

**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**

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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:

The Honorable Charles K. Adkins-Blanch, United States Department of Justice, Board of Immigration Appeals

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

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Associated Press Media Editors (*Amicus Curiae*)

Association of Alternative Newsmedia (*Amicus Curiae*)

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The Honorable Scott D. Criss, United States Department of Justice, Executive Office for Immigration Review

The Honorable Dee Drell, United States District Court for the Western District of Louisiana

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Media Law Resource Center (*Amicus Curiae*)

Memphis (Tennessee) Police Department

National Association of Hispanic Journalists (*Amicus Curiae*)

National Hispanic Media Coalition (*Amicus Curiae*)

Newell, Craig A. Jr., Trial Attorney, United States Department of Justice, Office of Immigration Litigation

The Honorable Kevin C. Newsom, United States Court of Appeals for the Eleventh Circuit (member of the panel granting Petitioner's motion for stay of removal)

Nielsen, Kirstjen, Secretary of the U.S. Department of Homeland Security
PEN America (*Amicus Curiae*)

The Honorable Joseph Perez-Montes, United States District Court for the Western District of Louisiana

Radford, Emily Anne, Assistant Director, United States Department of Justice, Office of Immigration Litigation

Radio Television Digital News Association (*Amicus Curiae*)

Reporters Without Borders (*Amicus Curiae*)

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The Honorable Linda S. Wendtland, United States Department of Justice,
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Whitaker, Mathew, Acting United States Attorney General (*Respondent*)

Willis, Gracie (*Counsel for Petitioner*)

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 14th day of January 2019.

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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, National Hispanic Media Coalition, 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.

Pursuant to Fed. R. App. P. 29(a)(2), counsel for both Petitioner and Respondent have consented to *Amici*’s request to file this brief.

STATEMENT OF THE ISSUES

1. Whether the Board of Immigration Appeals erred in ruling that Mr. Duran Ortega had not established that conditions for investigative journalists in El Salvador have materially worsened since 2007, including by limiting its review to generalized State Department reports and ignoring substantial, reliable, and more

specific evidence demonstrating that conditions for journalists have in fact worsened.

2. Whether the Government's arrest, detention, and attempts to remove Mr. Duran Ortega in response to his journalism raise significant concerns that it violated his First Amendment rights, and those of his readers and listeners, in a manner that provides added justification for re-opening his immigration case and allowing him to seek asylum.

SUMMARY OF ARGUMENT

Amici appear in this case to support the Petitioner, Manuel Duran Ortega, by offering their expertise and experience on two central issues, namely, the increasingly dangerous conditions faced by investigative journalists in El Salvador and the First Amendment principles that would be threatened if the Court allows Mr. Duran Ortega to be removed without further hearing.

First, the Board of Immigration Appeals ("Board") erred in concluding that there had not been a material change in conditions for journalists in El Salvador since 2007, when the *in absentia* order was entered, and in affirming the finding of the Immigration Judge ("IJ") to that effect. *Amici* appeared in the proceeding below, with leave from the Board, and appear again, to offer their particularized knowledge and experience about the considerable extent to which conditions for journalists have worsened since 2007 and particularly in the past few years. The

Board erred in disregarding such information, submitted by both Mr. Duran Ortega and by *Amici*, and the Court should reverse and re-open Mr. Duran Ortega's case for further consideration of that information, which, if considered, will, in turn, allow him to have his claim for asylum heard.

Second, the First Amendment concerns presented by the Government's arrest, detention, and threatened removal of Mr. Duran Ortega merit re-opening of his case. He has presented substantial evidence establishing, at a minimum, a *prima facie* case that government actors retaliated against him for his reporting on matters of public concern and/or attempted to silence such reporting. The potential removal of Mr. Duran Ortega – to a country where he faces an ever-increasing risk of physical harm – in response to journalism critical of law enforcement officials and their conduct threatens core First Amendment rights that merit full consideration by the court.¹

¹ Mr. Duran Ortega also argues that the Board of Immigration Appeals erred in ruling that he received proper notice of his removal hearing. *Amici* have focused on those issues on which they have substantial, specialized experience and expertise that may assist the Court in considering this appeal. By concentrating on those two issues, *Amici* do not mean to suggest that they agree with the Board's conclusion on the "notice" issue. To the contrary, it is deeply concerning to *Amici* that a long-time professional journalist like Mr. Duran Ortega could be removed to El Salvador as the result of a combination of (a) apparently defective notice for an initial hearing; (b) the Board's refusal to grant a new hearing based on a failure to consider substantial evidence of dangerous conditions facing journalists there; and (c) a failure to consider the circumstances that led to his arrest, detention, and attempted removal, in response to his reporting.

ARGUMENT

I. THE BOARD IMPROPERLY FAILED TO CONSIDER EVIDENCE OF THE INCREASINGLY DANGEROUS CONDITIONS FACED BY INVESTIGATIVE JOURNALISTS IN EL SALVADOR.

Amici work with journalists from countries throughout the world and send their own journalists to report from those regions, giving them specialized, timely information about the conditions journalists face. Ensuring the safety of their journalists is of paramount importance, so *Amici* closely monitor those conditions, and many of them issue formal reports describing the current state of those conditions.

Both Mr. Duran Ortega and *Amici* presented a substantial body of evidence to the Board demonstrating the increasingly dangerous conditions faced by journalists – especially investigative journalists like Mr. Duran Ortega – in El Salvador. *See* Certified Administrative Record (“R.”) 943-1158 (Petitioner’s Mot. to Reopen); R. 53-60 (*Amicus* Brief). Reports from numerous journalist organizations, respected non-press watchdog organizations, and leading national and international publications all show a disturbing increase in incidents of violence against members of the media reporting on government corruption and misconduct in El Salvador, including as part of the overall deterioration of safety and security in the country. This evidence compels a finding that conditions have materially changed for journalists in El Salvador.

Inexplicably, the Board relegated its discussion of *Amici*'s specialized expertise to a brief footnote, declining to consider the evidence *Amici* submitted and determining instead that it could rely only on the official country reports issued by the State Department. R. 6-7 n.4 (Decision of the Board of Immigration Appeals) (rejecting publications provided by *Amici* because "these publications do not report commonly known facts ... and are not official documents"). The Board did not identify any authority that would limit the evidence it or the IJ were permitted to consult to State Department or other governmental reports or that would prohibit consideration of other evidence from Mr. Duran Ortega or from *Amici*, who are well-positioned to provide timely and specific information on conditions faced by journalists.

Quite to the contrary, the law required the Board and the Immigration Judge to evaluate all available evidence when deciding whether to re-open. *See Jiang v. U.S. Att'y Gen.*, 568 F.3d 1252, 1258 (11th Cir. 2009) (reversing and directing reopening based on government reports and affidavits submitted by petitioner); *Liu v. U.S. Att'y Gen.*, 359 F. App'x 993, 995 (11th Cir. 2010) (per curiam) (reversing and directing reopening based on news articles submitted by petitioner). In *Jiang*, this Court found that the Board abused its discretion in refusing to re-open the petitioner's immigration case based upon an affidavit from the petitioner's mother, who lived in China, which was corroborated by Department of State reports

demonstrating that forced sterilizations and other enforcement of China's one-child policy had increased in the years since an *in absentia* order was entered against the petitioner. 568 F.3d at 1258.²

Here, Petitioner has presented voluminous evidence from organizations and journalists on the ground in El Salvador attesting to the declining conditions for journalists, and, although much more general, the State Department reports relied upon by the Board actually corroborate that conclusion. *See id.*; R. 943-1158. For their part, *Amici* provided reports from multiple sources uniformly demonstrating that declining “conditions of insecurity and violence” in El Salvador have undermined the safety of journalists. *See* R. 61-64; Asociación de Periodistas de El Salvador, *Informe de Libertad de Prensa, El Salvador* (May 3, 2018), at 3-5 <http://apes.org.sv/wordpress/wp-content/uploads/2018/05/INFORME-LIBERTAD-DE-PRENSA-ENERO-2017-ABRIL-2018.pdf>; *see also* Reporters Without Borders, *El Salvador*, <https://rsf.org/en/el-salvador> (reporting that “[s]everal journalists have been murdered or physically attacked in recent years”); 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->

² It is notable that the Board in *Jiang* (like the Board below) did not articulate doubts about the truth of petitioner's evidence or point to evidence to the contrary; rather, it “overlooked, or, inexplicably discounted” the evidence and found that petitioner did not show a significant change in conditions. *Id.* at 1258.

[get-you-killed/](#) (reporting a climb in the “instances of aggression” against El Salvadoran journalists).

These reports, and numerous articles provided by Petitioner and *Amici*, identify murders and physical assaults on media professionals, death threats and intimidation attempts by government officials, and criminal prosecutions in retaliation for reporting, at increasing rates over the past four to five years. See 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*”) (describing “[e]xceptionally intense and persistent violence”).

Among the evidence the Board refused to consider were news reports detailing physical attacks on nine journalists, including eight murders of journalists or their family members, from 2011 to the present, with most of these brutal attacks occurring in the past three years:

- In 2011, a cameraman who covered “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 Center for Journalism in the Americas (April 27, 2011), <https://knightcenter.utexas.edu/es/blog/camarografo-es-acribillado-en-autobus-en-el-salvador>.

- In June 2014, journalist Melida Antonia Amaya and her son were hanged by gang members inside their home. 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>.
- In July 2014, Carlos Jose Orellana, a TV cameraman, was stabbed to death near his home. *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>.
- In April 2015, Luis Alonso Rosa López, a sports announcer and journalist, was attacked by six men and shot repeatedly. 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>.
- In November 2015, Samuel Rivas, a cameraman for Canal 21 television, was gunned down. 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>.
- In December 2015, 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>.

- 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. Committee to Protect Journalists, *Nicolás Humberto García* (Mar. 10, 2016), <https://cpj.org/data/people/nicolas-humberto-garcia>.
- In May 2016, Darwin Zelaya, a radio host, was shot to death outside his station. 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>.
- In August 2017, Roxana Cortez Cabrera, a TV reporter, was shot 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>.

Since filing their brief below, *Amici*'s counsel learned of yet another series of attacks against and intimidation of journalists in El Salvador. Journalists with *El Factum* sought the intervention of the Organization of American States' Inter-

American Commission on Human Rights (“IACHR”), because they had “been the target of harassment, threats, and other acts of violence after publishing the findings of an investigation in which they allege extrajudicial executions, sexual assault, and extortion on the part of officers of State security forces.” *See* IACHR 2017 Annual Report at 87, <http://www.oas.org/en/iachr/docs/annual/2017/docs/IA2017cap.2-en.pdf>. As the IACHR explained in its 2017 Report, “[a]fter analyzing the allegations of fact and law, the Commission believes that the information presented shows, *prima facie*, that the journalists of *Factum* magazine are in a serious and urgent situation.” *Id.*

Additional reports detail numerous incidents of threats and intimidation of Salvadoran journalists by the government or law enforcement. *E.g.*, *Two Salvadoran News Websites Threatened for Their Reporting*, Committee to Protect Journalists (Aug. 28, 2017), <https://cpj.org/2017/08/two-salvadoran-news-websites-threatened-for-their-.php> (reporting on death threats received by journalists reporting on police involvement in extrajudicial killings); U.S. Department of State, *El Salvador 2017 Human Rights Report*, at 17, <https://www.state.gov/documents/organization/277575.pdf>.

The episode described by the Committee to Protect Journalists in its 2017 Report is reminiscent not only of the one addressed by the IACHR in its 2017 Report, discussed *supra*, but also of events from 2015, in which investigative

journalists at the news site *El Faro* were subject to intimidation and death threats for its report also 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>; see also *In El Salvador, Journalism Can Get You Killed*, *supra*.

Even journalists who avoid physical harm and death threats may still face criminal charges – not for any valid reason but simply 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> (describing charges of “advocating terrorism and inciting crimes” brought against editor based on reporting); see also *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> (describing climate of hostility to press created by the President of El Salvador).

The extraordinary danger to journalists in El Salvador arises from a number of factors, including increased gang activity and control, widespread deterioration in safety and security in El Salvador, and discouragement of press activities from the highest levels of government. Warfare among the country’s gangs has created

“[e]xceptionally intense and persistent violence,” and, as of 2015, El Salvador had the highest murder rate in the world – nearly twice its murder rate in 2007, and 22 times the murder rate in the United States. *E.g.*, *Perpetual Violence*, *supra*, <https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/64-el-salvadors-politics-perpetual-violence>; *see also* BBC News, *El Salvador: No Murders Reported for 24 Hours* (Jan. 17, 2017), <https://www.bbc.com/news/world-latin-america-38605889> (“Police in El Salvador say the country has gone 24 hours without any murders, a rare occurrence in a nation plagued by gang warfare.”).³

Indeed, reports indicate that individuals deported from the United States to El Salvador and other Central American countries 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->

³ *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>.

[deportations-central-america](#); Kevin Seiff, *When Death Awaits Deported Asylum Seekers*, The Washington Post (Dec. 26, 2018), https://www.washingtonpost.com/graphics/2018/world/when-death-awaits-deported-asylum-seekers/?noredirect=on&utm_term=.b4d67c1d1aac (discussing murders of asylum seekers after being returned to El Salvador).

As both Petitioner and a member of this Court have pointed out, even the State Department reports relied upon by the IJ and the Board do, in fact, corroborate this information and demonstrate a deterioration of conditions for journalists from 2007 to 2017. *See* Order Granting Emerg. Mot. For Stay (Nov. 29, 2018) (Martin, J, concurring); Petitioner’s Emerg. Mot. For Stay (Oct. 30, 2018), at 8-9. Indeed, the increased persecution of journalists merited mention in the State Department’s 2017 report despite the fact that the Department, in 2017, “sharpened the focus of the report to be more responsive to statutory reporting requirements and more focused on *government action or inaction* with regard to the promotion and protection of human rights.” John J. Sullivan, Acting U.S. Secretary of State, *Remarks on the Release of the 2017 Country Reports on Human Rights Practices* (April 20, 2018), <https://www.state.gov/s/d/2018/280666.htm> (emphasis added).

In addition to its myopic consideration of the evidence presented by Mr. Duran Ortega and *Amici*, the Board also erred when it found that Mr. Duran Ortega

presented insufficient evidence of the country conditions at the time of the *in absentia* order for purposes of comparison. *See* R. 6 (BIA Order). The Board does not point to any law that requires separate, comparative evidence of both points in time; Petitioner need only show a material deterioration of country conditions. *See Liu*, 359 F. App'x at 995. In *Liu*, this Court ruled that the Board had abused its discretion by arbitrarily ruling that the petitioner had not shown that conditions for followers of her faith had changed from 2001 to 2008. *Id.* The petitioner had in fact presented news articles demonstrating that “conditions had worsened for Falun Gong practitioners before and after the 2008 Olympics,” and this Court ordered her case re-opened to allow an asylum claim on these grounds. *Id.*; *see also Jiang*, 568 F.3d at 1258 (considering reports of increased danger or worsening conditions without requiring separate evidence at both time periods).

As in those cases, both Mr. Duran Ortega and *Amici* have presented substantial evidence from individuals on the ground in El Salvador and in the United States, as well as organizations with substantial experience and expertise, all corroborated by State Department reports, that conditions for journalists in El Salvador have deteriorated materially in the years since the *in absentia* order. *See* R. 943-1158 (Petitioner's Mot. to Reopen); R. 53-60 (*Amicus* Brief). The Board's refusal to consider this evidence, together with its arbitrary interpretation of the State Department reports and unsupported requirement of additional evidence,

constitute clear and reversible error. When properly credited, that evidence confirms that Mr. Duran Ortega has more than carried his burden of making a *prima facie* showing of eligibility for an asylum hearing. He should have the opportunity to make his case for asylum, and the Board's decision should be reversed. *See Jiang*, 568 F.3d at 1257.

II. THE GOVERNMENT'S ACTIONS RAISE PROFOUND FIRST AMENDMENT CONCERNS.

This Court should also grant Petitioner's motion to reopen in light of the serious First Amendment concerns raised by the Government's actions in this case. Mr. Duran Ortega has presented substantial evidence that the Memphis Police Department and ICE, acting together, arrested, detained, and attempted to remove him in retaliation for his political speech and out of a desire to silence similar reporting in the future. The application of the statutes and regulations at issue must necessarily be consistent with the First Amendment, and the serious First Amendment interests at stake weigh in favor of granting Mr. Duran Ortega's motion to reopen.

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

The right to criticize government officials and policy without fear of reprisal is at the very heart of the First Amendment. When the Government attempts to suppress protected speech, it acts unconstitutionally – no matter whose speech it is

suppressing. *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”). Accordingly, Mr. Duran Ortega’s right to speak – and others’ right to hear his speech – is protected by the First Amendment, regardless of his status as a citizen or non-citizen.⁴

This is because the First Amendment both confers *rights* on individuals and imposes *limits* on what Congress and other government actors may constitutionally do. *See, e.g., Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016) (“[T]he First Amendment begins by focusing upon the activity of the Government.”); *Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) (by suppressing criticism of their conduct, officials “did more than compromise some attenuated or penumbral First Amendment right; they struck at its heart.”).

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). Where the speech in question involves a matter of public concern, as it unquestionably does here, it occupies “the highest rung of the

⁴ In contrast to some other constitutional provisions, the free speech clause is not limited to “citizens” or even “the people.” Rather, it provides that “Congress shall make no law ... abridging the freedom of speech.” U.S. Const. amend. I. As such it protects both citizens and aliens from unlawful retaliation. *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”); *see also* R. 61-64 (*Amicus* Brief).

hierarchy of First Amendment values, and is entitled to special protection.”

Connick v. Myers, 461 U.S. 138, 145 (1983) (internal marks and citations 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”) (internal marks and citations omitted); *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.”).

As a result, the First Amendment not only protects speakers, but also protects readers’ and listeners’ rights 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.”). Efforts to suppress speech violate the rights of both the speaker and the listeners, and threaten the future exercise of those rights, by creating a chilling effect that deters others from speaking freely.

Here, Mr. Duran Ortega's arrest raises First Amendment concerns in three interrelated ways: first, because it came on the heels of months of critical coverage; second, because he steadfastly refused an extraordinary request by officials to remove one of his stories; and third, because it occurred at the very moment he was lawfully recording and reporting on a protest about collaboration between MPD and ICE. His published reporting is unquestionably protected speech, and his recording and reporting on the protest was similarly protected by clearly established First Amendment precedent, which unequivocally protects the right to investigate and record matters of public interest. *See, e.g., 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.").

Put simply, such 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.

B. Recent Supreme Court Discussions Illuminate Impermissible Cases of Retaliation.

In *Lozman*, in an 8-1 decision, the Court held that the existence of probable cause is not necessarily a bar to a First Amendment retaliation claim where it results from an official policy. *Lozman*, 138 S. Ct. at 1955 ("Lozman need not prove the absence of probable cause to maintain a claim of retaliatory arrest against

the City.”). It left for a future case whether probable cause would bar a First Amendment retaliation claim in circumstances where the arrest had not been made pursuant to an official policy, as had been the case in *Lozman*.

Taking up that question, the Supreme Court recently heard argument in *Nieves v. Bartlett*, Case No. 17-1174 (argued Nov. 26, 2018), which considered more broadly whether an arrest for which there was probable cause could nevertheless constitute unlawful retaliation under the First Amendment. Because the Government here alleges that it is insulated from a retaliation claim based on a purportedly lawful removal order, the Court’s discussion at oral argument is instructive. See Transcript, *Nieves v. Bartlett*, U.S. Sup. Ct. Case No. 17-1174, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1174_n7ip.pdf (hereinafter, “*Nieves* Tr.”).

Although the facts in *Nieves* involved an arrest at a festival purportedly because the arrestee had purportedly challenged, or “mouthed-off” to, law enforcement officers, throughout the argument the Justices considered various fact patterns in which a First Amendment retaliation claim might arise. As Justice Alito framed the discussion, these ranged from cases in which an individual insults an officer in the course of an encounter, is arrested, and then claims retaliation to cases in which “a journalist has written something critical of the Police Department

and then a couple of days later or a week later ... is arrested” on a minor or discretionary charge. *See Nieves Tr.*, 9:13-10:14 (Alito, J.).

While a number of justices were not all that sympathetic to allowing a retaliation claim in the former circumstance, there seemed to be little question that the arrest of a journalist in response to his reporting presented a strong case of First Amendment retaliation, regardless of whether there was probable cause for the arrest. *E.g., id.* (Alito, J.); *id.* at 15:21-23 (Breyer, J.) (describing the need to “guard[] against the danger that Justice Alito said in his second example”); *id.* at 53:8-12 (Ginsburg, J.) (differentiating between the “category of case [that] has been called ‘contempt of cop’, as distinguished from a journalist who wrote something critical of the government”); *id.* at 11:9-12:1 (Kagan, J.) (describing “category of cases – and you can think of it as the journalist case or you can think of it as a case where an individual police officer, you know, decides to arrest for jaywalking somebody wearing a Black Lives Matter T-shirt or, alternatively, a Make America Great Again cap or something like that,” even though “there might be probable cause” since “[t]he person jaywalked”).

As Justice Kagan pointed out, like the charges that led to Mr. Duran Ortega’s arrest here, which sprung from his prior reporting and his lawful journalism covering a protest, retaliation cases often involve lesser offenses where “there are so many laws that people can break that police officers generally look

the other way, but ... you're saying something that the officer doesn't much like, so he doesn't look the other way.” *Id.* at 11:21-12:1. Of particular import in cases like these, Justice Kagan noted, “it makes no difference to the First Amendment that there might have been probable cause for an arrest if, in fact, the arrest occurred as a result of retaliation for protected speech.” *Id.* at 22:4-8.

The evidence presented by Mr. Duran Ortega is identical to, if not more troubling than, the “retaliatory arrest of a journalist” scenario discussed in *Nieves*. He was arrested – the only journalist on the scene who was – while engaged in unquestionably lawful conduct of covering and recording a protest, after a series of critical reports and having been expressly asked to withdraw one such negative report, but declining to do so. The police arrested him on minor, discretionary charges, which were immediately dismissed within two days.

C. There Is Substantial Evidence that the Government Acted in Response to Petitioner’s Reporting.

The facts presented by Mr. Duran Ortega demonstrate, at a minimum, a *prima facie* case that he was arrested, detained, and threatened with removal in response to his reporting on matters of public concern, primarily the MPD’s coordination with ICE, with both a retaliatory and censorial purpose. In light of this evidence, the Board’s ruling that Mr. Duran Ortega’s “statement in his affidavit that he suspects he was arrested for being critical of the MPD is not corroborated by any other evidence,” R. 8, is clearly erroneous. In assessing

whether Mr. Duran Ortega is entitled to an asylum hearing or instead will be removed from the country resulting directly from an arrest for his lawful reporting, this Court should properly consider the constitutionality of the Government's actions.

1. Petitioner Is a Well-Known, Trusted Journalist, and Local Government Officials Sought to Use Him as an Ally.

Mr. Duran Ortega is a prominent journalist in the Memphis area, where he has worked for more than a decade, first as a journalist with *La Voz*, then as a News Director and Co-Anchor for *Radio Ambiente*, and most recently through a news outlet he founded himself, *Memphis Noticias*. R. 381-82. He is known for reporting on issues of concern to the Latino community and for using modern electronic media, like Facebook Live, a social media platform that allows for contemporaneous video reporting. *E.g.*, R. 892 (describing Petitioner as “the go-to journalist in the Latino community in Memphis”); R. 918 (describing Petitioner’s reporting as a something that “Memphis so badly needs and does not exist”); R. 898, ¶ 4 (“As far as many people are concerned” the “only source of news” who “most people follow”).

More importantly, Mr. Duran Ortega’s reporting was well-known to the law enforcement community in Memphis. He was almost certainly recognizable to officers, based on both his reporting and local government’s attempts to capitalize on his prominence to help improve relations with the Latino community in

Memphis. Both the Mayor's office and MPD had invited Mr. Duran Ortega to meetings and published photographs of these meetings. *E.g.*, R. 657, 786, 148, 1009-10, 1148; *see also* R. 384, ¶ 11.

Moreover, after Mr. Duran Ortega reported on MPD's coordination with ICE, the MPD contacted him personally to ask that he "remove the interview and retract the information pertaining to MPD." R. 546-47. He declined to withdraw his journalism and continued to publish important news that impacted the Latino community. R. 499-500. In March 2018, he reported on a widely publicized situation in which MPD officers impounded a car, leaving a dead man's body to decompose in the back of a van for forty-nine days. R. 384, ¶ 12, 687-88 (describing Petitioner's Facebook Live interview of family of victim). Just weeks later, Mr. Duran Ortega was arrested while reporting on a public protest of law enforcement activity and detained by ICE immediately upon release.

2. *Petitioner was the Second Person and Sole Journalist Arrested at a Protest Objecting to MPD-ICE Coordination.*

Mr. Duran Ortega was arrested while actively and openly engaged in reporting on matters of public concern. While protesters linked themselves together in a "chain gang" demonstration to oppose coordination between MPD and ICE, Petitioner peacefully filmed the event and provided contemporaneous commentary on Facebook Live. *See* Manuel Duran Ortega (Apr. 3, 2018),

<https://www.facebook.com/memphisnoticias/videos/1807922945897801/>

(“Petitioner’s Video”); R. 556-558. He wore press credentials and used a selfie stick to film himself and the events as he reported on the protest. *See id.*; R. 781, 892-96 (Sworn Decl. of Francisco Ivan Flores). He complied with all police instructions, moving towards the sidewalk as directed, but was nevertheless arrested. *See* Petitioner’s Video; R. 894-96.

Mr. Duran Ortega was the only journalist arrested on the scene, despite the fact that other journalists were present covering the protest. *Id.*; R. 898-90; Petitioner’s Video. Eyewitnesses have testified that the MPD first arrested a well-known Black Lives Matter leader, then arrested Mr. Duran Ortega and other figures critical of law enforcement, leaving similarly-situated individuals (including other journalists) alone. *See* R. 893-96; 898-900 (Sworn Decl. of Guadalupe Yuleiny Escobar); *Nieves* Tr. at 23:3-17 (discussing significance of comparisons to treatment of others engaged in similar conduct in considering retaliation cases).

3. *Petitioner was Detained for Days and Handed over to ICE, Despite Payment of His Bond and Dismissal of the Charges.*

The police detained Mr. Duran Ortega on April 3, 2018, on exactly the sort of minor, discretionary charges discussed in *Nieves* – disorderly conduct and obstruction of a highway. R. 499-500; *Nieves* Tr. at 11:21-25 (Kagan, J.) (using jaywalking as example of discretionary policing). His long-time partner posted bond the same night, but MPD refused to release him. R. 688, ¶¶ 10-12 (Sworn

Decl. of Melisa Valdez). In fact, the following day, government officials publicly *denied* that his bond had been paid, and refused to release him from custody. *Id.* at ¶ 13. When he finally came before the Court – two days after his bond was posted and one day after others arrested with him were released – the judge dismissed all charges. R. 500; R. 899-900, ¶ 8 (Sworn Decl. of Guadalupe Yuleiny Escobar) (describing her arrest alongside Mr. Duran Ortega, her release on April 4, and the fact that, unlike her, his hearing was continued an additional day, indicating coordination with ICE). Notwithstanding the delayed hearing, dismissal of charges, MPD’s public denial of the payment of his bond, and its public denial of any immigration hold, Mr. Duran Ortega was then transferred to ICE custody for removal. ICE in turn transferred him to Louisiana, where, now nine months later, he remains in detention. R. 688-89, ¶ 15-16.

D. These Circumstances Warrant Review To Prevent Government Officials From Using the Threat of Removal to Chill Protected Speech, Both Here and in Future Cases.

These circumstances, especially taken in combination, paint a picture of two government agencies, MPD and the Memphis ICE office, who were coordinating with one another, including as evidenced by their handling of Mr. Duran Ortega; who denied doing so; and who did not like Mr. Duran Ortega’s journalism exposing and criticizing that coordination. Especially because he was a long-time and respected journalist in the community, they were embarrassed and had leaned

on him to remove an article, a truly extraordinary request. Yet, he persisted in critical reporting, including about a body left to decompose in a vehicle, causing further embarrassment. Then, while engaged in entirely lawful reporting on a protest – of the very coordination between ICE and MPD that he had exposed and they had denied – he was singled out for arrest on minor charges, like those criticized by the Court in considering retaliatory arrests in *Nieves*. Finally, to silence him for good, he was released to ICE (while MPD publicly denied it was doing so) for removal to a country that reserves a special brand of violence, threats, intimidation, and murder for journalists, and especially investigative journalists like Mr. Duran Ortega.

These facts raise serious concerns that the officials involved were acting in response to Mr. Duran Ortega's journalism and that they collaborated with one another, just as he had reported. Yet the Board and the Immigration Judge said that this evidence was insufficient. Troublingly, Mr. Duran Ortega and those acting on his behalf have apparently filed numerous FOIA and public records act requests with ICE and MPD, respectively, to probe their motives and coordination, but their responses have been seriously deficient. Petitioner's Br. at 53 n.12.

It is patently unfair to dismiss out of hand a serious question of whether officials violated the First Amendment rights of both Mr. Duran Ortega *and* his readers, listeners and viewers, saying the evidence is insufficient while the

Government flatly refuses to provide that information. Not only is that circumstance troubling to *Amici*, whose journalists rely on FOIA and public records act statutes to shine a light on the conduct of public officials, but it is particularly concerning here, given that such evidence has in prior cases established conclusively the very retaliatory and censorial purpose that the record evidence already suggests. *See, e.g., Gutierrez-Soto v. Sessions*, 317 F. Supp. 3d 917, 933 (W.D. Tex. 2018) (emails obtained through records requests confirmed conclusion, which had initially been based on “the temporal proximity between Mr. Gutierrez-Soto’s criticism of ICE and the revocation of Petitioners’ parole” a “couple months later,” that ICE officials were in fact “targeting” petitioner based on that criticism).

In short, the conduct here, if ratified by this Court, 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. *See Rossignol*, 316 F.3d at 528 (“If we were to sanction this conduct, we would point the way for other state officials to stifle public criticism of their policies and their performance.”). And, as Petitioner’s brief notes, this conduct is part of a larger pattern of using removal as a way of stifling the speech of those engaged in either advocacy, or as in Mr. Duran Ortega’s case, reporting about immigration issues. Petitioner’s Br. at 52-53; *see also* Nicole Acevedo, *Salvadoran Woman Who Won*

Wrongful Arrest Lawsuit Detained By ICE, NBC News (Jan. 9, 2019),

[https://www.nbcnews.com/news/latino/salvadoran-woman-who-won-wrongful-](https://www.nbcnews.com/news/latino/salvadoran-woman-who-won-wrongful-arrest-lawsuit-detained-ice-n956786)

[arrest-lawsuit-detained-ice-n956786](https://www.nbcnews.com/news/latino/salvadoran-woman-who-won-wrongful-arrest-lawsuit-detained-ice-n956786) (describing arrest and possible deportation of

woman in apparent retaliation for advocating against racial profiling by law

enforcement). Here, as in those cases, the Government is wielding the tool of

deportation to silence important voices reporting on the treatment of immigrants

and the activities of both state and federal officials. And, as discussed during the

Nieves argument, this conduct is part of a broader trend of punishing those who

have spoken out critically about law enforcement. *See Nieves* Tr., 31:5-15

(Sotomayor, J.) (explaining that, “at least based on the cert. petitions that we see,

[the second, “retaliate against a journalist” situation] is not so uncommon: small

municipalities where [a person] has alleged that the Police Department in that

municipality is corrupt, and all of a sudden they’re getting a slew of, you know, 25

to 50 building code, jaywalking, crossing a yellow light, every misdemeanor, every

violation humanly possible”).

The ultimate message from officials who wield their power in this way is clear: criticize us and you will pay. That message then sets off alarms with others who might report on or speak out against MPD, ICE, or other governmental officials or policies. *See Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (noting “the First Amendment interests of those who seek personal communication with”

noncitizens); *ACLU of Ill. 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). 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).

CONCLUSION

Petitioner and *Amici* presented substantial evidence of worsening country conditions for journalists in El Salvador as well as substantial evidence about the circumstances surrounding his arrest, detention and attempted removal that raise grave First Amendment concerns. The Board improperly refused to consider this evidence and summarily denied his appeal. In light of the grave dangers faced by Mr. Duran Ortega and the serious First Amendment concerns surrounding this case, the Court should reverse the Board, grant his motion to re-open, and allow

Mr. Duran Ortega a full opportunity to obtain and present evidence in his case for asylum.

Dated: January 14, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 14, 2019, I caused the foregoing brief to be filed and served electronically via the Court's ECF System, and served a paper copy by U.S. mail, upon counsel of record.

DATED: January 14, 2019

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**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 **National Hispanic Media Coalition** (“**NHMC**”) is a media advocacy and civil rights organization for the advancement of Latinos, working towards a media that is fair and inclusive of Latinos, and towards universal,

affordable, and open access to communications. NHMC was established in Los Angeles in 1986.

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.