and rape of a 12-year old girl with mental disabilities. Two of the men faced no charges and one of the National Police officers even kept his job. In this atmosphere of impunity for accused perpetrators, reporters observed an ***increase*** in gender-based violence. In 2013 the rate of reported violence against women—including murders, rapes, beatings and maimings—had ***tripled*** during the previous seven years. Although Nicaraguan law provides for the issuance of restraining orders, enforcement is tenuous and such orders are not perceived to be effective. Femicide, including the murder of women by their current and former intimate partners, was a factor that led Nicaragua's National Assembly to pass Law 779, which criminalizes domestic violence. Law

779, however, has been largely ineffective to date in altering the deeply-rooted tolerance in Nicaraguan society for violence against women and impunity for its perpetrators. RE116-117.

III. The PROCEDURAL HISTORY SHOWS MS. M[redacted] WILL LIKELY PREVAIL ON THE MERITS.

Ms. M[redacted] entered the United States without inspection and was detained by the Department of Homeland Security (DHS) on March 19, 2014. She was referred to an Asylum Officer who conducted a credible fear interview. The officer found a significant possibility that Ms. M[redacted]'s fear of persecution was on account of her membership in a particular social group, namely, "women in domestic relationships that they are unable to leave," and that she would be found credible in a full asylum hearing. RE155-156.

Ms. M[redacted] appeared *pro se* before the IJ via video teleconference from the [redacted] detention facility. RE038. After preliminary group hearings, she submitted an Application for Asylum and for Withholding of Removal, and the same day the IJ set her merits hearing for July 7, 2014. RE133. On July 1, 2014, Ms. M[redacted] filed a motion for a three-week continuance to allow time for supporting evidence to arrive from Nicaragua. RE094. But the IJ pushed forward with the merits hearing, just 18 days after Ms. M[redacted] had filed for asylum. RE074-76. Ms. M[redacted] again appeared *pro se* via video teleconference. *Id.* The IJ, after briefly questioning Ms. M[redacted] through a Spanish language interpreter, issued an oral

decision and order. RE007. He found that Ms. M had "testified credibly in that her testimony was specific, consistent, and detailed." RE013. But he denied her Motion for Continuance, expressing doubt that any additional evidence Ms. M might obtain "would, you know, be the pivotal factor or deciding factor in her case," because her testimony had been sufficient to establish her credibility. *Id.*; RE077. Then, the IJ stated that Ms. M had failed to meet her burden of proving persecution *on account of* a protected ground—having just denied her a short continuance to introduce evidence to support that precise element. RE013.

In his oral decision, the IJ rejected the cognizability of Ms. M's proposed particular social group as "circular," an assessment contrary to current BIA law. RE014. The IJ also found that that the harm Ms. M suffered was not "by an entity for which the government was unable or unwilling to offer protection." RE013-15.

Ms. M timely filed a Notice of Appeal with the BIA. RE021-22. Thereafter, Ms. M obtained *pro bono* counsel at the Rutgers School of Law Immigrant Rights Clinic through the Catholic Legal Immigration Network. Over a year later, during the law school final-exam period, the BIA issued a two-page decision dismissing Ms. M's appeal.[4] Ms. M, whose petition for review is now pending before this Court, is subject to deportation ***within days*** as ICE referred her to its travel department upon learning she intended to appeal.

[4] Because of the timing, Ms. M had to scramble to find new counsel to bring an appeal as the threat of deportation was looming.

LEGAL STANDARD

Granting a motion for stay of removal requires finding four factors: (1) her petition is likely to succeed; (2) the applicant will be irreparably injured absent a stay; (3) issuance of the stay will not substantially injure the other parties interested in the proceeding; and (4) the public interest favors a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009). *Nken* explains that the first two factors are "most critical." 556 U.S. at 434. The last two factors merge because the government is the respondent. *Id.* at 435. While "not a matter of right," courts may grant stays in the "exercise of judicial discretion" based on "the circumstances of the particular case." *Id.* at 433 (internal quotations and citation omitted).

ARGUMENT

Ms. M[redacted] deserves a stay because (1) success on the merits of her petition for review is likely; (2) she will be irreparably injured absent a stay; and (3)-(4) the issuance of the stay will not injure the Government but will instead serve the public interest.

I. MS. M[redacted] IS LIKELY TO SUCCEED ON THE MERITS.

Ms. M[redacted]'s petition is likely to succeed. First, the BIA implicitly admitted that the IJ made a foundational legal error in rejecting her particular social group as "vague and circular," a conclusion at odds with the BIA's own recent decision in *Matter of A-R-C-G-*, 26 I & N Dec. 388 (BIA 2014). Then, without explanation, the BIA stated that it would dismiss the appeal anyway because (1) it agreed with

the IJ that Ms. M[redacted]'s persecutor did not harm her *on account of* her membership in that group; and (2) that she had not shown that the government was unable or unwilling to protect her because the persecutor had been "detained and arrested numerous times for his abusive treatment" of Ms. M[redacted], which is factually incorrect. **TAB A** at 2. The BIA then erroneously concluded that it need not consider the additional issues raised in her appeal. *Id.* For instance, the BIA made no reference to the baseless denial of her Motion for Continuance, which prevented her from introducing evidence from Nicaragua relevant to the government's inability/unwillingness to protect her. Each of the BIA's proffered reasons for dismissing Ms. M[redacted]'s appeal is wrong as a matter of law.

A. BIA erred in finding Ms. M[redacted]'s was not persecuted "on account of" her membership in a particular social group.

This case should be controlled by the BIA's recent decision in *Matter of A-R-C-G-*, 26 I & N Dec. 388, 388-89 (BIA 2014), holding that "married women in Guatemala who are unable to leave their relationship," constitutes a cognizable particular social group.[5] In *A-R-C-G-* the BIA expressly rejected the very argument that the IJ made here and then the BIA rubberstamped: that the harm Ms. M[redacted] sustained was the result of "criminal acts, not persecution." *Id.* at 390. That is, the IJ and then the BIA found that, because the man who persecuted Ms. M[redacted] was

[5] Although *Matter of A-R-C-G-* was decided shortly after the IJ made his oral decision in this case, as the BIA noted in *A-R-C-G-* itself, the latter had been presaged by developments dating back to 2001. *See Matter of A-R-C-G-*, 26 I&N Dec. at 391-94.

also a criminal/drug-user, this means that his persecution of her was not "on account of" her domestic relationship with him. This argument is facially untenable. In *A-R-C-G-* itself the DHS conceded the nexus requirement under virtually identical circumstances. *See id.* at 390, 392.

Ms. M[redacted] established that she was persecuted on account of her membership in a particular social group. *See* INA §§ 101(a)(42)(A), 208(a). That is, she established that her abusive domestic partner was motivated to harm her because she is a Nicaraguan woman bound to him in an intimate relationship that she was unable to leave. *See, e.g.*, *Matter of A-R-C-G-*, 26 I & N Dec. 388 (BIA 2014); *Matter of Kasinga*, 21 I&N Dec. 357, 366 (BIA 1996); *Matter of H-*, 21 I&N Dec. 337, 343-44 (BIA 1996).

Oddly, the IJ and BIA penalized Ms. M[redacted] because her persecutor had also perpetrated other criminal acts. But most persecutors are criminals, and their criminal status does not negate the fact that they persecuted the asylum-seeker on account of a protected ground. Years before the BIA decided *A-R-C-G-*, DHS itself acknowledged: that domestic abusers target their female partners because they believe that the woman occupies a subordinate position in the relationship, that this belief is bolstered in societies that allow such behavior, and that the asylum-seeker's domestic-relationship status can be immutable where leaving the abusive relationship is hindered by "economic, social, physical or other constraints." *See* **TAB C** at 14-16, 20-21.

Ms. M[redacted]'s testimony, that the IJ found credible, indicates that her domestic partner targeted her ***because of*** their intimate relationship. He only began his relentless campaign of abuse when she tried to leave him, suggesting a belief that he owned her. She tried and failed to escape from him. Her inability to escape further motivated [redacted] to harm her because he knew he could do so with impunity, regardless of any action she might take. His assaults were public and extreme. He repeatedly stalked and attacked her with a machete, threatening to kill her and chop her up. The police did nothing meaningful to restrain him.

[redacted]'s confidence in flouting the authorities is enabled by Nicaraguan institutions and cultural norms such that perpetrators of domestic violence are rarely brought to justice and, even when convicted, do not generally receive meaningful punishment. *See* RE116-118. The uncontroverted evidence shows that [redacted] believed he had the authority to abuse and control Ms. M[redacted] "on account of" her domestic relationship with him.

B. BIA erred in concluding that Ms. M[redacted] failed to show the government was unable or unwilling to control her persecutor.

To qualify for asylum, an applicant must show that the harm she suffered was inflicted "by the Government, or by forces that the Government is unable or unwilling to control." *Matter of A-M-*, 23 I&N Dec. 737, 741 (BIA 2005). The IJ erred in concluding that Ms. M[redacted] failed to show that the Nicaraguan government had been unable or unwilling to control [redacted]. RE014. The IJ's

error rests on two fallacious observations: (1) the view that "measures taken by the government to address" domestic violence suggest that the government was not unable or unwilling to control [redacted], *id.*[6]; and (2) that [redacted]'s arrests somehow show the government's resolve and capacity to protect Ms. M[redacted]—even while acknowledging that all but one of those arrests were for crimes unrelated to his assaults of Ms. M[redacted]. *Id.* The BIA merely rubberstamped without discussing the IJ's two fallacious premises.

First, the mere fact that a government has official policies in place ostensibly to control private persecutors does not mean that it in fact provides effective protection from their abuses or that it is able or willing to control the persecutors. *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 26 (BIA 1998). As in *O-Z & I-Z-* (involving Ukrainian laws v. legal norms), the State Department's Human Rights Report expressly notes that while Nicaragua has domestic violence laws that ***theoretically*** protect women, "the government failed to enforce the law effectively…leading to widespread impunity and increased violence." RE116.

Second, an arrest, by itself, does not show that the government is willing and able to control a particular persecutor. The Fifth Circuit has not yet addressed this precise legal question, but other circuit courts have. *See Chitay–Pirir v. INS*, 169 F.3d 1079, 1081 (7th Cir. 1999) (holding that arrests by police, without more, are

[6] The IJ cited the Nicaragua Country Report at 22-23. Those pages mention Nicaraguan laws penalizing spousal rape and other domestic abuse. However, those pages also describe the ineffectiveness of such laws, something the IJ did not discuss.

not sufficient to rebut claims that the government is unable or unwilling to stop persecutors); *Deloso v. Ashcroft*, 393 F.3d 858, 868 (9th Cir. 2005) (same).

Ms. M[redacted] has demonstrated that the Nicaraguan authorities were unable or unwilling to protect her under circumstances similar to those in *Chitay–Pirir* and *Deloso*. RE012. She explained that [redacted] had been arrested numerous times for ***other*** bad acts, but the Nicaraguan police had always released him. She sought protection twice after his assaults became life-threatening and only once, when he was caught in the act, was he detained. Thus, the BIA's conclusory assertion that [redacted] was "detained and arrested numerous times" for abusing Ms. M[redacted] is demonstrably wrong. **TAB A** at 2.

The first request for police support, in September 2013, followed weeks of violence and threats. If authorities took any action at all to protect Ms. M[redacted] on that occasion, it was entirely ineffective. After she went to the police, [redacted] escalated the violence by invading Ms. M[redacted]'s home armed with a machete. Only the intervention of [redacted]'s brother, not government authorities, saved Ms. M[redacted]. Thereafter, [redacted] stalked her with his machete at her workplace, threatening to "cut [her] in two." RE158-162.

Ms. M[redacted] lodged her second request for police protection before dawn on January 25, 2014, hours after [redacted] again struck her with his machete, and "said he would kill [her] that night." RE161. Police detained [redacted] after finding him on the roof of her home, trying to break in. *Id.* It is unclear whether [redacted]

was charged with any crime; in any event, he, like the alleged persecutors in *Chitay–Pirir* and *Deloso*, was soon free—and without any notice to Ms. M. *Id.* Within hours of his release, was again waiting outside Ms. M's home and, like the persecutors in *Chitay–Pirir* and *Deloso*, was poised to harm her again. *Id.* Only because she was at work and her family called to warn her in time was she able to flee for her life—escaping the country the very next day, with at her heels. *Id.*; RE087. Ms. M reasonably concluded that , his fury stoked by a brief detention, intended to make good on his threats and that she would be murdered before Nicaraguan authorities would intervene. RE158-162.

C. BIA erred in failing to consider the other issues raised on appeal including the IJ's flagrant abuse of discretion in denying Ms. M a brief continuance.

For no legitimate reason, the IJ refused to continue the removal hearing to permit a detained, *pro se*, non-English-speaking asylum-seeker to submit evidence being sent to her from Nicaragua. Indeed, when Ms. M broke down sobbing during the hearing, the IJ seemed eager to get through the proceeding as quickly as possible, asking few questions and then taking a "ten minute" break before delivering his oral decision. RE082-89. Refusing a continuance violated Ms. M's right to due process and prejudiced her ability to support her claims.

Noncitizens have statutory, regulatory, and constitutional rights to present all material evidence at impartial hearings. 8 U.S.C. § 1229a(b)(4); 8 C.F.R. §

1240.1(c); *Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 538 (7th Cir. 2005) (holding due process requires a court to afford an applicant a reasonable opportunity to present evidence on her behalf); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1039 (5th Cir. 1982) (holding that the Government violates the fundamental fairness that is the essence of due process when it creates a right to petition and then makes the exercise of that right impossible).

A respondent in a removal proceeding is entitled to a continuance for good cause. *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) (citing 8 C.F.R. § 1003.29 (2008)). Ms. M[redacted], operating *pro se* within the constraints imposed by detention, filed for just one continuance of a mere three weeks[7] for highly relevant evidence from the police, forensic evidence, and medical evidence she had requested from Nicaragua. RE094; RE076. The IJ denied the request, stating that good cause had not been shown because Ms. M[redacted]'s "testimony alone suffices to establish she was the victim of domestic violence," thus additional evidence was "not necessary in light of [her] testimony." RE013. However, in the very next sentence, he found that she had "failed to meet her burden of proof." *Id.* The evidence he did not allow her to present would have further fortified her claims.

The IJ did not ask Ms. M[redacted] about the exact nature of the evidence she was awaiting. RE076. And the BIA ignored the detailed affidavit that Ms. M[redacted] submitted with her appeal describing that evidence. *See* **TAB A**. That evidence

[7] Her merits hearing was on July 7, 2014; she had requested a continuance until July 30, 2014.

would have illuminated, *inter alia*, the nature of the ineffectual "bond" that she obtained against [redacted], whether he was formally charged after his arrest during the January 25 home invasion, and on what basis he was released.[8] The IJ also denied Ms. M[redacted] the opportunity to present a more complete picture of the widespread tolerance of domestic abuse in Nicaragua, including evidence of the murder of a co-worker at the hands of her co-worker's husband, of the prevalence and difficulty of leaving common-law marriages in Nicaragua, of the government's failure to protect her, of her persecutor's motivations, and of his ties to police.

Moreover, the IJ's decision shows that he denied the continuance based on the legally erroneous belief that her particular social group is not cognizable. In light of *A-R-C-G-*, Ms. M[redacted] is plainly a member of a cognizable social group. If given the opportunity, she would have presented further evidence that she was persecuted on account of her membership in that particular social group and that the government is unwilling and unable to protect members of that group.

The IJ's denial of her continuance prejudiced her, and the BIA plainly erred in refusing to address this clear abuse of discretion recounted in her appeal.

For each of these reasons, Ms. M[redacted] is likely to succeed on the merits.

II. MS. M[redacted] WILL BE IRREPARABLY INJURED ABSENT A STAY.

Forced deportation to Nicaragua would irreparably harm Ms. M[redacted]. A showing of irreparable harm is "dependent upon the circumstances of the particular

[8] Ms. M[redacted] submitted a detailed affidavit in support of her appeal to the BIA describing the evidence. The affidavit is in the Administrative Record, which has not yet been produced.

case." *Nken*, 556 U.S. at 433 (internal quotations and citation omitted). In Nicaragua, Ms. M[redacted] will be subjected to further persecution and likely killed by an abuser who has demonstrated his commitment to harming her. He was even willing to hound her all the way from Nicaragua to Guatemala. RE085.

Additionally, if Ms. M[redacted] is deported now, an eventual victory on the merits of her petition will ring hollow because ICE has no reliable, fair, or binding policy to ensure her return to the United States if this Court grants her petition for review. While the Supreme Court in *Nken* stated that the burden of wrongful removal is "serious" but not "categorically irreparable," that statement was based on the Solicitor General's express assurance that individuals "who prevail can be afforded effective relief by facilitation of their return along with restoration of the immigration status they had upon removal." 566 U.S. at 435 (citing Brief for Respondent). Subsequent developments, however, showed that the Supreme Court had been misled. *See, e.g.*, *Nat'l Imm. Project v. U.S. Dep't of Homeland Sec.*, 842 F. Supp. 2d 720, 722 (S.D.N.Y. 2012) ("When the Solicitor General of the United States makes a representation to the Supreme Court, trustworthiness is presumed. Here, however, . . . it seems the Government's lawyers were engaged in a bit of a shuffle"). Internal Government e-mails produced after *Nken* show there is no inconsistent "policy and practice" of returning individuals who prevail on a petition for review. *Id.* at 726-30.

Were the Government to take the position that some new policy, which has not yet been tested and is not binding, now obviates the need for a stay of removal to prevent irreparable harm, that position should be unavailing. *See United States v. W.T. Grant*, 345 U.S. 629, 632 n.5 (1953) (noting courts should "beware of efforts to defeat injunctive relief by protestations of repentance and reform"). Any new policy promising to effectuate actual returns would require coordination among several agencies, any one of which could effectively defeat the promise of return. Considering the current dissention over recent executive-level changes in other immigration policies, it is virtually inconceivable that yet more new policy that ***might*** pertain to this case ***might*** be forthcoming. *See also* 8 U.S.C. § 1229a(b)(5) (permitting IJs to administratively close proceedings or order removal *in absentia*).

In short, if Ms. M[redacted] is removed before her petition for review is adjudicated, she faces grave danger; even if she survives, no policy guarantees that ICE would facilitate her return, that the border patrol would permit her to enter the country, that she could afford to return, or that she could even obtain the requisite travel documentation from Nicaraguan authorities required to return. Because a pathway to return is a chimera, and because the irreparable harm she faces is plainly evidenced by the record of past persecution and State Department reports, she satisfies the second factor requisite to a stay.

III. THE ISSUANCE OF A STAY WILL NOT SUBSTANTIALLY INJURE RESPONDENT NOR BE CONTRARY TO THE PUBLIC INTEREST.

Both the third and fourth factors weigh decisively in Ms. M[redacted]'s favor. *Nken* explains that these last two factors, injury to other parties in the litigation and the public interest, merge in immigration cases because the Government is both the opposing litigant and the public's representative. 556 U.S. at 435. The Court further noted that the interests of the Government and the public in the "prompt execution of removal orders" is only heightened where "'the alien is particularly dangerous'" or "has substantially prolonged his stay by abusing the process provided to him." *Id.* at 436 (citations omitted).

The Government has no particular interest in Ms. M[redacted]'s removal. She has no criminal history and poses no threat to the community. She is a 38-year-old woman who is simply trying to avoid a violent death in Nicaragua. *Id.* Further, *Nken* recognizes a "public interest in preventing aliens from being wrongfully removed," which must weigh heavily in the Court's consideration. 566 U.S. at 436. Because the Government cannot make any particularized showing that granting a stay of removal would substantially injure the Government, and because the Government has no interest in enabling the violation of domestic and international human rights laws, granting a stay would serve the public interest.

CONCLUSION

For the foregoing reasons, Ms. M[redacted] respectfully asks that the Court grant this emergency motion for a stay of removal pending resolution of her petition for review.

Dated: December 22, 2014

Respectfully submitted,

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