

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

CASE NO. 18-14563

**MANUEL LEONIDAS DURAN ORTEGA,
Petitioner.**

v.

**UNITED STATES ATTORNEY GENERAL,
Respondent.**

On Appeal from the Executive Office of Immigration Review
Board of Immigration Appeals
File No. A 094 772 678

**BRIEF OF *AMICI CURIAE* JOURNALIST ORGANIZATIONS
IN SUPPORT OF PETITIONER'S EMERGENCY PETITION FOR
REVIEW AND EMERGENCY MOTION FOR STAY OF REMOVAL
PENDING APPEAL**

Seth D. Berlin
Jacquelyn N. Schell
Ballard Spahr LLP
1909 K Street, NW, 12th Floor
Washington, DC 20006-1157
Telephone: 202.661.2200
Facsimile: 202.661.2299
berlins@ballardspahr.com
schellj@ballardspahr.com
Counsel for Amici

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following listed persons and entities, as described in Eleventh Circuit Rule 26.1-2(a) have an interest in the outcome of this case:

David Cole, Warden of the LaSalle Detention Facility

The Honorable Scott D. Criss, U.S. Department of Justice, Executive Office
for Immigration Review

The Honorable Dee Drell, U.S. District Court for the Western District of
Louisiana

Manuel Duran Ortega (*Petitioner*)

Kristi L. Graunke (*Counsel for Petitioner*)

Jeremy John (*Counsel for Petitioner*)

David C. Joseph, U.S. Attorney for the Western District of Louisiana

Michelle R. Lapointe (*Counsel for Petitioner*)

Memphis (Tennessee) Police Department

Kristjen Nielsen, Secretary of the U.S. Department of Homeland Security

The Honorable Joseph Perez-Montes, U.S. District Court for the Western
District of Louisiana

David Rivera, Director of the News Orleans Field Office of U.S.
Immigration and Customs Enforcement

The Honorable Grace A. Sease, U.S. Department of Justice, Executive
Office for Immigration Review

Matthew Whitaker, Acting U.S. Attorney General (*Respondent*)

Shelby County (Tennessee) Sheriff's Department

Southern Poverty Law Center

U.S. Department of Homeland Security

U.S. Immigration and Customs Enforcement

Cristina Walker, Assistant U.S. Attorney for the Western District of
Louisiana

Gracie Willis (*Counsel for Petitioner*)

The American Society of News Editors (*Amicus Curiae*)

Associated Press Media Editors (*Amicus Curiae*)

Association of Alternative Newsmedia (*Amicus Curiae*)

Media Law Resource Center (*Amicus Curiae*)

National Association of Hispanic Journalists (*Amicus Curiae*)

PEN America (*Amicus Curiae*)

Radio Television Digital News Association (*Amicus Curiae*)

Reporters Without Borders (*Amicus Curiae*)

Society of Professional Journalists (*Amicus Curiae*)

Seth D. Berlin (*Counsel for Amici Curiae*)

Jacquelyn N. Schell (*Counsel for Amici Curiae*)

The undersigned counsel of record certifies that there are no publicly traded companies or corporations that have an interest in the outcome of the case or appeal.

Respectfully submitted this 12th day of November 2018.

/s/ Seth D. Berlin

Seth D. Berlin

Jacquelyn N. Schell

Ballard Spahr LLP

1909 K Street, NW, 12th Floor

Washington, DC 20006-1157

Telephone: 202.661.2200

Facsimile: 202.661.2299

berlins@ballardspahr.com

schellj@ballardspahr.com

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT	C-1
TABLE OF AUTHORITIES	ii
STATEMENT OF IDENTITY OF <i>AMICI</i>	1
STATEMENT OF THE ISSUES.....	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. The Board Improperly Dismissed Evidence About The Increasingly Dangerous Conditions Investigative Journalists Face In El Salvador	3
II. The Government’s Actions Raise Profound First Amendment Concerns	5
CONCLUSION	9
CERTIFICATE OF COMPLIANCE.....	10
CERTIFICATE OF SERVICE	11
APPENDIX	A-1

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Board of Education v. Pico</i> , 457 U.S. 853 (1982).....	8
<i>Heffernan v. City of Paterson, N.J.</i> , 136 S. Ct. 1412 (2016).....	7
<i>Jiang v. U.S. Attorney General</i> , 568 F.3d 1252 (11th Cir. 2009)	4
<i>Liu v. U.S. Attorney General</i> , 359 F. App'x 993 (11th Cir. 2010).....	4
<i>Lozman v. City of Riviera Beach, Fla.</i> , 138 S. Ct. 1945 (2018).....	6
<i>Massignani v. INS</i> , 438 F.2d 1276 (7th Cir. 1971)	8
<i>Rossignol v. Voorhaar</i> , 316 F.3d 516 (4th Cir. 2003)	6
<i>Smith v. City of Cumming</i> , 212 F.3d 1332 (11th Cir. 2000)	7
<i>Walker v. Texas Division, Sons of Confederate Veterans</i> , 135 S. Ct. 2239 (2015).....	7
Other Authorities	
U.S. Const. amend. I.....	<i>passim</i>

STATEMENT OF IDENTITY OF *AMICI*

Amici Curiae The American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, Media Law Resource Center, National Association of Hispanic Journalists, PEN America, Radio Television Digital News Association, Reporters Without Borders, and Society of Professional Journalists (“*Amici*”), are media and journalism organizations with extensive experience working with and representing the interests of journalists, both in the United States and abroad. A detailed description of each *amicus* is set forth in the Appendix.

No counsel for any party authored this brief in part or in whole. No party or party’s counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *Amici*, their members, and counsel, contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF THE ISSUES

1. Whether investigative journalists face increasingly dangerous conditions in El Salvador.
2. Whether the Government violated the First Amendment by arresting, detaining and threatening to remove Petitioner in response to his journalism and while engaged in journalism, including by silencing and retaliating

against him, depriving his readers and listeners of his speech, and chilling the speech of others.

SUMMARY OF ARGUMENT

Amici urge this Court to review the decision of the Board of Immigration Appeals (the “Board”) dated October 17, 2018, and to stay petitioner’s removal while the Court does so.

With leave from the Board, *Amici* appeared in the proceeding below and addressed two issues. First, *Amici* explained the increasingly dangerous conditions faced by journalists in El Salvador, a subject on which *Amici* have particular expertise and experience, which was simply dismissed by the Board below. Second, *Amici* addressed the First Amendment considerations when a journalist is punished for his past work as a journalist, including an unfounded arrest at the precise moment he was reporting on a protest criticizing the Government. This, too, is a subject on which *Amici* have particular knowledge and experience. A copy of *Amici*’s brief before the Board is attached hereto as Exhibit A.

Despite having appeared before the Board with its authorization, the Board failed to serve *Amici* with a copy of its October 17, 2018 ruling, such that *Amici* did not learn of the decision until seeing a news report on November 7, 2018. Accordingly, mindful of the fact that the Court is faced with an emergency petition and an emergency motion, and that Petitioner faces removal as early as the end of

this week, *Amici* file this short brief urging the Court to accept review and to stay Petitioner's removal pending review. *Amici* appear to highlight the increasingly dangerous conditions faced by investigative journalists in El Salvador and defend fundamental First Amendment principles that are at the heart of what they do.

ARGUMENT

I. The Board Improperly Dismissed Evidence About The Increasingly Dangerous Conditions Investigative Journalists Face In El Salvador.

Amici have specialized expertise in the conditions journalists face around the globe. Their members either work with journalists from countries throughout the world or they send their own journalists to report from those regions. In both instances, ensuring the safety of their journalists is of paramount importance. As a result, *Amici* closely monitor those conditions, and many of them issue formal reports describing the current state of those conditions.

Below, *Amici* put before the Board a substantial body of evidence to demonstrate the increasingly dangerous conditions faced by journalists – especially investigative journalists like Petitioner – in El Salvador. This included recent reports by (a) la Asociación de Periodistas de El Salvador, or APES, the organization of Salvadoran journalists; (b) *amicus* Reporters Without Borders; (c) the Committee to Protect Journalists; (d) the Knight Center for Journalism in the Americas; (e) respected non-press watchdog organizations like International Crisis Group and Freedom House; and (f) leading national and international

publications covering this issue on the ground. These reports uniformly paint a brutal picture of the increasingly dangerous landscape for journalists in El Salvador, detailing a rising incidence of murders of and threats to journalists. *See* Exhibit A at 3-10.

Inexplicably, the Board found it appropriate to ignore that evidence, relegating its “discussion” to a brief footnote. Petition Ex. A at 5 n.4. In so doing, the Board dismissed the substantial evidence submitted by *Amici*, finding that it could only rely on the official country report issued by the State Department. *Id.* This is wrong as a matter of law, and it is exceedingly troubling that a Government tribunal (the Board) would deem it appropriate to consider only the prevailing view of the Government (the State Department’s general country report for El Salvador), while completely discounting the expertise of a host of journalism groups about the conditions faced specifically by journalists on the ground in El Salvador.

That was plain error and should be reviewed, and reversed, by this Court. The determination the Board was supposed to make was whether Petitioner has made a *prima facie* showing of eligibility for such relief. *See Jiang v. U.S. Att’y Gen.*, 568 F.3d 1252, 1257 (11th Cir. 2009). That determination is properly made on the basis of all the evidence available. *See id.* at 1258 (granting petition and directing reopening of proceedings on basis of government reports and petitioner’s affidavits); *Liu v. U.S. Att’y Gen.*, 359 F. App’x 993, 995 (11th Cir. 2010) (news

articles submitted by petitioner established that country conditions had worsened for Falun Gong practitioners in China).

II. The Government's Actions Raise Profound First Amendment Concerns.

Amici also believe that the Government's conduct in this case raises serious First Amendment issues, as explained in their brief below. *See* Exhibit A at 10-15. These concerns warrant full review by this Court.

Petitioner is not lurking in the shadows of society, hiding from officials, and evading detection. To the contrary, he operated as a journalist openly in the United States for nearly a decade – first as a News Director and Co-Anchor for *Radio Ambiente*, and then through a news outlet he founded himself, *Memphis Noticias*. Only when his journalism began to report critically on the Government – in this case, the collaboration between local law enforcement (the Memphis Police Department) and federal officials (Immigration and Customs Enforcement), collaboration which had been officially denied – was he subjected to arrest, detention and threatened removal. Indeed, his arrest and detention for more than eight months flowed immediately from his lawful coverage of a protest about that very collaboration. Of particular concern, his arrest appears to be part of an ongoing pattern and practice of detaining and removing speakers critical of the Government, including its immigration practices. *See* Exhibit A at 18-20.

While the Government is obviously free to enforce the laws, when it does so in this manner – doing nothing for a decade and then acting in response to Petitioner’s journalism and at the precise moment he was reporting on a protest – the First Amendment is implicated. Otherwise, the Government could easily misuse the enforcement of supposedly neutral laws to silence and punish views that Government officials find disagreeable. Affording such unbridled discretion to Government officials is dangerous – not only for individuals directly involved like Petitioner, but in two additional and constitutionally-significant ways. First, when the Government is permitted to use its enforcement powers in this fashion, listeners are deprived of valuable speech, as has been the case here for Petitioner’s audience in Memphis who are no longer informed by his reporting on important matters of public concern. Second, when Government officials wield the awesome power of law enforcement to silence one critic, other speakers are chilled from speaking, for fear that the law – whether immigration laws or, for that matter, any other law – will be misused to punish them. *See, e.g., Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1949 (2018) (“the First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech.”); *Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) (Wilkinson, C.J.) (“In suppressing [a journalist’s] criticism of their official conduct . . . , defendants did more than compromise some attenuated or penumbral First

Amendment right; they struck at its heart.”). Here, Petitioner was arrested – the only journalist on the scene who was – while engaged in unquestionably lawful conduct of covering a protest. *See Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”). Indeed, the initial charges against him were immediately dropped.

Such conduct inflicts a First Amendment wound on all of us – on Petitioner, on his readers and listeners, on others who would speak but for fear of Government reprisal, and on their readers and listeners. Simply put, the First Amendment does more than endow a *right* on Petitioner – it also imposes a *limit* on what Congress and other government actors may constitutionally do. *See, e.g., Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1418 (2016) (“[T]he First Amendment begins by focusing upon the activity of the Government. . . . The Government acted upon a constitutionally harmful policy whether [petitioner] did or did not in fact engage in political activity.”). Thus, the right operates structurally: It shields not only a speaker’s right to communicate his or her views, but also protects the right of readers and listeners to receive the information communicated, benefitting the populace at large and ultimately serving our structural ability to govern ourselves. *See, e.g., Walker v. Tex. Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2246

(2015) (“[T]he Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate.”); *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (“[T]he right to receive ideas is a necessary predicate to the *recipient’s* meaningful exercise of his own rights of speech, press, and political freedom.”).¹

These weighty concerns were dismissed by the Board below, in part because it believed it lacked the authority to address them and in part because it lacked this Court’s expertise in this area. *See* Petition Ex. A at 6. But the message sent to journalists and speakers everywhere is unmistakable: when a journalist is arrested while engaging in journalism disfavored by officials, was the only one of many journalists so treated, is detained for eight months, and faces removal to a country that is increasingly deadly for investigative journalists, the lesson to be drawn is that speech critical of officials will, one way or another, be punished. That is intolerable from a First Amendment perspective and merits review by this Court.

¹ In contrast to certain other provisions of the Constitution, the free speech clause is not limited to “citizens” of the United States, or even to “the people.” Rather, it provides simply that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. Thus, it both protects Petitioner, *see, e.g., Massignani v. INS*, 438 F.2d 1276, 1278 (7th Cir. 1971) (“aliens fully enjoy our primary rights of free speech guaranteed by the First Amendment”), and restrains the Government for the benefit of all of us.

CONCLUSION

For these reasons and those outlined in Petitioner's Motion, *Amici* urge the Court to grant Petitioner's Emergency Petition for Review and his Emergency Motion to Stay Removal Pending Appeal.

Respectfully submitted,

/s/ Seth D. Berlin

Seth D. Berlin

Jacquelyn N. Schell

Ballard Spahr LLP

1909 K Street, NW, 12th Floor

Washington, DC 20006-1157

Telephone: 202.661.2200

Facsimile: 202.661.2299

berlins@ballardspahr.com

schellj@ballardspahr.com

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

This document complies with the word limit of Fed. R. App. P. 27(d)(2) because this document contains 1902 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced type-face using Microsoft Word 2016 in 14 point Times New Roman.

DATED: November 12, 2018

/s/ Seth D. Berlin

Seth D. Berlin

Jacquelyn N. Schell

Ballard Spahr LLP

1909 K Street, NW, 12th Floor

Washington, DC 20006-1157

Telephone: 202.661.2200

Facsimile: 202.661.2299

berlins@ballardspahr.com

schellj@ballardspahr.com

CERTIFICATE OF SERVICE

I certify that on November __, 2018, I caused the foregoing brief to be filed and served electronically via the Court's ECF System upon counsel of record.

DATED: November __, 2018

Seth D. Berlin

**APPENDIX:
DESCRIPTIONS OF *AMICI CURIAE***

Amicus curiae **American Society of News Editors (“ASNE”)**, with some 500 members, is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

Amicus curiae **The Associated Press Media Editors (“APME”)** is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

Amicus curiae **Association of Alternative Newsmedia (“AAN”)** is a not-for-profit trade association for approximately 110 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the

mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

Amicus curiae **Media Law Resource Center** is a non-profit trade association which counts as members about 140 media companies and 200 law firms practicing media law. It presents conferences on media law globally, distributes newsletters and bulletins about media law and has sixteen (16) standing committees on substantive media law subjects.

Amicus curiae **The National Association of Hispanic Journalists** (“**NAHJ**”) is the largest organization of Latino journalists in the United States and dedicated to the recognition and professional advancement of Hispanics in the news industry. The mission of NAHJ is to increase the number of Latinos in the newsrooms and to work toward fair and accurate representation of Latinos in news media. Established in April 1984, NAHJ created a national voice and unified vision for all Hispanic journalists. NAHJ has approximately 2,200 members, including working journalists, journalism students, other media-related professionals and journalism educators. For more information please visit NAHJ.org or follow on Twitter @NAHJ.

Amicus curiae **PEN America**, a non-profit organization based in New York, stands at the intersection of literature and human rights to protect open expression in the United States and worldwide. It champions the freedom to write,

recognizing the power of the word to transform the world. Its mission is to unite writers and their allies to celebrate creative expression and defend the liberties that make it possible. PEN America's free expression work includes advocacy to defend writers, journalists and protect free expression and press freedoms in the United States and around the world. PEN America, founded in 1922, is the largest of more than 100 centers of PEN International. PEN America's membership of over 7,000 includes a nationwide community of novelists, journalists, editors, poets, essayists, playwrights, publishers, translators, agents, and other professionals.

Amicus curiae **Radio Television Digital News Association (“RTDNA”)** is the world's largest professional organization devoted exclusively to broadcast and digital journalism. RTDNA members include local and network news executives, news directors, producers, reporters, photographers, editors, multimedia journalists and digital news professionals in broadcasting, cable and digital media, as well as journalism educators and students. Founded as a grassroots organization in 1946, RTDNA works to protect the rights of broadcast and digital journalists in the courts and legislatures throughout the country, promotes ethical standards in the industry, provides members with training and education and honors outstanding work in the profession through the Edward R. Murrow Awards. The Association's members help shape the future of the journalism profession as it protects their

interests by advocating on their behalf and lobbying in their interest. It defends the First Amendment, advocates for open government and freedom of information, and promotes diversity in newsroom staffing and coverage.

Amicus curiae **Reporters Without Borders**, a 501(c)(3) non-profit organization is the US office of the global organization Reporters sans frontières (“**RSF**”), based in Paris, a world leading defender of freedom of information with more than 30 years of experience. Thanks to an international network of correspondents in 130 countries, 12 offices (Vienna, Brussels, Helsinki, Paris, Berlin, Madrid, Stockholm, Geneva, Taipei, Tunis, DC, London) and a consultative status at the UN and UNESCO, RSF is able to make a global impact, gather a great deal of on-the ground information, conduct major advocacy campaigns, and assist and defend news providers all across the world. RSF has a significant interest in protecting freedom of expression and the ability of journalists to gather and report news – including by ensuring that journalists are free to exercise their profession reporting on important issues such as corruption and drug cartels without fear of physical violence or murder.

Amicus curiae **Society of Professional Journalists (“SPJ”)** is the nation’s largest, most broad-based journalism association. SPJ is dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information

vital to a well-informed citizenry through the daily work of its nearly 7,500 members; works to inspire and educate current and future journalists through professional development; and protects First Amendment guarantees of freedom of speech and press through its advocacy efforts.

Exhibit A

DETAINED

Marjorie J. Peerce
Seth D. Berlin
Al-Amyr Sumar
BALLARD SPAHR LLP
1675 Broadway, 19th Floor
New York, NY 10019-5820
Phone: 212-223-0200
Fax: 212-223-1942
peercem@ballardspahr.com
berlins@ballardspahr.com
sumara@ballardspahr.com

Counsel for *amici curiae*

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

<p>In the Matter of:</p> <p>DURAN ORTEGA, MANUEL LEONIDAS</p>	<p>File No. A094 772 678</p>
---	------------------------------

**BRIEF OF *AMICI CURIAE* JOURNALIST ORGANIZATIONS IN
SUPPORT OF RESPONDENT MANUEL DURAN ORTEGA**

Table of Contents

I.	STATEMENT OF INTEREST OF <i>AMICI CURIAE</i>	1
II.	SUMMARY OF ARGUMENT	1
III.	ARGUMENT.....	
A.	There is Abundant Evidence that Circumstances For Journalists in El Salvador Have Materially Changed Since 2007	3
B.	Attempting to Deport Mr. Duran Ortega in These Circumstances Violates the First Amendment	11
1.	The First Amendment Protects Mr. Duran Ortega From Retaliation for and Censorship of His Political Speech.....	11
2.	There is Substantial Evidence Indicating the Government’s Retaliatory and Censorial Purpose and Effect Against Mr. Duran Ortega’s Speech	16
III.	CONCLUSION.....	21

I. STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Curiae are ten media and journalism organizations that represent and advocate for the interests of journalists, both in the United States and abroad. They request to appear before the Board to defend two fundamental principles at stake in this case: that individuals who face the risk of persecution abroad should be given safe harbor in the United States, and that all persons in this country – no matter their citizenship or legal status – enjoy a First Amendment right to free speech.

What sets the United States apart from many other countries in the world is its guarantee to all within its borders of basic civil liberties, including the right to speak freely. Seeking removal of the respondent, Manuel Duran Ortega, as reprisal for exercising his right to speech breaks from that venerable tradition. Moreover, the country to which the Government has sought his removal – El Salvador – is one where such government reprisal is routine. More than that, deporting Mr. Duran Ortega to El Salvador may imperil his life. The law does not permit his removal.

II. SUMMARY OF ARGUMENT

Amici offer two arguments for the Board's consideration. *First*, Mr. Duran Ortega's motion to reopen should be granted because of substantial evidence showing that the conditions in which journalists in El Salvador operate have materially changed since his *in absentia* removal order was entered in 2007. Non-

governmental organizations and the press itself have documented a disturbing increase in incidents of violence against members of the media. Those reporting on government corruption and misconduct – the subjects Mr. Duran Ortega primarily writes about – are at particular risk. These changed circumstances warrant granting Mr. Duran Ortega’s motion to reopen.

Second, Mr. Duran Ortega’s motion to reopen should be considered in the context of the evidence that the Government’s conduct was carried out in retaliation for Mr. Duran Ortega’s exercise of his First Amendment rights. Mr. Duran Ortega enjoys a constitutional right to speak freely, to be free from retaliation for that speech, and to be free from efforts to squelch his ongoing speech on matters of public concern. And readers of Mr. Ortega’s reporting on government corruption have a concomitant right to receive that information, without government officials deliberately interfering with the flow of that information with a censorial and retaliatory motive and effect. The circumstances of his arrest and attempted removal, however, indicate that the Government’s conduct is motivated by such an impermissible purpose. The First Amendment rights and interests at stake independently require that the Board grant Mr. Duran Ortega’s motion to reopen.

III. ARGUMENT

A. **There is Abundant Evidence that Circumstances For Journalists in El Salvador Have Materially Changed Since 2007.**

An otherwise untimely motion to reopen removal proceedings will be granted where the evidence of changed country conditions “is material and was not available and would not have been discovered or presented at the previous proceeding.” *Zhang v. U.S. Att’y Gen.*, 572 F.3d 1316, 1319 (11th Cir. 2009) (quoting 8 U.S.C. § 1229a(c)(7)(C)(ii)); 8 C.F.R. § 1003.2(c)(3)(ii); *see, e.g., Jiang v. U.S. Att’y Gen.*, 568 F.3d 1252, 1258 (11th Cir. 2009) (recent increased enforcement of one-child policy in petitioner’s home province and town in China constituted changed circumstances). The movant’s burden is not to establish entitlement to asylum, but merely to make a *prima facie* showing of eligibility for such relief. *See Jiang*, 568 F.3d at 1257. This determination is made on the basis of all the evidence available. *See id.* at 1258 (granting petition and directing reopening of proceedings on basis of government reports and petitioner’s affidavits); *Liu v. U.S. Att’y Gen.*, 359 F. App’x 993, 995 (11th Cir. 2010) (news articles submitted by petitioner established that country conditions had worsened for Falun Gong practitioners in China).

Notwithstanding the Immigration Judge’s finding to the contrary, the evidence available establishes that the conditions in El Salvador for journalists like

Mr. Duran Ortega have materially worsened since his *in absentia* removal order was entered in 2007. Both journalist organizations and the media itself have documented a recent and alarming rise in incidents of violence against the country's journalists, particularly those who report on organized crime and government corruption. Just last month, an organization of Salvadoran journalists – la Asociación de Periodistas de El Salvador, or APES – released a report regarding the state of free press in the country. See APES, *Informe de Libertad de Prensa, El Salvador* (May 3, 2018), <http://apes.org.sv/wordpress/wp-content/uploads/2018/05/INFORME-LIBERTAD-DE-PRENSA-ENERO-2017-ABRIL-2018.pdf>.¹ It found that the “conditions of insecurity and violence” in El Salvador in recent years had undermined the safety of journalists and others in the media industry, and reported that three media professionals – two journalists and one cameraman – have been murdered in the past 16 months. *Id.* at 3-5. APES's finding that members of the press in El Salvador are increasingly victims of violence is well corroborated. *Amicus curiae* Reporters Without Borders notes that “[s]everal journalists have been murdered or physically attacked in recent years,” Reporters Without Borders, *El Salvador*, <https://rsf.org/en/el-salvador>, and in 2015

¹ Many of the sources cited below were submitted by Mr. Duran Ortega with his motion to reopen. To the extent they were not, the Board may take administrative notice of them. See, e.g., *Kaczmarczyk v. INS*, 933 F.2d 588, 593 (7th Cir. 1991).

The Nation reported a climb in the “instances of aggression” against Salvadoran journalists, John Washington, *In El Salvador, Journalism Can Get You Killed*, *The Nation* (Sept. 8, 2015), <https://www.thenation.com/article/in-el-salvador-journalism-can-get-you-killed>. The growing consensus, in short, is that matters have worsened significantly and that it is presently a particularly dangerous time to be engaged in journalism in El Salvador.

That fact appears in large part attributable to the widespread and severe deterioration in safety and security in El Salvador. As has been widely reported, warfare by and between the country’s gangs has created “[e]xceptionally intense and persistent violence.” International Crisis Group, *El Salvador’s Politics of Perpetual Violence* (Dec. 19, 2017), <https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/64-el-salvadors-politics-perpetual-violence> (hereinafter, “*Perpetual Violence*”).² Indeed, given El Salvador’s size and population, the extent of its gangs’ territorial presence and armed power “has no

² See also, e.g., Jasmine Garsd, *How El Salvador Fell Into a Web of Gang Violence*, NPR (Oct. 5, 2015), <https://www.npr.org/sections/goatsandsoda/2015/10/05/445382231/how-el-salvador-fell-into-a-web-of-gang-violence>; Dan Harris, Adam Desiderio, Jenna Millman, & Lauren Effron, *In El Salvador, The Murder Capital of the World, Gang Violence Becomes a Way of Life*, ABC News (May 17, 2016), <https://abcnews.go.com/International/el-salvador-murder-capital-world-gang-violence-life/story?id=39177963>; Oscar Martinez, Efren Lemus, Carlos Martinez, & Deborah Sontag, *Killers on a Shoestring: Inside the Gangs of El Salvador*, N.Y. Times (Nov. 20, 2016), <https://www.nytimes.com/2016/11/21/world/americas/el-salvador-drugs-gang-ms-13.html>.

equal anywhere in the world.” *Id.* Government institutions “have proved singularly unable” to address this problem: security strategy has been largely counterproductive, legal institutions are inadequately resourced, and distrust in the police is high. *Id.* The results have been devastating: in 2015, for example, the country had the highest murder rate in the world (103 per 100,000 inhabitants) – nearly twice its murder rate in 2007, and 22 times the murder rate in the United States. *Id.* This violence, in turn, is causing Salvadorans to flee their country en masse – at levels not seen in decades – and seek asylum here and elsewhere.³ The Administration’s cancellation of temporary protected status for close to 200,000 Salvadorans in the United States is likely to exacerbate the country’s precarious state of affairs, both because the country is ill-equipped to handle a large influx of people and because returnees would be vulnerable to gang violence. *Id.*⁴ Indeed,

³ See, e.g., Bruno Gallo, *U.S. Sees Steep Rise in Asylum Claims From Latin America*, NBC News (June 21, 2017), <https://www.nbcnews.com/news/latino/u-s-sees-steep-rise-asylum-claims-latin-america-n775046>; Kate Linthicum, *Why Tens of Thousands of Kids from El Salvador Continue to Flee to the United States*, L.A. Times (Feb. 16, 2017), <http://www.latimes.com/world/mexico-americas/la-fg-el-salvador-refugees-20170216-htmstory.html>; Maureen Meyer and Elyssa Pachico, *Fact Sheet: U.S. Immigration and Central American Asylum Seekers*, Wash. Office on Latin Am. (Feb. 1, 2018), <https://www.wola.org/analysis/fact-sheet-united-states-immigration-central-american-asylum-seekers/>.

⁴ See also, e.g., *Perpetual Violence*; Ryan Devereaux, *Ignoring Violence in El Salvador, Trump Ends Years of Special Protective Status for Immigrants*, The Intercept (Jan. 8, 2018), <https://theintercept.com/2018/01/08/el-salvador-immigration-tps-trump>.

reports indicate that individuals deported from the United States to El Salvador and other central American countries with high rates of violence are murdered with disturbing frequency. Sibylla Brodzinsky & Ed Pilkington, *US Government Deporting Central American Migrants to Their Deaths*, *The Guardian* (Oct. 12, 2015), <https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america>.

As gang violence has risen in El Salvador, so too have targeted attacks by gangs on Salvadoran journalists. In March 2016, Nicolás Humberto García, a 23-year-old director of a community radio station, was disfigured and killed after his reporting on youth violence prevention, which had drawn death threats from gangs. Comm. to Protect Journalists, *Nicolás Humberto García* (Mar. 10, 2016), <https://cpj.org/data/people/nicolas-humberto-garcia>. That killing followed an incident in December 2015, when gang members took a cameraman for a television news program hostage, confiscated his cellphone, and demanded that he show them footage he had recently recorded before releasing him. Freedom House, *El Salvador: Freedom of the Press 2016*, <https://freedomhouse.org/report/freedom-press/2016/el-salvador>. And that incident took place in Soyapango – the same region where, four and a half years earlier, a cameraman “constantly participating in police operations and raids against gang members” died after he was shot ten times. Monica Medel, *Camarógrafo es acribillado en autobús en El*

Salvador, Knight Ctr. for Journalism in the Americas (April 27, 2011),

<https://knightcenter.utexas.edu/es/blog/camarografo-es-acribillado-en-autobus-en-el-salvador>. Other examples of members of the press whose murders are linked to gang violence abound.⁵

At the same time, Salvadoran journalists face an equal if not greater threat to their safety from their own government, and in particular the police. The Salvadoran press has reported extensively on the police's corruption and heavy-

⁵ Among other examples: Roxana Cortez Cabrera, a TV reporter, was shot in August 2017, on her way to work, *Delincuentes Asesinan Experiodista de Noticias Cuando Se Dirija a Su Trabajo en Apopa*, Solo Noticias (Aug. 22, 2017), <https://www.solonoticias.com/2017/08/22/delincuentes-asesinan-una-mujer-cuando-se-dirija-trabajo-apopa>; Samuel Rivas, a cameraman for Canal 21 television, was gunned down in November 2015, AFP, *El Salvador Arrests 200 Gang Members in Nationwide Sweep*, Yahoo (Apr. 16, 2018), <https://www.yahoo.com/news/el-salvador-arrests-200-gang-members-nationwide-sweep-210617086.html>; Luis Alonso Rosa López, a noted sports announcer and journalist, was attacked by six men and shot repeatedly in April 2015, EDH Deportes, *Asesinan a Locutor Deportivo en San Miguel*, [elsalvador.com](https://www.elsalvador.com/deportes/futbol/281070/asesinan-a-locutor-deportivo-en-san-miguel) (Apr. 28, 2015) <https://www.elsalvador.com/deportes/futbol/281070/asesinan-a-locutor-deportivo-en-san-miguel>; Melida Antonia Amaya, a journalist, and her son were hanged by gang members in their home, in June 2014, Yeny Letona, *Envían a Juicio a Dos por Asesinato de Comunicadora*, [elsalvador.com](https://www.elsalvador.com/noticias/nacional/156471/envian-a-juicio-a-dos-por-asesinato-de-comunicadora) (July 6, 2015), <https://www.elsalvador.com/noticias/nacional/156471/envian-a-juicio-a-dos-por-asesinato-de-comunicadora>; Carlos Jose Orellana, a TV cameraman, was stabbed to death near his home in July 2014, *TV Cameraman Stabbed to Death Near His Home*, Reporters Without Borders (July 16, 2014), <https://rsf.org/en/news/tv-cameraman-stabbed-death-near-his-home>; and Darwin Zelaya, a radio host, was shot to death outside his station in May 2016, AFP, *Asesinan a Locutor de Radio en El Salvador*, El Telégrafo (May 25, 2016), <https://www.eltelegrafo.com.ec/noticias/mundo/8/asesinan-a-locutor-de-radio-en-el-salvador>.

handed responses to gang violence – frequently at their own peril. Just last year, journalists at two major news outlets received death threats in response to a story about the police’s involvement in three extrajudicial killings and other illegal activities. *Two Salvadoran News Websites Threatened for Their Reporting*, Comm. to Protect Journalists (Aug. 28, 2017) <https://cpj.org/2017/08/two-salvadoran-news-websites-threatened-for-their-.php>; see also State Department, *El Salvador 2017 Human Rights Report*, at 17, <https://www.state.gov/documents/organization/277575>. That episode was reminiscent of one from 2015, when investigative journalists at the news site *El Faro* were subject to intimidation and death threats for a report documenting an extrajudicial massacre by police forces. Rafael Castillo, *El Salvador Journalists Fear for Their Lives After Accusing Police of a Massacre*, Vice (Aug. 25, 2015), <https://news.vice.com/article/el-salvador-journalists-fear-for-their-lives-after-accusing-police-of-a-massacre>; John Washington, *In El Salvador, Journalism Can Get You Killed*, *The Nation* (Sept. 8, 2015), <https://www.thenation.com/article/in-el-salvador-journalism-can-get-you-killed>. Other journalists have been threatened with criminal charges for reporting on matters unfavorable or embarrassing to law enforcement. See Jay Root, *El Salvador Journalist Faces Threats From Gangs, Government*, *The Texas Tribune* (Oct. 17, 2016), <https://www.texastribune.org/2016/10/17/el-salvador-newspaper-editor>. For his part, the President of El Salvador has exacerbated matters by

creating a climate of distrust of the press, accusing it of waging a “psychological terror campaign” against him. *Freedom of Information Shrinks During President’s First Year*, Reporters Without Borders (June 4, 2015), <https://rsf.org/en/news/freedom-information-shrinks-during-presidents-first-year>. In sum, El Salvador is simply not the same country it was when Mr. Duran Ortega left it 12 years ago.

Mr. Duran Ortega’s brand of journalism is precisely the kind that would put him in the crosshairs of both the gangs and the government. Mr. Duran Ortega’s career as journalist has focused on “government malfeasance and corruption.” Respondent’s Motion to Reopen Removal Proceedings (“Mot.”) at 7. His reporting in the United States is well-known in El Salvador. Mot., Ex. A ¶ 16. Given recent events in El Salvador involving journalists who report on such topics, he has a justifiable fear that returning him to El Salvador would put his life in danger. *Id.* ¶¶ 16-19.

The law and basic considerations of fairness give him the right to make his case for asylum. Given that conditions for journalists operating in El Salvador have materially changed since 2007, the Board should grant Mr. Duran Ortega’s motion to reopen.

B. Attempting to Deport Mr. Duran Ortega in These Circumstances Violates the First Amendment.

The merits of Mr. Duran Ortega’s motion to reopen cannot be divorced from

the Government’s conduct in seeking to deport him. There is substantial evidence that it has done so here in retaliation for his political speech and its desire to silence similar speech in the future. The right to criticize government officials and policy without fear of reprisal – a right that citizens of El Salvador and many others around the world lack – is at the very heart of what the First Amendment protects. The application of the statutes and regulations at issue must necessarily yield to the First Amendment, and the serious First Amendment interests at stake weigh in favor of granting Mr. Duran Ortega’s motion to reopen.

1. The First Amendment Protects Mr. Duran Ortega From Retaliation for and Censorship of His Political Speech.

As a preliminary matter, a noncitizen in Mr. Duran Ortega’s position enjoys First Amendment free speech protections. In contrast to some other provisions of the Constitution, the free speech clause is not limited to “citizens” of the United States, or even to “the people.” Rather, it provides simply that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. In other words, the First Amendment’s free speech clause does more than endow Americans with a *right* – it also imposes a *limit* on what Congress (and other government actors) may constitutionally do. *See, e.g., Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1418 (2016) (“[T]he First Amendment begins by focusing upon the activity of the Government. . . . The Government acted upon a

constitutionally harmful policy whether [petitioner] did or did not in fact engage in political activity.”).⁶ In other words, when the Government undertakes to suppress protected speech, and/or attempts to do so with an improper motive, it acts unconstitutionally – no matter *whose* speech it is suppressing. This is so because the right operates structurally. It shields not only a speaker’s right to communicate his or her views, but also protects the right of readers and listeners to receive the information communicated, benefitting the populace at large and ultimately serving our structural ability to govern ourselves. *See, e.g., Walker v. Tex. Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2246 (2015) (“[T]he Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate.”); *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (“[T]he right to receive ideas is a necessary predicate to the *recipient’s* meaningful exercise of his own rights of speech, press, and political freedom.”).

Moreover, even if the First Amendment’s free speech protections were somehow circumscribed to a certain class of speakers, Mr. Duran Ortega would

⁶ *See also* Nikolas Bowie & Leah Litman, *The First Amendment Belongs Only to Americans? Wrong*, Take Care (Mar. 29, 2017), <https://takecareblog.com/blog/the-first-amendment-belongs-only-to-americans-wrong>.

plainly be part of that class. The Supreme Court’s decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), is instructive. That case addressed whether the Fourth Amendment’s protection for the “right of the people” to be free from unreasonable searches and seizures applied to the government’s search of a noncitizen’s property in Mexico. *Id.* at 261. The Court held that it did not, but explained that “the people” protected by the Fourth Amendment is a group broader than just the American citizenry; rather, it refers to “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *Id.* at 265. The Court’s analysis has been applied to other constitutional provisions as well. *See, e.g., Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 996-97 (9th Cir. 2012) (applying *Verdugo-Urquidez* analysis to First Amendment right to freedom of association and Fifth Amendment rights to equal protection and due process).⁷

Applying that test, Mr. Duran Ortega clearly benefits from constitutional protections, including those of the First Amendment. The evidence in the record

⁷ At least some courts have also held as a categorical matter that citizens and noncitizens residing in the United States are on the same footing for purposes of First Amendment protections. *See, e.g., Massignani v. INS*, 438 F.2d 1276, 1278 (7th Cir. 1971) (“aliens fully enjoy our primary rights of free speech guaranteed by the First Amendment”); *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1066 (9th Cir. 1995) (“We reject the government’s contention that we apply gradations of First Amendment protection . . . in determining which citizens and aliens may receive particular government benefits.”).

here attests to his substantial and meaningful connections to the United States. Mr. Duran Ortega has continuously resided in the United States for close to 12 years. Mot., Ex. A ¶ 2. He has not hidden in the shadows, but has spent nearly all of the time as a journalist in Memphis, reporting on matters of interest to his local community – first as a News Director and Co-Anchor for *Radio Ambiente*, and then through a news outlet he founded himself, *Memphis Noticias*. *Id.* ¶ 6. He has developed close relationships within the community, and has served it by providing years’ worth of reporting on matters that are indisputably matters of public concern. *See generally id.* These ties are more than sufficient to bestow upon him the same constitutional right to free speech enjoyed by American citizens. *See, e.g., Ibrahim*, 669 F.3d at 996-97 (noncitizen’s doctoral studies at American university were sufficient to establish “substantial voluntary connection to United States” required to assert constitutional claims). Simply put, Mr. Duran Ortega has the same First Amendment rights that any American citizen does.

The right to speak freely entails, of course, the right to be free from reprisal for one’s speech and from actions by government officials to censor or to suppress such speech. The central meaning of the First Amendment – and the protection that differentiated our Nation from the English Crown and continues to distinguish it from large swaths of the world – is that it prevents government officials from taking actions to suppress speech critical of them. *See, e.g., Rossignol v.*

Voorhaar, 316 F.3d 516, 522 (4th Cir. 2003) (“In suppressing criticism of their official conduct . . . , defendants did more than compromise some attenuated or penumbral First Amendment right; they struck at its heart.”). And, as the Supreme Court just reiterated earlier this week in an 8-1 decision, “the First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech.” *Lozman v. City of Riviera Beach, Fla.*, --- S. Ct. ----, 2018 WL 3013809, at *3 (Jun. 18, 2018). In whatever form or context it may occur, government reprisal for protected speech is anathema because “it threatens to inhibit exercise of the protected right.” *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998). And where, as here, the speech in question bears on a matter of public concern, it occupies “the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal marks and citation omitted); *see also Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (“Speech on matters of public concern is at the heart of the First Amendment’s protection”); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”). Put simply, efforts to suppress speech related to matters of public concern, whether through retaliation or otherwise, “strike at the heart” of the First Amendment’s limitation on government action.

2. There is Substantial Evidence Indicating the Government's Retaliatory and Censorial Purpose and Effect Against Mr. Duran Ortega's Speech.

The circumstances leading up to and surrounding Mr. Duran Ortega's arrest and transfer to ICE demonstrate that the Government's efforts to remove Mr. Duran Ortega are based primarily on his critical reporting about the MPD and ICE.

A simple review of the evidence in the record evinces that retaliatory and censorial motive and effect for the Government's conduct. For the past decade, Mr. Duran Ortega has peacefully lived and worked as a journalist in Memphis. *See generally* BIA Motion to for Emergency Stay, Ex. D (Affidavit of Melisa Valdez) ("Valdez Aff."). He became known to the MPD because of his reporting through *Memphis Noticias*, the news outlet he founded in 2014. Mot., Ex. A ¶ 6. *Memphis Noticias* regularly published hard-hitting stories critical of the MPD's collaboration with ICE and its conduct towards black and Latino members of the community. *Id.* ¶¶ 7-11. In one notable case from 2017, Mr. Duran Ortega reported that, contrary to public statements made by the mayor of Memphis, the MPD had in fact been collaborating with ICE. *Id.* ¶ 9; Mot., Ex. D. The MPD requested that he remove the story; he refused. Mot., Ex. A ¶ 10. In another report in 2018, Mr. Duran Ortega drew national opprobrium when he reported that the MPD had left the body of a murder victim in the back of a van for 49 days. *Id.* ¶ 11.

The MPD arrested Mr. Duran Ortega on April 3, 2018, as he covered for

Memphis Noticias a peaceful protest against the MPD’s collaboration with ICE. *Id.* ¶ 12. He wore his press credentials, complied with all police instructions prior to his arrest, and was the only member of the media arrested. *Id.* ¶ 13. The police detained him on the charges – disorderly conduct and obstruction of a highway – and, remarkably, refused to release him even after his girlfriend posted his bond. Valdez. Aff. ¶¶ 10-11. The charges were dropped two days later, but rather than release him, MPD transferred him to ICE custody for removal, with the Government effectively silencing his future speech. Mot., Ex. A ¶ 14. Although a spokesman justified this conduct by asserting that Mr. Duran Ortega has been an “immigration fugitive” since his removal order was entered *in absentia* in 2007,⁸ there is substantial evidence that both MPD and ICE acted with a censorial and retaliatory purpose, and in so doing violated the constitutional rights of Mr. Duran Ortega *and* his readers.

Indeed, despite ICE’s claim that Mr. Duran Ortega has been an “immigration fugitive” for the past eleven years, it apparently made no previous effort to pursue him, even though he is a prominent journalist who would have been easy to locate. Mr. Duran Ortega was not swept up in an immigration raid or pulled over at a

⁸ Sheila Burke, *Lawyers: Journalist was Detained by ICE Because of Reporting*, The Associated Press (Apr. 16, 2018), <https://www.apnews.com/fe29c2bb9c7743cb992a89a461b39c86>.

traffic stop – rather, he was singled out by the MPD, at a public event where his identity was well known to authorities. There is no reasonable explanation for Mr. Duran Ortega’s arrest on minor charges that were promptly dropped, and his transfer to ICE, apart from his critical journalism on matters of public concern. *Cf., e.g., Taylor v. Keith*, 338 F.3d 639, 646 (6th Cir. 2003) (police brutality is matter of public concern). To claim that the content of Mr. Duran Ortega’s speech is unrelated to his arrest and attempted removal is simply not credible.⁹

Mr. Duran Ortega’s case is not an isolated one; to the contrary, it fits an emerging and disturbing pattern of punishing immigrants who have spoken out against ICE. *See* John Burnett, *See The 20+ Immigration Activists Arrested Under Trump*, NPR (Mar. 16, 2018), <https://www.npr.org/2018/03/16/591879718/see-the-20-immigration-activists-arrested-under-trump>. None has committed violent crimes, and many have not committed any crimes at all. Among them is Ravi Ragbir, a well-known immigration activist in New York City who ICE arrested –

⁹ To the extent that the Government intends to rely on *Reno v. American Anti-Arab Discrimination Committee*, 525 U.S. 471 (1999), in an attempt to escape its unconstitutional conduct, that case has no application here for at least three reasons: (i) that case involved an individual’s membership in an organization supporting terrorist activity, circumstances far removed from those here, involving core First Amendment-protected activity; (ii) the remedy sought at this juncture is not that Mr. Duran Ortega be permitted to remain in the United States, but that he simply be allowed to make a case for asylum; and, (iii) in any event, this case would fall within the exception for “outrageous” cases of viewpoint discrimination, given officials’ clear retaliatory and censorial conduct. *See id.* at 487-91.

and sought to immediately deport – following a routine check-in. A judge enjoined Ragbir’s immediate deportation on due process grounds, and suggested that ICE’s conduct may have also violated the First Amendment. *Ragbir v. Sessions*, 2018 WL 623557, at *1 n.1 (S.D.N.Y. Jan. 29, 2018) (noting “with grave concern the argument that petitioner has been targeted as a result of his speech and political advocacy on behalf of immigrants’ rights and social justice” and quoting *United States v. Alvarez*, 579 U.S. 709, 716 (2012)). In March of last year, a 22-year-old activist named Daniela Vargas was pulled over by ICE officials after leaving a rally where she had spoken about the rights of undocumented immigrants. Samantha Schmidt, *ICE nabs young ‘dreamer’ applicant after she speaks out at a news conference*, Wash. Post (Mar. 2, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/03/02/ice-nabs-young-dreamer-applicant-after-she-speaks-out-at-a-news-conference>. And, another prominent advocate of immigrants’ rights, Maru Mora-Villalpando, is facing deportation after 22 years in the United States with no criminal record. Linda Yang, *Immigration Activists Say ICE Is Targeting Them for Deportation*, Broadly (Feb. 28, 2018), https://broadly.vice.com/en_us/article/zmwkqe/undocumented-activists-targeted-ice-maru-mora-villalpando. An internal ICE document about Villalpando tellingly noted her “extensive involvement with anti-ICE protests and Latino advocacy programs.” *Id.* Here, as in the cases above, the

Government is wielding the tool of deportation and an important voice reporting on the rights of immigrants is effectively being silenced.

Further, as explained above, the Government's conduct here is also troublesome because it burdens the First Amendment rights of others. Mr. Duran Ortega's arrest and attempted removal, which have garnered national media attention,¹⁰ conveys a stark and direct message to others considering speaking out against ICE or other law enforcement. This chilling effect, which falls to a great degree on the community of the very people likely to be impacted by ICE and police policies, undermines our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Muzzling Mr. Duran Ortega deprives the audience of his journalism, both within his community and elsewhere, of their First Amendment right to receive his speech. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (noting "the First Amendment interests of those who seek

¹⁰ See, e.g., Chantal De Silva, *ICE Arrests Journalist Who Covered Protest Against Agency's Policies*, Newsweek (Apr. 6, 2018), <http://www.newsweek.com/ice-arrests-manuel-duran-journalist-covered-protest-immigration-agencys-875279>; Sheila Burke, *Lawyers: Journalist was Detained by ICE Because of Reporting*, The Associated Press (Apr. 16, 2018), <https://www.apnews.com/fe29c2bb9c7743cb992a89a461b39c86>; Emma Roller, *ICE Is Trying to Deport a Journalist for Reporting on Them, His Lawyers Say*, Splinter News (Apr. 17, 2018), <https://splinternews.com/ice-is-trying-to-deport-a-journalist-for-reporting-on-t-1825321928>.

personal communication with” noncitizens); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 592 (7th Cir. 2012) (“[I]t is well established that ‘when one person has a right to speak,’ others hold a ‘reciprocal right to receive’ the speech.” (citations omitted)). In short, the conduct here, if ratified by the Board, provides a roadmap for officials to suppress and retaliate against speech critical of them in a manner that is directly at odds with the values enshrined in the First Amendment.

IV. CONCLUSION

The circumstances of this case are unusual, but the relief sought is anything but. There is substantial evidence that both the MPD and ICE are seeking Mr. Duran Ortega’s removal to punish him for his constitutionally protected speech and to prevent him from engaging in such speech in the future. Official conduct with a such a retaliatory and censorial purpose and effect is patently unconstitutional, both squelching Mr. Duran Ortega’s speech and interrupting the flow of information to the community about matters of indisputable public concern. We do not allow officials to engage in such conduct under any circumstances, but particularly where the consequences are to return a person to the “murder capital of the world,” a place that has become decidedly more dangerous over the past decade for journalists, especially those who report on government misconduct and corruption. To forcibly send Mr. Duran Ortega there now could very well be a death sentence, pursued in direct violation of our constitution. He should be

afforded the opportunity to present his full case, and the Board should grant his motion to reopen.

Dated: June 20, 2018

Respectfully submitted,



Marjorie J. Peerce

Seth D. Berlin

Al-Amyr Sumar

BALLARD SPAHR LLP

1675 Broadway, 19th Floor

New York, NY 10019-5820

Phone: 212-223-0200

Fax: 212-223-1942

peercem@ballardspahr.com

berlins@ballardspahr.com

sumara@ballardspahr.com

Counsel for *amici curiae*

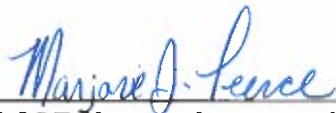
CERTIFICATE OF SERVICE

On June 20, 2018, the foregoing was sent by certified mail, return-receipt to the following:

Jeremy Jong
Southern Poverty Law Center
PO Box 1092
Jena, LA 71342

Counsel for Manuel Duran Ortega

Office of Chief Counsel
DHS/ICE
180 Ted Turner Drive, SW Suite 332
Atlanta, GA, 30303



COUNSEL FOR AMICI CURIAE