[redacted]

[redacted] Asylum Office
[redacted]

Re: Request for Reconsideration and Re-Interview in the Alternative
[redacted], A# [redacted]
[redacted], A# [redacted]
[redacted], A# [redacted]

INDEX OF EXHIBITS

Ex. A Health Promoters Ask To Clarify Murder of Colleague
Ex. B [redacted]
Ex. C "Family as a Social Construct in El Salvador, Honduras, And Guatemala: Visibility and Vulnerability Of Family Members Of Individuals Targeted By Organized Criminal Groups"

Dear Officer,

Ms. [redacted] (A# [redacted]) and her minor children, [redacted] (A# [redacted] and [redacted] (A# [redacted]) ("Applicants") request reconsideration of their negative credible fear determinations, and re-interview in the alternative. Applicants were issued negative credible fear determinations on [redacted]. These negative credible fear determinations were then affirmed by an immigration judge on [redacted]

USCIS has the authority to reconsider its own credible fear determination. USCIS's internal guidance prescribes that re-interviews shall occur when USCIS "determines that the alien has made a reasonable claim that compelling new information concerning the case exists and should be considered."[1] This request for reconsideration is based upon:

(1) Prejudicial procedural and legal errors impacting the fairness and legal sufficiency of Ms. [redacted] credible fear process; and

(2) Recent and intervening federal litigation that has invalidated the Safe Third Country Transit Bar previously found at 8 C.F.R. 208.13(c)(4), which compels reconsideration of Applicants' claims.

STATEMENT OF FACTS

Ms. [redacted] fled El Salvador because she and her daughters were threatened with death and rape by the 18th Street gang. *See credible fear record, generally*. Upon arriving at the U.S. border to seek asylum, Ms. [redacted] and her children were detained by Border Patrol and transferred to the [redacted] Residential Center, where they underwent a credible fear interview before the Asylum Office.

Ms. [redacted] was interviewed by an Asylum Officer on [redacted]. She was not reoriented 72 hours prior to her interview and did not receive notice of her impending interview until the night before it took place. At her interview, she testified that she had been threatened by the 18 gang. *See CFI record* at 3. She stated that she worked as a community health promoter, that the 18 and MS-13 gangs controlled the cantones in which she worked, and that the gang members "don't allow me to work they are always on top of me." *Id.* She stated the gang members had informed her that they knew "everything" about her and her children and that they extorted money from her by threatening to hurt her daughters if she did not pay. *Id.* at 3-4. She stated that she feared that the gang would rape her daughters. *Id.* at 4. Ms. [redacted] testified that she had a good relationship with the mayor in her town; however, she did not believe the authorities would protect her from the gang because she had already tried to report a gang shooting to the police before and they had taken no action, and therefore believed that there was some "contact" between the police and the gang. *Id.* at 5. She feared that the gang would continue disrupting her work as a community health promoter, would continue extorting money from her, and would carry out their threats against her children. *Id.* She believed that the gang would be able to investigate and find her if she tried to escape them by moving to another location in El Salvador. *Id.* at 3. The officer also interviewed Ms. [redacted] two children, jointly asking them a total of four questions about their ages and if they were afraid. *Id.* at 6. The Asylum Officer did not ask Ms. [redacted] any additional questions about her work as a community health promoter, her relationship with the mayor and local government, or her family.

Subsequent to her interview, Ms. [redacted] was issued a copy of a negative credible fear determination that did not include the Credible Fear Determination Checklist and Written Analysis, and Ms. [redacted] was required to proceed to her review before the Immigration Judge without any knowledge of the specific legal reasons why her claim had been denied.

Undersigned counsel requested and obtained a copy of the Credible Fear Determination Checklist and Written Analysis directly from the Asylum Office some months after her interview. In his analysis, the interviewing officer found that neither Ms. [redacted] nor her daughters had established that they had been harmed or would be harmed based upon a protected ground, and specifically wrote that: "The applicant was told by a members of the 18th gang that she must pay them or she or children would be harmed. The applicant was targeted because the gang was interested in obtaining financial resources from the applicant. The applicant's testimony indicates that the gang members targeted her because they wanted her to pay and not

because of any protected ground." *See Credible Fear Determination Checklist and Written Analysis.*

ARGUMENT

Review and reconsideration of this credible fear claim is appropriate and necessary because the Asylum Office has the exclusive authority to reconsider and rescind the negative determinations pursuant to 8 C.F.R. § 1208.30(g)(2)(iv)(A). This power enables the Asylum Office to correct procedural errors, consider new evidence and changed conditions, and remedy errors in law. In other contexts, the Asylum Office has reconsidered and rescinded decisions wherein the applicant's case was impacted by a procedural error. As no other agency or department within the executive branch has the ability or authority to rectify the injustice caused by the lack of a validly issued removal order, it follows that the Asylum Office possesses not only the power to remedy the situation but the duty to do so. Any other conclusion will result in irreparable harm to the Applicants in the form of deportation to a country in which the Applicants were persecuted and tortured on account of a protected ground. *See infra* Statement of Facts.

I. USCIS should reconsider the negative credible fear determination of Ms. [redacted] and her minor children because of prejudicial procedural errors impacting the fairness and legal sufficiency of the credible fear process and the reliability of the record of determination.

The following procedural errors have occurred in Ms. [redacted] case: (1) Ms. [redacted] was denied her statutory and regulatory right to consult with a person of her choosing when she was denied reorientation 72 hours prior to her interview; (2) prior to her negative credible fear review with an immigration judge, Ms. [redacted] was not served with a complete record of determination due to the exclusion of the Credible Fear Determination Checklist and Written Analysis, (3) the Asylum Officer did not adequately elicit testimony from Applicant regarding Ms. [redacted] job as a government-employed health promoter and her imputed political opinion as a government health worker, or her daughters' membership in a particular social group based on kinship ties; (4) the Asylum Officer committed legal error when he failed to find that the minor Applicants had established a nexus to a particular social group defined by kinship ties; and finally, (5) Ms. [redacted] daughters were not provided with child-friendly procedures during their interviews.

These procedural errors are *per se* prejudicial because they violated federal regulations and hindered Ms. [redacted] ability to fully present her credible fear claim during her CFI and subsequent negative credible fear review. The Asylum Office has the duty to ensure that legally adequate credible fear proceedings occur and the authority to remedy procedural and substantive errors.

1. **Ms. [redacted] was denied her statutory and regulatory right to consult with a person of her choosing when she was denied reorientation 72 hours prior to her interview.**

Credible fear applicants have the right to be "provide[d] [with] information concerning the asylum interview." 8 U.S.C. § 1225(b)(1)(B)(iv). Furthermore, credible fear Applicants must be "given 72 hours after arrival at the facility and re-orientation by USCIS" prior to the scheduling of their credible fear interview. This 72-hour period allows applicants time to understand the nature and purpose of their interview and time to "consult with a person or persons of the[ir] choosing prior to the interview." 8 C.F.R. § 208.30(d)(4)

Here, Applicants were not re-oriented by USCIS 72 hours prior to their interview. Orientation by ICE to the credible fear process in writing fails to comply with the asylum office's policy—as upheld by District Court Judge Randolph Moss in *L.M.-M. v. Cuccinelli*—to "re-orient" all families to their credible fear proceeding at least 72 hours in advance of their interview. 442 F. Supp. 3d 1 (D.D.C. 2020). In *L.M.-M. v. Cuccinelli*, District Court Judge Randolph D. Moss ruled in favor of Dilley families who were denied re-orientation and their right to consult with counsel prior to their credible fear interviews. Id. In a March 1, 2020 decision, discussed further infra, the Court deemed each Plaintiff family's removal orders "deficient" and ordered that they be "set aside." Id. at 36. In the words of the Court: "until a legally sufficient interview occurs, the individual Plaintiffs are not subject to expedited removal." Id.

Although the *L.M.-M.* Court declined to extend its ruling to set aside the orders of removal issued to the plaintiffs to other non-plaintiff families who were denied re-orientation by USCIS for lack of jurisdiction, the Court deferred to EOIR and the asylum office to address and resolve the failure to re-orient Applicants in advance of interview on appeal. Here, Applicants' negative credible fear findings have been affirmed by the Immigration Judge and the asylum office alone is empowered to ensure the Applicants received a legally sufficient interview. Given the fact that Applicants were not afforded re-orientation by USCIS 72 hours prior to their interview and the opportunity to consult with counsel, their negative credible fear findings should be "set aside" as deficient and they should be scheduled for new interviews or issued positive findings outright.

2. **Prior to her negative credible fear review, Ms. [redacted] was not served with a complete record of determination contrary to federal regulations which prejudiced her ability to meaningfully consult with the person or persons of her choosing prior to review.**

Federal regulations governing the credible fear process specify that "[t]he asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant" AND "any additional facts relied on by the officer." 8 C.F.R. § 208.30(e)(1). Following a negative credible fear determination, this complete record of determination, "including copies of the Form I-863, the asylum officer's notes, the summary

of the material facts, and other materials upon which the determination was based ***shall be provided*** to the immigration judge with the negative determination." 8 C.F.R. § 208.30(g)(2)(ii) (emphasis added).

In the record of the negative credible fear determination served on Ms. [redacted] on [redacted], no Credible Fear Determination Checklist and Written Analysis was provided.[1] The Credible Fear Determination Checklist and Written Analysis included the "asylum officer's notes" and "materials upon which the determination" and supervisory review was based. The omission of the Credible Fear Determination Checklist and Written Analysis contravenes the Asylum Office's obligation under federal law to compile all material facts and notes and suggests that the immigration judge was not provided with a complete and reliable record on which review was based. *See* 8 C.F.R. § 1003.42(a) ("The Service shall also file with the notice of referral a copy of the written record of determination as defined in section 235(b)(1)(B)(iii)(II) of the Act..."). This omission of the Credible Fear Determination Checklist and Written Analysis further prohibited Ms. [redacted] from a meaningful consultation with the "person or persons of [her] choosing," as is her right prior to a negative credible fear review, because she did not possess her complete record of determination. *See* 8 C.F.R. § 1003.42(c).

3. The Asylum Officer did not adequately elicit testimony from Applicant regarding Ms. [redacted] job as a government-employed health promoter, or her daughters' membership in a particular social group based on kinship ties.

Asylum Officers have a clear duty to elicit testimony from applicants based on their knowledge of the law and to follow up on statements made by applicants that could be legally relevant to their claims. The officer must conduct the interview with the purpose of eliciting all relevant and useful information bearing on the applicant's eligibility. *See* 8 C.F.R. § 208.9(b); 8 C.F.R. § 208.30(d).

During her interview, Ms.[redacted] informed the officer that she was a community health promoter. *See* CFI record at 3. Her testimony clearly indicated that the threats against her from the Barrio 18 gang were not solely for the purpose of extracting money from her, but were also connected to the gang's desire to inhibit her work; she stated that the gang controlled the cantones in which she worked as a health promoter and that the gang members "don't allow me to work they are always on top of me." *Id.* She also indicated that she was close with the mayor, although she did not believe the government had the ability to protect her because she had witnessed the police fail to respond to reports of gang shootings. *Id.* at 5. She testified that she was afraid the gang would continue inhibiting her work. *Id.*

The Asylum Officer did not ask Ms. [redacted] any further questions about her work

[1] Undersigned counsel requested and obtained a copy of these missing documents directly from the Asylum Office after Ms. [redacted] review before the Immigration Judge was already completed, but they were not served upon the applicant or the immigration judge prior to her review as legally required.

or her connections to the government, despite the fact that Ms. [redacted] status as a government-employed health promoter created a clear possibility of a nexus to a protected ground based on imputed political opinion and/or a particular social group defined by her status as a health worker. The Board of Immigration Appeals has reasoned that "medical professionals" qualifies a cognizable social group, when analyzing the case of a nurse who was targeted by a Mexican cartel in connection to his medical work and training. *See V-H-R-*, AXXX XXX 489 (BIA July 24, 2019) (Exhibit B).[2] Country conditions evidence shows that Barrio 18 has similarly threatened other community health promoters with death. Exhibit A. Case law also clearly establishes that an individual who is targeted by non-government persecutors may demonstrate a nexus to an imputed political opinion simply by virtue of being a government employee, or by being a member of an organization or group that is perceived as government-aligned. *See Sagaydak v. Gonzales*, 405 F.3d 1035, 1042 (9th Cir. 2005) (petitioner "was aligned with the political opinion of his employer simply by the fact that he worked as a government official enforcing government policies"); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1380 (9th Cir. 1990) ("[Petitioner]'s status as a government employee caused the opponents of the government to classify him as a person 'guilty' of a political opinion"); *Agbuya v. INS*, 241 F.3d 1224, 1229 (9th Cir. 2001) (applicant was viewed by guerillas as politically aligned with mining company and government based on trade union activities). Given the background case law on this subject, Ms. [redacted] statements about her work as a community health promoter created a clear obligation for the Asylum Officer to elicit further testimony, but the record shows that he failed to do so. This was a significant procedural error that prejudiced Ms. [redacted] claim.

4. The Asylum Officer committed legal error when he failed to find that the minor Applicants had established a nexus to a particular social group defined by kinship ties.

Ms. [redacted] also testified at her interview that she feared her daughters would be raped or harmed by the Barrio 18 gang. *See* CFI record at p. 4. In his written analysis (see footnote 1, above), the Asylum Officer noted that "the applicant was told by members of the 18 gang that she must pay them or she and her children would be harmed." *See* Credible Fear Determination Checklist and Written Analysis, C.3. This statement, on its face, establishes that Ms. [redacted] children were targeted on account of their kinship ties to their mother. Ms. [redacted] testimony is consistent with underlying country conditions. *Maras* and other organized criminal groups in Northern Triangle countries often deliberately target their victims based upon their kinship relationships. Expert witness Thomas Boerman writes that "because of its centrality as a social unit, targeting or threatening family members is an effective way for gangs to force their primary target to comply with their demands, or to punish or terrorize them,"

[2] The injunction in *Grace v. Whitaker* reiterates that the Asylum Office must consider credible fear claims "based on the particular facts and circumstances of each case." The Asylum Office's own internal guidance, moreover, requires that "to determine whether the applicant belongs to a legally viable particular social group, where there are no precedent decisions on point, asylum officers must analyze the facts using the immutability requirements described in *Matter of Acosta*." U.S. Citizenship and Immigration Services – RAIO, Asylum Officer Division Training Course, Credible Fear of Persecution or Torture Determinations (April 30, 2019)," p. 22.

and notes that "the implications of this strategy are overwhelming not only in terms of the sheer number of people who are victimized solely as a result of their membership in their nuclear and/or extended family but also in terms of its contribution to gangs' level of control over communities…" *See* Exhibit C, p. 11. Dr. Boerman further notes that "[o]ftentimes the threat to other family members is greater than to the initial target, and it often involves pursuing loved ones after the targeted individual has been murdered, an attempt to 'punish them in the grave.'" *Id.*

a. Particular social groups based on kinship ties are "new and novel" and therefore should be adjudicated in removal proceedings under section 240 of the INA.

Subsequent to Applicants' interview, multiple families detained at the South Texas Family Residential Center filed litigation in *S.A.P. v. Barr* to challenge the implementation of the Attorney General's July 29, 2019 decision, *L-E-A- II*, 27 I&N Dec. 581, in the expedited removal context. While the litigation remains pending, family-based claims, categorically, are new and novel. 8 C.F.R. § 208.30; *see also* RAIO Credible Fear Lesson Plan.

More broadly, family-based claims remain new and novel because no court of appeals has squarely decided whether the Attorney General's *L-E-A- II* decision will stand given its direct conflict with substantial circuit court precedent. The only court of appeals decision, to counsel's knowledge, that references *L-E-A- II*, *Pena Oseguera v. Barr*, 936 F.3d 249, 251 (5th Cir. 2019), directly acknowledges that *L-E-A- II* "is at odds with the precedent of several circuits," including precedent in the First, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits. Cases before the Board and circuit courts subsequent to *L-E-A- II* have been remanded back down to immigration judges for additional fact-finding. See, e.g. *Perez-Sanchez v. Att'y Gen.*, 935 F.3d 1148 (11th Cir. 2019). While these cases become ripe for adjudication on appeal in the first instance, and *S.A.P. v. Barr* remains pending, family-based claims remain new and novel and mandate the issuance of an NTA.

b. Assuming *arguendo* that the Asylum Office believes that the cognizability of particular social groups based on kinship ties can be assessed at the credible fear stage, such groups are cognizable under the *Acosta* test.

Under the obligation imposed by *Grace v. Whitaker* to apply the case law most favorable to the applicant at the credible fear stage, the appropriate legal standard for assessing the cognizability of a particular social group is the *Acosta* test used in the Seventh Circuit, which requires that a particular social group be defined by one or more "immutable" characteristics. *See Grace v. Whitaker*, 344 F. Supp. 3d 96, 140 (D.D.C. 2018); *see also* U.S. Citizenship and Immigration Services – RAIO, Asylum Officer Division Training Course, Credible Fear of Persecution or Torture Determinations (April 30, 2019), p. 22 (requiring that "to determine whether the applicant belongs to a legally viable particular social group, where there are no precedent decisions on point, asylum officers must analyze the facts using the immutability requirements described in *Matter of Acosta*.") The First Circuit has recently reaffirmed that

"family is a sufficiently permanent and distinct characteristic to support an asylum claim." *See Enamorado-Rodriguez v. Barr*, No. 19-1084 (1st Cir. Oct. 30, 2019); *see also* ***Ferreya v. Barr***, 962 F.3d 331 (7th Cir. 2020) (positing that "[a] person's family can be a 'particular social group' whose members may be eligible for asylum if membership is a central reason for persecution."); *see also*, *Fuentes v. Barr*, No. 19-1773, 2020 WL 4641287 (8th Cir. Aug. 12, 2020) (citing *Matter of L-E-A- I*'s pronouncement that family membership may constitute a particular social group).

Dr. Boerman describes the "fundamental importance of family as a social construct in the Northern Triangle… which differentiate[s] it from the U.S. and many other industrialized societies," noting that "for a host of social, cultural and economic reasons, intergenerational kinship ties are key to personal and collective identity as well as physical, emotional, and economic survival. This pattern is particularly prominent within the low- and lower-income sectors of the region where, due to long-standing cultural patterns and socioeconomic pressures, virtually every dimension of daily life involves integration and cooperation within and between families." *See* Exhibit C, p. 2. Not only are such kinship ties immutable in that the legal and blood relationship of kinship is usually one that *cannot* be changed, they are also immutable because they are so fundamental to most individuals' identities within the societies of Northern Triangle countries that such individuals should not be *required* to change them.

c. Assuming *arguendo* that the Asylum Office believes that the cognizability of particular social groups based on kinship ties should be assessed under the *M-E-V-G-* test at the credible fear stage, the interviewing officer has a duty to specifically elicit testimony about a family group's particularity and social distinction.

Assuming *arguendo* that the Asylum Office believes that—despite the explicit instructions in its own training materials to assess particular social group claims according to the *Acosta* test—it must assess the cognizability of a particular social group based on kinship ties according to the standard laid out by the Board of Immigration Appeals in *Matter of M-E-V-G-* 26 I&N Dec. 227, 237 (BIA 2014) (finding that a particular social group must be immutable, particular, and socially distinct), the Asylum Officer erred by failing to ask any follow-up questions about whether Ms. [redacted] family was particular and socially distinct within their community, once Ms. [redacted] testimony had already established that her daughters were targeted based on their family relationship to her. Dr. Boerman notes, for example, that the social distinctiveness and recognizability of a family group in a Northern Triangle country may center around ventures such as family businesses ("the fact that home and family-based ventures often involve multiple members of the family, each fulfilling different roles to support the process… further increases the family's visibility among members of the community"), as well as country-specific factors such as "hypervigilance… as to who is in the social environment," which results from "social and cultural norms" as well as being "a function of self-protection; people, particularly those in the low-and lower-income areas where violence is most heavily concentrated, are acutely aware of who is in the environment because this knowledge is crucial in the ongoing process of assessing risk." *See* Exhibit C, p. 3-4.

Although the Attorney General's *L-E-A- II* opinion stated in dicta that the average

family is unlikely to constitute a particular social group, the opinion expressly states that it "does not bar all family-based social groups from qualifying for asylum." *Id.* at 595. Further, the USCIS Asylum Division Officer Training Course specifies that each asylum claim and each particular social group must be evaluated on its own merits and thus, there is "no general presumption against officers recognizing any particular type of fear claim." U.S. Citizenship and Immigration Services, RAIO Asylum Division Officer Training Course, Lesson Plan on Credible Fear of Persecution and Torture Determinations (Sept. 24, 2019). This obligation to conduct particularized factual analysis of each individual claim, coupled with the Asylum Officer's obligation to elicit all relevant testimony, imposed an obligation on the interviewing officer to specifically question Applicants about their family's social distinction within their community. The officer's failure to do so was legal error.

5. **Ms. [redacted] daughters were not provided with child friendly procedures during their interview**

The Asylum Officer failed to provide [redacted] and [redacted] Ms. [redacted] minor daughters, with child-friendly procedures during their interviews. Child-friendly procedures have long been required by USCIS policy and practice in credible fear proceedings – and all asylum adjudications – in recognition of the fact that children are uniquely vulnerable within a legally complex adjudicatory process and less likely to understand what information is important for their claim. *See* USCIS, Asylum Officer Training Course, Guidelines for Children's Asylum Claims (November 30, 2015). Child-friendly procedures include building rapport with the child by discussing "neutral topics, such as general interests, family, pets, hobbies, and sports". *Id. at 30.* They also require the Asylum Officer to be aware of common misconceptions that children may have about the interview process, or reality more generally--such as the belief that "all governments are corrupt" and fears that their testimony will be shared with others or will endanger family members still in the home country--and to take care to explain these issues thoroughly to child applicants. *Id. 51; 25-26.*

Child-friendly interviewing procedures presuppose that the child will be interviewed at the [redacted] Residential Center by an officer trained in the specifics of interviewing children, who appropriately applies them. The Asylum Office's training materials direct the interviewing officer to pay close attention to "non-verbal cues," such as "puzzled looks, knitted eyebrows, downcast eyes, long pauses, and irrelevant responses," that may indicate that the child does not understand the interview question. *Id. at 31*. The training further notes that officers must "expect the child to be attuned to your body language" because "children rely on non-verbal cues more than adults to determine whether they can trust the person." *Id.*

The Asylum Officer failed to comply with the asylum office's own procedures for ensuring the fundamental fairness of the children's proceeding, in the following ways:

- The Asylum Officer failed to build rapport with the children, failing to engage the children on neutral topics;
- The officer failed to explain the nature and the purpose of the interview at any time;

- The officer failed to explain that the interview was confidential, and to verify the children's understanding of confidentiality.

II. Recent and intervening federal litigation has invalidated the Safe Third Country Transit Bar previously found at 8 C.F.R. 208.13(c)(4), which compels reconsideration of Applicants' claims.

On June 30, 2020, Judge Timothy Kelly of the U.S. District Court for the District of Columbia vacated the interim final rule entitled "Asylum Eligibility and Procedural Modifications," also known as the Safe Third Country Transit Bar (STCTB). See *Capital Area Immigrants' Rights (CAIR) Coalition et al v. Trump*, No. 19-2117 (TJK), 1:19-cv-02117-TJK, Doc. 72 (D.C. Dist. Ct. Jun. 30, 2020); *I.A. v. Barr*, No. 19-2530 (TJK), 1:19-cv-02117-TJK, Doc. 72 (D.C. Dist. Ct. Jun. 30, 2020). Additionally, on July 6, 2020, the Ninth Circuit Court of Appeals issued a preliminary injunction against enforcement of the STCTB nationally. See *East Bay Sanctuary Covenant et al v. Barr*, Nos. 19-16487, 19-16773, 4:19-cv-04073-JST, ID: 11742103, DktEntry: 71-1 (9th Cir. Jul. 6, 2020). Both courts reached the same conclusion: that the STCTB is unlawful as promulgated and as written.

As the Asylum Office employed the use of the unlawful STCTB in reaching the negative determination, reconsideration is proper and required. Additionally, Applicants established a "significant possibility" of prevailing on an application for asylum, withholding of removal, and protection under the Convention Against Torture (CAT), which entitles them to a positive determination of credible fear. We respectfully request that the Asylum Office review and reconsider the negative credible fear determination under the proper legal standard and issue a Notice to Appear as the appropriate remedy for applying an inappropriate standard pursuant to an illegal regulation.

a. Based upon the Asylum Office's exclusive authority to reconsider Applicants' negative determination and its dual duty to issue positive determinations of credible fear where an applicant meets the standard, review of the negative determination is proper and required.

Vacatur of the STCTB by two courts substantially alters the standard under which the Asylum Office reviewed and adjudicated Applicants' credible fear claim. As such, these cases ought to be reviewed under the proper legal standard. Pursuant to its authority under 8 C.F.R. §208.30(f), the Asylum Office bears the responsibility of issuing positive determinations and placing asylum-seekers into INA 240 removal proceedings through operation of the Notice to Appear (NTA) 8 when they meet the credible fear standard. Specifically, the regulation states:

> If an alien […] is found to have a credible fear of persecution or torture, the asylum officer ***will*** so inform the alien and issue a Form I-862, Notice to Appear, for full consideration of the asylum and withholding of removal claim in proceedings under section 240 of the Act. *Id*. (***emphasis*** added).

The regulation does not limit this responsibility to pre-Immigration Judge review nor is the Asylum Officer permitted discretion in issuing an NTA where an applicant demonstrates a credible fear of persecution or torture. Additionally, the ability of the Asylum Office to review

and reconsider the negative determinations concurred upon by the Immigration Judge demonstrates that the Asylum Office ***must*** exercise this essential function of the credible fear process at any point in the proceeding. See 8 C.F.R. § 1208.30(g)(2)(iv)(A). Therefore, not only does the Asylum Office possess the exclusive authority to reconsider and rescind negative determinations, it has the obligation to do so wherever and whenever a non-citizen demonstrates a significant possibility that she can prevail on a claim for asylum, withholding of removal, or protection under the Convention Against Torture.

b. Review and reconsideration is proper and required in light of the decisions in *CAIR Coalition v. Trump* and *East Bay Sanctuary Covenant v. Barr*, both of which vacated the Safe Third Country Transit Bar (STCTB).

Pursuant to regulation, the Asylum Office possesses the authority to review and reconsider "a negative credible fear finding that has been concurred upon by an Immigration Judge." 8 C.F.R. §1208.30(g)(2)(iv)(A). This authority is exclusive to the Asylum Office, which means that only the Asylum Office possesses the power to rescind the negative credible fear determination in conformance with *CAIR Coalition v. Trump* and *East Bay Sanctuary Covenant v. Barr*.

In light of the orders vacating the Safe Third Country Transit Bar, review is proper and required for the following reasons: 1) the STCTB was promulgated and put into force illegally thereby invalidating the credible fear decisions that stemmed from the regulation, 2) the regulation as written is unlawful, which voids the credible fear determination made pursuant to the unlawful regulation, and 3) by unequivocally and universally invalidating the STCTB, the D.C. District Court and Ninth Circuit in effect intended that the decisions apply retroactively to Applicants' proceedings. Additionally, review and reconsideration is necessary to avoid the clear and present danger of irreparable harm to the Applicants in the form of deportation through a fatally flawed proceeding.

i. The STCTB was promulgated and put into force illegally thereby invalidating the credible fear decisions that stemmed from the unlawful regulation ab initio.

In *CAIR Coalition v. Trump,* the Plaintiffs challenged the procedures used to implement the STCTB as failing to conform to the rule-making process proscribed by Congress in the Administrative Procedures Act (APA). According to the Court, the government "unlawfully promulgated the rule without complying with the APA's notice-and-comment requirements […]." *CAIR Coalition*, at 2 of 52. In other words, the STCTB was fatally flawed at its inception, which means that any act stemming from such regulation is likewise fatally flawed.

In fact, the APA demands that courts "hold unlawful and set aside agency action, findings, and conclusions found to be […] without observance of procedure required by law […]." 5 U.S.C. § 706(2)(D). As the Court noted in *CAIR Coalition*, "[h]aving found that the Rule was enacted unlawfully, the Court sees no reason why it should not be vacated." At 48 of 52.

When the Departments of Justice and Homeland Security issued the interim final rule for the STCTB, they overstepped the authority delegated to them by Congress through the APA. The

Court rectified this overreach by vacating the regulation in whole; however, the damage had been done to an untold number of asylum-seekers. At the point in which the Asylum Office relied in good faith upon the rules set forth in the STCTB, the fatally flawed rule itself created the circumstances through which the negative determination was issued thereby tainting the individual proceedings from the start. The only means by which the Asylum Office has to remedy the flaw is to review and reconsider the negative determination under the correct and lawful legal standard.

ii. As written, the STCTB is unlawful, which voids the credible fear determination made pursuant to the unlawful regulation.

In *East Bay Sanctuary Covenant v. Barr*, the Ninth Circuit Court of Appeals determined that the STCTB is unlawful as written. The Court stated two main reasons for finding the rule unlawful: 1) the rule is "not in accordance with law" and was written "in excess of statutory limitations," and 2) the rule's purpose is "arbitrary and capricious." See *Id*. at 54 of 66. In discussing the former reasoning, the Court found that the Departments of Justice and Homeland Security assumed authority that is not provided to the executive branch. The government argued that Section 208(b)(2)(C) of the Immigration and Nationality Act ("INA" or "the Act") provides the Attorney General with broad-reaching discretion in creating rules limiting eligibility for asylum protection in the United States. That provision provides, "[t]he Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (b)(1)." INA §208(b)(2)(C). While the government argued that this provision provides expansive executive authority to proscribe the STCTB limitation on asylum-seekers, the Court determined that the STCTB is *not consistent* with the statutorily proscribed requirements for asylum eligibility, and, therefore, the rule oversteps the executive's regulatory authority. *East Bay Sanctuary Covenant*, at 27-36 of 66.

When the Court determined that the rule is "arbitrary and capricious," it did so after a thorough analysis of the government's purported intent in promulgating the rule. The Court found three key rationales for determining that the STCTB is arbitrary and capricious:

> First, evidence in the record contradicts the agencies' conclusion that aliens barred by the Rule have safe options in Mexico. Second, the agencies have not justified the Rule's assumption that an alien who has failed to apply for asylum in a third country is, for that reason, not likely to have a meritorious asylum claim. Finally, the agencies failed to adequately consider the effect of the Rule on unaccompanied minors. *Id*. at 36 of 66.

Additionally, while the Court in *CAIR Coalition* did not reach the substantive arguments challenging the legality of the STCTB, it did leave open those challenges by stating, "Plaintiffs advance other colorable claims that the Rule is unlawful […]." *Id*. at 49 of 52. In recognizing the meritorious challenges to the substance of the STCTB, the Court determined that vacating the rule was the most appropriate remedy because "leaving the regulations in place during remand would ignore petitioners' potentially meritorious challenges." *Id*. citing *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007).

If the STCTB was deemed harmful enough to be vacated for the Plaintiffs in both *East Bay Sanctuary Covenant* and *CAIR Coalition*—against whom the rule was applied—and all

future potential asylum-seekers—against whom it could be applied, then it follows that the rule would be prohibitively detrimental to the Applicants against whom it was also applied and resulted in a negative credible fear determination. To assume otherwise would result in a wholly unconscionable result: namely, that the rule is unlawful as applied to everyone ***except*** to the individuals most affected by the unlawful rule, which includes Applicants here.

The Asylum Office cannot ignore its mandate to protect potentially meritorious claims of asylum-seekers by allowing a negative determination to remain in effect when it was issued pursuant to an illegal regulation. Doing so would result in irreparable harm to the Applicants in the form of deportation to a country in which the Applicants possess a credible fear of persecution and torture. Review and reconsideration must be provided to avoid this outcome.

iii. By unequivocally and universally invalidating the STCTB, the D.C. District Court and Ninth Circuit in effect intended that the decisions apply retroactively to Applicants' proceedings.

The government requested that the *CAIR Coalition* Court limit the application of the decision to the parties in question; however, the Court unequivocally rejected the government's arguments. In citing Circuit Court precedent, the Court stated, "[w]hen reviewing court determinations that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." At 50 of 52 (internal citation omitted).

Likewise, the Ninth Circuit in *East Bay Sanctuary Covenant* determined that the only path forward was to grant injunctive relief and apply such relief universally. Because the Court found that the STCTB was an overreach of executive power as well as arbitrary and capricious, the Court was required to vacate the rule pursuant to the Administrative Procedures Act. See 5 U.S.C. §706(2) ("[t]he reviewing court shall […] hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, […] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right […]). According to the Court, "[v]acatur of an agency rule ***prevents its application to all*** those who would otherwise be subject to its operation." *Id*. at 52 of 66 (***emphasis*** added). Applicants have already been subjected to the unlawful regulation; however, it is not too late to remedy and rectify the situation by reconsidering and rescinding the negative determination as the Asylum Office has the power to do under 8 C.F.R. §1208.30(g)(2)(iv)(A).

By refusing to limit the application of its decision to the parties before the courts, each court recognized the problematic nature of leaving the fatally flawed rule in force. The universal application of a rule means that the rule applies to all—regardless of when application takes place. Likewise, if a rule is universally deemed unlawful, it is unlawful when applied at any point in time, even if that point takes place before the rule is deemed unlawful by the courts.

In *CAIR Coalition*, the Court could not fathom a resolution in which the rule was deemed unlawful yet still in force for any individual Applicant. Notably, apart from vacating the STCTB, the Court did not name an individual or specific remedy for the asylum-seekers who were listed

as plaintiffs in the litigation, which indicates that the Court envisioned that its decision would apply retrospectively as is the common practice when new precedent is established.

c. The courts' orders to vacate the STCTB voided the Applicants' credible fear determination thereby invalidating the expedited removal order.

When the D.C. District Court and the Ninth Circuit Court of Appeals issued their respective decisions invalidating the STCTB, the universal nature of the courts' orders invalidated the expedited removal orders in place against the Applicants. As discussed above, the unlawful STCTB mandated that Applicants' claim be reviewed under a heightened standard for assessing eligibility for a positive determination of credible fear. The application of the unlawful regulation to Applicants' valid claim of credible fear is the direct and proximate cause for the issuance of the negative determination. As two courts have invalidated the STCTB, the effects of the rule cannot be permitted to remain in place.

The D.C. Circuit Court, in particular, has long held that vacating an administrative rule returns things to the status quo. See *Envtl. Def. v. Leavitt*, 329 F.Supp.2d 55, 64 (D.C. Cir. 2004). In other words, the Court's action in vacating the regulation void it and start anew as if the vacated regulation never existed. *Id*. For Applicants, this inevitably means that the process by which they were determined not to have a credible fear of returning to their home country is now defunct, and their removal orders, therefore, have been invalidated by the vacatur of the STCTB.

The Asylum Office has the exclusive authority to reconsider and rescind the negative determinations pursuant to 8 C.F.R. § 1208.30(g)(2)(iv)(A). This power enables the Asylum Office to correct procedural errors, consider new evidence and changed conditions, and remedy errors in law. In other contexts, the Asylum Office has reconsidered and rescinded decisions wherein the applicant's case was impacted by a change in law. Here too, the invalidation of the rule that is the direct and proximate cause of the negative determination constitutes a significant shift which necessitates reconsideration and rescission of the negative determination. As no other agency or department within the executive branch has the ability or authority to rectify the injustice caused by the application of an unlawful regulation, it follows that the Asylum Office possesses not only the power to remedy the situation but the duty to do so. Any other conclusion will result in irreparable harm to the Applicants in the form of deportation to a country in which the Applicants were persecuted and tortured on account of a protected ground (see Section II, *infra*.).

III. As Applicants have established a significant possibility of prevailing on an application for asylum, withholding of removal, and protection under CAT, the Asylum Office should rescind the negative credible fear determination and issue a Notice to Appear.

Pursuant to its authority under 8 C.F.R. §208.30(f) and its obligations to reconsider and rescind negative determinations under 8 C.F.R. § 1208.30(g)(2)(iv)(A), the Asylum Office must reconsider and rescind Applicants' negative determination in light of the vacatur of the STCTB. As Applicants meet their burden in credible fear proceedings by establishing a significant possibility of prevailing on an application for asylum, withholding of removal, and protection under CAT, they merit such rescission.

Respectfully submitted,

/s/ [redacted]

Pro Bono Counsel for Applicants