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Non-Detained

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
130 Delaware Avenue, Suite 300
Buffalo, NY, 14202

In the Matter of	)	
Oscar Patricio Azogue Martinez	)	**File No. A 245-892-413**
In Removal Proceedings	)	

Immigration Judge: N/A

Next Hearing: N/A

RESPONDENT'S OPPOSITION TO DHS MOTION TO PRETERMIT

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Respondent, Oscar Patricio Azogue Martinez, through undersigned counsel, respectfully opposes the Department of Homeland Security's Motion to Pretermit his applications for asylum, withholding of removal, and protection under the Convention Against Torture. The Motion should be denied, and the applications should proceed to a full evidentiary hearing on the merits.

The Department moves under *Matter of H-A-A-V-*, 29 I&N Dec. 233 (BIA 2025). Under that decision, pretermission is available only where the factual allegations underlying the claim, viewed in the light most favorable to the respondent, do not establish prima facie eligibility for relief or protection. *Id.* at 233, 238. Pretermission is therefore unavailable where the applicant has articulated a legally cognizable theory of relief, or where material factual issues remain in dispute.

Both circumstances that foreclose pretermission are present here. Respondent has articulated specific protected grounds, namely his political opinion and membership in defined particular social groups, supported by his declaration, a medical report and photograph documenting a head injury, three letters of support, and eighteen country conditions exhibits. Accepting the allegations in that record as true, Respondent has stated a prima facie claim for each form of relief, and the Department's contrary characterizations of the record present precisely the factual disputes that must be resolved through testimony at a merits hearing.

I. PROCEDURAL BACKGROUND

Respondent, Oscar Patricio Azogue Martinez, is a native and citizen of Ecuador. He entered the United States on or about March 9, 2024, near Lukeville, Arizona, where he presented himself to immigration authorities and was processed. Removal proceedings were initiated through a charging document dated March 11, 2024, and the matter is now pending before this Court in Buffalo, New York.

Respondent filed his Form I-589, Application for Asylum and for Withholding of Removal, pro se on February 3, 2025, within one year of his entry, satisfying INA § 208(a)(2)(B). He prepared and submitted that initial application without the assistance of counsel and without a full understanding of the legal grounds that asylum requires. *See* Declaration of Oscar Patricio Azogue Martinez ¶ 43 (Evidence).

After retaining counsel, Respondent filed an amended Form I-589 on August 13, 2026, together with a Pre-Hearing Statement articulating each ground for protection: past persecution and a well-founded fear of future persecution on account of his imputed political opinion and, cumulatively and independently, his membership in defined particular social groups; his entitlement to withholding of removal; and his eligibility for protection under the Convention Against Torture.

No individual merits hearing has yet been held in this matter, and none is presently scheduled. On September 18, 2026, before any evidentiary hearing could take place, the Department filed the instant Motion to Pretermit, seeking to foreclose adjudication of Respondent's applications on the merits.

The record currently before the Court reflects a developed evidentiary basis for Respondent's claims, including:

A. Form I-589 and subsequent update/amendment (*See* Forms I-589);

B. Respondent's Declaration (*See* Evidence);

C. Oscar Patricio Azogue Martinez's Birth Certificate (*See* Evidence Part 01);

D. Country Conditions Reports, comprising exhibits CC1 to CC16 (*See* Evidence Part 2);

E. Letters of Support (*See* Evidence Part 03);

F. Respondent's Supplemental Answer to the Scheduling Order;

G. Evidence of physical harm, consisting of a photograph of the head wound inflicted on Respondent during the December 29, 2023 incident and a medical report documenting the physical injury sustained by the Respondent (*See* Evidence Part 04);

H. Proof of payment of the annual asylum fee (*See* Fee Receipt); and

I. Respondent's Pre-Hearing Statement setting forth the factual and legal basis of the claim and demonstrating Respondent's prima facie eligibility for asylum, withholding of removal, and protection under the Convention Against Torture (*See* Pre-Hearing Statement).

This evidence corroborates material portions of Respondent's account, but it does not substitute for his sworn, cross-examinable testimony regarding the escalating threats, the December 29, 2023 assault, the local police infiltration that informed his decision not to report it, and the futility of internal relocation. Given the quantity and quality of the evidence already on record, the Department cannot plausibly maintain that Respondent has failed to present even a minimal showing of eligibility such that pretermission would be warranted.

II. LEGAL STANDARD

A. Pretermission is available only where no factual issue is in dispute and the record fails to establish prima facie eligibility.

Section 240(b)(4)(B) of the INA, 8 U.S.C. § 1229a(b)(4)(B), provides that an alien in removal proceedings shall have a reasonable opportunity to examine the evidence against him, to present evidence on his own behalf, and to cross-examine the witnesses presented by the Government. Section 240(c)(4)(B) of the INA, 8 U.S.C. § 1229a(c)(4)(B), in turn requires the trier of fact to weigh the applicant's credible testimony together with the other evidence of record before determining whether the burden of proof has been met.

The regulations implementing these provisions direct that applications for asylum, withholding of removal, and withholding or deferral of removal under the Convention Against Torture be decided after an evidentiary hearing to resolve factual issues in dispute. *See* 8 C.F.R. § 1240.11(c)(3). At that hearing, the applicant shall be examined under oath on his application and may present evidence and witnesses on his own behalf. *See* 8 C.F.R. § 1240.11(c)(3)(iii).

Together, these statutory and regulatory provisions codify the adversarial character of removal proceedings and protect the applicant's right to develop the record, present testimony

and documentary evidence, and rebut the evidence introduced by the Department before an impartial adjudicator.

These protections are reinforced by the constitutional guarantee of due process, which requires that an applicant be afforded the opportunity to be heard at a meaningful time and in a meaningful manner. *See Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). Questions of credibility, the existence of a well-founded fear of persecution, the nexus to a protected ground, and the weight of country conditions evidence are inherently factual.

They depend on the applicant's detailed account, his responsiveness under questioning, and the context supplied by the supporting record, and they cannot be resolved in the abstract or by summary disposition where the underlying facts remain contested.

Matter of H-A-A-V- operates against this settled backdrop. It recognizes the foregoing statutory and regulatory framework and holds that a full evidentiary hearing is not required only where there are no factual issues in dispute. 29 I&N Dec. at 234. Pretermission is proper solely if the factual allegations underlying the claim, viewed in the light most favorable to the respondent, do not establish prima facie eligibility for relief. *Id.* at 238.

The Board analogized the inquiry to a motion to dismiss under Rule 12(b)(6) and to summary judgment, each of which requires the adjudicator to assume the truth of the applicant's factual allegations and to afford the applicant the full benefit of the doubt before concluding that relief is unavailable as a matter of law. *Id.* at 235 n.3. Prima facie eligibility requires no more than a reasonable likelihood of satisfying the requirements for relief. *Id.* at 236 (citing *Matter of L-O-G-*, 21 I&N Dec. 413, 419 (BIA 1996)).

It follows that pretermission is unavailable in either of two circumstances: where the applicant has articulated a legally cognizable theory of relief, or where material factual issues remain in dispute and must be resolved through testimony. In each situation, the statutory right to a hearing and the due process guarantee of a meaningful opportunity to be heard converge to require that the case proceed to a full evidentiary hearing rather than be resolved on the pleadings.

B. *Matter of H-A-A-V- is materially distinguishable from this case.*

The respondent in *Matter of H-A-A-V-* failed on grounds absent here. The Board sustained the pretermission in that case against the backdrop of Fifth Circuit law holding that

economic extortion is not a form of persecution. 29 I&N Dec. at 236 (quoting *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 493 (5th Cir. 2015)). In any event Respondent's claim does not rest on economic extortion. As set forth below, the harm he suffered escalated well beyond any demand for money, culminating in explicit death threats and a violent, weapon-inflicted assault.

The respondent in *Matter of H-A-A-V-* also did not articulate any particular social group or other protected ground when given the opportunity to do so. *Id.* at 236. Respondent here has articulated an imputed political opinion and three particular social groups with specificity, each tied to the facts of his claim.

The procedural posture likewise differs. In *Matter of H-A-A-V-*, the Immigration Judge pretermitted the applications only after an abbreviated hearing at the master calendar stage, at which counsel confirmed that there were no disputed issues of fact and was given the opportunity to proffer any particular social group. *Id.* at 235 to 236. Here, by contrast, no evidentiary hearing on the merits has been held, none is currently scheduled, and Respondent has made no concession that the material facts are undisputed.

In footnote 1 of its motion, the Department reserves the right to raise arguments related to "respondent's credibility and the reliability of the respondent's application and supporting documentation." The Department therefore concedes that issues of credibility bear on Respondent's factual claims. Credibility cannot be assessed on the pleadings; it can be evaluated only through sworn testimony subject to cross-examination. To deny Respondent the opportunity to have his credibility assessed on the stand is to deny him a full and fair hearing consistent with due process. Pretermitting the applications in these circumstances would deprive Respondent entirely of that opportunity.

Under INA § 240(c)(4)(B), 8 U.S.C. § 1229a(c)(4)(B), the credibility determination rests exclusively with the adjudicator, who must weigh Respondent's testimony together with the record after he is examined under oath. *See* 8 C.F.R. § 1240.11(c)(3)(iii). Credibility thus cannot be presumed against Respondent or disregarded at the pleadings stage; it can be assessed only by the Immigration Judge, after Respondent's personal testimony, at a merits hearing.

Because Respondent has articulated cognizable grounds and material facts remain contested, *Matter of H-A-A-V-* does not authorize pretermission here.

C. Pretermission on this record would violate the regulatory command that Respondent be examined under oath and the due process guarantee of a full and fair hearing.

The regulations do not treat an evidentiary hearing as optional in a contested asylum case. When an applicant files a Form I-589, the application is to be decided after an evidentiary hearing to resolve factual issues in dispute, and at that hearing the applicant "shall be examined under oath on his or her application" and may present evidence and witnesses on his own behalf. 8 C.F.R. § 1240.11(c)(3), (c)(3)(iii). The command is mandatory in terms, and it protects the same interest secured by due process, namely the opportunity to be heard at a meaningful time and in a meaningful manner. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Matter of H-A-A-V- did not displace that command. It recognized these very provisions and held only that a full evidentiary hearing is not required where there are no factual issues in dispute, permitting pretermission solely where the allegations, accepted as true and viewed in the light most favorable to the respondent, fail to establish prima facie eligibility. 29 I&N Dec. at 234, 238. The exception is a narrow one. Where the allegations accepted as true establish a prima facie claim, or where material facts remain in dispute, the case falls outside that exception and squarely within the regulatory command that the applicant be examined under oath before his applications are adjudicated.

This case falls outside the exception on both counts. As set forth below, Respondent's allegations establish a prima facie claim for asylum, withholding of removal, and protection under the Convention Against Torture, and material facts remain genuinely in dispute, including the persecutors' motive, the sufficiency of state protection, and the likelihood of future torture.

The credibility determination underscores the point. Under INA § 240(c)(4)(B), 8 U.S.C. § 1229a(c)(4)(B), the trier of fact must weigh Respondent's credible testimony together with the record in deciding whether the burden of proof has been met. That determination rests exclusively with the adjudicator and presupposes that Respondent has testified; it cannot be presumed against him or resolved at the pleadings stage, particularly where the Department has expressly reserved a challenge to his credibility and to the reliability of his evidence.

To pretermit the applications in these circumstances would resolve, on the pleadings and without the examination under oath the regulation requires, the very questions of fact and credibility that the statute and regulations commit to the adjudicator after testimony. That result would contravene both the regulatory text and the due process guarantee of a full and fair hearing.

III. ARGUMENT

A. Accepted as true, the record states a prima facie claim of past persecution, and the DHS's contrary characterization is itself a disputed factual issue.

The Department characterizes Respondent's harm as threats and an isolated act of violence. That characterization contradicts the record and cannot be adopted on a motion that requires the allegations to be viewed in the light most favorable to Respondent. *See Matter of H-A-A-V-,* 29 I&N Dec. at 238.

The record describes a sustained campaign rather than an isolated incident. Beginning in February 2023, Los Choneros demanded weekly payments and Respondent's cooperation in moving illicit proceeds; when he refused, the organization placed his worksite under surveillance, confronted him in person on more than one occasion, and identified him by name while demonstrating knowledge of where he lived and how he moved through the city. *See* Declaration of Oscar Patricio Azogue Martinez ¶¶ 7 to 21 (Evidence).

The campaign escalated on December 29, 2023, when three assailants intercepted Respondent at night, threw him to the ground, beat him, and struck his head with a weapon, inflicting a deep laceration that caused heavy bleeding and loss of consciousness and left a permanent scar. The assailants told him the assault was punishment for his continued refusal and warned that he would not survive a second encounter. *See* Declaration of Oscar Patricio Azogue Martinez ¶¶ 25 to 32 (Evidence); *see also* Evidence Part 04. The harm did not end there. Unknown callers continued to contact Respondent's brother after his departure from Ecuador, demonstrating that the organization's interest in him persisted. *See* Declaration of Oscar Patricio Azogue Martinez ¶ 39 (Evidence).

A physical assault of this kind, considered together with the surrounding threats and surveillance, states a claim of past persecution, and the adjudicator must assess the relevant events cumulatively rather than in isolation. *See Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 341, 342 (2d Cir. 2006); *Beskovic v. Gonzales*, 467 F.3d 223, 226, 227 (2d Cir. 2006);

Poradisova v. Gonzales, 420 F.3d 70, 79, 80 (2d Cir. 2005). Death threats accompanied by a violent, weapon-inflicted attack fall well beyond the mere harassment that the persecution standard excludes.

The authorities the Department invokes do not support pretermission. *Matter of V-T-S-, 21 I&N Dec. 792 (BIA 1997)*, *Matter of Chicas, 19 I&N Dec. 114, (BIA 1984)* , and *Matter of Rodriguez-Majano, 19 I&N Dec. 811 (BIA 1988)* address treatment that society merely regards as unfair and harm arising from generalized civil strife, not a targeted, weapon-inflicted assault accompanied by explicit death threats directed at an individual the organization identified by name. Whether the harm Respondent suffered rises to the level of persecution is, at a minimum, a contested question that the Court cannot resolve against Respondent on the present motion. *See Matter of H-A-A-V-*, 29 I&N Dec. at 238.

B. The nexus and protected-ground questions raise cognizable theories and disputed facts.

1. Respondent's imputed political opinion presents a cognizable theory that turns on disputed facts.

The Department invokes *Matter of D-G-E-A- & N-G-G-E-*, 29 I&N Dec. 570 (BIA 2026), for the proposition that opposition to a criminal gang is not a political opinion. That decision does not resolve Respondent's claim on a motion to pretermit. *Matter of D-G-E-A-* holds that a political opinion must be tethered to a belief or conviction regarding a discrete cause related to a government, and it expressly preserves that such a claim may lie where the persecuting organization functions as a de facto government. *Id.* at 575 to 576. The Board defined a de facto government as one that exercises actual sovereignty over territory and people, and it identified the determinative question as whether the organization has exercised such sovereignty. *Id.* at 576 to 577.

Whether Los Choneros functions as a de facto government is a fact-intensive inquiry, as *Matter of D-G-E-A-* itself demonstrates. The Board rejected the claim in that case only after examining the country conditions record and finding that it did not establish that the gangs exercised actual sovereignty or control where they operated, even though they influenced some communities and interfered with the functions of the official government through violence and criminal activity. *Id.* at 576 to 577. That was an evidentiary conclusion about a particular record, not a categorical rule. Here, by contrast, the record speaks directly to sovereignty and control. It describes an organization that regulates and taxes economic

activity through the collection of vacunas, determines who may work, controls prisons and trafficking corridors across multiple provinces, finances electoral campaigns, and maintains influence over local governance structures, and that has been designated a Foreign Terrorist Organization. *See* Country Conditions (Evidence Part 2, CC5, CC6, CC7, CC8, CC10). The Ecuadorian State responded by declaring a nationwide state of emergency and an internal armed conflict against Los Choneros and other organizations in January 2024. *See* Country Conditions (Evidence Part 2, CC1). Whether that evidence establishes the sovereignty or territorial control that the record in *Matter of D-G-E-A-* lacked is a factual question that cannot be resolved against Respondent on a motion to pretermit.

The theory is cognizable under Second Circuit law as well. A political opinion includes disagreement with the practices of a government and its instrumentalities, with an entity that seeks to directly influence laws, regulations, or policy, or with a group that plays some other similar role in society. *See Zelaya-Moreno v. Wilkinson*, 989 F.3d 190, 199 to 200 (2d Cir. 2021). Respondent's claim is not that gangs are generally undesirable, the statement held insufficient in *Zelaya-Moreno*. It is that he refused, publicly and repeatedly, to submit to the governing authority Los Choneros asserted over his liberty and his livelihood, and that the organization imputed to him the status of an opponent and an informer for doing so.

The persecutors' own words confirm that the dispute is factual. The assailants told Respondent that the December 29, 2023 assault was punishment for his continued refusal to obey and for behaving as an informer, not the collection of a debt. *See* Declaration of Oscar Patricio Azogue Martinez ¶¶ 29 to 30 (Evidence). Respondent's own account is sufficient to establish at the prima facie level that Los Choneros understood his sustained refusal as a challenge to the authority it claimed and that a protected ground was one central reason for the harm. To the extent the Department disputes the persecutors' motive, that dispute concerns a question of fact that must be resolved through testimony at a merits hearing, not eliminated on the pleadings.

To the extent *Matter of D-G-E-A-* departs from the Second Circuit's recognition that resistance to a criminal organization's claimed authority may constitute political opinion, *see Hernandez-Chacon v. Barr*, 948 F.3d 94, 104 (2d Cir. 2020), Respondent preserves the position that *Hernandez-Chacon* remains binding authority in this Circuit. That question need not be resolved now, because whether Los Choneros functions as a de facto government is a factual inquiry that independently requires an evidentiary hearing. *See Matter of H-A-A-V-*, 29

I&N Dec. at 238.

2. Respondent's particular social groups are cognizable and their remaining elements turn on disputed facts.

The Department contends that Respondent's proposed particular social groups are not cognizable and relies on *Matter of V-A-B-*, 29 I&N Dec. 621 (BIA 2026), for the proposition that a group is not cognizable simply because it is defined by characteristics that are immutable. Respondent's groups do not rest on immutability alone. They satisfy each element the Board requires, immutability, particularity, and social distinction, and the record already before the Court supports each at the prima facie level.

Respondent's groups are defined by a completed, historical act, namely having been directly and personally confronted by Los Choneros and having refused, publicly and repeatedly, to submit to the authority the organization asserted, including in his identifiable role as a construction supervisor with authority over a worksite. A past experience is immutable because it has already occurred and cannot be undone. *See Matter of C-A-*, 23 I&N Dec. 951, 958 (BIA 2006); *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). The Board reaffirmed that principle in *Matter of O-A-R-G-*, recognizing that past experiences, by definition, cannot be changed. 29 I&N Dec. 30, 32 (BIA 2025).

For that reason, Respondent's groups are not circular in the manner condemned in *Matter of V-A-B-* and *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018). The circularity those decisions address arises where a group is defined by its members' vulnerability to the harm they fear, so that the group cannot exist independently of the persecution. *See Matter of V-A-B-*, 29 I&N Dec. at 623. Respondent's groups are defined not by vulnerability to harm but by verifiable past conduct that occurred before the assault and that exists independently of it.

The groups are also defined with particularity. Each is bounded by concrete and objective criteria, a person directly and personally confronted by Los Choneros, who openly and repeatedly refused to submit to the authority the organization asserted, and who was thereafter identified as its opponent. Those criteria are not amorphous or subjective; they supply a clear benchmark for determining who belongs to the group and who does not, and they exclude the general population exposed to Los Choneros' activity. That is precisely the particularity the Board found lacking in the overbroad groups it has rejected. *See Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014).

The groups are socially distinct as well. Social distinction asks whether the relevant society perceives the group as distinct, and the record establishes that perception. Respondent's refusal was not private or hidden; it was open, communicated to the organization, witnessed by others, and known within his community, and those who openly refuse Los Choneros and are labeled its opponents are recognized as such within Ecuadorian society. *See Matter of M-E-V-G-*, 26 I&N Dec. at 238; Declaration of Oscar Patricio Azogue Martinez ¶¶ 7 to 22 (Evidence).

That community-level recognition is corroborated at the national level by the openly reported practice of collecting vacunas and the documented consequences for those who refuse. *See* Country Conditions (Evidence Part 2, CC5). These elements have thus been satisfied and proven on the record. Should the Department raise doubt as to any of them or contest Respondent's credibility, that challenge would have to be resolved through Respondent's testimony at a hearing; it cannot be resolved on the pleadings, particularly where the Department has offered no evidence to the contrary and the allegations must be viewed in the light most favorable to Respondent. *See Matter of H-A-A-V-*, 29 I&N Dec. at 238.

The Department's reliance on *Matter of S-E-G-* is misplaced at this stage. That decision denied social group claims where the gang directed harm against anyone and everyone perceived to threaten its enterprise, so that the proposed groups captured a diffuse and undifferentiated segment of society rather than identifiable individuals. Respondent's claim is the opposite. Accepted as true, the record describes a person the organization singled out, not a population exposed to generalized risk.

Los Choneros did not approach Respondent as one of many. It contacted him directly, returned to his worksite to surveil him, confronted him in person on more than one occasion, identified him by name, and demonstrated that it knew where he lived, where his mother and daughters lived, and how he moved between cities. *See* Declaration of Oscar Patricio Azogue Martinez ¶¶ 7 to 21, 38 to 39 (Evidence). What distinguishes Respondent from other Ecuadorians, and from business owners subjected to extortion generally, is that he was personally confronted and then personally targeted for his open and repeated refusal to submit, a refusal communicated by him and known to those around him.

Respondent's own experience confirms that individualized targeting. The December 29, 2023 assault was not indiscriminate violence; the assailants identified his refusal as its reason, told him the attack was punishment for his continued defiance, and warned that he would not survive a second encounter. *See* Declaration of Oscar Patricio Azogue Martinez ¶¶ 29 to 30 (Evidence).

That the threats continued through his family after he left the country further confirms that the organization's interest was in Respondent specifically, not in a broad class of persons exposed to its activity. *See* Declaration of Oscar Patricio Azogue Martinez ¶ 39 (Evidence). On this record, and absent any contrary evidence from the Department, Respondent has made the prima facie showing that pretermission requires him to overcome, and any residual dispute about the group's contours is for a merits hearing, not the pleadings. *See Matter of H-A-A-V-*, 29 I&N Dec. at 238.

C. The record already establishes the requisite nexus at the prima facie level, and the Department's single-motive theory cannot be adopted on the pleadings.

The Department contends that the harm Respondent suffered was motivated solely by pecuniary gain and therefore lacks a protected nexus. That contention cannot be adopted on a motion that requires the allegations to be accepted as true and viewed in the light most favorable to Respondent, and it is contradicted by the evidentiary record already before the Court. *See Matter of H-A-A-V-*, 29 I&N Dec. at 238.

Nexus turns on the persecutor's motive, and a persecutor may act for more than one reason. An applicant need not show that a protected ground was the sole motive, only that it was one central reason for the harm. *See* INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i). Respondent has made that showing at the prima facie level, and he has done so on a developed record rather than on allegation alone.

The record establishes that the organization's conduct was not confined to the collection of a debt. What began as a demand for payment escalated into surveillance of Respondent's worksite, repeated in-person confrontations in which he was identified by name, and a violent assault during which the assailants themselves stated the reason for the harm: they told Respondent that the beating was punishment for his continued refusal to obey and for behaving as an informer, and that he would not survive a second encounter. *See* Declaration of Oscar Patricio Azogue Martinez ¶¶ 20 to 30 (Evidence). The persecutors' own

words, sworn to in Respondent's declaration and thus already part of the record, establish that a protected ground was at least one central reason for the harm, and not merely an unpaid debt.

That the persecution also had an economic component does not defeat nexus. Where a persecutor acts from mixed motives, a financial objective does not displace a protected ground that is also a central reason for the harm. On this record, accepted as true, Respondent's imputed political opinion and his imputed status as an opponent of Los Choneros were central reasons for the assault, which is all that prima facie eligibility requires.

Because Respondent's declaration already sets forth the persecutors' own statements of motive, the nexus element is established for prima facie purposes without the need for any further evidentiary development. What remains is not a gap in Respondent's proof but the Department's reserved intention to contest that proof, and a challenge to the persecutor's motive of that kind is resolved through cross-examination at a hearing, not by adopting the Department's contrary characterization on the pleadings. The same showing satisfies the nexus standard for withholding of removal, which in this Circuit is also the one central reason standard. *See Quituizaca v. Garland*, 52 F.4th 103 (2d Cir. 2022).

D. Whether the Ecuadorian State is unable or unwilling to protect Respondent is a disputed question of fact.

The Department contends that the harm Respondent fears comes from a private actor and that the record does not establish the Ecuadorian State is unwilling or unable to protect him. Respondent's principal position, set forth above, is that Los Choneros exercises de facto governmental authority in the areas where he lived and worked. In the alternative, and to the extent the Court treats Los Choneros as a private actor, the record establishes at least a genuine dispute as to whether the State is unable or unwilling to control it.

Under the standard reinstated in *Matter of S-S-F-M-*, 29 I&N Dec. 207 (A.G. 2025), an applicant harmed by a private actor must show that the government condoned the conduct or is unable to protect him, and inability means more than the failure to prevent or solve a particular crime. *See Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); *Matter of A-B-*, 28 I&N Dec. 199, 205 (A.G. 2021). That inquiry is applied as a matter of degree and does not require proof that protection was wholly unavailable.

The record here describes far more than an isolated unsolved crime. The Ecuadorian

State declared a nationwide state of emergency and an internal armed conflict in January 2024, designating Los Choneros among the organizations against which military operations were authorized, and the organization has nonetheless continued to operate and expand. *See* Country Conditions (Evidence Part 2, CC1). That record reflects an incapacity to control Los Choneros that extends across the national territory rather than a discrete failure in a single case.

The record also reflects more than incapacity. Respondent's account is that the police in his sector were infiltrated by Los Choneros, so that a report would have delivered the information directly to the organization he feared. *See* Declaration of Oscar Patricio Azogue Martinez ¶ 36 (Evidence). That individualized account is corroborated at the national level by country conditions evidence of corruption and collusion, including narco-generals within the security forces, manipulation of judicial appointments, and criminal financing of electoral campaigns. *See* Country Conditions (Evidence Part 2, CC5, CC9, CC10, CC12). Infiltration and collusion of this kind reflect not merely a State that struggles to protect, but one whose institutions have in part been compromised by the organization itself.

Respondent's decision not to report the December 29, 2023 assault must be assessed against that record, not in isolation. Whether a report would have been futile or dangerous, whether the State is able or willing to protect Respondent, and whether internal relocation is reasonable given his own unsuccessful attempt to relocate to Ambato, where the calls continued, are questions of fact reviewed for clear error. *See Matter of C-G-T-*, 28 I&N Dec. 740, 743 (BIA 2023); *see also* Declaration of Oscar Patricio Azogue Martinez ¶¶ 36, 38 to 39 (Evidence). None can be resolved against Respondent on a motion to pretermit. *See Matter of H-A-A-V-*, 29 I&N Dec. at 238.

E. Respondent has stated a prima facie claim for withholding of removal, a mandatory form of protection the Department's motion does not separately address.

Withholding of removal under INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), is not discretionary. Unlike asylum, it must be granted once the applicant establishes that it is more likely than not that his life or freedom would be threatened on account of a protected ground. The Department's motion seeks pretermission of this claim but does not address its distinct statutory standard, treating it as coextensive with asylum.

The showing that supports Respondent's asylum claim establishes a prima facie claim for withholding as well. Respondent's imputed political opinion and his membership in the proposed particular social groups supply the protected grounds, and in this Circuit the nexus standard for withholding is the same one central reason standard that governs asylum. *See Quituizaca v. Garland*, 52 F.4th 103 (2d Cir. 2022). A showing of past persecution gives rise to a rebuttable presumption that Respondent's life or freedom would be threatened on return, which the Department can overcome only through factual development at a hearing. *See* 8 C.F.R. § 1208.16(b)(1).

That withholding is mandatory makes pretermission on this record particularly inappropriate. Whereas asylum ultimately rests in the discretion of the adjudicator, withholding does not; if Respondent meets the clear probability standard, the Court is required to grant relief. To foreclose that mandatory protection on the pleadings, without the evidentiary hearing at which the presumption and the likelihood of future harm would be tested, would deprive Respondent of a form of relief to which he may be entitled as a matter of law.

F. Respondent has stated a prima facie claim under the Convention Against Torture, which independently forecloses pretermission.

Protection under the Convention Against Torture requires no nexus to a protected ground. Even if the Court were to accept the Department's arguments concerning political opinion, particular social group, and nexus, Respondent's claim for protection under the Convention Against Torture would remain. Because that claim, accepted as true, states a prima facie case, it independently defeats the Department's request to pretermit Respondent's applications in their entirety. *See Matter of H-A-A-V-*, 29 I&N Dec. at 238.

The December 29, 2023 assault states a prima facie case of past torture. Three assailants threw Respondent to the ground, beat him throughout his body, and struck his head with a weapon, inflicting a deep and heavily bleeding wound, causing loss of consciousness, and leaving a permanent scar. *See* Declaration of Oscar Patricio Azogue Martinez ¶¶ 27 to 30 (Evidence); *see also* Evidence Part 04. That harm was intentionally inflicted for a proscribed purpose, namely to punish and coerce Respondent for his refusal to submit, as the assailants' own statements reflect. *See* 8 C.F.R. § 1208.18(a)(1). Past torture is relevant evidence bearing on the likelihood of future torture, which the adjudicator must weigh together with all other evidence of record. *See* 8 C.F.R. § 1208.16(c)(3).

The Department's contention that Respondent cannot establish acquiescence likewise turns on disputed facts. Acquiescence includes a public official's willful blindness to torture inflicted by private actors, followed by a breach of the official's legal duty to intervene. *See Pierre v. Gonzales*, 502 F.3d 109, 118 to 119 (2d Cir. 2007); *De La Rosa v. Holder*, 598 F.3d 103, 109 to 110 (2d Cir. 2010). The Board has recognized that generalized ineffectiveness in combating crime does not by itself establish acquiescence. *See Matter of O-A-R-G-*, 29 I&N Dec. 30, 36 (BIA 2025).

Respondent alleges more than ineffectiveness. His account is that the police in his sector were infiltrated by Los Choneros, such that a report would have reached the organization itself, and that Los Choneros operates with the collusion of compromised officials, including within the security forces and the judiciary. *See* Declaration of Oscar Patricio Azogue Martinez ¶ 36 (Evidence); *see also* Country Conditions (Evidence Part 2, CC5, CC9, CC10). Infiltration and collusion of that kind describe official complicity and willful blindness that exceed mere inability to control crime and state a prima facie case of acquiescence. Whether that evidence ultimately satisfies the standard is a merits determination reserved for the hearing.

The Department's assertion that Respondent's fear is speculative because more than two years have passed since his departure is a factual and probabilistic argument, not a legal bar. It is contradicted by the record, which reflects continuing threats communicated to Respondent's family after his departure and the persistence and expansion of Los Choneros following the 2025 extradition of its principal leader. *See* Declaration of Oscar Patricio Azogue Martinez ¶ 39 (Evidence); *see also* Country Conditions (Evidence Part 2, CC10, CC14). Whether it is more likely than not that Respondent would be tortured if returned to Ecuador is the paradigmatic factual question reserved for a full evidentiary hearing, and it cannot be resolved against Respondent on the present motion. *See Matter of H-A-A-V-*, 29 I&N Dec. at 238.

IV. CONCLUSION

Respondent has articulated cognizable grounds for asylum, withholding of removal, and protection under the Convention Against Torture, and has identified material factual disputes that only an evidentiary hearing can resolve. Accepted as true and viewed in the light most favorable to Respondent, the record establishes a prima facie claim for each form of

relief, and the claim for protection under the Convention Against Torture alone forecloses pretermission of the applications in their entirety.

The protected grounds, the nexus between those grounds and the harm Respondent suffered and fears, and each request for relief are fully developed in Respondent's Pre-Hearing Statement and the accompanying record, which the Court should consider in determining whether prima facie eligibility has been shown.

Filed in direct response to this Court's Scheduling Order of June 14, 2026, that submission articulates the imputed political opinion the order directed Respondent to specify and sets forth his membership in the proposed particular social groups, supported by his declaration, documentary and medical evidence, letters of support, and country conditions exhibits.

For the foregoing reasons, Respondent respectfully requests that the Court deny the Department's Motion to Pretermit and set this matter for a full individual merits hearing.

Respectfully submitted,



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Oscar Patricio Azogue Martinez **File No. A 245-892-413**

Proof of Service

On this day, I, Otavio Haverroth Silva, served a copy of the following documents:

RESPONDENT'S OPPOSITION TO DHS MOTION TO PRETERMIT

To the following:

Office Location:	**Mailing Address:**
Office of the Principal Legal Advisor Department of Homeland Security 250 Delaware Avenue, Suite 773 Buffalo, NY 14202	US Immigration and Customs Enforcement US Department of Homeland Security Office of the Chief Counsel 250 Delaware Avenue, Suite 773 Buffalo, NY 14202

by:

☑ Through the EOIR Courts and Appeals System (ECAS), which will automatically send service notification to both parties that a new document has been filed.

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