(1) INAPPLICABILITY OF RESTRICTION ON REMOVAL TO CERTAIN COUNTRIES.—Section 241(b)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1231(b)(3)(B)) is amended in the matter preceding clause (i) by inserting ''who is described in section 212(a)(2)(J)(i) or section 237(a)(2)(G)(i) or who is'' after ''to an alien''.

(2) INELIGIBILITY FOR ASYLUM.—Section 208(b)(2)(A) of the Immigration and Nationality Act (8 U.S.C. 1158(b)(2)(A)) is amended—

(A) in clause (v), by striking ''or'' at the end;

(B) by redesignating clause (vi) as clause (vii);

(C) by inserting after clause (v) the following:

''(vi) the alien is described in section 212(a)(2)(J)(i) or section 237(a)(2)(G)(i) (relating to participation in criminal gangs); or''; and

(D) by amending clause (vii), as redesignated, to read as follows:

''(vii) the alien was firmly resettled in another country in any legal status prior to arriving in the United States.''.

(h) GOOD MORAL CHARACTER BAR FOR CRIMINAL GANG MEMBERS.—Section 101(f) of the Immigration and Nationality Act (8 U.S.C. 1101(f)), as amended by section 1710(d), 1713(d), and 1822(a) of this Act, is further amended by inserting after paragraph (10) the following:

"(11) is a member of 1 or more classes of persons described in section 212(a)(2)(J) or 237(a)(2)(G) and has been convicted of any offense described in section 101(a)(43), 212(a)(2), or 237(a)(2); or".

(i) ANNUAL REPORT ON DETENTION OF CRIMINAL GANG MEMBERS.—Not later than March 1 of the first calendar year beginning at least 1 year after the date of the enactment of this Act, and annually thereafter, the Secretary of Homeland Security, after consultation with the heads of appropriate Federal agencies, shall submit a report to the Committee on Homeland Security and Governmental Affairs of the Senate, the Committee on the Judiciary of the Senate, the Committee on Homeland Security of the House of Representatives, and the Committee on the Judiciary of the House of Representatives that identifies the number of aliens detained described in sections 212(a)(2)(J) and section 237(a)(2)(G) of the Immigration and Nationality Act, as added by subsections (b) and (d).

(j) EFFECTIVE DATE AND APPLICATION.—The amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to acts that occur before, on, or after the date of the enactment of this Act.

**SEC. 1713. BARRING AGGRAVATED FELONS, BORDER CHECKPOINT RUNNERS, AND SEX OFFENDERS FROM ADMISSION TO THE UNITED STATES.**

(a) INADMISSIBILITY ON CRIMINAL AND RELATED GROUNDS; WAIVERS.—Section 212 of the Immigration and Nationality Act (8 U.S.C. 1182) is amended—

(1) in subsection (a)(2)—

(A) in subparagraph (A)(i)—

(i) in subclause (I), by striking ", or" at the end and inserting a semicolon;

(ii) in subclause (II), by striking the comma at the end and inserting "; or"; and

(iii) by inserting after subclause (II) the following:

"(III) a violation of (or a conspiracy or attempt to violate) any statute relating to section 208 of the Social Security Act (42 U.S.C. 408)

(relating to social security account numbers or social security cards) or section 1028 of title 18, United States Code (relating to fraud and related activity in connection with identification documents, authentication features, and information)''; and

(B) by inserting after subparagraph (K), as added by section 1713(b) of this Act, the following:

''(L) CITIZENSHIP FRAUD.—Any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of, a violation of, or an attempt or a conspiracy to violate, subsection (a) or (b) of section 1425 of title 18, United States Code (relating to the procurement of citizenship or naturalization unlawfully), is inadmissible.

''(M) CERTAIN FIREARM OFFENSES.—Any alien who at any time has been convicted under any law of, admits having committed, or admits committing acts which constitute the essential elements of, any law relating to, purchasing, selling, offering for sale, exchanging, using,

owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law, is inadmissible. For purposes of this subparagraph the term 'any law' includes State laws that do not contain an exception for antique firearms. If the State law does not contain an exception for antique firearms, the Secretary or the Attorney General may consider documentary evidence related to the conviction, including, but not limited to, charging documents, plea agreements, plea colloquies, jury instructions, and police reports, to establish that the offense involved at least 1 firearm that is not an antique firearm.

''(N) AGGRAVATED FELONS.—Any alien who has been convicted of an aggravated felony at any time is inadmissible.

''(O) HIGH SPEED FLIGHT.—Any alien who has been convicted of a violation of section 758 of title 18, United States Code (relating to

high speed flight from an immigration checkpoint) is inadmissible.

''(P) FAILURE TO REGISTER AS A SEX OFFENDER.—Any alien convicted under section 2250 of title 18, United States Code, is inadmissible.

''(Q) CRIMES OF DOMESTIC VIOLENCE, STALKING, OR VIOLATION OF PROTECTION ORDERS; CRIMES AGAINST CHILDREN.—

''(i) DOMESTIC VIOLENCE, STALKING, AND CHILD ABUSE.—Except as provided in subsection (v), any alien who at any time is or has been convicted of a crime involving the use or attempted use of physical force, or threatened use of a deadly weapon, a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is inadmissible. For purposes of this clause, the term 'crime of domestic violence' has the meaning given the term in section 237(a)(2)(E)(i).

''(ii) VIOLATORS OF PROTECTION ORDERS.—Except as provided in subsection (v), any alien who at any time is or has

been enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is inadmissible. For purposes of this clause, the term 'protection order' has the meaning given the term in section 237(a)(2)(E)(ii).'';

(2) in subsection (h)—

(A) in paragraph (1)—

(i) in subparagraph (A), by redesignating clauses (i), (ii), and (iii) as subclauses (I), (II), and (III), respectively;

(ii) by redesignating subparagraphs (A), (B), and (C) as clauses (i), (ii), and (iii), respectively;

(B) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively;

(C) in the matter preceding subparagraph (A), as redesignated and as amended by section 1713(e) of this Act—

(i) by inserting ''(1)'' before ''The Attorney General''; and

(ii) by striking '', and (K)'', and inserting ''(K), and (M)'';

(D) in the matter following subparagraph (B), as redesignated—

(i) by striking the first 2 sentences and inserting the following:

''(2) A waiver may not be provided under this subsection to an alien—

''(A) who has been convicted of (or who has admitted committing acts that constitute)—

''(i) murder or criminal acts of torture; or

''(ii) an attempt or conspiracy to commit murder or a criminal act involving torture;

''(B) who has been convicted of an aggravated felony; or

''(C) who has been lawfully admitted for permanent residence and who since the date of such admission has not lawfully resided continuously in the United States for at least 7 years immediately preceding the date on which proceedings were initiated to remove the alien from the United States.''; and

(ii) by striking ''No court'' and inserting the following:

''(3) No court'';

(3) by redesignating subsection (t), as added by section 1(b)(2)(B) of Public Law 108–449, as subsection (u); and

(4) by adding at the end the following:

''(v) WAIVER FOR VICTIMS OF DOMESTIC VIOLENCE.—

''(1) IN GENERAL.—The Secretary or the Attorney General is not limited by the criminal court record and may waive the application of subsection (a)(2)(Q)(i) (with respect to crimes of domestic violence and crimes of stalking) and subsection (a)(2)(Q)(ii), in the case of an alien who has been battered or subjected to extreme cruelty and who is not and was not the primary perpetrator of violence in the relationship, upon a determination that—

''(A) the alien was acting in self-defense;

''(B) the alien was found to have violated a protection order intended to protect the alien; or

''(C) the alien committed or was convicted of committing a crime—

''(i) that did not result in serious bodily injury; and

''(ii) where there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty.

''(2) CREDIBLE EVIDENCE CONSIDERED.—In acting on applications for a waiver under this subsection, the Secretary or the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Secretary or the Attorney General.''.

(b) DEPORTABILITY; CRIMINAL OFFENSES.—Section 237(a)(2) of the Immigration and Nationality Act (8 U.S.C. 1227(a)(2)), as amended by sections 1712(c) and 1713(c) of this Act, is further amended by adding at the end the following:

''(I) IDENTIFICATION FRAUD.—Any alien who is convicted of a violation of (or a conspiracy or attempt to violate) an offense relating to section 208 of the Social Security Act (42 U.S.C. 408) (relating to social security account numbers or social security cards) or section 1028 of title 18, United States Code (relat-

ing to fraud and related activity in connection with identification) is deportable.''.

(c) DEPORTABILITY; CRIMINAL OFFENSES.—Section 237(a)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1227(a)(3)(B)) is amended—

(1) in clause (i), by striking the comma at the end and inserting a semicolon;

(2) in clause (ii), by striking ``, or'' at the end and inserting a semicolon;

(3) in clause (iii), by striking the comma at the end and inserting ``; or''; and

(4) by inserting after clause (iii) the following:

``(iv) of a violation of, or an attempt or a conspiracy to violate, subsection (a) or (b) of section 1425 of title 18, United States Code (relating to the unlawful procurement of citizenship or naturalization),''.

(d) APPLICABILITY.—The amendments made by this section shall apply to—

(1) any act that occurred before, on, or after the date of the enactment of this Act;

(2) all aliens who are required to establish admissibility on or after such date of enactment; and

(3) all removal, deportation, or exclusion proceedings that are filed, pending, or reopened, on or after such date of enactment.

(e) RULE OF CONSTRUCTION.—The amendments made by this section may not be construed to create eligibility for relief from removal under section 212(c) of the Immigration and Nationality Act (8 U.S.C. 1182(c)), as in effect on the day before the date of the enactment of this Act, if such eligibility did not exist before such date of enactment.

**SEC. 1714. PROTECTING IMMIGRANTS FROM CONVICTED SEX OFFENDERS.**

(a) IMMIGRANTS.—Section 204(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)) is amended—

(1) in subparagraph (A), by amending clause (viii) to read as follows:

''(viii) Clause (i) shall not apply to a citizen of the United States who has been convicted of an offense described in subparagraph (A), (I), or (K) of section 101(a)(43) or a specified offense against a minor (as defined in section 111(7) of the Adam Walsh Child Protection and Safety Act of 2006 (34 U.S.C. 20911(7))) unless the Secretary, in the Secretary's sole and unreviewable discretion, determines that the citizen poses no risk to the

alien with respect to whom a petition described in clause (i) is filed.''; and

(2) in subparagraph (B)(i)—

(A) by redesignating the second subclause (I) as subclause (II); and

(B) by amending such subclause (II) to read as follows:

''(II) Subclause (I) shall not apply to an alien lawfully admitted for permanent residence who has been convicted of an offense described in subparagraph (A), (I), or (K) of section 101(a)(43) or a specified offense against a minor as defined in section 111(7) of the Adam Walsh Child Protection and Safety Act of 2006 (34 U.S.C. 20911(7)) unless the Secretary, in the Secretary's sole and unreviewable discretion, determines that the alien lawfully admitted for permanent residence poses no risk to the alien with respect to whom a petition described in subclause (I) is filed.''.

(b) NONIMMIGRANTS.—Section 101(a)(15)(K) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(K)) is amended by striking ''204(a)(1)(A)(viii)(I))'' each place it appears and inserting ''204(a)(1)(A)(viii))''.

(c) EFFECTIVE DATE AND APPLICATION.—The amendments made by this section shall take effect on the

date of the enactment of this Act and shall apply to petitions filed on or after such date.

**SEC. 1715. ENHANCED CRIMINAL PENALTIES FOR HIGH SPEED FLIGHT.**

(a) IN GENERAL.—Section 758 of title 18, United States Code, is amended to read as follows:

**"§ 758. Unlawful flight from immigration or customs controls**

''(a) EVADING A CHECKPOINT.—Any person who, while operating a motor vehicle or vessel, knowingly flees or evades a checkpoint operated by the Department of Homeland Security or any other Federal law enforcement agency, and then knowingly or recklessly disregards or disobeys the lawful command of any law enforcement agent, shall be fined under this title, imprisoned not more than 5 years, or both.

''(b) FAILURE TO STOP.—Any person who, while operating a motor vehicle, aircraft, or vessel, knowingly or recklessly disregards or disobeys the lawful command of an officer of the Department of Homeland Security engaged in the enforcement of the immigration, customs, or maritime laws, or the lawful command of any law enforcement agent assisting such officer, shall be fined under this title, imprisoned not more than 2 years, or both.

''(c) ALTERNATIVE PENALTIES.—Notwithstanding the penalties provided in subsection (a) or (b), any person who violates such subsection—

''(1) shall be fined under this title, imprisoned not more than 10 years, or both, if the violation involved the operation of a motor vehicle, aircraft, or vessel—

''(A) in excess of the applicable or posted speed limit;

''(B) in excess of the rated capacity of the motor vehicle, aircraft, or vessel; or

''(C) in an otherwise dangerous or reckless manner;

''(2) shall be fined under this title, imprisoned not more than 20 years, or both, if the violation created a substantial and foreseeable risk of serious bodily injury or death to any person;

''(3) shall be fined under this title, imprisoned not more than 30 years, or both, if the violation caused serious bodily injury to any person; or

''(4) shall be fined under this title, imprisoned for any term of years or life, or both, if the violation resulted in the death of any person.

''(d) ATTEMPT AND CONSPIRACY.—Any person who attempts or conspires to commit any offense under this

section shall be punished in the same manner as a person who completes the offense.

''(e) FORFEITURE.—Any property, real or personal, constituting or traceable to the gross proceeds of the offense and any property, real or personal, used or intended to be used to commit or facilitate the commission of the offense shall be subject to forfeiture.

''(f) FORFEITURE PROCEDURES.—Seizures and forfeitures under this section shall be governed by the provisions of chapter 46 (relating to civil forfeitures), including section 981(d), except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in that section shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Secretary of Homeland Security or the Attorney General. Nothing in this section may be construed to limit the authority of the Secretary of Homeland Security to seize and forfeit motor vehicles, aircraft, or vessels under the customs laws or any other laws of the United States.

''(g) DEFINITIONS.—For purposes of this section—

''(1) the term 'checkpoint' includes any customs or immigration inspection at a port of entry or immigration inspection at a U.S. Border Patrol checkpoint;

''(2) the term 'law enforcement agent' means—

''(A) any Federal, State, local or tribal official authorized to enforce criminal law; and

''(B) when conveying a command described in subsection (b), an air traffic controller;

''(3) the term 'lawful command' includes a command to stop, decrease speed, alter course, or land, whether communicated orally, visually, by means of lights or sirens, or by radio, telephone, or other communication;

''(4) the term 'motor vehicle' means any motorized or self-propelled means of terrestrial transportation; and

''(5) the term 'serious bodily injury' has the meaning given in section 2119(2).''.

(b) CLERICAL AMENDMENT.—The table of sections for chapter 35 of title 18, United States Code, is amended by striking the item relating to section 758 and inserting the following:

''758. Unlawful flight from immigration or customs controls.''.

(c) RULE OF CONSTRUCTION.—The amendments made by subsection (a) may not be construed to create eligibility for relief from removal under section 212(c) of the Immigration and Nationality Act (8 U.S.C. 1182(c)), as in effect on the day before the date of the enactment

of this Act, if such eligibility did not exist before such date of enactment.

**SEC. 1716. PROHIBITION ON ASYLUM AND CANCELLATION OF REMOVAL FOR TERRORISTS.**

(a) ASYLUM.—Section 208(b)(2)(A) of the Immigration and Nationality Act (8 U.S.C. 1158(b)(2)(A)), as amended by 1712(f) of this Act, is further amended—

(1) by inserting ''or the Secretary'' after ''if the Attorney General''; and

(2) by amending clause (v) to read as follows:

''(v) the alien is described in subparagraph (B)(i) or (F) of section 212(a)(3), unless, in the case of an alien described in section 212(a)(3)(B)(i)(IX), the Secretary or the Attorney General determines, in his or her sole and unreviewable discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States;''.

(b) CANCELLATION OF REMOVAL.—Section 240A(c)(4) of the Immigration and Nationality Act (8 U.S.C. 1229b(c)(4)) is amended—

(1) by striking ''inadmissible under'' and inserting ''described in''; and

(2) by striking ''deportable under'' and inserting ''described in''.

(c) RESTRICTION ON REMOVAL.—

(1) IN GENERAL.—Section 241(b)(3)(A) of the Immigration and Nationality Act (8 U.S.C. 1231(b)(3)(A)) is amended—

(A) by inserting ''or the Secretary'' after ''Attorney General'' both places it appears;

(B) by striking ''Notwithstanding'' and inserting the following:

''(i) IN GENERAL.—Notwithstanding''; and

(C) by adding at the end the following:

''(ii) BURDEN OF PROOF.—The alien has the burden of proof to establish that the alien's life or freedom would be threatened in such country, and that race, religion, nationality, membership in a particular social group, or political opinion would be at least 1 central reason for such threat.''.

(2) EXCEPTION.—Section 241(b)(3)(B) of such Act (8 U.S.C. 1231(b)(3)(B)) is amended—

(A) by inserting ''or the Secretary'' after ''Attorney General'' both places it appears;

(B) in clause (iii), striking ''or'' at the end;

(C) in clause (iv), striking the period at the end and inserting a semicolon;

(D) inserting after clause (iv) the following:

''(v) the alien is described in subparagraph (B)(i) or (F) of section 212(a)(3)(B), unless, in the case of an alien described in section 212(a)(3)(B)(i)(IX), the Secretary or the Attorney General determines, in his or her sole and unreviewable discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

''(vi) the alien is convicted of an aggravated felony.''; and

(E) by striking the undesignated matter at the end.

(3) SUSTAINING BURDEN OF PROOF; CREDIBILITY DETERMINATIONS.—Section 241(b)(3)(C) of such Act (8 U.S.C. 1231(b)(3)(C)) is amended by striking ''In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph

(A),'' and inserting ''For purposes of this paragraph,''.

(4) EFFECTIVE DATE AND APPLICATION.—The amendments made by paragraphs (1) and (2) shall take effect as if enacted on May 11, 2005, and shall apply to applications for withholding of removal made on or after such date.

(d) EFFECTIVE DATES; APPLICATIONS.—Except as provided in subsection (c)(4), the amendments made by this section shall take effect on the date of the enactment of this Act and sections 208(b)(2)(A), 240A(c), and 241(b)(3) of the Immigration and Nationality Act, as amended by this section, shall apply to—

(1) all aliens in removal, deportation, or exclusion proceedings;

(2) all applications pending on, or filed after, the date of the enactment of this Act; and

(3) with respect to aliens and applications described in paragraph (1) or (2), acts and conditions constituting a ground for exclusion, deportation, or removal occurring or existing before, on, or after the date of the enactment of this Act.

**SEC. 1717. AGGRAVATED FELONIES.**

(a) DEFINITION OF AGGRAVATED FELONY.—Section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)) is amended to read as follows:

''(43)(A) The term 'aggravated felony' means—

''(i) any offense punishable by a maximum term of imprisonment of not less than 2 years regardless of the term of imprisonment, if any, actually imposed;

''(ii) any offense for which the term of imprisonment imposed was not less than 1 year even if that term is suspended or probated;

''(iii) any 2 or more offenses, regardless of whether the convictions for such offenses resulted from a single trial or plea or whether the offenses arose from a single scheme of misconduct, for which the aggregate term of imprisonment imposed was not less than 3 years;

''(iv) any offense not otherwise determined to be an aggravated felony offense under clauses (i) through (iii), regardless of the term of imprisonment imposed (unless otherwise indicated) or of the elements of the offense required for a conviction if the nature of the offense is described in 1 of the following subclauses:

''(I) Any crime of, or related to—

''(aa) murder, in any degree;

''(bb) voluntary or involuntary manslaughter;

''(cc) homicide (regardless of the required level of intent and including reckless or negligent homicide);

''(dd) sexual assault or battery;

''(ee) rape (including statutory rape);

''(ff) any offense for which the individual was required to register as a sex offender under Federal or state law;

''(gg) , or any other sex offense, including offenses related to the actual or attempted abuse of or contact with minors (defined as individuals under the age of 18 but including offenses in which the intended victim was actually a law enforcement officer), regardless of the reason and extent of the act.

''(II) Any drug trafficking crime (as defined in section 924(c) of title 18, United States Code).

''(III) Any other crime classified as a felony in the jurisdiction of conviction involving or related to a controlled substance that is classi-

fied as controlled in the jurisdiction of conviction, regardless of whether the substance is also classified as controlled by the Federal government and regardless of whether the crime would be classified as a felony under Federal law.

''(IV) Any offense relating to illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of such title).

''(V) Any offense relating to laundering of monetary instruments or engaging in monetary transactions in property derived from unlawful activity if the amount of the funds exceeded $10,000.

''(VI) A crime of violence (or an offense relating to a crime of violence), including any crime labeled as assault or battery by the relevant jurisdiction of conviction, state or Federal, regardless of whether the crime also meets the definition in section 16 of title 18, United States Code, for which the term of imprisonment imposed is at least 9 months.

''(VII) A theft offense (or an offense relating to a theft offense), including any crime la-

beled as theft, shoplifting, burglary, or embezzlement by the relevant jurisdiction of conviction, state or Federal, and regardless of the method of the theft , and regardless of whether any taking was temporary or permanent, for which the term of imprisonment imposed is at least 9 months.

''(VIII) Any offense relating to offenses described in—

''(aa) section 842 or 844 of title 18, United States Code;

''(bb) section 922 or 924 of such title; or

''(cc) section 5861 of the Internal Revenue Code of 1986.

''(IX) Any offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony.

''(X) Any offense relating to the demand for or receipt of ransom.

''(XI) Any offense relating to child pornography (as defined by the jurisdiction of conviction).

''(XII) Any offense relating to racketeer influenced corrupt organizations, or relating to

transmission of wagering information (if it is a second or subsequent offense) or relating to illegal gambling business offenses.

''(XIII) Any offense relating to—

''(aa) the owning, controlling, managing, or supervising of a prostitution business;

''(bb) transportation for the purpose of prostitution, if committed for commercial advantage; or

''(cc) peonage, slavery, involuntary servitude, and trafficking in persons.

''(XIV) Any offense relating to—

''(aa) gathering or transmitting national defense information, disclosure of classified information, sabotage or treason;

''(bb) protecting the identity of undercover intelligence agents; or

''(cc) protecting the identity of undercover agents; or

''(XV) Any offense—

''(aa) involving fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

''(bb) relating to those described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

''(XVI) Any offense relating to an offense described in paragraph (1)(A) or (2) of section 274(a) (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act.

''(XVII) Any offense relating to offenses described in section 275(a) or 276 committed by an alien who was previously excluded, deported, or removed from the United States.

''(XVIII) An offense related to falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument relating to document fraud.

''(XIX) Any offense relating to a failure to appear by a defendant for service of sentence if

the underlying offense is punishable by imprisonment for a term of 3 years or more.

''(XX) Any offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered.

''(XXI) Any offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness.

''(XXII)(aa) A single conviction for driving while intoxicated or impaired (as such terms are defined under the jurisdiction in which the conviction occurred), including a conviction for driving while under the influence of or impaired by alcohol or drugs, without regard to whether the conviction is classified as a misdemeanor or felony under State law when such impaired driving was a cause of serious bodily injury or death of another person.

''(bb) A second or subsequent conviction for driving while intoxicated or impaired (as such terms are defined under the jurisdiction in which the conviction occurred), including a conviction for driving while under the influence of or impaired by alcohol or drugs) without regard

to whether the conviction is classified as a misdemeanor or felony under State law.

''(cc) A finding under this subclause does not require the Secretary or the Attorney General to prove the first conviction for driving while intoxicated or impaired (including a conviction for driving while under the influence of or impaired by alcohol or drugs) as a predicate offense.

''(dd) The Secretary or the Attorney General need only make a factual determination that the alien was previously convicted for driving while intoxicated or impaired (as such terms are defined under the jurisdiction in which the conviction occurred), including a conviction for driving while under the influence of or impaired by alcohol or drugs.

''(XXIII) An offense relating to terrorism or national security, including a conviction for a violation under chapter 113B of title 18, United States Code.

''(XXIV) A conviction for violating section 295.

''(XXV) Any offense relating to those described in chapter 50A (genocide), 113C (tor-

ture), or 118 (war crimes and recruitment or use of child soldiers) of title 18, United States Code, or section 116 of such title (female genital mutilation), or a felony conviction under chapter 35 of title 50, United States Code (relating to violations of International Emergency Economic Powers Act licenses, orders, regulations, or prohibitions) or under section 38 of the Arms Export Control Act (22 U.S.C. 2778).

''(XXVI) An attempt, conspiracy, or solicitation to commit an offense described in subclauses I through XXV or any other inchoate form of an offense described in this clause.

''(B) Notwithstanding any other provision of law (including any effective date), the term 'aggravated felony' applies, regardless of whether the conviction was entered before, on, or after the effective date of theSECURE and SUCCEED Act, to—

''(i) an offense described in subparagraph (A), whether in violation of Federal or State law; and

''(ii) an offense described in subparagraph (A) in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years.''.

(b) DEFINITION OF CONVICTION.—Section 101(a)(48) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(48)) is amended to read as follows:

''(48)(A) The term 'conviction' means, with respect to an alien—

''(i) a formal judgment of guilt of the alien entered by a court; or

''(ii) if adjudication of guilt has been withheld or deferred, where—

''(I) a judge, jury, or other adjudicator has found the alien guilty or the alien has entered a plea of guilty, an Alford plea, or a plea of nolo contendere, or the alien has admitted sufficient facts to warrant a finding of guilt; and

''(II) the judge or other adjudicator has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed, including, but not limited to, the imposition of probation or any fees or costs associated with the proceeding.

''(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole

or in part, including a sentence of imprisonment that is probated.

''(C) Any reference to a term of imprisonment of at least '1 year' includes any sentence of 365 days or more, or as '1 year' was defined under State or local law in the jurisdiction in which the conviction occurred at the time of the conviction.

''(D) Any reference to a term of imprisonment that is 'punishable by' shall include the maximum statutory term of imprisonment authorized by law for the most aggravated instance of the offense without regard to the individual circumstances of the defendant or the specific facts of the conviction, provided that for convictions under Federal law, the maximum statutory term of imprisonment shall not include a statutory sentence enhancement under title 18, United States Code, or the title IV of the Controlled Substances Act (21 U.S.C. 841 et seq.) unless the defendant's record of conviction reflects that he was convicted or sentenced pursuant to such an enhancement.

''(E) Subject to subparagraphs (F) and (G), no order purporting to vacate a conviction, modify a sentence, or clarify a sentence shall have any effect under this Act unless all 4 of the following conditions are met:

''(i) The order was entered prior to the initiation of any proceeding to remove the alien from the United States.

''(ii) The order was entered not later than 1 year after the date of the original order of conviction or sentencing.

''(iii) The court issuing the order had jurisdiction and authority to do so.

''(iv) The order was not entered for purposes of ameliorating the immigration consequences of the conviction or sentence.

''(F) No nunc pro tunc order purporting to vacate a conviction, modify a sentence, or clarify a sentence shall have any effect under the immigration laws.

''(G) No reversal, vacatur, expungement, or modification of a conviction or sentence that was granted, solely or in part, to ameliorate the immigration consequences of the conviction or sentence or was granted, solely or in part, for rehabilitative purposes shall have any effect under the immigration laws. For purposes of this subparagraph, any reversal, vacatur, expungement, or modification of a conviction or sentence due to an alleged procedural or constitutional defect shall be insufficient to meet the alien's burden of proof, even if the conditions in subparagraphs (E) and (F) are otherwise satisfied, unless the

record contains a clear statement of position from the prosecutor on the issue and a clear explanation in the relevant order of the alleged defect.

''(H) In all cases under the immigration laws, the alien shall bear the burden of establishing that all 4 conditions in subparagraph (E) have been met and that the limitations in subparagraph (F) and (G) do not apply.

''(I) Any order purporting to vacate a conviction, modify a sentence, or clarify a sentence shall not be given any effect for immigration purposes unless the requirements under this paragraph have been met. The fact that these requirements have been met shall not preclude a finding by the Attorney General or Secretary, in the exercise of discretion, that the conviction is still valid for immigration purposes. Notwithstanding any other provision of law (statutory or nonstatutory) and regardless of whether the determination is made in removal proceedings, no court shall have jurisdiction to review a determination by the Attorney General or Secretary of Homeland Security regarding whether such an order should be given any effect under the immigration laws.

''(J) All references to a criminal offense or criminal conviction in the immigration laws shall be deemed to include any attempt, conspiracy, or solicitation to commit the offense or any other inchoate form of the offense.

''(K) In making a determination of whether a criminal conviction is for an aggravated felony or a crime involving moral turpitude or for any other provision under the immigration laws, the Attorney General shall not be required to apply any single or particular methodology. In making such determinations, the Attorney General shall not be limited to applying a categorical or modified categorical approach (including determining if a statute of conviction is divisible), shall not limit his consideration to a single generic definition of a crime, and shall not consider any hypothetical criminal offense beyond the facts of the actual conviction at issue. In all cases, the Attorney General may look behind the record of conviction and consider all reliable evidence (including charging documents, plea agreements, plea colloquies, jury instructions, police reports, testimony during the removal hearing, and any prior statements by the respondent or any other person about the crime) of relevant facts (including the underlying conduct at issue, the actual type of firearm involved (if any), the amount of a controlled substance involved (if any), and the identity of the victim).''.

**SEC. 1718. FAILURE TO OBEY REMOVAL ORDERS.**

(a) IN GENERAL.—Section 243 of the Immigration and Nationality Act (8 U.S.C. 1253) is amended—

(1) in subsection (a)—

(A) in paragraph (1), in the matter preceding subparagraph (A), by inserting ''212(a) or'' before ''237(a),''; and

(B) by striking paragraph (3);

(2) by striking subsection (b); and

(3) by redesignating subsections (c) and (d) as subsections (b) and (c), respectively.

(b) EFFECTIVE DATE AND APPLICATION.—The amendments made by subsection (a)(1) shall take effect on the date of the enactment of this Act and shall apply to acts that are described in subparagraphs (A) through (D) of section 243(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1253(a)(1)) that occur on or after such date of enactment.

**SEC. 1719. SANCTIONS FOR COUNTRIES THAT DELAY OR PREVENT REPATRIATION OF THEIR NATIONALS.**

Section 243 of the Immigration and Nationality Act (8 U.S.C. 1253), as amended by section 1720(a), is further amended by adding at the end the following:

''(e) LISTING OF COUNTRIES WHO DELAY REPATRIATION OF REMOVED ALIENS.—

''(1) LISTING OF COUNTRIES.—Beginning on the date that is 6 months after the date of the enactment of the SECURE and SUCCEED Act, and

every 6 months thereafter, the Secretary shall publish a report in the Federal Register that includes a list of—

''(A) countries that have refused or unreasonably delayed repatriation of an alien who is a national of that country since the date of enactment of this Act and the total number of such aliens, disaggregated by nationality;

''(B) countries that have an excessive repatriation failure rate; and

''(C) each country that was reported as noncompliant in the most recent reporting period.

''(2) EXEMPTION.—The Secretary, in the Secretary's sole and unreviewable discretion, and in consultation with the Secretary of State, may exempt a country from inclusion on the list under paragraph (1) if there are significant foreign policy or security concerns that warrant such an exemption.

''(f) DISCONTINUING GRANTING OF VISAS TO NATIONALS OF COUNTRIES DENYING OR DELAYING ACCEPTING ALIEN.—

''(1) IN GENERAL.—Notwithstanding section 221(c), the Secretary shall take the action described in paragraph (2)(A), and may take an action de-

scribed in paragraph (2)(B), if the Secretary determines that—

''(A) an alien who is a national of a foreign country is inadmissible under section 212 or deportable under section 237, or has been ordered removed from the United States; and

''(B) the government of the foreign country referred to in subparagraph (A) is—

''(i) denying or unreasonably delaying accepting aliens who are citizens, subjects, nationals, or residents of that country after the Secretary asks whether the government will accept an alien under this section; or

''(ii) refusing to issue any required travel or identity documents to allow the alien who is citizen, subject, national, or resident of that country to return to that country.

''(2) ACTIONS DESCRIBED.—The actions described in this paragraph are the following:

''(A) Direct the Secretary of State to authorize consular officers in the foreign country referred to in paragraph (1) to deny visas under section 101(a)(15)(A)(iii) to attendants,

servants, personal employees, and members of their immediate families, of the officials and employees of that country who receive non-immigrant status under clause (i) or (ii) of section 101(a)(15)(A).

''(B) In consultation with the Secretary of State, deny admission to any citizens, subjects, nationals, or residents from the foreign country referred to in paragraph (1), consistent with other international obligations, and the imposition of any limitations, conditions, or additional fees on the issuance of visas or travel from that country, or the imposition of any other sanctions against that country that are authorized by law.

''(3) RESUMPTION OF VISA ISSUANCE.—Consular officers in the foreign country that refused or unreasonably delayed repatriation or refused to issue required identity or travel documents may resume visa issuance after the Secretary notifies the Secretary of State that the country has accepted the aliens.''.

**SEC. 1720. ENHANCED PENALTIES FOR CONSTRUCTION AND USE OF BORDER TUNNELS.**

Section 555 of title 18, United States Code, is amended—

(1) in subsection (a), by striking ''not more than 20 years.'' and inserting ''not less than 7 years and not more than 20 years.''; and

(2) in subsection (b), by striking ''not more than 10 years.'' and inserting ''not less than 3 years and not more than 10 years.''.

**SEC. 1721. ENHANCED PENALTIES FOR FRAUD AND MISUSE OF VISAS, PERMITS, AND OTHER DOCUMENTS.**

Section 1546(a) of title 18, United States Code, is amended—

(1) by striking ''Commissioner of the Immigration and Naturalization Service'' each place it appears and inserting ''Secretary of Homeland Security''; and

(2) by striking ''Shall be fined'' and all that follows and inserting ''Shall be fined under this title or imprisoned for not less than 12 years and not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331)), not less than 10 years and not more than 20 years (if the offense was committed to

facilitate a drug trafficking crime (as defined in section 929(a)), not less than 5 years and not more than 10 years (for the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or not less than 7 years and not more than 15 years (for any other offense), or both.''.

**SEC. 1722. EXPANSION OF CRIMINAL ALIEN REPATRIATION PROGRAMS.**

(a) EXPANSION OF CRIMINAL ALIEN REPATRIATION FLIGHTS.—Not later than 90 days after the date of the enactment of this Act, the Secretary of Homeland Security shall increase the number of criminal and illegal alien repatriation flights from the United States conducted by U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement Air Operations by not less than 15 percent compared to the number of such flights operated, and authorized to be operated, under existing appropriations and funding on the date of the enactment of this Act.

(b) U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT AIR OPERATIONS.—Not later than 90 days after the date of the enactment of this Act, the Secretary of Homeland Security shall issue a directive to expand U.S. Immigration and Customs Enforcement Air Operations

(referred to in this subsection as ''ICE Air Ops'') so that ICE Air Ops provides additional services with respect to aliens who are illegally present in the United States. Such expansion shall include—

(1) increasing the daily operations of ICE Air Ops with buses and air hubs in the top 5 geographic regions along the southern border;

(2) allocating a set number of seats for such aliens for each metropolitan area; and

(3) allowing a metropolitan area to trade or give some of seats allocated to such area under paragraph (2) for such aliens to other areas in the region of such area based on the transportation needs of each area.

(c) AUTHORIZATION OF APPROPRIATIONS.—In addition to the amounts otherwise authorized to be appropriated, there is authorized to be appropriated $10,000,000 for each of the fiscal years 2018 through 2022 to carry out this section.

**SEC. 1723. PROHIBITION ON FLIGHT TRAINING AND NUCLEAR STUDIES FOR NATIONALS OF HIGH-RISK COUNTRIES.**

(a) IN GENERAL.—The Secretary of State shall deny a visa to, and the Secretary of Homeland Security may

not admit or parole into the United States, any alien who—

(1) is a citizen of Libya, Iran, Syria, or any country designated by the Secretary of State as a state sponsor of terrorism; and

(2)(A)(i) is an applicant for a visa or for admission to the United States; and

(ii) the Secretary of State or the Secretary of Homeland Security determines seeks to enter the United States to participate in—

(I) coursework at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))) to prepare the alien for a career in nuclear science, nuclear engineering, or a related field; or

(II) coursework or training or otherwise engage in aviation maintenance or flight operations;

(B)(i) is in the United States; and

(ii) the Secretary of Homeland Security determines is applying to change status to participate in coursework, training, or activities described in subparagraph (A)(ii); or

(C)(i) is lawfully present in the United States, either as a nonimmigrant student or otherwise authorized to study at an institution of higher education; and

(ii) the Secretary of Homeland Security determines is participating in coursework, training, or activities described in subparagraph (A)(ii) or seeks to change his or her field of study to participate in such coursework, training, or activities.

(b) TERMINATION OF STATUS.—The Secretary of Homeland Security shall terminate the nonimmigrant status or otherwise revoke the authorization to remain in the United States of any alien in the United States who is described in subsection (a).

(c) HIGH-RISK COUNTRIES.—The Secretary of Homeland Security may, in the discretion of the Secretary, designate additional countries whose nationals are subject to the restrictions described in subsection (a) if the Secretary determines that the imposition of such restrictions on such nationals is in the national interest.

## CHAPTER 2—STRONG VISA INTEGRITY SECURES AMERICA ACT

### SEC. 1731. SHORT TITLE.

This chapter may be cited as the ''Strong Visa Integrity Secures America Act''.

**SEC. 1732. VISA SECURITY.**

(a) VISA SECURITY UNITS AT HIGH RISK POSTS.—Section 428(e)(1) of the Homeland Security Act of 2002 (6 U.S.C. 236(e)(1)) is amended—

(1) by striking ''The Secretary'' and inserting the following:

''(A) AUTHORIZATION.—Subject to the minimum number specified in subparagraph (B), the Secretary''; and

(2) by adding at the end the following:

''(B) RISK-BASED ASSIGNMENTS.—

''(i) IN GENERAL.—In carrying out subparagraph (A), the Secretary shall assign employees of the Department to not fewer than 75 diplomatic and consular posts at which visas are issued. Assignments under this subparagraph shall be made—

''(I) in a risk-based manner;

''(II) after considering the criteria described in clause (iii); and

''(III) in accordance with Nationality Security Decision Directive 38, issued by President Reagan on June 2, 1982, or any superseding presi-

dential directive concerning staffing at diplomatic and consular posts.

''(ii) PRIORITY CONSIDERATION.—In carrying out the presidential directive described in clause (i)(III), the Secretary of State shall ensure priority consideration of any staffing assignment under this subparagraph.

''(iii) CRITERIA DESCRIBED.—The criteria referred to in clause (i) are—

''(I) the number of nationals of a country in which any of the diplomatic and consular posts referred to in clause (i) are located who were identified in United States Government databases related to the identities of known or suspected terrorists during the previous year;

''(II) information on cooperation of the country referred to in subclause (I) with the counterterrorism efforts of the United States;

''(III) information analyzing the presence, activity, or movement of terrorist organizations (as such term is

defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi)) within or through such country;

''(IV) the number of formal objections based on derogatory information issued by the Visa Security Advisory Opinion Unit pursuant to paragraph (10) regarding nationals of a country in which any of the diplomatic and consular posts referred to in clause (i) are located;

''(V) the adequacy of the border and immigration control of such country; and

''(VI) any other criteria the Secretary determines appropriate.''.

(b) ACCOMMODATION OF VISA SECURITY UNITS.—Section 428 of the Homeland Security Act of 2002 (6 U.S.C. 236) is amended by adding at the end the following:

''(j) EXPEDITED CLEARANCE AND PLACEMENT OF DEPARTMENT OF HOMELAND SECURITY PERSONNEL AT OVERSEAS EMBASSIES AND CONSULAR POSTS.—Notwithstanding any other provision of law, and the processes set

forth in National Security Defense Directive 38, issued by President Reagan on June 2, 1982, or any successor Directive, the Chief of Mission of a post to which the Secretary of Homeland Security has assigned personnel under subsection (e) or (i) shall ensure, not later than 1 year after the date on which the Secretary of Homeland Security communicates such assignment to the Secretary of State, that such personnel have been stationed and accommodated at post and are able to carry out their duties.''.

(c) FUNDING FOR THE VISA SECURITY PROGRAM.—

(1) IN GENERAL.—The Department of State and Related Agency Appropriations Act, 2005 (title IV of division B of Public Law 108–447) is amended, in the fourth paragraph under the heading ''Diplomatic and Consular Programs'', by striking ''Beginning'' and all that follows and inserting the following: ''Beginning in fiscal year 2005 and thereafter, the Secretary of State is authorized to charge surcharges related to consular services in support of enhanced border security that are in addition to the immigrant visa fees in effect on January 1, 2004: *Provided*, That funds collected pursuant to this authority shall be credited to the appropriation for U.S. Immigration and Customs Enforcement for the fiscal year in which the fees were collected, and shall

be available until expended for the funding of the Visa Security Program established by the Secretary of Homeland Security under section 428(e) of the Homeland Security Act of 2002 (Public Law 107–296): *Provided further*, That such surcharges shall be 10 percent of the fee assessed on immigrant visa applications.''.

(2) REPAYMENT OF APPROPRIATED FUNDS.—Of the amounts collected each fiscal year under the heading ''Diplomatic and Consular Programs'' in the Department of State and Related Agency Appropriations Act, 2005 (title IV of division B of Public Law 108–447), as amended by paragraph (1), 20 percent shall be deposited into the general fund of the Treasury.

(d) COUNTERTERRORISM VETTING AND SCREENING.—Section 428(e)(2) of the Homeland Security Act of 2002 (6 U.S.C. 236(e)(2)) is amended—

(1) by redesignating subparagraph (C) as subparagraph (D); and

(2) by inserting after subparagraph (B) the following:

''(C) Screen any such applications against the appropriate criminal, national security, and

terrorism databases maintained by the Federal Government.''.

(e) TRAINING AND HIRING.—Section 428(e)(6)(A) of the Homeland Security Act of 2002 (6 U.S.C. 236(e)(6)(A)) is amended—

(1) by striking ''The Secretary shall ensure, to the extent possible, that any employees'' and inserting ''The Secretary, acting through the Commissioner of U.S. Customs and Border Protection and the Director of U.S. Immigration and Customs Enforcement, shall provide training to any employees''; and

(2) by striking ''shall be provided the necessary training''.

(f) PRE-ADJUDICATED VISA SECURITY ASSISTANCE AND VISA SECURITY ADVISORY OPINION UNIT.—Section 428(e) of the Homeland Security Act of 2002 (6 U.S.C. 236(e)) is amended by adding at the end the following:

''(9) REMOTE PRE-ADJUDICATED VISA SECURITY ASSISTANCE.—At the visa-issuing posts at which employees of the Department are not assigned pursuant to paragraph (1), the Secretary shall, in a risk-based manner, assign employees of the Department to remotely perform the functions required

under paragraph (2) at not fewer than 50 of such posts.

''(10) VISA SECURITY ADVISORY OPINION UNIT.—The Secretary shall establish within U.S. Immigration and Customs Enforcement a Visa Security Advisory Opinion Unit to respond to requests from the Secretary of State to conduct a visa security review using information maintained by the Department on visa applicants, including terrorism association, criminal history, counter-proliferation, and other relevant factors, as determined by the Secretary.''.

(g) DEADLINES.—Not later than 3 years after the date of the enactment of this Act, the Secretary of Homeland Security shall implement the requirements under paragraphs (1) and (9) of section 428(e) of the Homeland Security Act of 2002 (6 U.S.C. 236(e)), as amended and added by this section.

**SEC. 1733. ELECTRONIC PASSPORT SCREENING AND BIOMETRIC MATCHING.**

(a) IN GENERAL.—Subtitle B of title IV of the Homeland Security Act of 2002 (6 U.S.C. 231 et seq.) is amended by adding at the end the following:

**"SEC. 420. ELECTRONIC PASSPORT SCREENING AND BIOMETRIC MATCHING.**

''(a) IN GENERAL.—Not later than 1 year after the date of the enactment of the Strong Visa Integrity Secures America Act, the Commissioner of U.S. Customs and Border Protection shall—

''(1) screen electronic passports at airports of entry by reading each such passport's embedded chip; and

''(2) to the greatest extent practicable, utilize facial recognition technology or other biometric technology, as determined by the Commissioner, to inspect travelers at United States airports of entry.

''(b) APPLICABILITY.—

''(1) ELECTRONIC PASSPORT SCREENING.—Subsection (a)(1) shall apply to passports belonging to individuals who are United States citizens, individuals who are nationals of a program country pursuant to section 217 of the Immigration and Nationality Act (8 U.S.C. 1187), and individuals who are nationals of any other foreign country that issues electronic passports.

''(2) FACIAL RECOGNITION MATCHING.—Subsection (a)(2) shall apply, at a minimum, to individuals who are nationals of a program country pursuant to section 217 of such Act.

''(c) ANNUAL REPORT.—

''(1) IN GENERAL.—The Commissioner of U.S. Customs and Border Protection, in collaboration with the Chief Privacy Officer of the Department, shall submit an annual report, through fiscal year 2022, to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Homeland Security of the House of Representatives that describes the utilization of facial recognition technology and other biometric technology pursuant to subsection (a)(2).

''(2) REPORT CONTENTS.—Each report submitted pursuant to paragraph (1) shall include—

''(A) information on the type of technology used at each airport of entry;

''(B) the number of individuals who were subject to inspection using either of such technologies at each airport of entry;

''(C) within the group of individuals subject to such inspection, the number of those individuals who were United States citizens and lawful permanent residents;

''(D) information on the disposition of data collected during the year covered by such report; and

''(E) information on protocols for the management of collected biometric data, including time frames and criteria for storing, erasing, destroying, or otherwise removing such data from databases utilized by the Department.

**''SEC. 420A. CONTINUOUS SCREENING BY U.S. CUSTOMS AND BORDER PROTECTION.**

''The Commissioner of U.S. Customs and Border Protection shall, in a risk-based manner, continuously screen individuals issued any visa, and individuals who are nationals of a program country pursuant to section 217 of the Immigration and Nationality Act (8 U.S.C. 1187), who are present, or expected to arrive within 30 days, in the United States, against the appropriate criminal, national security, and terrorism databases maintained by the Federal Government.''.

(b) CLERICAL AMENDMENT.—The table of contents in section 1(b) of the Homeland Security Act of 2002 is amended by inserting after the item relating to section 419 the following:

''Sec. 420. Electronic passport screening and biometric matching.
''Sec. 420A. Continuous screening by U.S. Customs and Border Protection.''.

**SEC. 1734. REPORTING VISA OVERSTAYS.**

Section 2 of Public Law 105–173 (8 U.S.C. 1376) is amended—

(1) in subsection (a)—

(A) by striking ''Attorney General'' and inserting ''Secretary of Homeland Security''; and

(B) by inserting '', and any additional information that the Secretary determines necessary for purposes of the report under subsection (b)'' before the period at the end; and

(2) by amending subsection (b) to read as follows:

''(b) ANNUAL REPORT.—Not later than September 30, 2018, and annually thereafter, the Secretary of Homeland Security shall submit a report to the Committee on Homeland Security and Governmental Affairs of the Senate, the Committee on the Judiciary of the Senate, the Committee on Homeland Security of the House of Representatives, and the Committee on the Judiciary of the House of Representatives that provides, for the preceding fiscal year, numerical estimates (including information on the methodology utilized to develop such numerical estimates) of—

''(1) for each country, the number of aliens from the country who are described in subsection (a), including—

''(A) the total number of such aliens within all classes of nonimmigrant aliens described in

section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)); and

''(B) the number of such aliens within each of the classes of nonimmigrant aliens, as well as the number of such aliens within each of the subclasses of such classes of nonimmigrant aliens, as applicable;

''(2) for each country, the percentage of the total number of aliens from the country who were present in the United States and were admitted to the United States as nonimmigrants who are described in subsection (a);

''(3) the number of aliens described in subsection (a) who arrived by land at a port of entry into the United States;

''(4) the number of aliens described in subsection (a) who entered the United States using a border crossing identification card (as defined in section 101(a)(6) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(6)); and

''(5) the number of Canadian nationals who entered the United States without a visa and whose authorized period of stay in the United States terminated during the previous fiscal year, but who remained in the United States.''.

**SEC. 1735. STUDENT AND EXCHANGE VISITOR INFORMATION SYSTEM VERIFICATION.**

Not later than 90 days after the date of the enactment of this Act, the Secretary of Homeland Security shall ensure that the information collected under the program established under section 641 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1372) is available to officers of U.S. Customs and Border Protection conducting primary inspections of aliens seeking admission to the United States at each port of entry of the United States.

**SEC. 1736. SOCIAL MEDIA REVIEW OF VISA APPLICANTS.**

(a) IN GENERAL.—Subtitle C of title IV of the Homeland Security Act of 2002 (6 U.S.C. 231 et. seq.), as amended by sections 1127 and 1131, is further amended by adding at the end the following:

**"SEC. 436. SOCIAL MEDIA SCREENING.**

''(a) IN GENERAL.—Not later than 180 days after the date of the enactment of the Strong Visa Integrity Secures America Act, the Secretary shall, to the greatest extent practicable, and in a risk based manner and on an individualized basis, review the social media accounts of visa applicants who are citizens of, or who reside in, high risk countries, as determined by the Secretary based on the criteria described in subsection (b).

''(b) HIGH-RISK CRITERIA DESCRIBED.—In determining whether a country is high-risk pursuant to subsection (a), the Secretary shall consider the following criteria:

''(1) The number of nationals of the country who were identified in United States Government databases related to the identities of known or suspected terrorists during the previous year.

''(2) The level of cooperation of the country with the counter-terrorism efforts of the United States.

''(3) Any other criteria the Secretary determines appropriate.

''(c) COLLABORATION.—To develop the technology and procedures required to carry out the requirements under subsection (a), the Secretary shall collaborate with—

''(1) the head of a national laboratory within the Department's laboratory network with relevant expertise;

''(2) the head of a relevant university-based center within the Department's centers of excellence network; and

''(3) the heads of other appropriate Federal agencies, including the Secretary of State, the Direc-

tor of National Intelligence, and the Attorney General.

''(d) WAIVER.—The Secretary, in collaboration with the Secretary of State, is authorized to waive the requirements under subsection (a) to the extent necessary to comply with the international obligations of the United States.

''(e) RULE OF CONSTRUCTION.—The requirement to screen social information under subsection (a) may not be construed as limiting the authority of the Secretary or the Secretary of State to screen social media information from any individual filing an application, petition, or other request with the Department or the Department of State for—

''(1) an immigration benefit or immigration status;

''(2) other authorization, employment authorization, identity, or travel document; or

''(3) relief or protection under any provision of the immigration laws.

**''SEC. 437. OPEN SOURCE SCREENING.**

''The Secretary shall, to the greatest extent practicable, and in a risk-based manner, review open source information of visa applicants.''.

(b) CLERICAL AMENDMENT.—The table of contents in section 1(b) of the Homeland Security Act of 2002, as

amended by this Act, is further amended by inserting after the item relating to section 435 the following:

''Sec. 436. Social media screening.
''Sec. 437. Open source screening.''.

## CHAPTER 3—VISA CANCELLATION AND REVOCATION

### SEC. 1741. CANCELLATION OF ADDITIONAL VISAS.

(a) IN GENERAL.—Section 222(g) of the Immigration and Nationality Act (8 U.S.C. 1202(g)) is amended—

(1) in paragraph (1)—

(A) by striking ''Attorney General,'' and inserting ''Secretary,''; and

(B) by inserting ''and any other nonimmigrant visa issued by the United States that is in the possession of the alien'' after ''such visa''; and

(2) in paragraph (2)(A), by adding ''or foreign residence'' after ''the alien's nationality''.

(b) EFFECTIVE DATE AND APPLICATION.—The amendments made by subsection (a) shall take effect on the date of the enactment of this Act and shall apply to a visa issued before, on, or after such date.

### SEC. 1742. VISA INFORMATION SHARING.

(a) IN GENERAL.—Section 222(f) of the Immigration and Nationality Act (8 U.S.C. 1202(f)) is amended—

(1) in the matter preceding paragraph (1), by striking ''issuance or refusal'' and inserting ''issuance, refusal, or revocation''; and

(2) in paragraph (2)—

(A) in the matter preceding subparagraph (A), by striking ''and on the basis of reciprocity'' and all that follows and inserting ''may provide to a foreign government information in a Department of State computerized visa database and, when necessary and appropriate, other records covered by this section related to information in such database'';

(B) by amending subparagraph (A) to read as follows:

''(A) on the basis of reciprocity, with regard to individual aliens, at any time on a case-by-case basis for the purpose of—

''(i) preventing, investigating, or punishing acts that would constitute a crime in the United States, including, but not limited to, terrorism or trafficking in controlled substances, persons, or illicit weapons; or

''(ii) determining a person's removability or eligibility for a visa, admission, or other immigration benefit;'';

(C) in subparagraph (B)—

(i) by inserting ''on basis of reciprocity,'' before ''with regard to'';

(ii) by striking ''in the database'' and inserting ''such database'';

(iii) by striking ''for the purposes'' and inserting ''for 1 of the purposes''; and

(iv) by striking ''or to deny visas to persons who would be inadmissible to the United States.'' and inserting ''; or''; and

(D) by adding at the end the following:

''(C) with regard to any or all aliens in such database, specified data elements from each record, if the Secretary of State determines that it is required for national security or public safety or in the national interest to provide such information to a foreign government.''.

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall take effect on the date that is 60 days after the date of the enactment of the Act.

**SEC. 1743. VISA INTERVIEWS.**

(a) IN GENERAL.—Section 222(h) of the Immigration and Nationality Act (8 U.S.C. 1202(h)) is amended—

(1) in paragraph (1)—

(A) in subparagraph (B), by striking ''or'' at the end;

(B) in subparagraph (C), by striking ''and'' at the end and inserting ''or''; and

(C) by adding at the end the following:

''(D) by the Secretary of State, if the Secretary, in his or her sole and unreviewable discretion, determines, after reviewing the application, that an interview is unnecessary because the alien is ineligible for a visa; and''.

(2) in paragraph (2)—

(A) in subparagraph (E), by striking ''or'' at the end;

(B) in subparagraph (F), by striking the period at the end and inserting ''; or''; and

(C) by adding at the end the following:

''(G) is an individual within a class of aliens that the Secretary of State, in his or her sole and unreviewable discretion, has determined may pose a threat to national security or public safety.''.

**SEC. 1744. VISA REVOCATION AND LIMITS ON JUDICIAL REVIEW.**

(a) IN GENERAL.—Section 221(i) of the Immigration and Nationality Act (8 U.S.C. 1201(i)) is amended—

(1) by inserting ''(1)'' after ''(i)'';

(2) in paragraph (1), as redesignated—

(A) by striking ''Attorney General'' and inserting ''Secretary of Homeland Security'';

(B) by striking ''shall invalidate the visa or other documentation from the date of issuance: *Provided,* That carriers'' and inserting ''of any visa or documentation shall take effect immediately. Carriers''; and

(C) by striking the last sentence and inserting the following:

''(2) Notwithstanding any other provision of law, including section 2241 of title 28, United States Code, any other habeas corpus provision, and sections 1361 and 1651 of such title, a revocation under this subsection may not be reviewed by any court, and no court shall have jurisdiction to hear any claim arising from, or any challenge to, such a revocation, provided that the revocation is executed by the Secretary.

''(3) A revocation under this subsection of a visa or other documentation from an alien shall

automatically cancel any other valid visa that is in the alien's possession.''.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall—

(1) take effect on the date of the enactment of this Act; and

(2) apply to all revocations made on or after such date.

## CHAPTER 4—SECURE VISAS ACT

**SEC. 1751. SHORT TITLE.**

This chapter may be cited as the ''Secure Visas Act''.

**SEC. 1752. AUTHORITY OF THE SECRETARY OF HOMELAND SECURITY AND THE SECRETARY OF STATE.**

(a) IN GENERAL.—Section 428 of the Homeland Security Act of 2002 (6 U.S.C. 236) is amended by striking subsections (b) and (c) and inserting the following:

''(b) AUTHORITY OF THE SECRETARY OF HOMELAND SECURITY.—

''(1) IN GENERAL.—Notwithstanding section 104(a) of the Immigration and Nationality Act (8 U.S.C. 1104(a)) and any other provision of law, and except for the authority of the Secretary of State under subparagraphs (A) and (G) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)), the Secretary—

''(A) shall have exclusive authority to issue regulations, establish policy, and administer and enforce the provisions of the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) and all other immigration or nationality laws relating to the functions of consular officers of the United States in connection with the granting and refusal of a visa; and

''(B) may refuse or revoke any visa to any alien or class of aliens if the Secretary, or his or her designee, determines that such refusal or revocation is necessary or advisable in the security interests of the United States.

''(2) EFFECT OF REVOCATION.—The revocation of any visa under paragraph (1)(B)—

''(A) shall take effect immediately; and

''(B) shall automatically cancel any other valid visa that is in the alien's possession.

''(3) JUDICIAL REVIEW.—Notwithstanding any other provision of law, including section 2241 of title 28, United States Code, any other habeas corpus provision, and sections 1361 and 1651 of such title, no United States court has jurisdiction to review a decision by the Secretary or a consular officer to refuse or revoke a visa.

''(c) VISA REFUSAL AUTHORITY OF THE SECRETARY OF STATE.—

''(1) IN GENERAL.—The Secretary of State may direct a consular officer to refuse or revoke a visa to an alien if the Secretary determines that such refusal or revocation is necessary or advisable in the foreign policy interests of the United States.

''(2) LIMITATION.—No decision by the Secretary of State to approve a visa may override a decision by the Secretary under subsection (b).''.

(b) VISA REVOCATION.—Section 428 of the Homeland Security Act (6 U.S.C. 236) is amended by adding at the end the following:

''(j) VISA REVOCATION INFORMATION.—If the Secretary or the Secretary of State revokes a visa—

''(1) the relevant consular, law enforcement, and terrorist screening databases shall be immediately updated on the date of the revocation; and

''(2) look-out notices shall be posted to all Department port inspectors and Department of State consular officers.''.

(c) CONFORMING AMENDMENT.—Section 104(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1104(a)(1)) is amended by inserting ''and the power au-

thorized under section 428(c) of the Homeland Security Act of 2002 (6 U.S.C. 236(c))'' after ''United States,''.

# CHAPTER 5—VISA FRAUD AND SECURITY IMPROVEMENT ACT OF 2018

**SEC. 1761. SHORT TITLE.**

This chapter may be cited as the ''Visa Fraud and Security Improvement Act of 2018''.

**SEC. 1762. EXPANDED USAGE OF FRAUD PREVENTION AND DETECTION FEES.**

Section 286(v)(2)(A) of the Immigration and Nationality Act (8 U.S.C. 1356(v)(2)(A)) is amended—

(1) in the matter preceding clause (i), by striking ''at United States embassies and consulates abroad'';

(2) by amending clause (i) to read as follows:

''(i) to increase the number of diplomatic security personnel assigned exclusively or primarily to the function of preventing and detecting visa fraud;''; and

(3) in clause (ii), by striking '', including primarily fraud by applicants for visas described in subparagraph (H)(i), (H)(ii), or (L) of section 101(a)(15)''.

**SEC. 1763. INADMISSIBILITY OF SPOUSES AND SONS AND DAUGHTERS OF TRAFFICKERS.**

Section 212(a)(2) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(2)) is amended—

(1) in subparagraph (C)(ii), by inserting ‘‘, or has been,’’ after ‘‘is’’; and

(2) in subparagraph (H)(ii), by inserting ‘‘, or has been,’’ after ‘‘is’’.

**SEC. 1764. DNA TESTING AND CRIMINAL HISTORY.**

(a) DNA TESTING FOR VISA APPLICANTS.—Section 222(b) of the Immigration and Nationality Act (8 U.S.C. 1202(b)) is amended by inserting after the second sentence the following: ‘‘If considered necessary by a consular officer to establish the bona fides of a family relationship, the immigrant shall provide DNA evidence of such relationship in accordance with procedures established for submitting such evidence. The Secretary of State may issue regulations to require the submission of DNA evidence to establish family relationship from applicants for certain visa classifications.’’.

(b) REQUIRED DOCUMENTARY EVIDENCE AND DNA TESTING.—Section 245 of the Immigration and Nationality Act (8 U.S.C. 1255) is amended by adding at the end the following:

‘‘(n) REQUIRED DOCUMENTARY EVIDENCE AND DNA TESTING FOR ADJUSTMENT OF STATUS.—

"(1) REQUIRED DOCUMENTARY EVIDENCE.—Any alien applying for adjustment of status under the immigration laws shall present a valid unexpired passport or other suitable travel document, or document of identity and nationality, if such documentation is required under regulations issued by the Secretary of Homeland Security. The alien shall furnish, with his or her application—

"(A) a copy of a certification by the appropriate police authorities, stating what their records show concerning the alien;

"(B) a certified copy of any existing prison record, military record, and record of his or her birth; and

"(C) a certified copy of all other records or documents concerning the alien or his or her case, which may be required by the Secretary or the Attorney General.

"(2) DNA TESTING.—If the Secretary or the Attorney General determine that DNA evidence is necessary to establish the bona fides of a family relationship, the immigrant shall provide DNA evidence of such relationship in accordance with procedures established for submitting such evidence. The Secretary may issue regulations to require the sub-

mission of DNA evidence to establish family relationship from applicants for certain visa classifications. If the alien establishes, to the satisfaction of the Secretary or the Attorney General, that any document or record required under this subsection is unobtainable, the Secretary or the Attorney General may permit the alien to submit, in lieu of such document or record, other satisfactory evidence of the fact to which such document or record, if obtainable, pertains.''.

**SEC. 1765. ACCESS TO NCIC CRIMINAL HISTORY DATABASE FOR DIPLOMATIC VISAS.**

Subsection (a) of article V of section 217 of the National Crime Prevention and Privacy Compact Act of 1998 (34 U.S.C. 40316(V)(a)) is amended by inserting '', except for diplomatic visa applications for which only full biographical information is required'' before the period at the end.

**SEC. 1766. ELIMINATION OF SIGNED PHOTOGRAPH REQUIREMENT FOR VISA APPLICATIONS.**

Section 221(b) of the Immigration and Nationality Act (8 U.S.C. 1201(b)) is amended by striking the first sentence and insert the following: ''Each alien who applies for a visa shall be registered in connection with his or her

application and shall furnish copies of his or her photograph for such use as may be required by regulation.''.

## CHAPTER 6—OTHER MATTERS

### SEC. 1771. REQUIREMENT FOR COMPLETION OF BACKGROUND CHECKS.

(a) IN GENERAL.—Section 103 of Immigration and Nationality Act (8 U.S.C. 1103) is amended by adding at the end the following:

''(h) COMPLETION OF BACKGROUND AND SECURITY CHECKS.—

''(1) REQUIREMENT TO COMPLETE.—Notwithstanding any other provision of law (statutory or nonstatutory), including section 309 of the Enhanced Border Security and Visa Entry Reform Act of 2002 (8 U.S.C. 1738), sections 1361 and 1651 of title 28, United States Code, and section 706(1) of title 5, United States Code, the Secretary and the Attorney General may not approve or grant to an alien any status, relief, protection from removal, employment authorization, or any other benefit under the immigration laws, including an adjustment of status to lawful permanent residence or a grant of United States citizenship or issue to the alien any documentation evidencing a status or grant of any status, relief, protection from removal, employment

authorization, or other benefit under the immigration laws until—

''(A) all background and security checks required by statute or regulation or deemed necessary by the Secretary or the Attorney General, in his or her sole and unreviewable discretion, for the alien have been completed; and

''(B) the Secretary or the Attorney General has determined that the results of such checks do not preclude the approval or grant of any status, relief, protection from removal, employment authorization, or any other benefit under the immigration laws or approval, grant, or the issuance of any documentation evidencing such status, relief, protection, authorization, or benefit.

''(2) PROHIBITION ON JUDICIAL ACTION.—No court shall have authority to order the approval of, grant, mandate, or require any action in a certain time period, or award any relief for the Secretary's or Attorney General's failure to complete or delay in completing any action to provide any status, relief, protection from removal, employment authorization, or any other benefit under the immigration laws, including an adjustment of status to lawful permanent

residence, naturalization, or a grant of United States citizenship for an alien until—

''(A) all background and security checks for the alien have been completed; and

''(B) the Secretary or the Attorney General has determined that the results of such checks do not preclude the approval or grant of such status, relief, protection, authorization, or benefit, or issuance of any documentation evidencing such status, relief, protection, authorization, or benefit.''.

(b) EFFECTIVE DATE AND APPLICATION.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act and shall apply to any application, petition, or request for any benefit or relief or any other case or matter under the immigration laws pending with on or filed with the Secretary of Homeland Security, the Attorney General, the Secretary of State, the Secretary of Labor, or a consular officer on or after such date of enactment.

**SEC. 1772. WITHHOLDING OF ADJUDICATION.**

(a) IN GENERAL.—Section 103 of Immigration and Nationality Act (8 U.S.C. 1103), as amended by section 1771 of this Act, is further amended by adding at the end the following:

''(i) WITHHOLDING OF ADJUDICATION.—

''(1) IN GENERAL.—Except as provided in paragraph (4), nothing in this Act or in any other law, including sections 1361 and 1651 of title 28, United States Code, may be construed to require, and no court can order, the Secretary, the Attorney General, the Secretary of State, the Secretary of Labor, or a consular officer to grant any visa or other application, approve any petition, or grant or continue any relief, protection from removal, employment authorization, or any other status or benefit under the immigration laws by, to, or on behalf of any alien with respect to whom a criminal proceeding or investigation is open or pending (including the issuance of an arrest warrant or indictment), if such proceeding or investigation is deemed by such official to be material to the alien's eligibility for the status, relief, protection, or benefit sought.

''(2) WITHHOLDING OF ADJUDICATION.—The Secretary, the Attorney General, the Secretary of State, or the Secretary of Labor may, in his or her discretion, withhold adjudication any application, petition, request for relief, request for protection from removal, employment authorization, status or benefit

under the immigration laws pending final resolution of the criminal or other proceeding or investigation.

''(3) JURISDICTION.—Notwithstanding any other provision of law (statutory or nonstatutory), including section 309 of the Enhanced Border Security and Visa Entry Reform Act of 2002 (8 U.S.C. 1738), sections 1361 and 1651 of title 28, United States Code, and section 706(1) of title 5, United States Code, no court shall have jurisdiction to review a decision to withhold adjudication pursuant to this subsection.

''(4) WITHHOLDING OF REMOVAL AND TORTURE CONVENTION.—This subsection does not limit or modify the applicability of section 241(b)(3) or the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Public Law 105–277) with respect to an alien otherwise eligible for protection under such provisions.''.

(b) EFFECTIVE DATE AND APPLICATION.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act and shall apply to any application, petition, or request for any benefit or relief or any other case or matter under the immigration laws pending with or filed with the Secretary of Homeland Security on or after such date of enactment.

**SEC. 1773. ACCESS TO THE NATIONAL CRIME INFORMATION CENTER INTERSTATE IDENTIFICATION INDEX.**

(a) CRIMINAL JUSTICE ACTIVITIES.—Section 104 of the Immigration and Nationality Act (8 U.S.C. 1104) is amended by adding at the end the following:

''(f) Notwithstanding any other provision of law, any Department of State personnel with authority to grant or refuse visas or passports may carry out activities that have a criminal justice purpose.''.

(b) LIAISON WITH INTERNAL SECURITY OFFICERS; DATA EXCHANGE.—Section 105 of the Immigration and Nationality Act (8 U.S.C. 1105) is amended by striking subsections (b) and (c) and inserting the following:

''(b) ACCESS TO NCIC-III.—

''(1) IN GENERAL.—Notwithstanding any other provision of law, the Attorney General and the Director of the Federal Bureau of Investigation shall

provide to the Department of Homeland Security and the Department of State access to the criminal history record information contained in the National Crime Information Center's Interstate Identification Index (NCIC-III) and the Wanted Persons File and to any other files maintained by the National Crime Information Center for the purpose of determining whether an applicant or petitioner for a visa, admission, or any benefit, relief, or status under the immigration laws, or any beneficiary of an application, petition, relief, or status under the immigration laws, has a criminal history record indexed in the file.

''(2) AUTHORIZED ACTIVITIES.—

''(A) IN GENERAL.—The Secretary and the Secretary of State—

''(i) shall have direct access, without any fee or charge, to the information described in paragraph (1) to conduct name-based searches, file number searches, and any other searches that any criminal justice or other law enforcement officials are entitled to conduct; and

''(ii) may contribute to the records maintained by the National Crime Information Center.

''(B) SECRETARY OF HOMELAND SECURITY.—The Secretary shall receive, upon request, access to the information described in paragraph (1) by means of extracts of the records for placement in the appropriate database without any fee or charge.

''(c) CRIMINAL JUSTICE AND LAW ENFORCEMENT PURPOSES.—Notwithstanding any other provision of law, adjudication of eligibility for benefits, relief, or status under the immigration laws, and other purposes relating to citizenship and immigration services, shall be considered to be criminal justice or law enforcement purposes with respect to access to or use of any information maintained by the National Crime Information Center or other criminal history information or records.''.

**SEC. 1774. APPROPRIATE REMEDIES FOR IMMIGRATION LITIGATION.**

(a) LIMITATION ON CLASS ACTIONS.—

(1) IN GENERAL.—Except as provided in paragraph (2), no court may certify, or continue the certification of, a class under Rule 23 of the Federal Rules of Civil Procedure in any civil action that—

(A) is pending or filed on or after the date of the enactment of this Act; and

(B) pertains to the administration or enforcement of the immigration laws.

(2) EXCEPTION.—A court may certify a class upon a motion by the Government if the Government is requesting such a certification to ensure efficiency in case management or uniformity in application of precedent decisions or interpretations of laws when there is a nationwide class.

(b) REQUIREMENTS FOR AN ORDER GRANTING PROSPECTIVE RELIEF AGAINST THE GOVERNMENT.—

(1) IN GENERAL.—If a court determines that prospective relief should be ordered against the Government in any civil action pertaining to the administration or enforcement of the immigration laws, the court shall—

(A) limit the relief to the minimum necessary to correct the violation of law;

(B) adopt the least intrusive means to correct the violation of law;

(C) minimize, to the greatest extent practicable, the adverse impact on national security, border security, immigration administration and enforcement, and public safety; and

(D) provide for the expiration of the relief on a specific date, which is not later than the earliest date necessary for the Government to remedy the violation.

(2) WRITTEN EXPLANATION.—The requirements described in paragraph (1) shall be discussed and explained in writing in the order granting prospective relief and shall be sufficiently detailed to allow review by another court.

(3) EXPIRATION OF PRELIMINARY INJUNCTIVE RELIEF.—Preliminary injunctive relief granted under paragraph (1) shall automatically expire on the date that is 90 days after the date on which such relief is entered, unless the court—

(A) finds that such relief meets the requirements described in subparagraphs (A) through (D) of paragraph (1) for the entry of permanent prospective relief; and

(B) orders the preliminary relief to become a final order granting prospective relief before the expiration of such 90-day period.

(c) PROCEDURE FOR MOTION AFFECTING ORDER GRANTING PROSPECTIVE RELIEF AGAINST THE GOVERNMENT.—

(1) IN GENERAL.—A court shall promptly rule on a motion made by the United States Government to vacate, modify, dissolve, or otherwise terminate an order granting prospective relief in any civil action pertaining to the administration or enforcement of the immigration laws.

(2) AUTOMATIC STAYS.—

(A) IN GENERAL.—A motion to vacate, modify, dissolve, or otherwise terminate an order granting prospective relief made by the United States Government in any civil action pertaining to the administration or enforcement of the immigration laws shall automatically, and without further order of the court, stay the order granting prospective relief on the date that is 15 days after the date on which such motion is filed unless the court previously has granted or denied the Government's motion.

(B) DURATION OF AUTOMATIC STAY.—An automatic stay under subparagraph (A) shall continue until the court enters an order granting or denying the Government's motion.

(C) POSTPONEMENT.—The court, for good cause, may postpone an automatic stay under subparagraph (A) for not longer than 15 days.

(D) ORDERS BLOCKING AUTOMATIC STAYS.—Any order staying, suspending, delaying, or otherwise barring the effective date of the automatic stay described in subparagraph (A), other than an order to postpone the effective date of the automatic stay for not longer than 15 days under subparagraph (C)—

(i) shall be treated as an order refusing to vacate, modify, dissolve, or otherwise terminate an injunction; and

(ii) shall be immediately appealable under section 1292(a)(1) of title 28, United States Code.

(d) SETTLEMENTS.—

(1) CONSENT DECREES.—In any civil action pertaining to the administration or enforcement of the immigration laws of the United States, the court may not enter, approve, or continue a consent decree that does not comply with the requirements under subsection (b)(1).

(2) PRIVATE SETTLEMENT AGREEMENTS.—Nothing in this subsection may be construed to preclude parties from entering into a private settlement agreement that does not comply with subsection (b)(1).

(e) EXPEDITED PROCEEDINGS.—It shall be the duty of every court to advance on the docket and to expedite the disposition of any civil action or motion considered under this section.

(f) CONSENT DECREE DEFINED.—In this section, the term ''consent decree''—

(1) means any relief entered by the court that is based in whole or in part on the consent or acquiescence of the parties; and

(2) does not include private settlements.

(g) COSTS AND FEES.—Section 2412(d)(2)(B) of title 28, United States Code, is amended—

(1) by striking ''an individual'' and inserting ''a United States citizen''; and

(2) by inserting ''United States citizen'' before ''owner''.

**SEC. 1775. USE OF 1986 IRCA LEGALIZATION INFORMATION FOR NATIONAL SECURITY PURPOSES.**

(a) SPECIAL AGRICULTURAL WORKERS.—Section 210(b)(6) of the Immigration and Nationality Act (8 U.S.C. 1160(b)(6)) is amended—

(1) by striking ''Attorney General'' each place it appears and inserting ''Secretary'';

(2) in subparagraph (A), in the matter preceding clause (i), by striking ''Justice'' and inserting ''Homeland Security'';

(3) by redesignating subparagraphs (C) and (D) as subparagraphs (D) and (E), respectively;

(4) inserting after subparagraph (B) the following:

''(C) AUTHORIZED DISCLOSURES.—

''(i) CENSUS PURPOSE.—The Secretary may provide, in the Secretary's discretion, for the furnishing of information furnished under this section in the same manner and circumstances as census information may be disclosed under section 8 of title 13, United States Code.''.

''(ii) NATIONAL SECURITY PURPOSE.—The Secretary may provide, in the Secretary's discretion, for the furnishing, use, publication, or release of information furnished under this section in any investigation, case, or matter, or for any purpose, relating to terrorism, national intelligence or the national security.

''(iii) SUBSEQUENT APPLICATIONS FOR IMMIGRATION BENEFITS.—The Sec-

retary may use the information furnished under this section to adjudicate subsequent applications, petitions, or requests for immigration benefits filed by the alien.

''(iv) ALIEN CONSENT.—The Secretary may use the information furnished under this section for any purpose when the alien consents to its disclosure or use by the Secretary.

''(v) OTHER CIRCUMSTANCES.—The Secretary may use the information furnished under this section for other purposes and in other circumstances in which disclosure of the information is not related to removal of the alien from the United States.''; and

(5) in subparagraph (D), as redesignated, striking ''Service'' and inserting ''Department of Homeland Security''.

(b) ADJUSTMENT OF STATUS.—Section 245A(c)(5) of the Immigration and Nationality Act (8 U.S.C. 1255a(c)(5)) is amended—

(1) by striking ''Attorney General'' each place it appears and inserting ''Secretary'';

(2) in subparagraph (A), in the matter preceding clause (i), by striking ''Justice'' and inserting ''Homeland Security''; and

(3) by amending subparagraph (C) to read as follows:

''(C) AUTHORIZED DISCLOSURES.—

''(i) CENSUS PURPOSE.—The Secretary may provide, in the Secretary's discretion, for the furnishing of information furnished under this section in the same manner and circumstances as census information may be disclosed under section 8 of title 13, United States Code.

''(ii) NATIONAL SECURITY PURPOSE.—The Secretary may provide, in the Secretary's discretion, for the furnishing, use, publication, or release of information furnished under this section in any investigation, case, or matter, or for any purpose, relating to terrorism, national intelligence or the national security.''.

**SEC. 1776. UNIFORM STATUTE OF LIMITATIONS FOR CERTAIN IMMIGRATION, NATURALIZATION, AND PEONAGE OFFENSES.**

Section 3291 of title 18, United States Code, is amended to read as follows:

**"§ 3291. Nationality, citizenship and passports**

''No person shall be prosecuted, tried, or punished for a violation of any section of chapter 69 (relating to nationality and citizenship offenses) or 75 (relating to passport, visa, and immigration offenses), for a violation of any criminal provision of section 243, 274, 275, 276, 277, or 278 of the Immigration and Nationality Act (8 U.S.C. 1253, 1324, 1325, 1326, 1327, 1328), or for an attempt or conspiracy to violate any such section, unless the indictment is returned or the information is filed within 10 years after the commission of the offense.''.

**SEC. 1777. CONFORMING AMENDMENT TO THE DEFINITION OF RACKETEERING ACTIVITY.**

Section 1961(1) of title 18, United States Code, is amended by striking ''section 1542'' and all that follows through ''section 1546 (relating to fraud and misuse of visas, permits, and other documents)'' and inserting ''sections 1541 through 1546 (relating to passports and visas)''.

**SEC. 1778. VALIDITY OF ELECTRONIC SIGNATURES.**

(a) CIVIL CASES.—

(1) IN GENERAL.—Chapter 9 of title II of the Immigration and Nationality Act (8 U.S.C. 1351 et seq.), as amended by section 1126(a) of this Act, is further amended by adding at the end the following:

**"SEC. 296. VALIDITY OF SIGNATURES.**

''(a) IN GENERAL.—In any proceeding, adjudication, or any other matter arising under the immigration laws, an individual's hand written or electronic signature on any petition, application, or any other document executed or provided for any purpose under the immigration laws establishes a rebuttable presumption that the signature executed is that of the individual signing, that the individual is aware of the contents of the document, and intends to sign it.''.

''(b) RECORD INTEGRITY.—The Secretary shall establish procedures to ensure that when any electronic signature is captured for any petition, application, or other document submitted for purposes of obtaining an immigration benefit, the identity of the person is verified and authenticated, and the record of such identification and verification is preserved for litigation purposes.''.

(2) CLERICAL AMENDMENT.—The table of contents in the first section of the Immigration and Nationality Act is amended by inserting after the item

relating to section 295, as added by section 1126(a)(2) of this Act, the following:

''Sec. 296. Validity of signatures.''.

(b) CRIMINAL CASES.—

(1) IN GENERAL.—Chapter 223 of title 18, United States Code, is amended by adding at the end the following:

**''§ 3513. Signatures relating to immigration matters**

''In a criminal proceeding in a court of the United States, if an individual's handwritten or electronic signature appears on a petition, application, or other document executed or provided for any purpose under the immigration laws (as defined in section 101(a)(17) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(17)), the trier of fact may infer that the document was signed by that individual, and that the individual knew the contents of the document and intended to sign the document.''.

(2) CLERICAL AMENDMENT.—The table of sections for chapter 223 of title 18, United States Code, is amended by inserting after the item relating to section 3512 the following:

''3513. Signatures relating to immigration matters.''.

# Subtitle H—Prohibition on Terrorists Obtaining Lawful Status in the United States

## CHAPTER 1—PROHIBITION ON ADJUSTMENT TO LAWFUL PERMANENT RESIDENT STATUS

### SEC. 1801. LAWFUL PERMANENT RESIDENTS AS APPLICANTS FOR ADMISSION.

Section 101(a)(13)(C) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(13)(C)) is amended—

(1) in clauses (i), (ii), (iii), and (iv), by striking the comma at the end of each clause and inserting a semicolon;

(2) in clause (v), by striking the ‘‘, or’’ and inserting a semicolon;

(3) in clause (vi), by striking the period at the end and inserting ‘‘; or’’ and

(4) by adding at the end the following:

‘‘(vii) is described in section 212(a)(3) or 237(a)(4).’’.

### SEC. 1802. DATE OF ADMISSION FOR PURPOSES OF ADJUSTMENT OF STATUS.

(a) APPLICANTS FOR ADMISSION.—Section 101(a)(13) of the Immigration and Nationality Act (8

U.S.C. 1101(a)(13)), as amended by section 1801, is further amended by adding at the end the following:

''(D) Notwithstanding subparagraph (A), adjustment of status of an alien to that of an alien lawfully admitted for permanent residence under section 245 or under any other provision of law is an admission of the alien.''.

(b) ELIGIBILITY TO BE REMOVED FOR A CRIME INVOLVING MORAL TURPITUDE.—Section 237(a)(2)(A)(i)(I) of such Act (8 U.S.C. 1227(a)(2)(A)(i)(I)) is amended by striking ''date of admission,'' inserting ''alien's most recent date of admission;''.

**SEC. 1803. PRECLUDING ASYLEE AND REFUGEE ADJUSTMENT OF STATUS FOR CERTAIN GROUNDS OF INADMISSIBILITY AND DEPORTABILITY.**

(a) GROUNDS OF INADMISSIBILITY.—Section 209(c) of the Immigration and Nationality Act (8 U.S.C. 1159(c)) is amended by striking ''(other than paragraph (2)(C) or subparagraph (A), (B), (C), or (E) of paragraph (3))'', and inserting ''(other than subparagraph (C) or (G) of paragraph (2) or subparagraph (A), (B), (C), (E), (F), or (G) of paragraph (3))''.

(b) GROUNDS OF DEPORTABILITY.—Section 209 of such Act, as amended by subsection (a), is further amended by adding at the end the following:

''(d) An alien's status may not be adjusted under this section if the alien is in removal proceedings under section 238 or 240 and is charged with any ground of deportability under paragraph (2), (3), (4), or (6) of section 237(a).''.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to—

(1) any act that occurred before, on, or after the date of the enactment of this Act; and

(2) all aliens who are required to establish admissibility on or after such date in all removal, deportation, or exclusion proceedings that are filed, pending, or reopened, on or after such date.

**SEC. 1804. REVOCATION OF LAWFUL PERMANENT RESIDENT STATUS FOR HUMAN RIGHTS VIOLATORS.**

Section 240(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1229a(b)(5)) is amended by adding at the end the following:

''(F) ADDITIONAL APPLICATION TO CERTAIN ALIENS OUTSIDE OF THE UNITED STATES WHO ARE ASSOCIATED WITH HUMAN RIGHTS VIOLATIONS.—Subparagraphs (A) through (E) shall apply to any alien placed in proceedings under this section who—

''(i) is outside of the United States;

''(ii) has been provided written notice in accordance with section 239(a) (whether the alien is within or outside the United States); and

''(iii) is described in section 212(a)(2)(G) (persons who have committed particularly severe violations of religious freedom), 212(a)(3)(E) (Nazi and other persecution, genocide, war crimes, crimes against humanity, extrajudicial killing, torture, or specified human rights violations), or 212(a)(3)(G) (recruitment or use of child soldiers).''.

**SEC. 1805. REMOVAL OF CONDITION ON LAWFUL PERMANENT RESIDENT STATUS PRIOR TO NATURALIZATION.**

Chapter 2 of title II of the Immigration and Nationality Act (8 U.S.C. 1181 et seq.) is amended—

(1) in section 216(e) (8 U.S.C. 1186a(e)), by inserting '', if the alien has had the conditional basis removed pursuant to this section'' before the period at the end; and

(2) in section 216A(e) (8 U.S.C. 1186b(e)), by inserting '', if the alien has had the conditional basis

removed pursuant to this section'' before the period at the end.

**SEC. 1806. PROHIBITION ON TERRORISTS AND ALIENS WHO POSE A THREAT TO NATIONAL SECURITY OR PUBLIC SAFETY FROM RECEIVING AN ADJUSTMENT OF STATUS.**

(a) APPLICATION FOR ADJUSTMENT OF STATUS IN THE UNITED STATES.—

(1) IN GENERAL.—Section 245 of the Immigration and Nationality Act (8 U.S.C. 1255) is amended by striking the section heading and subsection (a) and inserting the following:

**"SEC. 245. ADJUSTMENT OF STATUS TO THAT OF A PERSON ADMITTED FOR PERMANENT RESIDENCE.**

''(a) IN GENERAL.—

''(1) ELIGIBILITY FOR ADJUSTMENT.—The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under the Violence Against Women Act of 1994 (42 U.S.C. 13701 et seq.) as a spouse or child who has been battered or subjected to extreme cruelty may be adjusted by the Secretary or by the Attorney General, in the discretion of the Secretary or the Attorney General, and under such regulations as

the Secretary or the Attorney General may prescribe, to that of an alien lawfully admitted for permanent residence if—

''(A) the alien files an application for such adjustment;

''(B) the alien is eligible to receive an immigrant visa, is admissible to the United States for permanent residence, and is not subject to exclusion, deportation, or removal from the United States; and

''(C) an immigrant visa is immediately available to the alien at the time the alien's application is filed.

''(2) REQUIREMENT TO OBTAIN AN IMMIGRANT VISA OUTSIDE OF THE UNITED STATES.—Notwithstanding any other provision of this section, if the Secretary determines that an alien may be a threat to national security or public safety or if the Secretary determines that a favorable exercise of discretion to allow an alien to seek to adjust his or her status in the United States is not warranted, the Secretary, in the Secretary's sole and unreviewable discretion, may deny the application for adjustment of status. If the Secretary denies an application for adjustment of status under this paragraph, the Sec-

retary shall notify the Attorney General of such decision and the Attorney General shall deny any application for adjustment of status filed by the alien in an immigration proceeding.''.

(2) CLERICAL AMENDMENT.—The table of contents in the first section of the Immigration and Nationality Act is amended by striking the item relating to section 245 and inserting the following:

''Sec. 245. Adjustment of status to that of a person admitted for permanent residence.''.

(b) PROHIBITION ON TERRORISTS AND ALIENS WHO POSE A THREAT TO NATIONAL SECURITY OR PUBLIC SAFETY ON ADJUSTMENT TO LAWFUL PERMANENT RESIDENT STATUS.—Section 245(c) of the Immigration and Nationality Act (8 U.S.C. 1255(c)) is amended to read as follows:

''(c) Except for an alien who has an approved petition for classification as a VAWA self-petitioner, subsection (a) shall not apply to—

''(1) an alien crewman;

''(2) subject to subsection (k), any alien (other than an immediate relative (as defined in section 201(b)) or a special immigrant (as described in subparagraph (H), (I), (J), or (K) of section 101(a)(27))) who—

''(A) continues in or accepts unauthorized employment before filing an application for adjustment of status;

''(B) is in unlawful immigration status on the date he or she files an application for adjustment of status; or

''(C) has failed (other than through no fault of his or her own or for technical reasons) to maintain continuously a lawful status since entry into the United States;

''(3) any alien admitted in transit without a visa under section 212(d)(4)(C);

''(4) an alien (other than an immediate relative (as defined in section 201(b))) who was admitted as a nonimmigrant visitor without a visa under section 212(l) or 217;

''(5) an alien who was admitted as a nonimmigrant under section 101(a)(15)(S);

''(6) an alien described in section 212(a)(3)(B) or in subparagraph (B), (F), or (G) of section 237(a)(4);

''(7) any alien who seeks adjustment of status to that of an immigrant under section 203(b) and is not in a lawful nonimmigrant status;

''(8) any alien who has committed, ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; or

''(9) any alien who—

''(A) was employed while the alien was an unauthorized alien (as defined in section 274A(h)(3)); or

''(B) has otherwise violated the terms of a nonimmigrant visa.''.

**SEC. 1807. TREATMENT OF APPLICATIONS FOR ADJUSTMENT OF STATUS DURING PENDING DENATURALIZATION PROCEEDINGS.**

(a) VISA ISSUANCE.—Section 221(g) of the Immigration and Nationality Act (8 U.S.C. 1201(g)) is amended—

(1) by inserting ''(1)'' before ''No visa'';

(2) by striking ''if (1) it appears'' and inserting the following: ''if—

''(A) it appears'';

(3) by striking ''law, (2) the application'' and inserting the following: ''law;

''(B) the application'';

(4) by striking ''thereunder, or (3) the consular officer'' and inserting the following: ''thereunder;

''(C) the consular officer'';

(5) by striking ''provision of law: *Provided,* That a visa'' and inserting the following: ''provision of law; or

''(D) the approved petition for classification under section 203 or 204 that is the underlying basis for the application for a visa was filed by an individual who has a judicial proceeding pending against him or her that would result in the individual's denaturalization under section 340.

''(2) A visa''; and

(6) by striking ''section 213: *Provided further,* That a visa'' and inserting the following: ''section 213.

''(3) A visa''.

(b) ADJUSTMENT OF STATUS.—Section 245 of the Immigration and Nationality Act (8 U.S.C. 1451), as amended by sections 1764 and 1806, is further amended by adding at the end the following:

''(o) An application for adjustment of status may not be considered or approved by the Secretary or the Attorney General, and no court may order the approval of an application for adjustment of status if the approved petition for classification under section 204 that is the underlying basis for the application for adjustment of status was

filed by an individual who has a judicial proceeding pending against him or her that would result in the revocation of the individual's naturalization under section 340.''.

**SEC. 1808. EXTENSION OF TIME LIMIT TO PERMIT RESCISSION OF PERMANENT RESIDENT STATUS.**

Section 246 of the Immigration and Nationality Act (8 U.S.C. 1256) is amended—

(1) in subsection (a)—

(A) by inserting ''(1)'' after ''(a)'';

(B) by striking ''within five years'' and inserting ''within 10 years'';

(C) by striking ''Attorney General'' each place that term appears and inserting ''Secretary''; and

(D) by adding at the end the following:

''(2) In any removal proceeding involving an alien whose status has been rescinded under this subsection, the determination by the Secretary that the alien was not eligible for adjustment of status is not subject to review or reconsideration during such proceedings.''.

(2) by redesignating subsection (b) as subsection (c); and

(3) by inserting after subsection (a) the following:

''(b) Nothing in subsection (a) may be construed to require the Secretary to rescind the alien's status before the commencement of removal proceedings under section 240. The Secretary may commence removal proceedings at any time against any alien who is removable, including aliens whose status was adjusted to that of an alien lawfully admitted for permanent residence under section 245 or 249 or under any other provision of law. There is no statute of limitations with respect to the commencement of removal proceedings under section 240. An order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.''.

**SEC. 1809. BARRING PERSECUTORS AND TERRORISTS FROM REGISTRY.**

Section 249 of the Immigration and Nationality Act (8 U.S.C. 1259) is amended to read as follows:

**"SEC. 249. RECORD OF ADMISSION FOR PERMANENT RESIDENCE IN THE CASE OF CERTAIN ALIENS WHO ENTERED THE UNITED STATES PRIOR TO JANUARY 1, 1972.**

''(a) IN GENERAL.—The Secretary, in the discretion of the Secretary and under such regulations as the Secretary may prescribe, may enter a record of lawful admission for permanent residence in the case of any alien, if no such record is otherwise available and the alien—

''(1) entered the United States before January 1, 1972;

''(2) has continuously resided in the United States since such entry;

''(3) has been a person of good moral character since such entry;

''(4) is not ineligible for citizenship;

''(5) is not described in paragraph (1)(A)(iv), (2), (3), (6)(C), (6)(E), (8), or (9)(C) of section 212(a);

''(6) is not described in paragraph (1)(E), (1)(G), (2), (4) of section 237(a); and

''(7) did not, at any time, without reasonable cause, fail or refuse to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability.

''(b) RECORDATION DATE OF PERMANENT RESIDENCE.—The record of an alien's lawful admission for permanence residence shall be the date on which the Secretary approves the application for such status under this section.''.

# CHAPTER 2—PROHIBITION ON NATURALIZATION AND UNITED STATES CITIZENSHIP

## SEC. 1821. BARRING TERRORISTS FROM BECOMING NATURALIZED UNITED STATES CITIZENS.

(a) IN GENERAL.—Section 316 of the Immigration and Nationality Act (8 U.S.C. 1427) is amended by adding at the end the following:

''(g)(1)(A) Except as provided in subparagraph (B), a person may not be naturalized if the Secretary determines, in the discretion of the Secretary, that the alien is described in section 212(a)(3) or 237(a)(4) at any time, including any period before or after the filing of an application for naturalization.

''(B) Subparagraph (A) shall not apply to an alien described in section 212(a)(3) if—

''(i) the alien received an exemption under section 212(d)(3)(B)(i); and

''(ii) the only conduct or actions by the alien that are described in section 212(a)(3) (and would bar the alien from naturalization under this paragraph) are specifically covered by the exemption referred to in clause (i).

''(2) A determination under paragraph (1) may be based upon any relevant information or evidence, including classified, sensitive, or national security information.''.

(b) APPLICABILITY TO CITIZENSHIP THROUGH NATURALIZATION OF PARENT OR SPOUSE.—Section 340(d) of such Act (8 U.S.C. 1451(d)) is amended—

(1) by striking the first sentence and inserting the following:

''(1) A person who claims United States citizenship through the naturalization of a parent or spouse shall be deemed to have lost his or her citizenship, and any right or privilege of citizenship which he or she may have acquired, or may hereafter acquire by virtue of the naturalization of such parent or spouse, if the order granting citizenship to such parent or spouse is revoked and set aside under the provisions of—

''(A) subsection (a) on the ground that the order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation; or

''(B) subsection (e) pursuant to a conviction under section 1425 of title 18, United States Code.''.

(2) in the second sentence, by striking ''Any person'' and inserting the following:

''(2) Any person''.

**SEC. 1822. TERRORIST BAR TO GOOD MORAL CHARACTER.**

(a) DEFINITION OF GOOD MORAL CHARACTER.—Section 101(f) of the Immigration and Nationality Act (8 U.S.C. 1101(f)), as amended by sections 1710(d), 1712(h), and 1713(d), is further amended—

(1) in paragraph (8), by inserting '', regardless of whether the crime was classified as an aggravated felony at the time of conviction'' before the semicolon at the end;

(2) by inserting after paragraph (11), the following:

''(12) one who the Secretary or the Attorney General determines, in the unreviewable discretion of the Secretary or the Attorney General, to have been an alien described in section 212(a)(3) or 237(a)(4), which determination—

''(A) may be based upon any relevant information or evidence, including classified, sensitive, or national security information; and

''(B) shall be binding upon any court regardless of the applicable standard of review.''; and

(3) in the undesignated matter at the end, by striking the first sentence and inserting following:

''The fact that a person is not within any of the foregoing classes shall not preclude a discretionary finding for other reasons that such a person is or was not of good moral character. The Secretary or the Attorney General shall not be limited to the applicant's conduct during the period for which good moral character is required, but may take into consideration as a basis for determination the applicant's conduct and acts at any time. The Secretary or the Attorney General, in the unreviewable discretion of the Secretary or the Attorney General, may determine that paragraph (8) shall not apply to a single aggravated felony conviction (other than murder, manslaughter, homicide, rape, or any sex offense when the victim of such sex offense was a minor) for which completion of the term of imprisonment or the sentence (whichever is later) occurred 15 years or longer before the date on which the person filed an application under this Act.''.

(b) AGGRAVATED FELONS.—Section 509(b) of the Immigration Act of 1990 (8 U.S.C. 1101 note; Public Law 101–649) is amended by striking ''convictions'' and all that follows and inserting ''convictions occurring before, on, or after such date.''.

(c) EFFECTIVE DATES; APPLICATION.—

(1) SUBSECTION (a).—The amendments made by subsection (a) shall take effect on the date of the

enactment of this Act, shall apply to any act that occurred before, on, or after such date of enactment, and shall apply to any application for naturalization or any other benefit or relief, or any other case or matter under the immigration laws pending on or filed after such date of enactment.

(2) SUBSECTION (b).—The amendment made by subsection (b) shall take effect as if included in the enactment of the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law 108–458).

**SEC. 1823. PROHIBITION ON JUDICIAL REVIEW OF NATURALIZATION APPLICATIONS FOR ALIENS IN REMOVAL PROCEEDINGS.**

Section 318 of the Immigration and Nationality Act (8 U.S.C. 1429) is amended to read as follows:

**"SEC. 318. PREREQUISITE TO NATURALIZATION; BURDEN OF PROOF.**

''(a) IN GENERAL.—Except as otherwise provided in this chapter, no person may be naturalized unless he or she has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this chapter.

''(b) BURDEN OF PROOF.—A person described in subsection (a) shall have the burden of proof to show that

he or she entered the United States lawfully, and the time, place, and manner of such entry into the United States. In presenting such proof, the person is entitled to the production of his or her immigrant visa, if any, or of other entry document, if any, and of any other documents and records, not considered by the Secretary to be confidential, pertaining to such entry, in the custody of the Department.

''(c) LIMITATIONS ON REVIEW.—Notwithstanding section 405(b), and except as provided in sections 328 and 329—

''(1) a person may not be naturalized against whom there is outstanding a final finding of removal, exclusion, or deportation;

''(2) an application for naturalization may not be considered by the Secretary or by any court if there is pending against the applicant any removal proceeding or other proceeding to determine whether the applicant's lawful permanent resident status should be rescinded, regardless of when such proceeding was commenced; and

''(3) the findings of the Attorney General in terminating removal proceedings or in cancelling the removal of an alien pursuant to this Act may not be deemed binding in any way upon the Secretary with

respect to the question of whether such person has established his or her eligibility for naturalization under this Act.''.

**SEC. 1824. LIMITATION ON JUDICIAL REVIEW WHEN AGENCY HAS NOT MADE DECISION ON NATURALIZATION APPLICATION AND ON DENIALS.**

(a) LIMITATION ON REVIEW OF PENDING NATURALIZATION APPLICATIONS.—Section 336 of the Immigration and Nationality Act (8 U.S.C. 1447) is amended—

(1) in subsection (a), by striking ''If,'' and inserting the following:

''(b) IN GENERAL.—If,''; and

(2) by amending subsection (b) to read as follows:

''(b) REQUEST FOR HEARING BEFORE DISTRICT COURT.—If a final administrative determination is not made on an application for naturalization under section 335 before the end of the 180-day period beginning on the date on which the Secretary completes all examinations and interviews under such section (as such terms are defined by the Secretary, by regulation), the applicant may apply to the district court for the district in which the applicant resides for a hearing on the matter. Such court shall only have jurisdiction to review the basis for

delay and remand the matter to the Secretary for the Secretary's determination on the application.''.

(b) LIMITATIONS ON REVIEW OF DENIAL.—Section 310 of the Immigration and Nationality Act (8 U.S.C. 1421) is amended—

(1) by amending subsection (c) to read as follows:

''(c) JUDICIAL REVIEW.—

''(1) JUDICIAL REVIEW OF DENIAL.—A person whose application for naturalization under this title is denied may, not later than 120 days after the date of the Secretary's administratively final determination on the application and after a hearing before an immigration officer under section 336(a), seek review of such denial before the United States district court for the district in which such person resides in accordance with chapter 7 of title 5, United States Code.

''(2) BURDEN OF PROOF.—The petitioner shall have burden of proof to show that the Secretary's denial of the application for naturalization was not supported by facially legitimate and bona fide reasons.

''(3) LIMITATIONS ON REVIEW.—Except in a proceeding under section 340, and notwithstanding

any other provision of law, including section 2241 of title 28, United States Code, any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to determine, or to review a determination of the Secretary made at any time regarding, whether, for purposes of an application for naturalization, an alien—

''(A) is a person of good moral character;

''(B) understands and is attached to the principles of the Constitution of the United States; or

''(C) is well disposed to the good order and happiness of the United States.'';

(2) in subsection (d)—

(A) by inserting ''**SUBPOENAS**.—'' before ''The immigration officer'';

(B) by striking ''subpena'' and inserting ''subpoena''; and

(C) by striking ''subpenas'' each place such term appears and inserting ''subpoenas''; and

(3) in subsection (e), by inserting ''NAME CHANGE.—'' before ''It shall''.

(c) EFFECTIVE DATE; APPLICATION.—The amendments made by this section—

(1) shall take effect on the date of the enactment of this Act;

(2) shall apply to any act that occurred before, on, or after such date of enactment; and

(3) shall apply to any application for naturalization or any other case or matter under the immigration laws that is pending on, or filed after, such date of enactment.

**SEC. 1825. CLARIFICATION OF DENATURALIZATION AUTHORITY.**

Section 340 of the Immigration and Nationality Act (8 U.S.C. 1451) is amended—

(1) in subsection (a), by striking ''United States attorneys for the respective districts'' and inserting ''Attorney General''; and

(2) by amending subsection (c) to read as follows:

''(c) The Government shall have the burden of proof to establish, by clear, unequivocal, and convincing evidence, that an order granting citizenship to an alien should be revoked and a certificate of naturalization cancelled because such order and certificate were illegally procured or were procured by concealment of a material fact or by willful misrepresentation.''.

**SEC. 1826. DENATURALIZATION OF TERRORISTS.**

(a) DENATURALIZATION FOR TERRORISTS ACTIVITIES.—Section 340 of the Immigration and Nationality Act, as amended by section 1825, is further amended—

(1) by redesignating subsections (d) through (h) as subsections (f) through (j), respectively; and

(2) by inserting after subsection (c) the following:

''(d)(1) If a person who has been naturalized, during the 15-year period after such naturalization, participates in any act described in paragraph (2)—

''(A) such act shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization; and

''(B) in the absence of countervailing evidence, such act shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation; and

''(C) such revocation and setting aside of the order admitting such person to citizenship and such

canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively.

''(2) The acts described in this paragraph that shall subject a person to a revocation and setting aside of his or her naturalization under paragraph (1)(B) are—

''(A) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means;

''(B) engaging in a terrorist activity (as defined in clauses (iii) and (iv) of section 212(a)(3)(B));

''(C) endorsing or espousing terrorist activity, or persuading others to endorse or espouse terrorist activity or a terrorist organization; and

''(D) receiving military-type training (as defined in section 2339D(c)(1) of title 18, United States Code) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in section 212(a)(3)(B)(vi)).''.

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall take effect on the date of the enactment of this Act and shall apply to acts that occur on or after such date.

**SEC. 1827. TREATMENT OF PENDING APPLICATIONS DURING DENATURALIZATION PROCEEDINGS.**

(a) IN GENERAL.—Section 204(b) of the Immigration and Nationality Act (8 U.S.C. 1154(b)) is amended—

(1) by striking ''After'' and inserting ''(1) Except as provided in paragraph (2), after''; and

(2) by adding at the end the following:

''(2) The Secretary may not adjudicate or approve any petition filed under this section by an individual who has a judicial proceeding pending against him or her that would result in the individual's denaturalization under section 340 until—

''(A) such proceedings have concluded; and

''(B) the period for appeal has expired or any appeals have been finally decided, if applicable.''.

(b) WITHHOLDING OF IMMIGRATION BENEFITS.—Section 340 of such Act (8 U.S.C. 1451), as amended by sections 1825 and 1826, is further amended by inserting after subsection (d), as added by section 1826(a)(2), the following:

''(e) The Secretary may not approve any application, petition, or request for any immigration benefit from an individual against whom there is a judicial proceeding pending that would result in the individual's denaturalization under this section until—

''(1) such proceedings have concluded; and

''(2) the period for appeal has expired or any appeals have been finally decided, if applicable.''.

**SEC. 1828. NATURALIZATION DOCUMENT RETENTION.**

(a) IN GENERAL.—Chapter 2 of title III of the Immigration and Nationality Act (8 U.S.C. 1421 et seq.) is amended by inserting after section 344 the following:

**''SEC. 345. NATURALIZATION DOCUMENT RETENTION.**

''(a) IN GENERAL.—The Secretary shall retain all documents described in subsection (b) for a minimum of 7 years for law enforcement and national security investigations and for litigation purposes, regardless of whether such documents are scanned into U.S. Citizenship and Immigration Services' electronic immigration system or stored in any electronic format.

''(b) DOCUMENTS TO BE RETAINED.—The documents described in this subsection are—

''(1) the original paper naturalization application and all supporting paper documents submitted with the application at the time of filing, subsequent to filing, and during the course of the naturalization interview; and

''(2) any paper documents submitted in connection with an application for naturalization that is filed electronically.''.

(b) CLERICAL AMENDMENT.—The table of contents in the first section of the Immigration and Nationality Act is amended by inserting after the item relating to section 344 the following:

''Sec. 345. Naturalization document retention.''.

## CHAPTER 3—FORFEITURE OF PROCEEDS FROM PASSPORT AND VISA OFFENSES, AND PASSPORT REVOCATION.

### SEC. 1831. FORFEITURE OF PROCEEDS FROM PASSPORT AND VISA OFFENSES.

Section 981(a)(1) of title 18, United States Code, is amended by adding at the end the following:

''(J) Any real or personal property that has been used to commit, or to facilitate the commission of, a violation of chapter 75, the gross proceeds of such violation, and any property traceable to any such property or proceeds.''.

### SEC. 1832. PASSPORT REVOCATION ACT.

(a) SHORT TITLE.—This section may be cited as the ''Passport Revocation Act''.

(b) REVOCATION OR DENIAL OF PASSPORTS AND PASSPORT CARDS TO INDIVIDUALS WHO ARE AFFILIATED WITH FOREIGN TERRORIST ORGANIZATIONS.—The Act entitled ''An Act to regulate the issue and validity of passports, and for other purposes'', approved July 3, 1926 (22 U.S.C. 211a et seq.), which is commonly known as

the ''Passport Act of 1926'', is amended by adding at the end the following:

**''SEC. 5. AUTHORITY TO DENY OR REVOKE PASSPORT AND PASSPORT CARD.**

''(a) INELIGIBILITY.—

''(1) ISSUANCE.—Except as provided under subsection (b), the Secretary of State shall refuse to issue a passport or a passport card to any individual—

''(A) who has been convicted of a violation of chapter 113B of title 18, United States Code; or

''(B)(i) whom the Secretary has determined is a member of or is otherwise affiliated with an organization the Secretary has designated as a foreign terrorist organization pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. 1189); or

''(ii) has aided, abetted, or provided material support to an organization described in clause (i).

''(2) REVOCATION.—The Secretary of State shall revoke a passport previously issued to any individual described in paragraph (1).

''(b) EXCEPTIONS.—

''(1) EMERGENCY CIRCUMSTANCES, HUMANITARIAN REASONS, AND LAW ENFORCEMENT PURPOSES.—Notwithstanding subsection (a), the Secretary of State may issue, or decline to revoke, a passport of an individual described in such subsection in emergency circumstances, for humanitarian reasons, or for law enforcement purposes.

''(2) LIMITATION FOR RETURN TO UNITED STATES.—Notwithstanding subsection (a)(2), the Secretary of State, before revocation, may—

''(A) limit a previously issued passport for use only for return travel to the United States; or

''(B) issue a limited passport that only permits return travel to the United States.

''(c) RIGHT OF REVIEW.—Any individual who, in accordance with this section, is denied issuance of a passport by the Secretary of State, or whose passport is revoked or otherwise limited by the Secretary of State, may request a hearing before the Secretary of State not later than 60 days after receiving notice of such denial, revocation, or limitation.

''(d) REPORT.—If the Secretary of State denies, issues, limits, or declines to revoke a passport or passport card under subsection (b), the Secretary, not later than

30 days after such denial, issuance, limitation, or revocation, shall submit a report to Congress that describes such denial, issuance, limitation, or revocation, as appropriate.''.

# TITLE II—PERMANENT REAUTHORIZATION OF VOLUNTARY E–VERIFY

**SEC. 2001. PERMANENT REAUTHORIZATION.**

Section 401(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104–208; 8 U.S.C. 1324a note) is amended by striking ''Unless the Congress otherwise provides, the Secretary of Homeland Security shall terminate a pilot program on September 30, 2015.''.

**SEC. 2002. PREEMPTION; LIABILITY.**

Section 402 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note) is amended by adding at the end the following:

''(g) LIMITATION ON STATE AUTHORITY.—

''(1) PREEMPTION.—A State or local government may not prohibit a person or other entity from verifying the employment authorization of new hires or current employees through E-Verify.

''(2) LIABILITY.—A person or other entity that participates in E-Verify may not be held liable under

any Federal, State, or local law for any employment-related action taken with respect to the wrongful termination of an individual in good faith reliance on information provided through E-Verify.''.

**SEC. 2003. INFORMATION SHARING.**

The Commissioner of Social Security, the Secretary of Homeland Security, and the Secretary of the Treasury shall jointly establish a program to share information among their respective agencies that could lead to the identification of unauthorized aliens (as defined in section 274A(h)(3) of the Immigration and Nationality Act (8 U.S.C. 1324a(h)(3)), including no-match letters and any information in the earnings suspense file.

**SEC. 2004. SMALL BUSINESS DEMONSTRATION PROGRAM.**

Section 403 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note) is amended—

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following:

''(d) SMALL BUSINESS DEMONSTRATION PROGRAM.—Not later than 9 months after the date of enactment of the SECURE and SUCCEED Act, the Director of U.S. Citizenship and Immigration Services shall estab-

lish a demonstration program that assists small businesses in rural areas or areas without internet capabilities to verify the employment eligibility of newly hired employees solely through the use of publicly accessible internet terminals.''.

**SEC. 2005. FRAUD PREVENTION.**

(a) BLOCKING MISUSED SOCIAL SECURITY ACCOUNT NUMBERS.—The Secretary of Homeland Security, in consultation with the Commissioner of Social Security, shall establish a program in which Social Security account numbers that have been identified to be subject to unusual multiple use in the employment eligibility verification system established under section 274A(d) of the Immigration and Nationality Act (8 U.S.C. 1324a(d)), or that are otherwise suspected or determined to have been compromised by identity fraud or other misuse, shall be blocked from use for such system purposes unless the individual using such number is able to establish, through secure and fair additional security procedures, that the individual is the legitimate holder of the number.

(b) ALLOWING SUSPENSION OF USE OF CERTAIN SOCIAL SECURITY ACCOUNT NUMBERS.—The Secretary of Homeland Security, in consultation with the Commissioner of Social Security, shall establish a program that provides a reliable, secure method by which victims of

identity fraud and other individuals may suspend or limit the use of their Social Security account number or other identifying information for purposes of the employment eligibility verification system established under section 274A(d) of the Immigration and Nationality Act (8 U.S.C. 1324a(d)). The Secretary may implement the program on a limited pilot program basis before making it fully available to all individuals.

(c) ALLOWING PARENTS TO PREVENT THEFT OF THEIR CHILD'S IDENTITY.—The Secretary of Homeland Security, in consultation with the Commissioner of Social Security, shall establish a program that provides a reliable, secure method by which parents or legal guardians may suspend or limit the use of the Social Security account number or other identifying information of a minor under their care for the purposes of the employment eligibility verification system established under 274A(d) of the Immigration and Nationality Act (8 U.S.C. 1324a(d)). The Secretary may implement the program on a limited pilot program basis before making it fully available to all individuals.

**SEC. 2006. IDENTITY AUTHENTICATION EMPLOYMENT ELIGIBILITY VERIFICATION PILOT PROGRAMS.**

(a) IN GENERAL.—Not later than 2 years after the date of the enactment of this Act, the Secretary of Home-

land Security, after consultation with the Commissioner of Social Security and the Director of the National Institute of Standards and Technology, shall establish, by regulation, not fewer than 2 Identity Authentication Employment Eligibility Verification pilot programs (referred to in this section as the ''Authentication Pilots''), each of which shall use a separate and distinct technology.

(b) PURPOSE.—The purpose of the Authentication Pilots shall be to provide for identity authentication and employment eligibility verification with respect to enrolled new employees to any employer that elects to participate in an Authentication Pilot.

(c) CANCELLATION.—Any participating employer may cancel the employer's participation in an Authentication Pilot after 1 year after electing to participate without prejudice to future participation.

(d) REPORT.—Not later than 12 months after commencement of the Authentication Pilots, the Secretary shall submit a report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives that includes the Secretary's findings on the Authentication Pilots and the authentication technologies chosen.

# TITLE III—SUCCEED ACT

**SEC. 3001. SHORT TITLES.**

This title may be cited as the ''Solution for Undocumented Children through Careers, Employment, Education, and Defending our Nation Act'' or the ''SUCCEED Act''.

**SEC. 3002. DEFINITIONS.**

In this title:

(1) IN GENERAL.—Except as otherwise specifically provided, any term used in this title that is also used in the immigration laws shall have the meaning given such term in the immigration laws.

(2) ALIEN ENLISTEE.—The term ''alien enlistee'' means a conditional temporary resident that seeks to maintain or extend such status by complying with the requirements under this title relating to enlistment and service in the Armed Forces of the United States.

(3) ALIEN POSTSECONDARY STUDENT.—The term ''alien postsecondary student'' means a conditional temporary resident that seeks to maintain or extend such status by complying with the requirements under this title relating to enrollment in, and graduation from, an institution of higher education in the United States.

(4) CONDITIONAL TEMPORARY RESIDENT.—

(A) DEFINITION.—The term ''conditional temporary resident'' means an alien described in subparagraph (B) who is granted conditional temporary resident status under this title.

(B) DESCRIPTION.—An alien granted conditional temporary resident status under this title—

(i) shall not be considered to be an alien who is unlawfully present in the United States for purposes of the immigration laws, including section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1623);

(ii) shall not be permitted to apply for adjustment of status under section 245(a) of the Immigration and Nationality Act (8 U.S.C. 1255(a)) until the date on which the alien is permitted to so apply under section 3005;

(iii) has the intention to permanently reside in the United States;

(iv) is not required to have a foreign residence which the alien has no intention of abandoning; and

(v) on the date on which the alien is eligible to apply for adjustment of status to that of an alien lawfully admitted for permanent residence under section 3005, the shall be considered to have been inspected and admitted for the purposes of section 245(a) of the Immigration and Nationality Act (8 U.S.C. 1255(a)).

(5) FEDERAL PUBLIC BENEFIT.—The term ''Federal public benefit'' means—

(A) the American Opportunity Tax Credit authorized under section 25A(i) of the Internal Revenue Code of 1986;

(B) the Earned Income Tax Credit authorized under section 32 of the Internal Revenue Code of 1986;

(C) the Health Coverage Tax Credit authorized under section 35 of the Internal Revenue Code of 1986;

(D) Social Security benefits authorized under title II of the Social Security Act (42 U.S.C. 401 et seq.);

(E) Medicare benefits authorized under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.); and

(F) benefits received under the Federal-State Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note).

(6) IMMIGRATION LAWS.—The term ''immigration laws'' has the meaning given the term in section 101(a)(17) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(17)).

(7) INSTITUTION OF HIGHER EDUCATION.—The term ''institution of higher education'' has the meaning given the term in section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002), except that the term does not include an institution of higher education outside of the United States.

(8) MILITARY-RELATED TERMS.—The terms ''active duty'', ''active service'', ''active status'', and ''armed forces'' have the meanings given those terms in section 101 of title 10, United States Code.

(9) APPLICABLE FEDERAL TAX LIABILITY.—The term ''applicable Federal tax liability'' means liability for Federal taxes imposed under the Internal Revenue Code of 1986, including any penalties and interest on such taxes.

(10) SECRETARY.—The term ''Secretary'' means the Secretary of Homeland Security.

(11) SIGNIFICANT MISDEMEANOR.—The term ''significant misdemeanor'' means—

(A) a criminal offense involving—

(i) domestic violence;

(ii) sexual abuse or exploitation, including sexually explicit conduct involving minors (as such terms are defined in section 2256 of title 18, United States Code);

(iii) burglary;

(iv) unlawful possession or use of a firearm;

(v) drug distribution or trafficking; or

(vi) driving under the influence or driving while intoxicated; or

(B) any other misdemeanor for which the individual was sentenced to a term of imprisonment of not less than 90 days (excluding a suspended sentence).

**SEC. 3003. CANCELLATION OF REMOVAL OF CERTAIN LONG-TERM RESIDENTS WHO ENTERED THE UNITED STATES AS CHILDREN.**

(a) SPECIAL RULE FOR CERTAIN LONG-TERM RESIDENTS WHO ENTERED THE UNITED STATES AS CHILDREN.—

(1) IN GENERAL.—Notwithstanding any other provision of law and except as otherwise provided in this title, the Secretary may cancel the removal of an alien who is inadmissible or deportable from the United States and grant the alien conditional temporary resident status under this title, if—

(A) the alien has been physically present in the United States for a continuous period since June 15, 2012;

(B) the alien was younger than 16 years of age on the date on which the alien initially entered the United States;

(C) on June 15, 2012, the alien—

(i) was younger than 31 years of age; and

(ii) had no lawful status in the United States;

(D) in the case of an alien who is 18 years of age or older on the date of enactment of this Act, the alien—

(i) meets the other requirements of this section; and

(ii)(I) has, while in the United States, earned a high school diploma, obtained a general education development certificate recognized under State law, or received a high school equivalency diploma;

(II) has been admitted to an institution of higher education in the United States; or

(III) has served, is serving, or has enlisted in the Armed Forces of the United States;

(E) in the case of an alien who is younger than 18 years of age on the date of enactment of this Act, the alien—

(i) meets the other requirements of this section; and

(ii)(I) is attending, or has enrolled in, a primary or secondary school; or

(II) is attending, or has enrolled in, a postsecondary school;

(F) the alien has been a person of good moral character (as defined in section 101(f) of the Immigration and Nationality Act (8 U.S.C.

1101(f))) since the date on which the alien initially entered the United States;

(G) the alien has paid any applicable Federal tax liability or has agreed to cure such liability through a payment installment plan that has been approved by the Internal Revenue Service; and

(H) the alien, subject to paragraph (2)—

(i) is not inadmissible under paragraph (1), (2), (3), (4), (6)(C), (6)(E), (8), (9)(C), or (10) of section 212(a) of the Immigration and Nationality Act (8 U.S.C. 1182(a)), and is not inadmissible under subparagraph (A) of section 212(a)(9) of such Act (unless the Secretary determines that the sole basis for the alien's removal under such subparagraph was unlawful presence under subparagraph (B) or (C) of such section 212(a)(9));

(ii) is not deportable under paragraph (1)(D), (1)(E), (1)(G), (2), (3), (4), (5), or (6) of section 237(a) of the Immigration and Nationality Act (8 U.S.C. 1227(a));

(iii) has not ordered, incited, assisted, or otherwise participated in the persecution

of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(iv) does not, in the sole and unreviewable discretion of the Secretary, pose a threat to national security or public safety;

(v) is not a person who the Secretary knows, or has reason to believe—

(I) is a member of a criminal gang; or

(II) has participated in an activity of a criminal gang, knowing or having reason to believe that the activity promoted, furthered, aided, or supported, or will promote, further, aid, or support, the illegal activity of the criminal gang; and

(vi) has not been convicted of—

(I) a felony under Federal or State law, regardless of the sentence imposed;

(II) any combination of offenses under Federal or State law for which

the alien was sentenced to imprisonment for at least 1 year;

(III) a significant misdemeanor; and

(IV) 3 or more misdemeanors; and

(I) the alien has never been under a final administrative or judicial order of exclusion, deportation, or removal, unless the alien—

(i) has remained in the United States under color of law after such final order was issued; or

(ii) received the final order before attaining 18 years of age.

(2) WAIVER.—

(A) IN GENERAL.—The Secretary, in the discretion of the Secretary, may waive, on a case-by-case basis, a ground of inadmissibility under paragraph (1), (4), (6)(B), or (6)(E) of section 212(a) of the Immigration and Nationality Act (8 U.S.C. 1182(a)), and a ground of deportability under paragraph (A), (B), (C), or (E) of section 237(a)(1) of such Act (8 U.S.C. 1227(a)(1)) for humanitarian purposes or if such waiver is otherwise in the public interest.

(B) QUARTERLY REPORT.—Not later than 180 days after the date of the enactment of this Act, and quarterly thereafter, the Secretary shall submit a report to Congress that identifies—

(i) the number of waivers under this paragraph that were requested by aliens during the preceding quarter;

(ii) the number of such requests that were granted; and

(iii) the number of such requests that were denied.

(C) JUDICIAL REVIEW.—Notwithstanding any other provision of law (statutory or nonstatutory), including sections 2241 of title 28, United States Code, any other habeas corpus provision, and sections 1361 and 1651 of title 28, United States Code, a court shall not have jurisdiction to review a determination made by the Secretary under subparagraph (A).

(3) PROCEDURES.—

(A) APPLICATION FOR AFFIRMATIVE RELIEF.—

(i) REGULATIONS.—

(I) IN GENERAL.—The Secretary shall issue regulations that provide a procedure for eligible individuals to affirmatively apply for the relief available under this subsection without being placed in removal proceedings.

(II) REQUIREMENTS.—The regulations issued under subclause (I)—

(aa) shall establish a date after which an alien may not seek relief under this title; and

(bb) shall not allow an affidavit or a sworn statement to be considered sufficient evidence to establish any claim under this title.

(ii) ELECTRONIC SUBMISSION.—An alien shall submit electronically an application for relief under this title that includes all supporting documentation, in accordance with the regulations issued under clause (i).

(iii) JUDICIAL REVIEW.—Notwithstanding any other provision of law (statutory or nonstatutory), including sections

2241 of title 28, United States Code, any other habeas corpus provision, and sections 1361 and 1651 of title 28, United States Code, a court shall not have jurisdiction to review a determination by the Secretary with respect to an application under this subsection.

(iv) DEADLINE FOR APPLICATION.—An alien shall submit an application under this section not later than the later of—

(I) in the case of an alien who is 18 years of age or older, 1 year after the date on which the Secretary begins accepting applications; and

(II) 180 days after the date on which the alien attains 18 years of age.

(v) FEE.—With respect to an application under this subsection, the Secretary shall collect a fee in an amount that will ensure the recovery of the full costs of administering the application and adjudication process.

(B) ACKNOWLEDGMENT TO BARS TO RELIEF.—

(i) ACKNOWLEDGMENT OF NOTIFICATION.—The regulations issued pursuant to subparagraph (A) shall include a requirement that each alien applying for conditional temporary resident status under this title who is at least 18 years of age sign, under penalty of perjury, an acknowledgment confirming that the alien was notified and understands that he or she will be ineligible for any form of relief or immigration benefit under this title or other immigration laws other than withholding of removal under section 241(b)(3), or relief from removal based on a claim under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, done at New York, December 10, 1984, if the alien violates a term for conditional temporary resident status under this title.

(ii) EXCEPTION.—Notwithstanding an acknowledgment under clause (ii), the Secretary, in the discretion of the Secretary, may allow an alien who violated the terms of conditional temporary resident status

(other than a criminal alien or an alien deemed to be a national security or public safety risk) to seek relief from removal if the Secretary determines that such relief is warranted for humanitarian purposes or if otherwise in the public interest.

(iii) JUDICIAL REVIEW.—Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review a determination by the Secretary under clause (ii).

(4) SUBMISSION OF BIOMETRIC AND BIOGRAPHIC DATA.—

(A) IN GENERAL.—The Secretary may not cancel the removal of, or grant temporary permanent resident status to, an alien under this title before the date on which—

(i) the alien submits biometric and biographic data, in accordance with procedures established by the Secretary; and

(ii) the Secretary receives and reviews the results of the background and security checks of the alien under paragraph (5).

(B) ALTERNATIVE PROCEDURE.—The Secretary shall provide an alternative procedure for any applicant who is unable to provide the biometric or biographic data referred to in subparagraph (A) due to a physical disability or impairment.

(5) BACKGROUND CHECKS.—

(A) REQUIREMENT FOR BACKGROUND CHECKS.—The Secretary shall utilize biometric, biographic, and other data that the Secretary determines to be appropriate, including information obtained pursuant to subparagraph (C)—

(i) to conduct security and law enforcement background checks of an alien seeking relief under this subsection; and

(ii) to determine whether there is any criminal, national security, or other factor that would render the alien ineligible for such relief.

(B) COMPLETION OF BACKGROUND CHECKS.—The security and law enforcement

background checks required under subparagraph (A) shall be completed, to the satisfaction of the Secretary, before the date on which the Secretary cancels the removal of an alien under this title.

(C) CRIMINAL RECORD REQUESTS.—The Secretary, in cooperation with the Secretary of State, shall seek to obtain information about any criminal activity the alien engaged in, or for which the alien was convicted in his or her country of nationality, country of citizenship, or country of last habitual residence, from INTERPOL, EUROPOL, or any other international or national law enforcement agency of the alien's country of nationality, country of citizenship, or country of last habitual residence.

(6) MEDICAL EXAMINATION.—An alien applying for relief available under this subsection shall undergo a medical examination conducted by a designated civil surgeon pursuant to procedures established by the Secretary.

(7) INTERVIEW.—The Secretary may conduct an in-person interview of an applicant for conditional temporary resident status as part of a determination

with respect to whether the alien meets the eligibility requirements described in this section.

(8) MILITARY SELECTIVE SERVICE.—An alien applying for relief available under this subsection shall establish that the alien has registered for the Selective Service under the Military Selective Service Act (50 U.S.C. App. 451 et seq.) if the alien is subject to such registration requirement under such Act.

(9) TREATMENT OF EXPUNGED CONVICTIONS.—

(A) IN GENERAL.—The Secretary shall evaluate expunged convictions on a case-by-case basis according to the nature and severity of the offense to determine whether, under the particular circumstances, an alien may be eligible for—

(i) conditional temporary resident status under this title; or

(ii) adjustment to that of an alien lawfully admitted for permanent residence under section 3005.

(B) JUDICIAL REVIEW.—Notwithstanding any other provision of law (statutory or non-statutory), including section 2241 of title 28,

United States Code, any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review a determination by the Secretary under subparagraph (A).

(b) TERMINATION OF CONTINUOUS PERIOD.—For purposes of this section, any period of continuous residence or continuous physical presence in the United States of an alien who applies for cancellation of removal under subsection (a) shall not terminate when the alien is served a notice to appear under section 239(a) of the Immigration and Nationality Act (8 U.S.C. 1229(a)).

(c) TREATMENT OF CERTAIN BREAKS IN PRESENCE.—

(1) IN GENERAL.—Except as provided in paragraph (2), an alien shall be considered to have failed to maintain continuous physical presence in the United States under subsection (a)(1)(A) if the alien has departed from the United States for—

(A) any period exceeding 90 days; or

(B) any periods exceeding 180 days, in the aggregate, during a 5-year period.

(2) EXTENSIONS FOR EXCEPTIONAL CIRCUMSTANCES.—The Secretary may extend the periods described in paragraph (1) by 90 days if the

alien demonstrates that the failure to timely return to the United States was due to exceptional circumstances. The exceptional circumstances determined sufficient to justify an extension should be not less compelling than the serious illness of the alien, or the death or serious illness of the alien's parent, grandparent, sibling, or child.

(3) EXCEPTION FOR MILITARY SERVICE.—Any time spent outside of the United States that is due to the alien's active service in the Armed Forces of the United States shall not be counted towards the time limits set forth in paragraph (1).

(d) RULEMAKING.—

(1) INITIAL PUBLICATION.—Not later than 180 days after the date of enactment of this Act, the Secretary shall publish regulations implementing this section.

(2) INTERIM REGULATIONS.—Notwithstanding section 553 of title 5, United States Code, the regulations required under paragraph (1) shall be effective, on an interim basis, immediately upon publication but may be subject to change and revision after public notice and opportunity for a period of public comment.

(3) FINAL REGULATIONS.—Within a reasonable time after publication of the interim regulations under paragraph (1), the Secretary shall publish final regulations implementing this section.

(e) REMOVAL OF ALIEN.—The Secretary may not seek to remove an alien who establishes prima facie eligibility for cancellation of removal and conditional temporary resident status under this title until the alien has been provided with a reasonable opportunity to file an application for conditional temporary resident status under this title.

**SEC. 3004. CONDITIONAL TEMPORARY RESIDENT STATUS.**

(a) INITIAL LENGTH OF STATUS.—Conditional temporary resident status granted to an alien under this title shall be valid—

(1) for an initial period of 7 years, subject to termination under subsection (c), if applicable; and

(2) if the alien will not reach 18 years of age before the end of the period described in paragraph (1), until the alien reaches 18 years of age.

(b) TERMS OF CONDITIONAL TEMPORARY RESIDENT STATUS.—

(1) EMPLOYMENT.—A conditional temporary resident may—

(A) be employed in the United States incident to conditional temporary resident status under this title; and

(B) enlist in the Armed Forces of the United States in accordance with section 504(b)(1)(D) of title 10, United States Code.

(2) TRAVEL.—A conditional temporary resident may travel outside the United States and may be admitted (if otherwise admissible) upon returning to the United States without having to obtain a visa if—

(A) the alien is the bearer of valid, unexpired documentary evidence of conditional temporary resident status under this title; and

(B) the alien's absence from the United States—

(i) was not for a period of 180 days or longer, or for multiple periods exceeding 180 days in the aggregate; or

(ii) was due to active service in the Armed Forces of the United States.

(c) TERMINATION OF STATUS.—The Secretary shall immediately terminate the conditional temporary resident status of an alien under this title—

(1) in the case of an alien who is 18 years of age or older, if the Secretary determines that the alien is a postsecondary student who was admitted to an accredited institution of higher education in the United States, but failed to enroll in such institution within 1 year after the date on which the alien was granted conditional temporary resident status under this title or to remain so enrolled;

(2) in the case of an alien who is younger than 18 years of age, if the Secretary determines that the alien enrolled in a primary or secondary school as a full-time student, but has failed to attend such school for a period exceeding 1 year during the 7-year period beginning on the date on which the alien was granted conditional temporary resident status under this title;

(3) in the case of an alien who was granted conditional temporary resident status under this title as an enlistee, if the alien—

(A) failed to complete basic training and begin active duty service or service in Selected Ready Reserve of the Ready Reserve of the Armed Forces of the United States within 1 year after the date on which the alien was

granted conditional temporary resident status under this title; or

(B) has received a dishonorable or other than honorable discharge from the Armed Forces of the United States;

(4) if the alien was granted conditional temporary resident status under this title as a result of fraud or misrepresentation;

(5) if the alien ceases to meet a requirement under subparagraph (F), (G), (H), or (I) of section 3003(a)(1);

(6) if the alien violated a term or condition of his or her conditional resident status;

(7) if the alien has become a public charge;

(8) if the alien has not maintained employment in the United States for a period of at least 1 year since the alien was granted conditional temporary resident status under this title and while the alien was not enrolled as a student in a postsecondary school or institution of higher education or serving in the Armed Forces of the United States; or

(9) if the alien has not completed a combination of employment, military service, or postsecondary school totaling 62 months during the 7-year period beginning on the date on which the alien was grant-

ed conditional temporary resident status under this title.

(d) RETURN TO PREVIOUS IMMIGRATION STATUS.—The immigration status of an alien the conditional temporary resident status of whom is terminated under subsection (c) shall return to the immigration status of the alien on the day before the date on which the alien received conditional temporary resident status under this title.

(e) EXTENSION OF CONDITIONAL TEMPORARY RESIDENT STATUS.—The Secretary shall extend the conditional temporary resident status of an alien granted such status under this title for 1 additional 5-year period beyond the period specified in subsection (a) if the alien—

(1) has demonstrated good moral character during the entire period the alien has been a conditional temporary resident under this title;

(2) is in compliance with section 3003(a)(1);

(3) has not abandoned the alien's residence in the United States by being absent from the United States for a period of 180 days, or multiple periods of at least 180 days, in the aggregate, during the period of conditional temporary resident status under this title, unless the absence of the alien was due to

active service in the Armed Forces of the United States;

(4) does not have any delinquent tax liabilities;

(5) has not received any Federal public benefit; and

(6) while the alien has been a conditional temporary resident under this title—

(A) has graduated from an accredited institution of higher education in the United States;

(B) has attended an accredited institution of higher education in the United States on a full-time basis for not less than 8 semesters;

(C)(i) has served as a member of a regular or reserve component of the Armed Forces of the United States in an active duty status for at least 3 years; and

(ii) if discharged from such service, received an honorable discharge; or

(D) has, for a cumulative total of not less than 48 months—

(i) attended an accredited institution of higher education in the United States on a full-time basis;

(ii)(I) honorably served in the Armed Forces of the United States; and

(II) maintained employment in the United States; or

(iii)(I) attended an accredited institution of higher education in the United States;

(II) honorably served in the Armed Forces of the United States; and

(III) otherwise maintained lawful employment in the United States.

(f) RETURN TO PREVIOUS STATUS.—The immigration status of an alien receiving an extension of conditional temporary resident status shall return to the immigration status of the alien on the day before the date on which the alien received conditional temporary resident status if the alien has not filed to adjust status to that of an alien lawfully admitted for permanent residence under section 3005 by the date on which the 5-year period referred to in subsection (e) ends.

**SEC. 3005. REMOVAL OF CONDITIONAL BASIS FOR TEMPORARY RESIDENCE.**

(a) IN GENERAL.—An alien who has been a conditional temporary resident under this title for at least 7 years may file an application with the Secretary, in ac-

cordance with subsection (c), to adjust status to that of an alien lawfully admitted for permanent residence. The application shall include the required fee and shall be filed in accordance with the procedures established by the Secretary.

(b) ADJUDICATION OF APPLICATION FOR ADJUSTMENT OF STATUS.—

(1) ADJUSTMENT OF STATUS IF FAVORABLE DETERMINATION.—If the Secretary determines that an alien who filed an application under subsection (a) meets the requirements described in subsection (d), the Secretary shall—

(A) notify the alien of such determination; and

(B) adjust the alien's status to that of an alien lawfully admitted for permanent residence.

(2) TERMINATION IF ADVERSE DETERMINATION.—If the Secretary determines that an alien who files an application under subsection (a) does not meet the requirements described in subsection (d), the Secretary shall—

(A) notify the alien of such determination; and

(B) terminate the conditional temporary status of the alien.

(c) TIME TO FILE APPLICATION.—

(1) IN GENERAL.—Applications for adjustment of status described in subsection (a) shall be filed during the period—

(A) beginning 180 days before the expiration of the 7-year period of conditional temporary resident status under this title; and

(B) ending—

(i) 7 years after the date on which conditional temporary resident status was initially granted to the alien under this title; or

(ii) after the conditional temporary resident status has been terminated.

(2) STATUS DURING PENDENCY.—An alien shall be deemed to be in conditional temporary resident status in the United States during the period in which an application filed by the alien under subsection (a) is pending.

(d) CONTENTS OF APPLICATION.—

(1) IN GENERAL.—Each application filed by an alien under subsection (a) shall contain information to permit the Secretary to determine whether the alien—

(A) has been a conditional temporary resident under this title for at least 7 years;

(B) has demonstrated good moral character during the entire period the alien has been a conditional temporary resident under this title;

(C) is in compliance with section 3003(a)(1); and

(D) has not abandoned the alien's residence in the United States.

(2) PRESUMPTIONS.—For purposes of paragraph (1)—

(A) the Secretary shall presume that an alien has abandoned the alien's residence in the United States if the alien is absent from the United States for more than 365 days, in the aggregate, during the period of conditional temporary resident status under this title, unless the alien demonstrates that the alien has not abandoned the alien's residence; and

(B) an alien who is absent from the United States due to active service in the Armed Forces of the United States has not abandoned the alien's residence in the United States during the period of such service.

(e) CITIZENSHIP REQUIREMENT.—

(1) IN GENERAL.—Except as provided in paragraph (2), an alien granted conditional temporary resident status under this title may not be adjusted to permanent resident status unless the alien demonstrates to the satisfaction of the Secretary that the alien satisfies the requirements under section 312(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1423(a)(1)).

(2) EXCEPTION.—Paragraph (1) shall not apply to an alien whom the Secretary determines is unable because of a physical or developmental disability or mental impairment to meet the requirements of such paragraph. The Secretary, in coordination with the Secretary of Health and Human Services and the Surgeon General, shall establish procedures for making determinations under this subsection.

(f) PAYMENT OF FEDERAL TAXES.—Not later than the date on which an application for adjustment of status is filed under subsection (a), the alien shall satisfy any applicable Federal tax liability due and owing on such date, as determined and verified by the Commissioner of Internal Revenue, notwithstanding section 6103 of title 26, United States Code, or any other provision of law.

(g) SUBMISSION OF BIOMETRIC AND BIOGRAPHIC DATA.—

(1) IN GENERAL.—The Secretary may not adjust the status of an alien under this section unless the alien submits biometric and biographic data, in accordance with procedures established by the Secretary.

(2) ALTERNATIVE PROCEDURE.—The Secretary shall provide an alternative procedure for an applicant who is unable to provide the biometric or biographic data referred to in paragraph (1) due to a physical disability or impairment.

(h) BACKGROUND CHECKS.—

(1) REQUIREMENT FOR BACKGROUND CHECKS.—The Secretary shall utilize biometric, biographic, and other data that the Secretary determines to be appropriate—

(A) to conduct security and law enforcement background checks of an alien applying for adjustment of status under this section; and

(B) to determine whether there is any criminal, national security, or other factor that would render the alien ineligible for such adjustment of status.

(2) COMPLETION OF BACKGROUND CHECKS.—The security and law enforcement background checks required under paragraph (1) shall be completed with respect to an alien, to the satisfaction of the Secretary, before the date on which the Secretary makes a decision on the application for adjustment of status of the alien.

(i) EXEMPTION FROM NUMERICAL LIMITATIONS.—Nothing in this section or in any other law may be construed to apply a numerical limitation on the number of aliens who may be eligible for adjustment of status under this section.

(j) TREATMENT OF ALIENS MEETING REQUIREMENTS FOR EXTENSION OF CONDITIONAL TEMPORARY RESIDENT STATUS.—If an alien has satisfied all of the requirements under section 3003(a)(1) as of the date of enactment of this Act, the Secretary may cancel the removal of the alien and permit the alien to apply for conditional temporary resident status under this title. After the initial period of conditional temporary resident status described in section 3004(a), the Secretary shall extend such alien's conditional temporary resident status and permit the alien to apply for adjustment of status in accordance with subsection (a) if the alien has met the requirements

under section 3004(e) during the entire period of conditional temporary resident status under this title.

**SEC. 3006. BENEFITS FOR RELATIVES OF ALIENS GRANTED CONDITIONAL TEMPORARY RESIDENT STATUS.**

Notwithstanding any other provision of law, a natural parent, prior adoptive parent, spouse, parent, child, or any other family member of an alien provided conditional temporary resident status or lawful permanent resident status under this title shall not thereafter be accorded, by virtue of parentage or familial relationship, any right, privilege, or status under the immigration laws.

**SEC. 3007. EXCLUSIVE JURISDICTION.**

(a) SECRETARY OF HOMELAND SECURITY.—Except as provided in subsection (b), the Secretary shall have exclusive jurisdiction to determine eligibility for relief under this title. If a final order of deportation, exclusion, or removal is entered, the Secretary shall resume all powers and duties delegated to the Secretary under this title. If a final order is entered before relief is granted under this title, the Attorney General shall terminate such order only after the alien has been granted conditional temporary resident status under this title.

(b) ATTORNEY GENERAL.—The Attorney General shall have exclusive jurisdiction to determine eligibility for

relief under this title for any alien who has been placed into deportation, exclusion, or removal proceedings, whether such placement occurred before or after the alien filed an application for cancellation of removal and conditional temporary resident status or adjustment of status under this title. Such exclusive jurisdiction shall continue until such proceedings are terminated.

**SEC. 3008. CONFIDENTIALITY OF INFORMATION.**

(a) CONFIDENTIALITY OF INFORMATION.—The Secretary shall establish procedures to protect the confidentiality of information provided by an alien under this title.

(b) PROHIBITION.—Except as provided in subsection (c), an officer or employee of the United States may not—

(1) use the information provided by an individual pursuant to an application filed under this title as the sole basis to initiate removal proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C. 1229a) against the parent or spouse of the individual;

(2) make any publication whereby the information provided by any particular individual pursuant to an application under this title can be identified; or

(3) permit anyone other than an officer or employee of the United States Government to examine such application filed under this title.

(c) REQUIRED DISCLOSURE.—The Attorney General or the Secretary shall disclose the information provided by an individual under this title and any other information derived from such information to—

(1) a Federal, State, Tribal, or local government agency, court, or grand jury in connection with an administrative, civil, or criminal investigation or prosecution;

(2) a background check conducted pursuant to the Brady Handgun Violence Protection Act (Public Law 103–159; 107 Stat. 1536) or an amendment made by that Act;

(3) for homeland security or national security purposes;

(4) an official coroner for purposes of affirmatively identifying a deceased individual (whether or not such individual is deceased as a result of a crime); or

(5) the Bureau of the Census in the same manner and circumstances as the information may be disclosed under section 8 of title 13, United States Code.

(d) FRAUD IN APPLICATION PROCESS OR CRIMINAL CONDUCT.—Nothing in this section may be construed to prevent the disclosure and use of information provided by an alien under this title to determine whether an alien seeking relief under this title has engaged in fraud in an application for such relief or at any time committed a crime from being used or released for immigration enforcement, law enforcement, or national security purposes.

(e) SUBSEQUENT APPLICATIONS FOR IMMIGRATION BENEFITS.—The Secretary may use the information provided by an individual pursuant to an application filed under this title to adjudicate an application, petition, or other request for an immigration benefit made by the individual on a date after the date on which the individual filed the application under this title.

(f) PENALTY.—Any person who knowingly uses, publishes, or permits information to be examined in violation of this section shall be fined not more than $10,000.

**SEC. 3009. RESTRICTION ON WELFARE BENEFITS FOR CONDITIONAL TEMPORARY RESIDENTS.**

An individual who has met the requirements under section 3005 for adjustment from conditional temporary resident status to lawful permanent resident status shall be considered, as of the date of such adjustment, to have completed the 5-year eligibility waiting period under sec-

tion 403 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (8 U.S.C. 1613).

**SEC. 3010. GAO REPORT.**

Not later than 7 years after the date of the enactment of this Act, the Comptroller General of the United States shall submit a report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives that sets forth—

(1) the number of aliens who were eligible for cancellation of removal and grant of conditional temporary resident status under section 3003(a);

(2) the number of aliens who applied for cancellation of removal and grant of conditional temporary resident status under section 3003(a);

(3) the number of aliens who were granted conditional temporary resident status under section 3003(a); and

(4) the number of aliens whose status was adjusted to that of an alien lawfully admitted for permanent residence pursuant to section 3005.

**SEC. 3011. MILITARY ENLISTMENT.**

Section 504(b)(1) of title 10, United States Code, is amended by adding at the end the following:

''(D) An alien who is a conditional temporary resident (as defined in section 3002 of the SUCCEED Act).''.

**SEC. 3012. ELIGIBILITY FOR NATURALIZATION.**

Notwithstanding sections 319(b), 328, and 329 of the Immigration and Nationality Act (8 U.S.C. 1430(b), 1439, and 1440), an alien whose status is adjusted under section 3005 to that of an alien lawfully admitted for permanent residence may apply for naturalization under chapter 2 of title III of the Immigration and Nationality Act (8 U.S.C. 310 et seq.) not earlier than 7 years after such adjustment of status.

**SEC. 3013. FUNDING.**

(a) DEPARTMENT OF HOMELAND SECURITY IMMIGRATION REFORM IMPLEMENTATION ACCOUNT.—

(1) IN GENERAL.—There is established in the Treasury a separate account, which shall be known as the ''Department of Homeland Security Immigration Reform Implementation Account'' (referred to in this section as the ''Implementation Account'').

(2) AUTHORIZATION AND APPROPRIATIONS.—There are appropriated to the Implementation Account, out of any funds in the Treasury not otherwise appropriated, $400,000,000, which shall remain available until September 30, 2022.

(3) USE OF APPROPRIATIONS.—The Secretary is authorized to use funds appropriated to the Implementation Account to pay for one-time and start-up costs necessary to implement this title, including, but not limited to—

(A) personnel required to process applications and petitions;

(B) equipment, information technology systems, infrastructure, and human resources;

(C) outreach to the public, including development and promulgation of any regulations, rules, or other public notice; and

(D) anti-fraud programs and actions related to implementation of this title.

(4) REPORTING.—Not later than 180 days after the date of the enactment of this Act, the Secretary shall submit a plan to the Committee on Appropriations of the Senate, the Committee on the Judiciary of the Senate, the Committee on Appropriations of the House of Representatives, and the Committee on the Judiciary of the House of Representatives for spending the funds appropriated under paragraph (2) that describes how such funds will be obligated in each fiscal year, by program.

(b) DEPOSIT AND USE OF PROCESSING FEES.—

(1) REPAYMENT OF STARTUP COSTS.—Notwithstanding section 286(m) of the Immigration and Nationality Act (8 U.S.C. 1356(m)), 75 percent of fees collected under this title shall be deposited monthly in the general fund of the Treasury until the funding provided by subsection (a)(2) has been repaid.

(2) DEPOSIT IN THE IMMIGRATION EXAMINATIONS FEE ACCOUNT.—Fees collected under this title in excess of the amount referenced in paragraph (1) shall be deposited in the Immigration Examinations Fee Account, pursuant to section 286(m) of the Immigration and Nationality Act (8 U.S.C. 1356(m)), and shall remain available until expended pursuant to section 286(n) of such Act (8 U.S.C. 1356(n)).

# TITLE IV—ENSURING FAMILY REUNIFICATION

**SEC. 4001. SHORT TITLE.**

This title may be cited as the ''Ensuring Family Reunification Act of 2018''.

**SEC. 4002. FAMILY-SPONSORED IMMIGRATION PRIORITIES.**

(a) REDEFINITION OF IMMEDIATE RELATIVE.—The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended—

(1) in section 101(b)(1), in the matter preceding subparagraph (A), by striking ''under twenty-one years of age who'' and inserting ''who is younger than 18 years of age and''; and

(2) in section 201 (8 U.S.C. 1151)—

(A) in subsection (b)(2)(A)—

(i) in clause (i), by striking ''children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age.'' and inserting ''children and spouse of a citizen of the United States.''; and

(ii) in clause (ii), by striking ''such an immediate relative'' and inserting ''the immediate relative spouse of a United States citizen'';

(B) by amending subsection (c) to read as follows:

''(c) WORLDWIDE LEVEL OF FAMILY-SPONSORED IMMIGRANTS.—(1) The worldwide level of family-sponsored immigrants under this subsection for a fiscal year is equal to 39 percent of 226,000 minus the number computed under paragraph (2).

''(2) The number computed under this paragraph for a fiscal year is the number of aliens who were paroled into the United States under section 212(d)(5) in the second preceding fiscal year who—

''(A) did not depart from the United States (without advance parole) within 1 year; and

''(B)(i) did not acquire the status of an alien lawfully admitted to the United States for permanent residence during the 2 preceding fiscal years; or

''(ii) acquired such status during such period under a provision of law (other than subsection (b)) that exempts adjustment to such status from the numerical limitation on the worldwide level of immigration under this section.''; and

(C) in subsection (f)—

(i) in paragraph (2), by striking ''section 203(a)(2)(A)'' and inserting ''section 203(a)'';

(ii) by striking paragraph (3);

(iii) by redesignating paragraph (4) as paragraph (3); and

(iv) in paragraph (3), as redesignated, by striking ''(1) through (3)'' and inserting ''(1) and (2)''.

(b) FAMILY-BASED VISA PREFERENCES.—Section 203(a) of the Immigration and Nationality Act (8 U.S.C. 1153(a)) is amended to read as follows:

''(a) SPOUSES AND MINOR CHILDREN OF PERMANENT RESIDENT ALIENS.—Family-sponsored immigrants described in this subsection are qualified immigrants who are the spouse or a child of an alien lawfully admitted for permanent residence.''.

(c) CONFORMING AMENDMENTS.—

(1) DEFINITION OF V NONIMMIGRANT.—Section 101(a)(15)(V) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(V)) is amended by striking ''section 203(a)(2)(A)'' each place such term appears and inserting ''section 203(a)''.

(2) NUMERICAL LIMITATION TO ANY SINGLE FOREIGN STATE.—Section 202 of such Act (8 U.S.C. 1152) is amended—

(A) in subsection (a)(4)—

(i) by striking subparagraphs (A) and (B) and inserting the following:

''(A) 75 PERCENT OF FAMILY-SPONSORED IMMIGRANTS NOT SUBJECT TO PER COUNTRY LIMITATION.—Of the visa numbers made available under section 203(a) in any fiscal year, 75

percent shall be issued without regard to the numerical limitation under paragraph (2).

''(B) TREATMENT OF REMAINING 25 PERCENT FOR COUNTRIES SUBJECT TO SUBSECTION (e).—

''(i) IN GENERAL.—Of the visa numbers made available under section 203(a) in any fiscal year, 25 percent shall be available, in the case of a foreign state or dependent area that is subject to subsection (e) only to the extent that the total number of visas issued in accordance with subparagraph (A) to natives of the foreign state or dependent area is less than the subsection (e) ceiling.

''(ii) SUBSECTION (e) CEILING DEFINED.—In clause (i), the term 'subsection (e) ceiling' means, for a foreign state or dependent area, 77 percent of the maximum number of visas that may be made available under section 203(a) to immigrants who are natives of the state or area, consistent with subsection (e).''; and

(ii) by striking subparagraphs (C) and (D); and

(B) in subsection (e)—

(i) in paragraph (1), by adding ''and'' at the end;

(ii) by striking paragraph (2);

(iii) by redesignating paragraph (3) as paragraph (2); and

(iv) in the undesignated matter after paragraph (2), as redesignated, by striking '', respectively,'' and all that follows and inserting a period.

(3) RULES FOR DETERMINING WHETHER CERTAIN ALIENS ARE CHILDREN.—Section 203(h) of the Immigration and Nationality Act (8 U.S.C. 1153(h)) is amended by striking ''(a)(2)(A)'' each place such term appears and inserting ''(a)(2)''.

(4) PROCEDURE FOR GRANTING IMMIGRANT STATUS.—Section 204 of such Act (8 U.S.C. 1154) is amended—

(A) in subsection (a)(1)—

(i) in subparagraph (A)(i), by striking ''to classification by reason of a relationship described in paragraph (1), (3), or (4) of section 203(a) or'';

(ii) in subparagraph (B), by striking ''203(a)(2)(A)'' each place such term appears and inserting ''203(a)''; and

(iii) in subparagraph (D)(i)(I), by striking ''a petitioner'' and all that follows through ''(a)(1)(B)(iii).'' and inserting ''an individual younger than 18 years of age for purposes of adjudicating such petition and for purposes of admission as an immediate relative under section 201(b)(2)(A)(i) or a family-sponsored immigrant under section 203(a), as appropriate, notwithstanding the actual age of the individual.'';

(B) in subsection (f)(1), by striking '', 203(a)(1), or 203(a)(3), as appropriate''; and

(C) by striking subsection (k).

(5) WAIVERS OF INADMISSIBILITY.—Section 212 of the Immigration and Nationality Act (8 U.S.C. 1182) is amended—

(A) in subsection (a)(6)(E)(ii), by striking ''section 203(a)(2)'' and inserting ''section 203(a)''; and

(B) in subsection (d)(11), by striking ''(other than paragraph (4) thereof)''.

(6) EMPLOYMENT OF V NONIMMIGRANTS.—Section 214(q)(1)(B)(i) of such Act (8 U.S.C. 1184(q)(1)(B)(i)) is amended by striking ''section 203(a)(2)(A)'' each place such term appears and inserting ''section 203(a)''.

(7) DEFINITION OF ALIEN SPOUSE.—Section 216(h)(1)(C) of such Act (8 U.S.C. 1186a(h)(1)(C)) is amended by striking ''section 203(a)(2)'' and inserting ''section 203(a)''.

(8) CLASSES OF DEPORTABLE ALIENS.—Section 237(a)(1)(E)(ii) of such Act (8 U.S.C. 1227(a)(1)(E)(ii)) is amended by striking ''section 203(a)(2)'' and inserting ''section 203(a)''.

(d) CREATION OF NONIMMIGRANT CLASSIFICATION FOR ALIEN PARENTS OF ADULT UNITED STATES CITIZENS.—

(1) IN GENERAL.—Section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)) is amended—

(A) in subparagraph (T)(ii)(III), by striking the period at the end and inserting a semicolon;

(B) in subparagraph (U)(iii), by striking ''or'' at the end;

(C) in subparagraph (V)(ii)(II), by striking the period at the end and inserting ''; or''; and

(D) by adding at the end the following:

''(W) Subject to section 214(s), an alien who is a parent of a citizen of the United States, if the citizen is at least 21 years of age.''.

(2) CONDITIONS ON ADMISSION.—Section 214 of the Immigration and Nationality Act (8 U.S.C. 1184) is amended by adding at the end the following:

''(s)(1) The initial period of authorized admission for a nonimmigrant described in section 101(a)(15)(W) shall be 5 years, but may be extended by the Secretary of Homeland Security for additional 5-year periods if the United States citizen son or daughter of the nonimmigrant is still residing in the United States.

''(2) A nonimmigrant described in section 101(a)(15)(W)—

''(A) is not authorized to be employed in the United States; and

''(B) is not eligible for any Federal, State, or local public benefit.

''(3) Regardless of the resources of a nonimmigrant described in section 101(a)(15)(W), the United States citizen son or daughter who sponsored the nonimmigrant

parent shall be responsible for the nonimmigrant's support while the nonimmigrant resides in the United States.

''(4) An alien is ineligible to receive a visa or to be admitted into the United States as a nonimmigrant described in section 101(a)(15)(W) unless the alien provides satisfactory proof that the United States citizen son or daughter has arranged for health insurance coverage for the alien, at no cost to the alien, during the anticipated period of the alien's residence in the United States.''.

(e) EFFECTIVE DATE; APPLICABILITY.—

(1) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of enactment of this Act.

(2) NEW PETITIONS.—

(A) IN GENERAL.—The Director of U. S. Citizenship and Immigration Services shall only accept new family-based petitions for spouses and minor children of United States citizens and lawful permanent residents under—

(i) section 201(b)(1)(A) of the Immigration and Nationality Act (8 U.S.C. 1151(b)(1)(A)); or

(ii) subsection (a) or (b) of section 203 of such Act (8 U.S.C. 1153).

(B) LIMITATION.—The Director of U. S. Citizenship and Immigration Services may not accept any new family-based petition other than a petition described in subparagraph (A).

(3) GRANDFATHERED PETITIONS AND VISAS.—Notwithstanding the termination by this title of the family-sponsored immigrant visa categories under section 203(a) of the Immigration and Nationality Act (8 U.S.C. 1153(a)) (as of the date before the date of enactment of this Act), the amendments made by this section shall not apply, and visas shall remain available to, any alien who has—

(A) an approved family-based petition that has not been terminated or revoked, or

(B) a properly-filed family-based petition that is—

(i) pending with U.S. Citizenship and Immigration Services; and

(ii) based on subsection (a) of section 203 of the Immigration and Nationality Act (8 U.S.C. 1153(a)) (as in effect on the day before the date of enactment of this Act).

(4) AVAILABILITY OF VISAS FOR GRANDFATHERED PETITIONS.—The Secretary shall con-

tinue to allocate a sufficient number of visas in family-sponsored immigrant visa categories until the date on which a visa has been made available, in conformance with the numeric and per country limitations in effect on the day before the date of enactment of this Act, to each beneficiary of an approved or pending petition described in subparagraph (A) or (B) of paragraph (3), if the beneficiary—

(A) indicates an intent to pursue the immigrant visa not later than 1 year after the date on which the Secretary of State notifies the beneficiary of the availability of the visa; and

(B) is otherwise qualified to receive a visa under this Act.

(f) TERMINATION OF REGISTRATION.—Section 203(g) of the Immigration and Nationality Act (8 U.S.C. 1153(g)) is amended—

(1) by striking the second sentence;

(2) by striking the subsection designation and heading and all that follows through ''For purposes'' in the first sentence and inserting the following:

''(g) LISTS.—

''(1) IN GENERAL.—For purposes''; and

(3) by adding at the end the following:

''(2) TERMINATION OF REGISTRATION.—

''(A) IN GENERAL.—Except as provided in subparagraph (B), the Secretary of State shall terminate the registration of any alien who fails to apply for an immigrant visa within the 1-year period beginning on the date on which the Secretary of State notifies the alien of the availability of the immigrant visa.

''(B) EXCEPTION.—The Secretary of State shall not terminate the registration of an alien under subparagraph (A) if the alien demonstrates that the failure of the alien to apply for an immigrant visa during the period described in that subparagraph was due to an extenuating circumstance beyond the control of the alien.''.

**SEC. 4003. ELIMINATION OF DIVERSITY VISA PROGRAM.**

(a) IN GENERAL.—Section 203 of the Immigration and Nationality Act (8 U.S.C. 1153) is amended—

(1) by striking subsection (c);

(2) by redesignating subsections (d), (e), (f), (g), and (h) as subsections (c), (d), (e), (f), and (g), respectively;

(3) in subsection (c), as redesignated, by striking ''subsection (a), (b), or (c)'' and inserting ''subsection (a) or (b)'';

(4) in subsection (d), as redesignated—

(A) by striking paragraph (2); and

(B) by redesignating paragraph (3) as paragraph (2);

(5) in subsection (e), as redesignated, by striking ''subsection (a), (b), or (c) of this section'' and inserting ''subsection (a) or (b)'';

(6) in subsection (f), as redesignated, by striking ''subsections (a), (b), and (c)'' and inserting ''subsections (a) and (b)''; and

(7) in subsection (g), as redesignated—

(A) by striking ''(d)'' each place it appears and inserting ''(c)''; and

(B) in paragraph (2)(B), by striking ''subsection (a), (b), or (c)'' and inserting ''subsection (a) or (b)''.

(b) TECHNICAL AND CONFORMING AMENDMENTS.—The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended—

(1) in section 101(a)(15)(V) (8 U.S.C. 1101(a)(15)(V)), by striking ''section 203(d)'' and inserting ''section 203(c)'';

(2) in section 201 (8 U.S.C. 1151)—

(A) in subsection (a)—

(i) in paragraph (1), by adding ''and'' at the end;

(ii) in paragraph (2), by striking ''; and'' and inserting a period; and

(iii) by striking paragraph (3);

(B) by striking subsection (e); and

(C) by redesignating subsection (f) as subsection (e);

(3) in section 203(b)(2)(B)(ii)(IV) (8 U.S.C. 1153(b)(2)(B)(ii)(IV)), by striking ''section 203(b)(2)(B)'' each place such term appears and inserting ''clause (i)'';

(4) in section 204 (8 U.S.C. 1154)—

(A) in subsection (a)(1)—

(i) by striking subparagraph (I); and

(ii) by redesignating subparagraphs (J) through (L) as subparagraphs (I) through (K), respectively;

(B) in subsection (e), by striking ''subsection (a), (b), or (c) of section 203'' and inserting ''subsection (a) or (b) of section 203''; and

(C) in subsection (l)(2)—

(i) in subparagraph (B), by striking ''section 203 (a) or (d)'' and inserting ''subsection (a) or (c) of section 203''; and

(ii) in subparagraph (C), by striking ''section 203(d)'' and inserting ''section 203(c)'';

(5) in section 214(q)(1)(B)(i) (8 U.S.C. 1184(q)(1)(B)(i)), by striking ''section 203(d)'' and inserting ''section 203(c)'';

(6) in section 216(h)(1) (8 U.S.C. 1186a(h)(1)), in the undesignated matter following subparagraph (C), by striking ''section 203(d)'' and inserting ''section 203(c)''; and

(7) in section 245(i)(1)(B) (8 U.S.C. 1255(i)(1)(B)), by striking ''section 203(d)'' and inserting ''section 203(c)''.

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the first day of the first fiscal year beginning on or after the date of the enactment of this Act.

(d) REALLOCATION OF VISAS; GRANDFATHERED PETITIONS.—

(1) GRANDFATHERED PETITIONS AND VISAS.—Notwithstanding the elimination under this section of the diversity visa program described in sections

201(e) and 203(c) of the Immigration and Nationality Act (8 U.S.C. 1151(e); 1153(c)) (as in effect on the day before the date of enactment of this Act), the amendments made by this section shall not apply, and visas shall remain available, to any alien whom the Secretary of State has selected to participate in the diversity visa lottery for fiscal year 2018.

(2) REALLOCATION OF VISAS.—

(A) REALLOCATION.—

(i) IN GENERAL.—Beginning in fiscal year 2019 and ending on the date on which the number of visas allocated for aliens who qualify for visas under the Nicaraguan Adjustment and Central American Relief Act (Public Law 105–100; 8 U.S.C. 1153 note) is exhausted, the Secretary of Homeland Security shall make available the annual allocation of diversity visas as follows:

(I) 25,000 visas shall be made available to aliens who have an approved family-based petition based on section 203(a) of the Immigration and Nationality Act (8 U.S.C. 1153(a)) that has not been terminated or re-

voked as of the date of enactment of this Act.

(II) 25,000 visas shall be made available to qualified aliens who have an approved employment-based petition based on paragraphs (1), (2), or (3) of section 203(b) of the Immigration and Nationality Act (8 U.S.C. 1153) that has not been terminated or revoked as of the date of enactment of this Act.

(ii) NACARA VISAS.—On the exhaustion of 5,000 visas made available under the Nicaraguan Adjustment and Central American Relief Act (Public Law 105–100; 8 U.S.C. 1153 note), the remainder of the visas made available under that Act shall be equally divided and added to the visas provided under subclauses (I) and (II) of clause (i).

(B) NOTIFICATION.—

(i) FEDERAL REGISTER.—The Secretary of Homeland Security, in consultation with the Secretary of State, shall pub-

lish a notice in the Federal Register to notify affected aliens with respect to—

(I) the availability of visas under subparagraph (A);

(II) the manner in which the visas shall be allocated.

(ii) VISA BULLETIN.—The Secretary of State shall publish a notice in the monthly visa bulletin of the Department of State with respect to—

(I) the availability of visas under subparagraph (A);

(II) the manner in which the visas shall be allocated.

# TITLE V—OTHER MATTERS

**SEC. 5001. OTHER IMMIGRATION AND NATIONALITY ACT AMENDMENTS.**

(a) NOTICE OF ADDRESS CHANGE.—Section 265(a) of the Immigration and Nationality Act (8 U.S.C. 1305(a)) is amended to read as follows:

''(a) Each alien required to be registered under this Act who is physically present in the United States shall notify the Secretary of Homeland Security of each change of address and new address not later than 10 days after

the date of such change and shall furnish such notice in the manner prescribed by the Secretary.''.

(b) PHOTOGRAPHS FOR NATURALIZATION CERTIFICATES.—Section 333 of the Immigration and Nationality Act (8 U.S.C. 1444) is amended—

(1) in subsection (b)—

(A) by redesignating paragraphs (1) through (7) as subparagraphs (A) through (G);

(B) by inserting ''(1)'' after ''(b)''; and

(C) by striking the undesignated matter at the end and inserting the following:

''(2) Of the photographs furnished pursuant to paragraph (1)—

''(A) 1 shall be affixed to each certificate issued by the Attorney General; and

''(B) 1 shall be affixed to the copy of such certificate retained by the Department.''; and

(2) by adding at the end the following:

''(c) The Secretary may modify the technical requirements under this section in the Secretary's discretion and as the Secretary may consider necessary to provide for photographs to be furnished and used in a manner that is efficient, secure, and consistent with the latest developments in technology.''.

**SEC. 5002. EXEMPTION FROM THE ADMINISTRATIVE PROCEDURE ACT.**

Except for regulations promulgated pursuant to this Act, section 552 of title 5, United States Code (commonly known as the ''Freedom of Information Act'' (5 U.S.C. 522)), and section 552a of such title (commonly known as the ''Privacy Act'' (5 U.S.C. 552a)), chapter 5 of title 5, United States Code (commonly known as the ''Administrative Procedures Act''), and any other law relating to rulemaking, information collection, or publication in the Federal Register, shall not apply to any action to implement this Act or the amendments made by this Act, to the extent the Secretary of Homeland Security, the Secretary of State, or the Attorney General determines that compliance with any such law would impede the expeditious implementation of this Act or the amendments made by this Act.

**SEC. 5003. EXEMPTION FROM THE PAPERWORK REDUCTION ACT.**

(1) IN GENERAL.—Chapter 35 of title 44, United States Code, shall not apply to any action to implement this Act or the amendments made by this Act to the extent the Secretary of Homeland Security, the Secretary of State, or the Attorney General determines that compliance with such law would im-

pede the expeditious implementation of this Act or the amendments made by this Act.

(2) SUNSET.—

(A) IN GENERAL.—The exemption provided under this section shall sunset not later than 3 years after the date of enactment of this Act.

(B) RULE OF CONSTRUCTION.—Subparagraph (A) does not impose any requirement on, or affect the validity of, any rule issued or other action taken by the Secretary under the exemption described in paragraph (1).

**SEC. 5004. EXEMPTION FROM GOVERNMENT CONTRACTING AND HIRING RULES.**

(1) COMPETITION REQUIREMENTS.—

(A) IN GENERAL.—For purposes of implementing this Act, the competition requirements of section 253(a) of title 41, United States Code, shall not apply.

(B) AGENCY DETERMINATION.—The determination of an agency under section 253(c) of title 41, United States Code, shall not be subject to challenge by protest to—

(i) the Government Accountability Office, under sections 3551 through 3556 of title 31, United States Code; or

(ii) the Court of Federal Claims, under section 1491 of title 28, United States Code.

(C) NOTICE TO CONGRESS.—An agency shall immediately advise the Congress of the exercise of the authority granted under this paragraph.

(2) CONTRACTING.—

(A) IN GENERAL.—Notwithstanding any other provision of law, the Secretary, in advance of the receipt of any fees imposed on any beneficiary or petitioner for benefits under this Act, may enter into 1 or more contracts for the purpose of implementing the programs under this Act.

(B) LIMITATION.—With respect to a contract under subparagraph (A), the Secretary shall not enter into an obligation that exceeds the amount necessary to defray the cost of the programs under this Act.

(3) NOTICE TO CONGRESS.—The Secretary shall—

(A) immediately advise Congress of the exercise of authority granted in paragraph (2); and

(B) shall report quarterly on the estimated obligations incurred pursuant to that paragraph.

(4) APPOINTMENTS.—

(A) IN GENERAL.—Notwithstanding any other provision of law, the Secretary shall have authority to make term, temporary limited, and part-time appointments without regard to—

(i) the number of such employees;

(ii) the ratio of such employees to permanent full-time employees; or

(iii) the duration of employment of such employees.

(B) RULE OF CONSTRUCTION.—Chapter 71 of title 5, United States Code, shall not affect the authority of any management official of the Department to hire term, temporary limited, or part-time employees under this paragraph.

**SEC. 5005. ABILITY TO FILL AND RETAIN DEPARTMENT OF HOMELAND SECURITY POSITIONS IN UNITED STATES TERRITORIES.**

(a) IN GENERAL.—Section 530C of title 28, United States Code, is amended—

(1) in subsection (a), in the matter preceding paragraph (1)—

(A) by inserting ''or the Department of Homeland Security'' after ''Department of Justice''; and

(B) by inserting ''or the Secretary of Homeland Security'' after ''Attorney General'';

(2) in subsection (b)—

(A) in paragraph (1)—

(i) in the matter preceding subparagraph (A), by inserting ''or to the Secretary of Homeland Security'' after ''Attorney General''; and

(ii) in subparagraph (K)—

(I) in clause (i)—

(aa) by inserting ''or within United States territories or commonwealths'' after ''outside United States''; and

(bb) by inserting ''or the Secretary of Homeland Security'' after ''Attorney General'';

(II) in clause (ii), by inserting ''or the Secretary of Homeland Security'' after ''Attorney General'';

(B) in paragraph (2)—

(i) in subparagraph (A), by striking ''for the Drug Enforcement Administration, and for the Immigration and Naturalization Service'' and inserting ''and for the Drug Enforcement Administration''; and

(ii) in subparagraph (B), in the matter preceding clause (i), by striking ''the Immigration and Naturalization Service'' and inserting ''the Department of Homeland Security'';

(C) in paragraph (5), by striking ''IMMIGRATION AND NATURALIZATION SERVICE.—Funds available to the Attorney General'' and replacing with ''DEPARTMENT OF HOMELAND SECURITY.—Funds available to the Secretary of Homeland Security''; and

(D) in paragraph (7)—

(i) by inserting ''or the Secretary of Homeland Security'' after ''Attorney General''; and

(ii) by striking ''the Immigration and Naturalization Service'' and inserting ''U.S. Immigration and Customs Enforcement''; and

(3) in subsection (d), by inserting ''or the Department of Homeland Security'' after ''Department of Justice''.

**SEC. 5006. SEVERABILITY.**

If any provision of this Act or any amendment made by this Act, or any application of such provision or amendment to any person or circumstance, is held to be unconstitutional, the remainder of the provisions of this Act and the amendments made by this Act and the application of the provision or amendment to any other person or circumstance shall not be affected.

**SEC. 5007. FUNDING.**

(a) IMPLEMENTATION.—The Director of the Office of Management and Budget shall determine and identify—

(1) the appropriation accounts which have unobligated funds that could be rescinded and used to fund the provisions of this Act; and

(2) the amount of the rescission that shall be applied to each such account.

(b) REPORT.—Not later than 60 days after the date of enactment of this Act, the Director of the Office of Management and Budget shall submit to Congress and to the Secretary of the Treasury a report that describes the accounts and amounts determined and identified for rescission pursuant to subsection (a).

(c) EXCEPTIONS.—This section shall not apply to unobligated funds of—

(1) the Department of Homeland Security;

(2) the Department of Defense; or

(3) the Department of Veterans Affairs.

# TITLE VI—TECHNICAL AMENDMENTS

## SEC. 6001. REFERENCES TO THE IMMIGRATION AND NATIONALITY ACT.

Except as otherwise expressly provided, whenever in this title an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Immigration and Nationality Act (8 U.S.C. 1101 et seq.).

**SEC. 6002. TECHNICAL AMENDMENTS TO TITLE I OF THE IMMIGRATION AND NATIONALITY ACT.**

(a) SECTION 101.—

(1) DEPARTMENT.—Section 101(a)(8) (8 U.S.C. 1101(a)(8)) is amended to read as follows:

''(8) The term 'Department' means the Department of Homeland Security.''.

(2) IMMIGRANT.—Section 101(a)(15) (8 U.S.C. 1101(a)(15)) is amended—

(A) in subparagraph (F)(i)—

(i) by striking the term ''Attorney General'' each place that term appears and inserting ''Secretary''; and

(ii) by striking ''214(l)'' and inserting ''214(m)'';

(B) in subparagraph (H)(i)—

(i) in subclause (b), by striking ''certifies to the Attorney General that the intending employer has filed with the Secretary'' and inserting ''certifies to the Secretary of Homeland Security that the intending employer has filed with the Secretary of Labor''; and

(ii) in subclause (c), by striking ''certifies to the Attorney General'' and insert-

ing ''certifies to the Secretary of Homeland Security''; and

(C) in subparagraph (M)(i), by striking the term ''Attorney General'' each place that term appears and inserting ''Secretary''.

(3) IMMIGRATION OFFICER.—Section 101(a)(18) (8 U.S.C. 1101(a)(18)) is amended by striking ''Service or of the United States designated by the Attorney General,'' and inserting ''Department or of the United States designated by the Secretary,''.

(4) SECRETARY.—Section 101(a)(34) (8 U.S.C. 1101(a)(34)) is amended to read as follows:

''(34) The term 'Secretary' means the Secretary of Homeland Security, except as provided in section 219(d)(4).''.

(5) SPECIAL IMMIGRANT.—Section 101(a)(27)(L)(iii) (8 U.S.C. 1101(a)(27)(L)(iii)) is amended by adding ''; or'' at the end.

(6) MANAGERIAL CAPACITY; EXECUTIVE CAPACITY.—Section 101(a)(44)(C) (8 U.S.C. 1101(a)(44)(C)) is amended by striking ''Attorney General'' and inserting ''Secretary''.

(7) ORDER OF REMOVAL.—Section 101(a)(47)(A) (8 U.S.C. 1101(a)(47)(A)) is amended to read as follows:

''(A) The term 'order of removal' means the order of the immigration judge, or other such administrative officer to whom the Attorney General or the Secretary has delegated the responsibility for determining whether an alien is removable, concluding that the alien is removable or ordering removal.''.

(8) TITLE I AND II DEFINITIONS.—Section 101(b) (8 U.S.C. 1101(b)) is amended—

(A) in paragraph (1)(F)(i), by striking ''Attorney General'' and inserting ''Secretary''; and

(B) in paragraph (4), by striking ''Immigration and Naturalization Service.'' and inserting ''Department.''.

(b) SECTION 103.—

(1) IN GENERAL.—Section 103 (8 U.S.C. 1103) is amended by striking the section heading and subsection (a)(1) and inserting the following:

**''SEC. 103. POWERS AND DUTIES.**

''(a)(1) The Secretary shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of

aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, the Attorney General, the Secretary of Labor, the Secretary of Agriculture, the Secretary of Health and Human Services, the Commissioner of Social Security, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers. A determination and ruling by the Attorney General with respect to all questions of law shall be controlling.''.

(2) TECHNICAL AND CONFORMING CORRECTIONS.—Section 103 (8 U.S.C. 1103), as amended by paragraph (1), is further amended—

(A) in subsection (a)—

(i) in paragraph (2), by striking ''He'' and inserting ''The Secretary'';

(ii) in paragraph (3)—

(I) by striking ''He'' and inserting ''The Secretary'';

(II) by striking ''he'' and inserting ''the Secretary''; and

(III) by striking ''his authority'' and inserting ''the authority of the Secretary'';

(iii) in paragraph (4)—

(I) by striking ''He'' and inserting ''The Secretary''; and

(II) by striking ''Service or the Department of Justice'' and insert the ''Department'';

(iv) in paragraph (5)—

(I) by striking ''He'' and inserting ''The Secretary'';

(II) by striking ''his discretion,'' and inserting ''the discretion of the Secretary,'' and

(III) by striking ''him'' and inserting ''the Secretary'';

(v) in paragraph (6)—

(I) by striking ''He'' and inserting ''The Secretary'';

(II) by striking ''Department'' and inserting ''agency, department,''; and

(III) by striking ''Service.'' and inserting ''Department or upon consular officers with respect to the granting or refusal of visas'';

(vi) in paragraph (7)—

(I) by striking ''He'' and inserting ''The Secretary'';

(II) by striking ''countries;'' and inserting ''countries'';

(III) by striking ''he'' and inserting ''the Secretary''; and

(IV) by striking ''his judgment'' and inserting ''the judgment of the Secretary'';

(vii) in paragraph (8), by striking ''Attorney General'' and inserting ''Secretary'';

(viii) in paragraph (10), by striking ''Attorney General'' each place that term appears and inserting ''Secretary''; and

(ix) in paragraph (11), by striking ''Attorney General,'' and inserting ''Secretary,'';

(B) by amending subsection (c) to read as follows:

''(c) SECRETARY; APPOINTMENT.—The Secretary shall be a citizen of the United States and shall be appointed by the President, by and with the advice and consent of the Senate. The Secretary shall be charged with any and all responsibilities and authority in the adminis-

tration of the Department and of this Act. The Secretary may enter into cooperative agreements with State and local law enforcement agencies for the purpose of assisting in the enforcement of the immigration laws.'';

(C) in subsection (e)—

(i) in paragraph (1), by striking ''Commissioner'' and inserting ''Secretary''; and

(ii) in paragraph (2), by striking ''Service'' and inserting ''U.S. Citizenship and Immigration Services'';

(D) in subsection (f)—

(i) by striking ''Attorney General'' and inserting ''Secretary'';

(ii) by striking ''Immigration and Naturalization Service'' and inserting ''Department''; and

(iii) by striking ''Service,'' and inserting ''Department,''; and

(E) in subsection (g)(1), by striking ''Immigration Reform, Accountability and Security Enhancement Act of 2002'' and inserting ''Homeland Security Act of 2002 (Public Law 107–296; 116 Stat. 2135)''.

(3) CLERICAL AMENDMENT.—The table of contents in the first section is amended by striking the item relating to section 103 and inserting the following:

''Sec. 103. Powers and duties.''.

(c) SECTION 105.—Section 105(a) is amended (8 U.S.C. 1105(a)) by striking ''Commissioner'' each place that term appears and inserting ''Secretary''.

**SEC. 6003. TECHNICAL AMENDMENTS TO TITLE II OF THE IMMIGRATION AND NATIONALITY ACT.**

(a) SECTION 202.—Section 202(a)(1)(B) (8 U.S.C. 1152(a)(1)(B)) is amended by inserting ''the Secretary or'' after ''the authority of''.

(b) SECTION 203.—Section 203 (8 U.S.C. 1153) is amended—

(1) in subsection (b)(2)(B)(ii)—

(A) in subclause (II)—

(i) by inserting ''the Secretary or'' before ''the Attorney General''; and

(ii) by moving such subclause 4 ems to the left; and

(B) by moving subclauses (III) and (IV) 4 ems to the left; and

(2) in subsection (f) (as redesignated by section 4003(a)(2))—

(A) by striking ''Secretary's'' and inserting ''Secretary of State's''; and

(B) by inserting ''of State'' after ''but the Secretary''.

(c) SECTION 204.—Section 204 (8 U.S.C. 1154) is amended—

(1) in subsection (a)(1)(G)(ii), by inserting ''of State'' after ''by the Secretary'';

(2) in subsection (c), by inserting ''the Secretary or'' before ''the Attorney General'' each place that term appears; and

(3) in subsection (e), by inserting ''to'' after ''admitted''.

(d) SECTION 208.—Section 208 (8 U.S.C. 1158) is amended—

(1) in subsection (a)(2)—

(A) by inserting ''the Secretary or'' before ''Attorney General'' in subparagraph (A);

(B) by inserting ''the Secretary or'' before ''Attorney General'' in subparagraph (D);

(2) in subsection (b)(2)—

(A) in subparagraph (B)(ii), by inserting ''the Secretary or'' before ''Attorney General'';

(B) in subparagraph (C), by inserting ''the Secretary or'' before ''Attorney General''; and

(C) in subparagraph (D), by inserting ''the Secretary or'' before ''Attorney General''.

(3) in subsection (c)—

(A) in paragraph (1), by striking ''the Attorney General'' and inserting ''the Secretary'';

(B) in paragraphs (2) and (3), by inserting ''the Secretary or'' before ''Attorney General'' each place that term appears; and

(4) in subsection (d)—

(A) in paragraph (1), by inserting ''the Secretary or'' before ''the Attorney General'',

(B) in paragraph (2), by striking ''Attorney General'' and inserting ''Secretary'';

(C) in paragraph (3)—

(i) by striking ''Attorney General'' each place that term appears and inserting ''Secretary''; and

(ii) by striking ''Attorney General's'' and inserting ''Secretary's''; and

(D) in paragraphs (4) through (6), by inserting ''the Secretary or'' before ''the Attorney General''; and

(e) SECTION 209.—Section 209(a)(1)(A) (8 U.S.C. 1159(a)(1)(A)) is amended by striking ''Secretary of

Homeland Security or the Attorney General'' each place that term appears and inserting ''Secretary''.

(f) SECTION 212.—Section 212 (8 U.S.C. 1182) is amended—

(1) in subsection (a)—

(A) in paragraph (2), in subparagraphs (C), (H)(ii), and (I), by inserting '', the Secretary,'' before ''or the Attorney General'' each place that term appears;

(B) in paragraph (3)—

(i) in subparagraph (B)(ii)(II), by inserting '', the Secretary,'' before ''or the Attorney General'' each place that term appears; and

(ii) in subparagraph (D), by inserting ''the Secretary or'' before ''the Attorney General'' each place that term appears;

(C) in paragraph (4)—

(i) in subparagraph (A), by inserting ''the Secretary or'' before ''the Attorney General''; and

(ii) in subparagraph (B), by inserting '', the Secretary,'' before ''or the Attorney General'' each place that term appears;

(D) in paragraph (5)(C), by striking ''or, in the case of an adjustment of status, the Attorney General, a certificate from the Commission on Graduates of Foreign Nursing Schools, or a certificate from an equivalent independent credentialing organization approved by the Attorney General'' and inserting ''or, in the case of an adjustment of status, the Secretary or the Attorney General, a certificate from the Commission on Graduates of Foreign Nursing Schools, or a certificate from an equivalent independent credentialing organization approved by the Secretary'';

(E) in paragraph (9)—

(i) in subparagraph (B)(v)—

(I) by inserting ''or the Secretary'' after ''Attorney General'' each place that term appears; and

(II) by striking ''has sole discretion'' and inserting ''have discretion''; and

(ii) in subparagraph (C)(iii), by inserting ''or the Attorney General'' after ''Secretary of Homeland Security''; and

(F) in paragraph (10)(C), in clauses (ii)(III) and (iii)(II), by striking ''Secretary's'' and inserting ''Secretary of State's'';

(2) in subsection (d), in paragraphs (11) and (12), by inserting ''or the Secretary'' after ''Attorney General'' each place that term appears;

(3) in subsection (e), by striking the first proviso and inserting the following: ''Provided, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Secretary after the Secretary has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his or her nationality or last residence because the alien would be subject to persecution on account of race, religion, or political opinion, the Secretary may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Secretary

to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States Government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements under section 214(l):'';

(4) in subsections (g), (h), (i), and (k), by inserting ''or the Secretary'' after ''Attorney General'' each place that term appears;

(5) in subsection (m)(2)(E)(iv), by inserting ''of Labor'' after ''Secretary'' the second and third place that term appears;

(6) in subsection (n), by inserting ''of Labor'' after ''Secretary'' each place that term appears, except that this amendment shall not apply to references to the ''Secretary of Labor''; and

(7) in subsection (s), by inserting '', the Secretary,'' before ''or the Attorney General''.

(g) SECTION 213A.—Section 213A (8 U.S.C. 1183a) is amended—

(1) in subsection (a)(1), in the matter preceding paragraph (1), by inserting '', the Secretary,'' after ''the Attorney General''; and

(2) in subsection (f)(6)(B), by inserting ''the Secretary,'' after ''The Secretary of State,''.

(h) SECTION 214.—Section 214(c)(9)(A) (8 U.S.C. 1184(c)(9)(A) is amended, in the matter preceding clause (i), by striking ''before''.

(i) SECTION 217.—Section 217 (8 U.S.C. 1187) is amended—

(1) in subsection (e)(3)(A), by inserting a comma after ''Regulations'';

(2) in subsection (f)(2)(A), by striking ''section (c)(2)(C),'' and inserting ''subsection (c)(2)(C),''; and

(3) in subsection (h)(3)(A), by striking ''the alien'' and inserting ''an alien''.

(j) SECTION 218.—Section 218 (8 U.S.C. 1188) is amended—

(1) by inserting ''of Labor'' after ''Secretary'' each place that term appears, except that this amendment shall not apply to references to the ''Secretary of Labor'' or to the ''Secretary of Agriculture'';

(2) in subsection (c)(3)(B)(iii), by striking ''Secretary's'' and inserting ''Secretary of Labor's''; and

(3) in subsection (g)(4), by striking ''Secretary's'' and inserting ''Secretary of Agriculture's''.

(k) SECTION 219.—Section 219 (8 U.S.C. 1189) is amended—

(1) in subsection (a)(1)(B)—

(A) by inserting a close parenthesis after ''section 212(a)(3)(B)''; and

(B) by striking the close parenthesis before the semicolon;

(2) in subsection (c)(3)(D), by striking ''(2),'' and inserting ''(2);''; and

(3) in subsection (d)(4), by striking ''the Secretary of the Treasury'' and inserting ''the Secretary of Homeland Security, the Secretary of the Treasury,''.

(l) SECTION 222.—Section 222 (8 U.S.C. 1202)—

(1) by inserting ''or the Secretary'' after ''Secretary of State'' each place that term appears; and

(2) in subsection (f)—

(A) in the matter preceding paragraph (1), by inserting '', the Department,'' after ''Department of State''; and

(B) in paragraph (2), by striking ''Secretary's'' and inserting ''their''.

(m) SECTION 231.—Section 231 (8 U.S.C. 1221) is amended—

(1) in subsection (c)(10), by striking ''Attorney General,'' and inserting ''Secretary,'';

(2) in subsection (f), by striking ''Attorney General'' each place that term appears and inserting ''Secretary'';

(3) in subsection (g)—

(A) by striking ''Attorney General'' each places that term appears and inserting ''Secretary'';

(B) by striking ''Commissioner'' each place that term appears and inserting ''Secretary''; and

(4) in subsection (h), by striking ''Attorney General'' each place that term appears and inserting ''Secretary''.

(n) SECTION 236.—Section 236(e) (8 U.S.C. 1226(e)) is amended—

(1) by striking ''review.'' and inserting ''review, other than administrative review by the Attorney General pursuant to the authority granted under section 103(g).''; and

(2) by inserting ''the Secretary or'' before ''the Attorney General under''.

(o) SECTION 236A.—Section 236A(a)(4) (8 U.S.C. 1226a(a)(4)) is amended by striking ''Deputy Attorney General'' both places that term appears and inserting ''Deputy Secretary of Homeland Security''.

(p) SECTION 237.—Section 237(a) (8 U.S.C. 1227(a)) is amended—

(1) in the matter preceding paragraph (1), by inserting ''following the initiation by the Secretary of removal proceedings'' after ''upon the order of the Attorney General''; and

(2) in paragraph (2)(E), in the subparagraph heading, by striking '', CRIMES AGAINST CHILDREN AND'' and inserting ''; CRIMES AGAINST CHILDREN''.

(q) SECTION 238.—Section 238 (8 U.S.C. 1228) is amended—

(1) in subsection (a)—

(A) in paragraph (2), by striking ''Attorney General'' each place that term appears and inserting ''Secretary''; and

(B) in paragraphs (3) and (4)(A), by inserting ''and the Secretary'' after ''Attorney General'' each place that term appears; and

(2) in subsection (e) (as redesignated by section 1703(a)(4))—

(A) by striking ''Commissioner'' each place that term appears and inserting ''Secretary'';

(B) by striking ''Attorney General'' each place that term appears and inserting ''Secretary''; and

(C) in subparagraph (D)(iv), by striking ''Attorney General'' and inserting ''United States Attorney''.

(r) SECTION 239.—Section 239(a)(1) (8 U.S.C. 1229(a)(1)) is amended by inserting ''and the Secretary'' after ''Attorney General'' each place that term appears.

(s) SECTION 240.—Section 240 (8 U.S.C. 1229a) is amended—

(1) in subsection (b)—

(A) in paragraph (1), by inserting '', with the concurrence of the Secretary with respect to employees of the Department'' after ''Attorney General''; and

(B) in paragraph (5)(A), by inserting ''the Secretary or'' before ''the Attorney General''; and

(2) in subsection (c)—

(A) in paragraph (2), by inserting '', the Secretary of State, or the Secretary'' before ''to be confidential''; and

(B) in paragraph (7)(C)(iv)(I), by striking ''240A(b)(2)'' and inserting ''section 240A(b)(2)''.

(t) SECTION 240A.—Section 240A(b) (8 U.S.C. 1229b(b)) is amended—

(1) in paragraph (3), by striking ''Attorney General shall'' and inserting ''Secretary shall''; and

(2) in paragraph (4)(A), by striking ''Attorney General'' and inserting ''Secretary''.

(u) SECTION 240B.—Section 240B(a) (8 U.S.C. 1229c(a)) is amended in paragraphs (1) and (3), by inserting ''or the Secretary'' after ''Attorney General'' each place that term appears.

(v) SECTION 241.—Section 241 (8 U.S.C. 1231) is amended—

(1) in subsection (a)(4)(B)(i), by inserting a close parenthesis after ''(L)'';

(2) in subsection (g)(2)—

(A) by striking the paragraph heading and inserting ''DETENTION FACILITIES OF THE DEPARTMENT OF HOMELAND SECURITY.—''; and

(B) by striking ''Service, the Commissioner'' and inserting ''Department, the Secretary''.

(w) SECTION 242.—Section 242(g) (8 U.S.C. 1252(g)) is amended by inserting ''the Secretary or'' before ''the Attorney General''.

(x) SECTION 243.—Section 243 (8 U.S.C. 1253) (as amended by section 1720) is amended in subsection (b)(1)—

(1) by striking ''Attorney General'' each place that term appears and inserting ''Secretary''; and

(2) by striking ''Commissioner'' each place that term appears and inserting ''Secretary''.

(y) SECTION 244.—Section 244 (8 U.S.C. 1254a) is amended—

(1) in subsection (c)(2), by inserting ''or the Secretary'' after ''Attorney General'' each place the term appears; and

(2) in subsection (g), by inserting ''or the Secretary'' after ''Attorney General''.

(z) SECTION 245.—Section 245 (8 U.S.C. 1255) is amended—

(1) by inserting ''or the Secretary'' after ''Attorney General'' each place that term appears except in subsections (j) (other than the first reference), (l), and (m);

(2) in subsection (k)(1), adding an ''and'' at the end; and

(3) in subsection (l)—

(A) in paragraph (1), by inserting a comma after ''appropriate''; and

(B) in paragraph (2)—

(i) in the matter preceding paragraph (1), by striking ''Attorney General's'' and inserting ''Secretary's''; and

(ii) in subparagraph (B), by striking ''(10(E))'' and inserting ''(10)(E))''.

(aa) SECTION 245A.—Section 245A (8 U.S.C. 1255a) is amended—

(1) in subsection (c)(7), by striking subparagraph (C); and

(2) in subsection (h)—

(A) in paragraph (4)(C), by striking ''The The'' and inserting ''The''; and

(B) in paragraph (5), by striking ''(Public Law 96–122),'' and inserting ''(8 U.S.C. 1522 note),''.

(bb) SECTION 251.—Section 251(d) (8 U.S.C. 1281(d)) is amended—

(1) by striking ''Attorney General'' each place that term appears and inserting ''Secretary''; and

(2) by striking ''Commissioner'' each place that term appears and inserting ''Secretary''.

(cc) SECTION 254.—Section 254(a) (8 U.S.C. 1284(a)) is amended by striking ''Commissioner'' each place that term appears and inserting ''Secretary''.

(dd) SECTION 255.—Section 255 (8 U.S.C. 1285) is amended by striking ''Commissioner'' each place that term appears and inserting ''Secretary''.

(ee) SECTION 256.—Section 256 (8 U.S.C. 1286) is amended—

(1) by striking ''Commissioner'' each place that term appears and inserting ''Secretary'';

(2) in the first and second sentences, by striking ''Attorney General'' each place that term appears and inserting ''Secretary''.

(ff) SECTION 258.—Section 258 (8 U.S.C. 1288) is amended—

(1) by inserting ''of Labor'' after ''Secretary'' each place that term appears (except for in subsection (e)(2)), except that this amendment shall not apply to references to the ''Secretary of Labor'', ''the Secretary of State'';

(2) in subsection (d)(2)(A), by striking ''at'' after ''while''; and

(3) in subsection (e)(2), by striking ''the Secretary shall'' and inserting ''the Secretary of State shall''.

(gg) SECTION 264.—Section 264(f) (8 U.S.C. 1304(f)) is amended by striking ''Attorney General is'' and inserting ''Attorney General and the Secretary are''.

(hh) SECTION 272.—Section 272 (8 U.S.C. 1322) is amended by striking ''Commissioner'' each place that term appears and inserting ''Secretary''.

(ii) SECTION 273.—Section 273 (8 U.S.C. 1323) is amended—

(1) by striking ''Commissioner'' each place that term appears and inserting ''Secretary''; and

(2) by striking ''Attorney General'' each place that term appears (except in subsection (e), in the matter preceding paragraph (1)) and inserting ''Secretary''.

(jj) SECTION 274.—Section 274(b)(2) (8 U.S.C. 1324(b)(2)) is amended by striking ''Secretary of the Treasury'' and inserting ''Secretary''.

(kk) SECTION 274B.—Section 274B(f)(2) (8 U.S.C. 1324b(f)(2)) is amended by striking ''subsection'' and inserting ''section''.

(ll) SECTION 274C.—Section 274C(d)(2)(A) (8 U.S.C. 1324c(d)(2)(A)) is amended by inserting ''or the Secretary'' after ''subsection (a), the Attorney General''.

(mm) SECTION 274D.—Section 274D(a)(2) (8 U.S.C. 1324d(a)(2)) is amended by striking ''Commissioner'' and inserting ''Secretary''.

(nn) SECTION 286.—Section 286 (8 U.S.C. 1356) is amended—

(1) in subsection (q)(1)(B), by striking '', in consultation with the Secretary of the Treasury,'';

(2) in subsection (r)(2), by striking ''section 245(i)(3)(b)'' and inserting ''section 245(i)(3)(B)''; and

(3) in subsection (s)(5)—

(A) by striking ''5 percent'' and inserting ''USE OF FEES FOR DUTIES RELATING TO PETITIONS.—Five percent''; and

(B) by striking ''paragraph (1) (C) or (D) of section 204'' and inserting ''subparagraph (C) or (D) of section 204(a)(1)''.

(oo) SECTION 294.—Section 294 (8 U.S.C. 1363a) is amended—

(1) in subsection (a), in the undesignated matter following paragraph (4), by striking ''Commissioner, in consultation with the Deputy Attorney General,'' and inserting ''Secretary''; and

(2) in subsection (d), by striking ''Deputy Attorney General'' and inserting ''Secretary''.

**SEC. 6004. TECHNICAL AMENDMENTS TO TITLE III OF THE IMMIGRATION AND NATIONALITY ACT.**

(a) SECTION 316.—Section 316 (8 U.S.C. 1427) is amended—

(1) in subsection (d), by inserting ''or by the Secretary'' after ''Attorney General''; and

(2) in subsection (f)(1), by striking ''Intelligence, the Attorney General and the Commissioner of Immigration'' and inserting ''Intelligence and the Secretary''.

(b) SECTION 322.—Section 322(a)(1) (8 U.S.C. 1433(a)(1)) is amended—

(1) by inserting ''is'' before ''(or,''; and

(2) by striking ''is'' before ''a citizen''.

(c) SECTION 342.—

(1) SECTION HEADING.—

(A) IN GENERAL.—Section 342 (8 U.S.C. 1453) is amended by striking the section heading and inserting ''**CANCELLATION OF CERTIFICATES; ACTION NOT TO AFFECT CITIZENSHIP STATUS**''.

(B) CLERICAL AMENDMENT.—The table of contents in the first section is amended by striking the item relating to section 342 and inserting the following:

''Sec. 342. Cancellation of certificates; action not to affect citizenship status.''.

(2) IN GENERAL.—Section 342 (8 U.S.C. 1453) is amended—

(A) by striking ''heretofore issued or made by the Commissioner or a Deputy Commissioner or hereafter made by the Attorney General''; and

(B) by striking ''practiced upon, him or the Commissioner or a Deputy Commissioner;''.

**SEC. 6005. TECHNICAL AMENDMENT TO TITLE IV OF THE IMMIGRATION AND NATIONALITY ACT.**

Section 412(a)(2)(C)(i) (8 U.S.C. 1522(a)(2)(C)(i)) is amended by striking ''insure'' and inserting ''ensure''.

**SEC. 6006. TECHNICAL AMENDMENTS TO TITLE V OF THE IMMIGRATION AND NATIONALITY ACT.**

(a) SECTION 504.—Section 504 (8 U.S.C. 1534) is amended—

(1) in subsection (a)(1)(A), by striking ''a'' before ''removal proceedings'';

(2) in subsection (i), by striking ''Attorney General'' inserting ''Government''; and

(3) in subsection (k)(2), by striking ''by''.

(b) SECTION 505.—Section 505(e)(2) (8 U.S.C. 1535(e)(2)) is amended by inserting ''and the Secretary'' after ''Attorney General''.

**SEC. 6007. OTHER AMENDMENTS.**

(a) CORRECTION OF COMMISSIONER OF IMMIGRATION AND NATURALIZATION.—

(1) IN GENERAL.—The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) as amended by this Act, is further amended by striking ''Commissioner'' and ''Commissioner of Immigration and Naturalization'' each place those terms appear and inserting ''Secretary''.

(2) EXCEPTION FOR COMMISSIONER OF SOCIAL SECURITY.—The amendment made by paragraph (1) shall not apply to any reference to the ''Commissioner of Social Security''.

(b) CORRECTION OF BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES.—Section 451(a)(1) of the Homeland Security Act of 2002 (6 U.S.C. 271(a)(1)) is amended by striking ''a bureau to be known as the 'Bureau of Citizenship and Immigration Services' '' and inserting ''an agency to be known as the 'United States Citizenship and Immigration Services', the headquarters of which shall be in the same State as the office of the Secretary.''.

(c) CORRECTION OF IMMIGRATION AND NATURALIZATION SERVICE.—The Immigration and Nationality Act (8 U.S.C. 1101 et seq.), as amended by this Act, is further amended by striking ''Service'' and ''Immigration and

Naturalization Service'' each place those terms appear and inserting ''Department''.

(d) CORRECTION OF DEPARTMENT OF JUSTICE.—

(1) IN GENERAL.—The Immigration and Nationality Act (8 U.S.C. 1101 et seq.), as amended by this Act, is further amended by striking ''Department of Justice'' each place that term appears and inserting ''Department''.

(2) EXCEPTIONS.—The amendment made by paragraph (1) shall not apply in—

(A) subsections (d)(3)(A) and (r)(5)(A) of section 214 (8 U.S.C. 1184);

(B) section 274B(c)(1) (8 U.S.C. 1324b(c)(1)); or

(C) title V (8 U.S.C. 1531 et seq.).

(e) CORRECTION OF ATTORNEY GENERAL.—The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) as amended by this Act, is further amended by striking ''Attorney General'' each place that term appears and inserting ''Secretary'', except for in the following:

(1) Any joint references to the ''Attorney General and the Secretary of Homeland Security'' or ''the Secretary of Homeland Security and the Attorney General''.

(2) Section 101(a)(5).

(3) Subparagraphs (S), (T), and (V) of section 101(a)(15).

(4) Section 101(a)(47)(A).

(5) Section 101(b)(4).

(6) Subsections (a)(1) and (g) of section 103.

(7) Subsections (b)(1) and (c) of section 105.

(8) Section 204(c).

(9) Section 208.

(10) Subparagraphs (C), (H), and (I) of section 212(a)(2).

(11) Subparagraphs (A), (B)(ii)(II), and (D) of section 212(a)(3).

(12) Section 212(a)(9)(C)(iii).

(13) Paragraphs (11) and (12) of section 212(d).

(14) Subsections (g), (h), (i), (k), and (s) of section 212.

(15) Subsections (a)(1) and (f)(6)(B) of section 213A.

(16) Section 216(d)(2)(c).

(17) Section 219(d)(4).

(18) Section 235(b)(1)(B)(iii)(III).

(19) The second sentence of section 236(e).

(20) Section 237.

(21) Paragraphs (1), (3), and (4)(A) of section 238(a).

(22) Paragraphs (1) and (5) of section 238(b).

(23) Section 238(c)(2)(D)(iv).

(24) Subsections (a) and (b) of section 239.

(25) Section 240.

(26) Section 240A.

(27) Subsections (a)(1), (a)(3), (b), and (c) of section 240B.

(28) The first reference in section 241(a)(4)(B)(i).

(29) Section 241(b)(3) (except for the first reference in subparagraph (A), to which the amendment shall apply).

(30) Section 241(i) (except for paragraph (3)(B)(i), to which the amendment shall apply).

(31) Section 242(a)(2)(B).

(32) Section 242(b) (except for paragraph (8), to which the amendment shall apply).

(33) Section 242(g).

(34) Subsections (a)(3)(C), (c)(2), (e), and (g) of section 244.

(35) Section 245 (except for subsection (i)(1)(B)(i), subsection (i)(3)) and the first reference to the Attorney General in subsection 245(j)).

(36) Section 245A(a)(1)(A).

(37) Section 246(a).

(38) Section 249.

(39) Section 264(f).

(40) Section 274(e).

(41) Section 274A.

(42) Section 274B.

(43) Section 274C.

(44) Section 292.

(45) Subsections (d) and (f)(1) of section 316.

(46) Section 342.

(47) Section 412(f)(1)(A).

(48) Title V (except for subsections 506(a)(1) and 507(b), (c), and (d) (first reference), to which the amendment shall apply).

**SEC. 6008. REPEALS; RULE OF CONSTRUCTION.**

(a) REPEALS.—

(1) IMMIGRATION AND NATURALIZATION SERVICE.—

(A) IN GENERAL.—Section 4 of the Act of February 14, 1903 (32 Stat. 826, chapter 552; 8 U.S.C. 1551) is repealed.

(B) 8 U.S.C. 1551.—The language of the compilers set out in section 1551 of title 8 of

the United States Code shall be removed from the compilation of such title 8.

(2) COMMISSIONER OF IMMIGRATION AND NATURALIZATION; OFFICE.—

(A) IN GENERAL.—Section 7 of the Act of March 3, 1891 (26 Stat. 1085, chapter 551; 8 U.S.C. 1552) is repealed.

(B) 8 U.S.C. 1552.—The language of the compilers set out in section 1552 of title 8 of the United States Code shall be removed from the compilation of such title 8.

(3) ASSISTANT COMMISSIONERS AND DISTRICT DIRECTOR; COMPENSATION AND SALARY GRADE.—Title II of the Department of Justice Appropriation Act, 1957 (70 Stat. 307, chapter 414; 8 U.S.C. 1553) is amended, in the matter under the heading ''Immigration and Naturalization Service'' and under the subheading ''SALARIES AND EXPENSES'', by striking ''That the compensation of the five assistant commissioners and one district director shall be at the rate of grade GS–16: Provided further''.

(4) SPECIAL IMMIGRANT INSPECTORS AT WASHINGTON.—The Act of March 2, 1895 (28 Stat. 780, chapter 177; 8 U.S.C. 1554) is amended in the mat-

ter following the heading ''Bureau of Immigration:'' by striking ''That hereafter special immigrant inspectors, not to exceed three, may be detailed for duty in the Bureau at Washington: And provided further,''.

(b) RULE OF CONSTRUCTION.—Nothing in this title may be construed to repeal or limit the applicability of sections 462 and 1512 of the Homeland Security Act of 2002 (6 U.S.C. 279 and 552) with respect to any provision of law or matter not specifically addressed by the amendments made by this title.

**SEC. 6009. MISCELLANEOUS TECHNICAL CORRECTION.**

Section 7 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 3508) is amended by striking ''Commissioner of Immigration'' and inserting ''Secretary of Homeland Security''.

MDM18172 S.L.C.

AMENDMENT NO._____ Calendar No._____

Purpose: To protect children affected by immigration enforcement actions.

**IN THE SENATE OF THE UNITED STATES—115th Cong., 2d Sess.**

**H. R. 2579**

**AMENDMENT No. 1974**

**By** SMITH

**To:** _____ and

HR2579

10

**Page(s)** SMITH

GPO: 2016 22–945 (mac)

1 At the appropriate place, insert the following:

2 **SECTION ___. HELPING SEPARATED CHILDREN.**

3 (a) SHORT TITLES.—This section may be cited as the
4 "Humane Enforcement and Legal Protections for Sepa-
5 rated Children Act" or the "HELP Separated Children
6 Act".

7 (b) DEFINITIONS.—In this section:

8 (1) APPREHENSION.—The term "apprehension"
9 means the detention or arrest by officials of the De-
10 partment or cooperating entities.

(2) CHILD.—The term "child" means an individual who is younger than 18 years of age.

(3) CHILD WELFARE AGENCY.—The term "child welfare agency" means a State or local agency responsible for child welfare services under subtitles B and E of title IV of the Social Security Act (42 U.S.C. 601 et seq.).

(4) COOPERATING ENTITY.—The term "cooperating entity" means a State or local entity acting under agreement with the Secretary.

(5) DEPARTMENT.—The term "Department" means the Department of Homeland Security.

(6) DETENTION FACILITY.—The term "detention facility" means a Federal, State, or local government facility, or a privately owned and operated facility, that is used, in whole or in part, to hold individuals under the authority of the Director of U.S. Immigration and Customs Enforcement, including facilities that hold such individuals under a contract or agreement with the Director.

(7) IMMIGRATION ENFORCEMENT ACTION.—The term "immigration enforcement action" means the apprehension of one or more individuals whom the Department has reason to believe are removable

from the United States by the Secretary or a cooperating entity.

(8) PARENT.—The term "parent" means a biological or adoptive parent of a child, whose parental rights have not been relinquished or terminated under State law or the law of a foreign country, or a legal guardian under State law or the law of a foreign country.

(9) SECRETARY.—The term "Secretary" means the Secretary of Homeland Security.

(c) APPREHENSION PROCEDURES FOR IMMIGRATION ENFORCEMENT-RELATED ACTIVITIES.—

(1) APPREHENSION PROCEDURES.—In any immigration enforcement action, the Secretary and cooperating entities shall—

(A) as soon as possible, but generally not later than 2 hours after an immigration enforcement action, inquire whether an individual is a parent or primary caregiver of a child in the United States and provide any such individuals with—

(i) the opportunity to make a minimum of 2 telephone calls to arrange for the care of such child in the individual's absence; and

(ii) contact information for—

(I) child welfare agencies and family courts in the same jurisdiction as the child; and

(II) consulates, attorneys, and legal service providers capable of providing free legal advice or representation regarding child welfare, child custody determinations, and immigration matters;

(B) notify the child welfare agency with jurisdiction over the child if the child's parent or primary caregiver is unable to make care arrangements for the child or if the child is in imminent risk of serious harm;

(C) ensure that personnel of the Department and cooperating entities do not, absent medical necessity or extraordinary circumstances, compel or request children to interpret or translate for interviews of their parents or of other individuals who are encountered as part of an immigration enforcement action; and

(D) ensure that any parent or primary caregiver of a child in the United States—

(i) absent medical necessity or extraordinary circumstances, is not transferred from his or her area of apprehension until the individual—

(I) has made arrangements for the care of such child; or

(II) if such arrangements are unavailable or the individual is unable to make such arrangements, is informed of the care arrangements made for the child and of a means to maintain communication with the child;

(ii) absent medical necessity or extraordinary circumstances, and to the extent practicable, is placed in a detention facility that is—

(I) proximate to the location of apprehension; and

(II) proximate to the child's habitual place of residence; and

(iii) receives due consideration of the best interests of such child in any decision or action relating to his or her detention, release, or transfer between detention facilities.

(2) REQUESTS TO STATE AND LOCAL ENTITIES.—If the Secretary requests a State or local entity to hold in custody an individual whom the Department has reason to believe is removable pending transfer of that individual to the custody of the Secretary or to a detention facility, the Secretary shall also request that the State or local entity provide the individual the protections specified in subparagraphs (A) and (B) of paragraph (1) if that individual is found to be the parent or primary caregiver of a child in the United States.

(3) PROTECTIONS AGAINST TRAFFICKING PRESERVED.—Nothing in this subsection may be construed to impede, delay, or limit the obligations of the Secretary, the Attorney General, or the Secretary of Health and Human Services under section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (8 U.S.C. 1232), section 462 of the Homeland Security Act of 2002 (6 U.S.C. 279), or the Stipulated Settlement Agreement filed in the United States District Court for the Central District of California on January 17, 1997 (CV 85-4544-RJK) (commonly known as the "Flores Settlement Agreement").

(d) ACCESS TO CHILDREN, STATE AND LOCAL COURTS, CHILD WELFARE AGENCIES, AND CONSULAR OFFICIALS.—At all detention facilities, the Secretary shall—

(1) prominently post in a manner accessible to detainees and visitors and include in detainee handbooks information on the protections of this subtitle as well as information on potential eligibility for parole or release;

(2) absent extraordinary circumstances, ensure that individuals who are detained by the Department and are parents of children in the United States are—

(A) permitted regular phone calls and contact visits with their children;

(B) provided with contact information for child welfare agencies and family courts in the relevant jurisdictions;

(C) able to participate fully and, to the extent possible, in person in all family court proceedings and any other proceedings that may impact their right to custody of their children;

(D) granted free and confidential telephone calls to relevant child welfare agencies and family courts as often as is necessary to ensure

that the best interest of their children, including a preference for family unity whenever appropriate, can be considered in child welfare agency or family court proceedings;

(E) able to fully comply with all family court or child welfare agency orders impacting custody of their children;

(F) provided access to United States passport applications or other relevant travel document applications for the purpose of obtaining travel documents for their children;

(G) afforded timely access to a notary public for the purpose of applying for a passport for their children or executing guardianship or other agreements to ensure the safety of their children; and

(H) granted adequate time before removal to obtain passports, apostilled birth certificates, travel documents, and other necessary records on behalf of their children if such children will accompany them on their return to their country of origin or join them in their country of origin; and

(3) if doing so would not impact public safety or national security, facilitate the ability of detained

alien parents and primary caregivers to share information regarding travel arrangements with their consulate, children, child welfare agencies, or other caregivers in advance of the detained alien individual's departure from the United States.

(e) MANDATORY TRAINING.—The Secretary, in consultation with the Secretary of Health and Human Services and independent child welfare and family law experts, shall develop and provide training on the protections required under subsections (c) and (d) to all personnel of the Department, cooperating entities, and detention facilities operated by or under agreement with the Department who regularly engage in immigration enforcement actions, including detention, and in the course of such actions come into contact with individuals who are parents or primary caregivers of children in the United States.

(f) RULEMAKING.—Not later than 180 days after the date of the enactment of this Act, the Secretary shall promulgate regulations to implement subsections (c) and (d).

(g) SEVERABILITY.—If any provision of this section, any amendment made by this section, or the application of any such provision or amendment to any person or circumstance is held to be unconstitutional, the remaining provisions of this section, the remaining amendments made by this section, and the application of such provi-

sions and amendments to any person or circumstance shall not be affected by such holding.

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EOIR # SL971530

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

| | | |
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| **In the Matter of:** | ) | |
| **Reynaldo Castro-Tum** | ) | **File No.** (b) (6) |
| **In removal proceedings** | ) | |

*AMICI CURIAE* BRIEF OF RETIRED IMMIGRATION JUDGES AND FORMER MEMBERS OF THE BOARD OF IMMIGRATION APPEALS

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## INTERESTS OF AMICI

*Amici curiae* are retired Immigration Judges and former members of the Board of Immigration Appeals, who seek to address the Attorney General's certified questions regarding administrative closure. *Amici* were appointed to serve at immigration courts around the United States and with the Board, and at senior positions with the Executive Office of Immigration Review. From their many combined years of service, *amici* have intimate knowledge of the operation of the immigration courts, including the importance of various procedural mechanisms to maintain efficient dockets. As explained in detail, administrative closure, when used judiciously, is a critical tool for immigration judges in managing their dockets. Without tools like administrative closure, immigration judges would be hampered, unable to set aside those matters that do not yet require court intervention and thus prevented from focusing on the removal cases that demand immediate attention.

In particular, the **Honorable Sarah M. Burr** served as a U.S. Immigration Judge in New York from 1994 and was appointed as Assistant Chief Immigration Judge in charge of the New York, Fishkill, Ulster, Bedford Hills and Varick Street immigration courts in 2006. She served in this capacity until January 2011, when she returned to the bench full-time until she retired in 2012. Prior to her appointment, she worked as a staff attorney for the Criminal Defense Division of the Legal Aid Society in its trial and appeals bureaus and also as the supervising attorney in its immigration unit. She currently serves on the Board of Directors of the Immigrant Justice Corps.

The **Honorable Jeffrey S. Chase** served as an Immigration Judge in New York City from 1995 to 2007 and was an attorney advisor and senior legal advisor at the Board from 2007 to 2017. He is presently in private practice as an independent consultant on immigration law, and

is of counsel to the law firm of DiRaimondo & Masi in New York City. Prior to his appointment, he was a sole practitioner and volunteer staff attorney at Human Rights First. He also was the recipient of the American Immigration Lawyers Association's annual pro bono award in 1994 and chaired AILA's Asylum Reform Task Force.

The **Honorable Bruce J. Einhorn** served as a United States Immigration Judge in Los Angeles from 1990 to 2007. He now serves as an Adjunct Professor of Law at Pepperdine University School of Law in Malibu, California, and a Visiting Professor of International, Immigration, and Refugee Law at the University of Oxford, England. He is also a contributing op-ed columnist at D.C.-based *The Hill* newspaper. He is a member of the Bars of Washington D.C., New York, Pennsylvania, and the Supreme Court of the United States.

The **Honorable Cecelia M. Espenoza** served as a Member of the Executive Office for Immigration Review ("EOIR") Board of Immigration Appeals from 2000-2003 and in the Office of the General Counsel from 2003-2017 where she served as Senior Associate General Counsel, Privacy Officer, Records Officer and Senior FOIA Counsel. She is presently in private practice as an independent consultant on immigration law, and a member of the World Bank's Access to Information Appeals Board. Prior to her EOIR appointments, she was a law professor at St. Mary's University (1997-2000) and the University of Denver College of Law (1990-1997) where she taught Immigration Law and Crimes and supervised students in the Immigration and Criminal Law Clinics. She has published several articles on Immigration Law. She is a graduate of the University of Utah and the University of Utah S.J. Quinney College of Law. She was recognized as the University of Utah Law School's Alumna of the Year in 2014 and received the Outstanding Service Award from the Colorado Chapter of the American Immigration Lawyers

Association in 1997 and the Distinguished Lawyer in Public Service Award from the Utah State Bar in 1989-1990.

The **Honorable Noel Ferris** served as an Immigration Judge in New York from 1994 to 2013 and an attorney advisor to the Board from 2013 to 2016, until her retirement. Previously, she served as a Special Assistant U.S. Attorney in the Southern District of New York from 1985 to 1990 and as Chief of the Immigration Unit from 1987 to 1990.

The **Honorable John F. Gossart, Jr.** served as a U.S. Immigration Judge from 1982 until his retirement in 2013 and is the former president of the National Association of Immigration Judges. At the time of his retirement, he was the third most senior immigration judge in the United States. Judge Gossart was awarded the Attorney General Medal by then Attorney General Eric Holder. From 1975 to 1982, he served in various positions with the former Immigration Naturalization Service, including as general attorney, naturalization attorney, trial attorney, and deputy assistant commissioner for naturalization. He is also the co-author of the National Immigration Court Practice Manual, which is used by all practitioners throughout the United States in immigration court proceedings. From 1997 to 2016, Judge Gossart was an adjunct professor of law at the University of Baltimore School of Law teaching immigration law, and more recently was an adjunct professor of law at the University of Maryland School of Law also teaching immigration law. He has been a faculty member of the National Judicial College, and has guest lectured at numerous law schools, the Judicial Institute of Maryland and the former Maryland Institute for the Continuing Education of Lawyers. He is also a past board member of the Immigration Law Section of the Federal Bar Association. Judge Gossart served in the United States Army from 1967 to 1969 and is a veteran of the Vietnam War.

The **Honorable William P. Joyce** served as an Immigration Judge in Boston, Massachusetts. Subsequent to retiring from the bench, he has been the Managing Partner of Joyce and Associates with 1,500 active immigration cases. Prior to his appointment to the bench, he served as legal counsel to the Chief Immigration Judge. Judge Joyce also served as an Assistant U.S. Attorney for the Eastern District of Virginia, and Associate General Counsel for enforcement for INS. He is a graduate of Georgetown School of Foreign Service and Georgetown Law School.

The **Honorable Edward Kandler** was appointed as an Immigration Judge in October 1998. Prior to his appointment to the Immigration Court in Seattle in June 2004, he served as an Immigration Judge at the Immigration Court in San Francisco from August 2000 to June 2004 and at the Immigration Court in New York City from October 1998 to August 2000. Judge Kandler received a Bachelor of Arts degree in 1971 from California State University at San Francisco, a Master of Arts degree in 1974 from California State University at Hayward, and a Juris Doctorate in 1981 from the University of California at Davis. Judge Kandler served as an assistant U.S. trustee for the Western District of Washington from 1988 to 1998. He worked as an attorney for the law firm of Chinello, Chinello, Shelton & Auchard in Fresno, California, in 1988. From 1983 to 1988, Judge Kandler served as an assistant U.S. attorney in the Eastern District of California. He was also with the San Francisco law firm of Breon, Galgani, Godino from 1981 to 1983. Judge Kandler is a member of the California Bar.

The **Honorable Carol King** served as an Immigration Judge from 1995 to 2017 in San Francisco and was a temporary Board member for six months between 2010 and 2011. She previously practiced immigration law for ten years, both with the Law Offices of Marc Van Der

Hout and in her own private practice. She also taught immigration law for five years at Golden Gate University School of Law and is currently on the faculty of the Stanford University Law School Trial Advocacy Program. Judge King now works as a Removal Defense Strategist, advising attorneys and assisting with research and writing related to complex removal defense issues.

The **Honorable Lory D. Rosenberg** served on the Board from 1995 to 2002. She then served as Director of the Defending Immigrants Partnership of the National Legal Aid & Defender Association from 2002 until 2004. Prior to her appointment, she worked with the American Immigration Law Foundation from 1991 to 1995. She was also an adjunct Immigration Professor at American University Washington College of Law from 1997 to 2004. She is the founder of IDEAS Consulting and Coaching, LLC., a consulting service for immigration lawyers, and is the author of Immigration Law and Crimes. She currently works as Senior Advisor for the Immigrant Defenders Law Group.

The **Honorable Susan Roy** started her legal career as a Staff Attorney at the Board of Immigration Appeals, a position she received through the Attorney General Honors Program. She served as Assistant Chief Counsel, National Security Attorney, and Senior Attorney for the DHS Office of Chief Counsel in Newark, NJ, and then became an Immigration Judge, also in Newark. Sue has been in private practice for nearly 5 years, and two years ago, opened her own immigration law firm. Sue is the NJ AILA Chapter Liaison to EOIR, is the Vice Chair of the Immigration Law Section of the NJ State Bar Association, and in 2016 was awarded the Outstanding Prop Bono Attorney of the Year by the NJ Chapter of the Federal Bar Association.

The **Honorable Paul W. Schmidt** served as an Immigration Judge from 2003 to 2016 in Arlington, virginia. He previously served as Chairman of the Board of Immigration Appeals from 1995 to 2001, and as a Board Member from 2001 to 2003. He authored the landmark decision *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1995) extending asylum protection to victims of female genital mutilation. He served as Deputy General Counsel of the former INS from 1978 to 1987, serving as Acting General Counsel from 1986-87 and 1979-81. He was the managing partner of the Washington, D.C. office of Fragomen, DelRey & Bernsen from 1993 to 1995, and practiced business immigration law with the Washington, D.C. office of Jones, Day, Reavis and Pogue from 1987 to 1992, where he was a partner from 1990 to 1992. He served as an adjunct professor of law at George Mason University School of Law in 1989, and at Georgetown University Law Center from 2012 to 2014 and 2017 to present. He was a founding member of the International Association of Refugee Law Judges (IARLJ), which he presently serves as Americas Vice President. He also serves on the Advisory Board of AYUDA, and assists the National Immigrant Justice Center/Heartland Alliance on various projects; and speaks, writes and lectures at various forums throughout the country on immigration law topics. He also created the immigration law blog immigrationcourtside.com.

The **Honorable Polly A. Webber** served as an Immigration Judge from 1995 to 2016 in San Francisco, with details in facilities in Tacoma, Port Isabel, Boise, Houston, Atlanta, Philadelphia, and Orlando. Previously, she practiced immigration law from 1980 to 1995 in her own private practice in San Jose. She was a national officer in AILA from 1985 to 1991 and served as National President of AILA from 1989 to 1990. She has also taught immigration and nationality law at both Santa Clara University School of Law and Lincoln Law School.

The **Honorable Gustavo D. Villageliu** served as a Board of Immigration Appeals Member from July 1995 to April 2003. He then served as Senior Associate General Counsel for the Executive Office for Immigration Review until he retired in 2011, helping manage FOIA, Privacy and Security as EOIR Records Manager. Before becoming a Board Member, Villageliu was an Immigration Judge in Miami, with both detained and non-detained dockets, as well as the Florida Northern Region Institutional Criminal Alien Hearing Docket 1990-95. Mr. Villageliu was a member of the Iowa, Florida and District of Columbia Bars. He graduated from the University of Iowa College of Law in 1977. After working as a Johnson County Attorney prosecutor intern in Iowa City, Iowa he joined the Board as a staff attorney in January 1978, specializing in war criminal, investor, and criminal alien cases.

## ARGUMENT

### I. Immigration Judges and the Board have inherent and delegated authority to order administrative closure in a case

The authority of Immigration Judges and the Board of Immigration Appeals (the "BIA") to order administrative closure derives from a judge's inherent authority to manage proceedings before the court. This inherent authority has been recognized by the U.S. Supreme Court, and lower federal courts have acknowledged administrative closure as a legitimate tool for exercising it. Moreover, this Department has specifically directed Immigration Judges to use administrative closure in a number of regulations. Accordingly, the Department cannot abrogate administrative closure without—at the very least—further rulemaking, as explained below.

Immigration Judges, like federal judges, need a broad range of tools, including administrative closure, to ensure the efficient use of judicial resources and to minimize backlog. Stripping Immigration Judges of the power to order administrative closure will only impede

efficiency in the adjudication of removal proceedings. For this reason and others, *amici* urge the Department not to take that step.

### A. Federal courts have recognized that judges possess an inherent authority to order administrative closure.

All judges, including Immigration Judges, possess an inherent authority to manage their dockets. In 1936, the U.S. Supreme Court acknowledged this authority, explaining that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). "How this can best be done," the Court observed, "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254–55 (citations omitted). Administrative closure is one of the many tools both federal judges and Immigration Judges use to maintain this balance.

By referring to administrative closure as a "docket-management tool," federal courts have recognized that—like the power to stay proceedings—the power to order administrative closure is "incidental" to a court's inherent authority to control its docket. *Ali v. Quarterman*, 607 F.3d 1046, 1047 n.2 (5th Cir. 2010) (citation omitted); *Penn-America Ins. Co. v. Mapp*, 521 F.3d 290, 295 (4th Cir. 2008) (citation omitted); *see also CitiFinancial Corp. v. Harrison*, 453 F.3d 245, 250 (5th Cir. 2006) (referring to administrative closure as a "case-management tool"). The U.S. Court of Appeals for the First Circuit has explained that administrative closure "is used in various districts throughout the nation in order to shelve pending, but dormant, cases." *Lehman v. Revolution Portfolio L.L.C.*, 166 F.3d 389, 392 (1st Cir. 1999). In *Lehman*, the First Circuit "endorse[d] the judicious use of administrative closings by district courts in circumstances in

which a case, though not dead, is likely to remain moribund for an appreciable period of time." *Id.*

### B. Regulations establishing and governing Immigration Judges ratify their inherent authority to order administrative closure.

The legal framework establishing Immigration Judges indicates that they possess the same inherent authority to manage their dockets as federal judges, including the authority to order administrative closure. In the Immigration and Nationality Act, Congress defined an Immigration Judge as "an attorney whom the Attorney General appoints as an administrative *judge* . . . qualified to conduct specified classes of proceedings." 8 U.S.C. § 1101(b)(4) (2017) (emphasis added). Specifically, Congress authorized Immigration Judges to "conduct proceedings for deciding the inadmissibility or deportability of an alien." *Id.* at § 1229a(a)(1). Consistent with its designation of Immigration Judges as judges authorized to conduct proceedings, Congress granted Immigration Judges the power to "administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses." *Id.* at § 1229a(b)(1). Furthermore, Congress authorized Immigration Judges to issue subpoenas and impose civil monetary sanctions for contempt—tools also used by Article III judges to ensure the smooth operation of court proceedings. *Id.*

Building on this statutory authorization, the relevant regulation promulgated under the Immigration and Nationality Act specifically grants Immigration Judges the authority to "exercise their *independent* judgment and discretion."[1] 8 C.F.R. § 1003.10(b) (2017) (emphasis

[1] The historical shift from using Special Inquiry Officers to Immigration Judges to adjudicate removal proceedings further demonstrates the independence with which Immigration Judges are intended

added). This regulatory provisions further provides that, "[i]n deciding the individual cases before them," Immigration Judges "may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases." *Id.*; *see also id.* at § 1003.1(d)(1)(ii) (granting the same authority to the BIA). By regulatory and statutory design, then, Immigration Judges are independent adjudicators with the authority to take a broad range of actions to appropriately manage the cases before them. *See Gonzalez-Caraveo v. Sessions*, No. 14-72472, slip op. at 14 n.4 (9th Cir. Feb. 14, 2018) (explaining that Immigration Judges' authority to order administrative closure is supported by these federal regulations).

More specifically, the Department of Justice ("DOJ") has equipped Immigration Judges with the explicit regulatory authority to pause proceedings. In 1987, DOJ promulgated a regulation ratifying the inherent authority for Immigration Judges to grant continuances. 52 Fed. Reg. 2,921, 2,938 (Jan. 29, 1987) (codified at 8 C.F.R. § 1003.29 (2017)); *see also* 8 C.F.R. § 1240.6 (2017) (allowing Immigration Judges to order postponement and adjournment of hearings). Administrative closure is a type of continuance that stays in place indefinitely. The duration of this type of continuance is set by the completion of a process separate and apart from

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to operate. In 1973, the Department of Justice authorized the use of the term Immigration Judge and the wearing of judicial robes at immigration hearings. Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 Notre Dame L. Rev. 655, 673 (2006); *see also* 38 Fed. Reg. 8,590, 8,590 (Mar. 30, 1973). In updating the Judges' title and appearance, "the Justice Department recognized what had certainly been clear to aliens for significantly longer that the power to adjudicate these disputes had such a significant effect on individual rights that the adjudication should take place before a neutral judge." Durham, 81 Notre Dame L. Rev. at 673. With the power to adjudicate removal proceedings comes the inherent power to manage one's docket, including by the use of administrative closure.

removal proceedings. When Immigration Judges administratively close a case that cannot move forward until an outside process is completed, it allows them to focus on other cases before their court without having to repeatedly recalendar inactive proceedings.

DOJ has recognized this type of continuance, and its utility, by issuing a number of regulations involving the use of administrative closure. In 2001, for example, DOJ directed Immigration Judges to administratively close cases in which the immigrant "appears eligible to file for relief under [Legal Immigration Family Equity] Legalization." 8 C.F.R. § 245a.12(b)(1) (2017); 66 Fed. Reg. 29,661, 29,674 (June 1, 2001). Similarly, in 2003, DOJ promulgated a regulation instructing Immigration Judges to administratively close cases in which the immigrant "appears eligible for V nonimmigrant status." 8 C.F.R. § 1214.3 (2017); 68 Fed. Reg. 9,823, 9,836 (Feb. 28, 2003). Another regulatory provision allows victims of severe forms of human trafficking to request administrative closure of removal proceedings "to allow the alien to pursue an application for T nonimmigrant status," relief created by the Victims of Trafficking and Violence Protection Act. 8 C.F.R. § 1214.2 (2017); 68 Fed. Reg. 9,823, 9,836 (Feb. 28, 2003).[2]

Additionally, the Department of Homeland Security ("DHS") has mandated the use of administrative closure to allow respondents to proceed with administrative relief from removal.

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[2] Furthermore, a variety of regulatory provisions provide procedural instructions for when an administratively-closed case should be deemed terminated or moved to be reopened. Regulations providing for relief under the Legal Immigration Family Equity ("LIFE") Act of 2000, the Haitian Refugee Immigrant Fairness Act of 1998, and the Nicaraguan Adjustment and Central American Relief Act of 1997 each state that if an immigrant's application for relief is approved, the administratively-closed case will be deemed terminated as of the date of approval. 8 C.F.R. §§ 245a.20(a)(1), 1245.15(q)(1), 1245.13(l) (2017). They each also provide that if the application is denied, the government shall request to recalendar the administratively closed case. *Id.* at §§ 245a.20(e)(2)(i), 1245.15(r)(2)(ii), 1245.13(m)(1)(ii).

In 2013, DHS amended regulations regarding waivers of certain grounds of inadmissibility to explicitly allow immigrants, after removal proceedings have been administratively closed, to file an application for a provisional unlawful presence waiver. 78 Fed. Reg. 535, 577 (Jan. 3, 2013) (codified at 8 C.F.R. § 212.7(e)(4)(v) (2017)). If the case has not been administratively closed, U.S. Citizenship and Immigration Services ("USCIS") is prohibited from evaluating the immigrant's application for a provisional unlawful presence waiver (titled Form I-601A). Accordingly, in such cases, without the power of administrative closure to pause removal proceedings to allow these waiver applications to be processed, Immigration Judges would be forced to unnecessarily hear cases in which an immigrant may otherwise be eligible for relief—in other words, Immigration Judges could expend time and resources adjudicating the case and entering an order of removal, only to have USCIS grant a provisional unlawful presence waiver after the fact.

Underscoring its endorsement of administrative closure, in 2016 DHS explicitly rejected a commenter's suggestion that it eliminate the requirement that removal proceedings be administratively closed before an immigrant can apply for a provisional waiver of inadmissibility. 81 Fed. Reg. 50,243, 50,255 (July 29, 2016). In response to the comment, DHS stated that DOJ "instructs its [I]mmigration [J]udges to use available docketing tools to ensure fair and timely resolution of cases." *Id.* DHS further stated that it "believes that current processes provide ample opportunity for eligible applicants to seek a provisional waiver, while improving the allocation of government resources and ensuring national security, public safety, and border

security." *Id.*[3] Both in the context of waivers of inadmissibility and in general, the use of administrative closure to manage the immigration court's docket is vital to allocating judicial resources efficiently.

## II. The Board's decisions in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), and *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017), articulate the appropriate standard for administrative closure.

### A. The legal standard set forth in *Avetisyan* and *W-Y-U-* gives the Immigration Judge the correct degree of independence in deciding motions for administrative closure.

The former legal standard for administrative closure under *Matter of Gutierrez* allowed one party—usually, but not necessarily DHS—"veto power" over a motion for administrative closure. 21 I&N Dec. 479, 480 (BIA 1996); *Avetisyan*, 25 I&N at 692. *Avetisyan* rejected this veto power, instead allowing the Immigration Judge to evaluate a motion on several factors, including "the basis for any opposition to administrative closure." 25 I&N at 696. This was further clarified in *Matter of W-Y-U-*, which held that the "the primary consideration for an Immigration Judge in determining whether to administratively close or recalendar proceedings is whether the party opposing administrative closure *has provided a persuasive reason* for the case to proceed and be resolved on the merits." 27 I&N Dec. at 20 (BIA 2017).

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[3] In addition, in 2002 DOJ restricted the use of administrative closure through notice and comment rulemaking. 67 Fed. Reg. 78,667, 78,673 (Dec. 26, 2002). A provision in one narrow circumstance providing for the adjustment of status for certain nationals of Vietnam, Cambodia, and Laos stated that unless USCIS consented to an immigrant's request for administrative closure, "the [I]mmigration [J]udge or the Board may not defer or dismiss the proceeding in connection with [the immigrant's application for relief]." 8 C.F.R. § 245.21(c) (2017). By limiting the use of administrative closure in this specific scenario, DOJ implicitly acknowledged that Immigration Judges have the inherent authority to use administrative closure.

Although the legal standard under *Avetisyan* and *W-Y-U-* is proper for several reasons, *amici* focus on the degree to which it confirms the role of the Immigration Judge as an independent and neutral arbiter and as the manager of its own docket. *See* 8 U.S.C. § 1101 (b)(4); 8 C.F.R. § 1003.10(b) (mandating judges to exercise "independent judgment and discretion") (cited by *Avetisyan*, 25 I&N at 691). Removal proceedings involve significant rights, including "the right to stay and live and work in this land of freedom," and "the right to rejoin [one's] immediate family." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (internal citations and quotations omitted).[4] It follows that the respondent's *substantive* rights are intertwined with the *procedural* rules and mechanisms. "[A]n administrative tribunal's decision to proceed immediately or to defer decision can affect an individual's liberty and thus infringe upon areas that courts often are called upon to protect." *Vahora v. Holder*, 626 F.3d 907, 918 (7th Cir. 2008); *see also Matter of A-A-*, 22 I&N Dec. 140, 147 n.5 (BIA 1998) ("Deportation proceedings involve the potential deprivation of a significant liberty interest and must be conducted according to the principles of fundamental fairness and substantial justice.") (Rosenberg, J, concurring in part and dissenting in part). Given the gravity of the rights involved, it is imperative that Immigration Judges have the independence and discretion to act in their best judgment.

To afford either party "veto power" over a motion to administratively close—as was allowed under *Gutierrez*—cuts against the judicial independence that is essential to the judge's

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[4] *Plasencia* discussed deportation proceedings, which were replaced with removal proceedings under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub.L. 104 208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.). The *Plasencia* court's discussion of deportation and their bearing on individual rights is wholly applicable to the issue of removal proceedings.

role as a neutral arbiter, and interferes with efficient docket management. Indeed, Circuit Courts of Appeals have criticized the BIA's legal standards that granted the DHS unilateral veto power over other motions. In the context of a qualified motion to reopen, the Sixth Circuit in *Sarr v. Gonzales* rejected "the government's contention that *Velarde* gives the government *unbridled discretion amounting to an absolute veto* to block consideration of a motion to reopen." 485 F.3d 354, 363 (6th Cir. 2007) (emphasis added); *see also Ahmed v. Mukasey*, 548 F.3d 768, 772-73 (adopting *Sarr*). And on the issue of a motion to continue, the BIA in *Hashmi* addressed how to properly weigh DHS opposition: "Government opposition that is reasonable and supported by the record may warrant denial of a continuance. On the other hand, unsupported opposition does not carry much weight. The Immigration Judge should evaluate the Government's objection, considering the totality of the circumstances." *Matter of Hashmi*, 24 I&N Dec. 785, 791 (BIA 2009).

*Avetisyan* and *W-Y-U-* reflect this sensible aversion to one-sided vetoes, giving judges a degree of independence to decide motions for administrative closure. Notably, the judge's discretion is not unbounded: the framework articulated in *Avetisyan* and refined in *W-Y-U-* obligates the judge to articulate a reasoned opinion and renders it subject to appellate review. *See Avetisyan*, 25 I&N at 695 & n.5. These cases also reflect the Board's recognition of the importance of administrative closure in allowing for fair and efficient completion of cases, and underscore the authority of the Immigration Judge to make such a decision without undue interference from either of the parties.

Moreover, appellate review of denial of administrative closure does not stop at the BIA; it can go further to the federal Circuit Courts of Appeals. Circuit courts have held that *Avetisyan*'s framework supplies a "sufficiently meaningful [legal] standard" for judicial review. *Gonzalez-*

*Caraveo*, No. 14-72472, slip op. at 13, 14. The prior law under *Gutierrez* did not. *Id.* at 14-15. This "meaningful standard" makes for more efficient proceedings at the higher levels of appeal. Whereas the BIA lacks the jurisdiction to resolve due process claims, due process violations can be challenged in the Circuit Courts. *Garcia-Ramirez v. Gonzales*, 423 F. 3d 935, 938 (9th Cir. 2005). Giving the parties and the immigration courts a meaningful standard focuses the analysis on the factors and gives courts a firmer framework by which to evaluate possible violations of due process.

Of course, appeal is not the only way to control any inappropriate use of administrative closure. The Office of the Chief Immigration Judge, currently staffed with 21 Assistant Chief Immigration Judges ("ACIJs"), is empowered to "provide[] overall program direction and establish[] priorities for approximately 350 Immigration Judges located in approximately 60 immigration courts throughout the Nation."[5] This power includes reviewing the performance of individual Immigration Judges. In *amici*'s experience, ACIJs pay close attention to trends that indicate that an Immigration Judge is not efficiently managing her docket. Accordingly, if an Immigration Judge were to use administrative closure inappropriately, we would expect an ACIJ to notice this trend and consult with the judge on any necessary corrections.

### B. The facts and disposition of the case at bar show that the legal standard under *Avetisyan* and *W-Y-U-* is working correctly.

Administrative closure is often used to address the situation where an event that could dispose of removal proceedings is outside of the parties' and the court's control. *See infra*,

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[5] U.S. Department of Justice, *Office of the Chief Immigration Judge*, https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios (last visited Feb. 14, 2018).

Sections IV-V (answering the third certified question). In *amici*'s experience, it is not typically used *sua sponte* to address possible defects in the address on a Notice of Hearing, as it was in the instant case. Reynaldo Castro-Tum (b) (6) (BIA Nov 27, 2017). This mismatch between the routine use of administrative closure and the facts presented makes this case a poor vehicle for reconsidering administrative closure as a tool for managing dockets across the board.

As the record demonstrates, Castro-Tum was personally served with a Notice to Appear ("NTA") in June of 2014. Reynaldo Castro-Tum (b) (6), at 1 (BIA Nov 27, 2017). Subsequently, four Notices of Hearing were sent to him by mail at the same address. *Id.* at 1 n.2. After he failed to appear for his hearing in April, 2016, the Immigration Judge harbored some doubts about the reliability of the address used in the Notices of Hearing. *Id.* at 2. The judge ordered the case administratively closed, *sua sponte* and over the objection of DHS. *Id.*

The issue at the heart of this case is the reliability of the address used. DHS is allowed to allege that proper notice of hearing was given and to provide the court with its basis for its belief that the address was correct. *See Matter of Lopez-Barrios*, 20 I&N Dec. 203, 204 (BIA 1990). If the Immigration Judge is satisfied with the notice, then an in absentia hearing may be held. *Id.* If the notice is not sufficient, then termination is appropriate. *Id.* But whether the case is terminated or not turns on whether DHS is able to meet its burden of proof—not on an outside event, such as respondent's pending visa application or other type relief whose outcome could dispose of the removal proceedings.

In light of these atypical facts, the Immigration Judge's decision to use administrative closure in this case should not be used as a justification for abrogating administrative closure in all circumstances. Indeed, on appeal, the Board vacated the Immigration Judge's decision and remanded the case. This case thus demonstrates that the legal framework established under

*Avetisyan/W-Y-U-* works properly. At most, this case is a routine instance of a lower judge erring, and being corrected on appeal. Overhauling the law on administrative closure will not eliminate these errors at the trial level, and such trial-level errors should not be used as a justification for sweeping changes in the law.

## III. Fundamental principles of administrative law hold that the Attorney General cannot change the regulations that grant this authority without proper notice and comment rulemaking.

Several specific regulations ratify the inherent authority of Immigration Judges to administratively close removal proceedings, and in fact require administrative closure in certain circumstances. Accordingly, the Attorney General cannot withdraw the authority for administrative closure for a simple reason: where a regulation was issued through notice and comment rulemaking, it cannot be rescinded without notice and comment. *See* 5 U.S.C. § 553(b)–(e). Such rulemaking requires notice in the Federal Register of the terms of and legal basis for the proposed change, a period for interested persons to comment, consideration of such comments, and publication of the new rule no less than 30 days before its effective date. *Id.*

As described above, Immigration Judges' authority to manage their dockets is reflected in numerous regulations. For starters, 8 C.F.R. § 1003.29 ratifies the inherent authority for Immigration Judges to grant continuances. This provision was enacted by notice and comment rulemaking in 1987. 52 Fed. Reg. 2921, 2931, 34 (Jan 29, 1987) (codified as 8 C.F.R. § 3.27); *see supra*, Section I.B (describing how administrative closure is a type of continuance). 8 C.F.R. § 1240.6, a similar provision allowing Immigration Judges to manage their dockets by granting reasonable adjournments, was enacted–again, by notice and comment rulemaking–in 1997. 62 Fed. Reg. 10,312, 10368 (March 6, 1997) (enacted as 8 C.F.R. § 240.6).

Aside from 8 C.F.R. §§ 1003.29 & 1240.6, other provisions rely on the power of administrative closure and thus would need to be revised through rulemaking if administrative closure were abrogated. By way of example, 8 C.F.R. § 212.7(e)(4)(v) provides that an alien is not eligible for a waiver inadmissibility if she is in removal proceedings, unless the removal proceedings have been administratively closed.[6] If the Attorney General wants to alter these regulations by abrogating administrative closure, he must afford notice and comment. *See* 5 U.S.C. § 553(b)–(e). This was precisely the mechanism through which interested parties attempted—unsuccessfully—to alter 8 C.F.R. § 212.7(e)(4)(v). *See* 81 Fed. Reg. 50,244, 50,255 (July 29, 2016).[7] This past practice serves as useful guidance and undercuts any attempt to change the rules without adhering to the rulemaking process

### A. Practical docket management considerations weigh in favor of retaining administrative closure.

Part of an Immigration Judge's responsibility is to manage her docket. Though ministerial in some respects, case management can have a significant effect on the substantive rights of individuals subject to removal proceedings. *See supra*, Section II.A (citing *Vahora*, 626 F.3d at 918). It can also bear on the government's interest in adjudicating cases to a final decision.

As *amici* well know, a judge's calendar is a puzzle with many moving parts. Each time a case is scheduled on the court's calendar, the judge and her staff devote time to identify a block

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[6] This provision was enacted by notice and comment rulemaking in 2013. 78 Fed. Reg. 536 (Jan. 3, 2013).

[7] As explained in footnote 3, *supra*, in 2002 DOJ restricted the use of administrative closure through notice and comment rulemaking. 67 Fed. Reg. 78,667, 78,673 (Dec. 26, 2002). That rulemaking also underscores the need to engage in notice and comment before abrogating Immigration Judges' authority to order administrative closure.

of time that can accommodate the hearing date, then coordinate the date with the parties' counsel, and, when the date is closer, notify the parties' counsel. (Immigration Judges often refer to a *touch down* when a case is scheduled on the calendar.)

Moreover, the court file must be pulled and reviewed by the Immigration Judge prior to each hearing, as must the Immigration and Customs Enforcement ("ICE") file be pulled and reviewed by the government attorney assigned to the case. These resources are all necessary in order to support the (often brief) in-court hearing time it takes merely to confirm that the case is still not ready to proceed due to factors outside the control of the court and the parties.

To operate efficiently, the Immigration Judge needs the ability to triage cases, and to prioritize those that are ripe for resolution. This concern is not new, nor is it specific to the facts of the case. *See* Memorandum from Brian M. O'Leary, Chief Immigration Judge, Operating Policies and Procedures Memorandum 13-01: Continuances and Administrative Closure 4 (March 7, 2013) [hereinafter O'Leary Memo]. While a continuance will temporarily postpone a hearing, scheduling the new date involves the same resources to coordinate with the parties' counsel and to notify them. A "domino effect" occurs when rescheduling one case bumps others.

Administrative closure, as opposed to a continuance, allows the judge and parties to avoid this cumbersome rescheduling when a case is not ripe to adjudicate. The *Hashmi* court, when deciding the respondent's request for a continuance when his I-130 petition was pending before USCIS, noted that "[a]dministrative closure is an attractive option in these situations, as it will assist in ensuring that only those cases that are likely to be resolved are before the Immigration Judge. *This will avoid the repeated rescheduling of a case that is clearly not ready to be concluded*." *Hashmi*, 24 I&N at 791 n.4 (emphasis added).

### B. Due process considerations also weigh in favor of retaining administrative closure.

In many instances, administrative closure is the optimal docket management tool. *See infra*, Section VI (answering the third certified question). A recent survey noted that immigration courts face a backlog of nearly 600,000 cases[8]—split among only 350 judges.[9] Given this heavy load, judges need every tool at their disposal to effectively and fairly adjudicate cases. Withdrawing administrative closure—which gives judges the flexibility to turn their attention away from cases likely to be resolved through other means—will significantly undermine the efficiency of the immigration court and delay the resolution of the more important cases.

While administrative expediency is a real concern for courts, efficiency must respect procedural fairness, not abridge it. "To reach a decision about whether to grant or deny a motion for a continuance based solely on case completion goals, with no regard for the circumstances of the case itself, is impermissibly arbitrary." *Hashmi v. Attorney General of the United States*, 531 F.3d 256, 261 (3d Cir. 2008). Despite the availability of a motion to reopen, ordering an alien removed when some other relief is available infringes upon rights. *Vahora*, 626 F.3d at 918; *cf. Potdar v. Mukasey*, 550 F.3d 594, 596 (7th Cir. 2008) ("Congress did not intend to entitle illegal aliens to seek an adjustment of status upon the receipt of certificates from . . . labor departments and at the same time also intend[] section 1252(a)(2)(B)(ii) to place beyond judicial review decisions by the immigration authorities that nullif[y] the statute."). In cases such as these, the

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[8] Dana Marks, *Immigration Courts Need Independence to Work Fairly and Efficiently*, Newsday, (July 16, 2017, 4:15 pm), https://www.newsday.com/opinion/commentary/want-to-boost-immigration-courts-1.13801499 (last visited Feb. 16, 2018).

[9] U.S. Department of Justice, *Office of the Chief Immigration Judge*, https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios (last visited Feb. 16, 2018).

most efficient way to preserve procedural fairness—and thus to protect substantive rights—is through administrative closure. "[I]t is a reality in any court system that fundamental fairness and due process require that legal proceedings be postponed in appropriate circumstances." O'Leary Memo, 4.

## IV. Options such as continuances, dismissal without prejudice, and termination without prejudice, are suboptimal as compared to administrative closure.

As reflected in the certified question, the principle purpose of the removal regulations is to ensure the "expeditious, fair, and proper resolution" of removal proceedings. *See* 8 C.F.R. § 1003.12. Moreover, in light of its large backlog of pending immigration cases, DOJ has prioritized case completion and performance metrics with the aim of ensuring "that EOIR's mission of fairly, expeditiously, and uniformly administering the immigration laws is fulfilled." *See* Office of the Attorney General, Memorandum for the EOIR: Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest (Dec. 5, 2017). *Amici*'s experience as Immigration Judges firmly persuades us that administrative closure is an essential tool in the successful advancement of EOIR's mission. More to the point, several key features of administrative closure that are absent from its procedural counterparts make it uniquely qualified to achieve judicial economy.

**Continuance**. Unlike administrative closure, continuances frequently lead to—indeed *require*—repeated but unnecessary appearances on an immigration court's Master Calendar. To be sure, there are cases in which continued appearances are necessary for expeditious adjudication. One such example is where the USCIS has asked the respondent for more information or evidence in the course of adjudicating a petition or application outside of the removal proceedings, such as a Request for Evidence ("RFE"). In that context, the respondent

must do or produce some concrete act or information in order to move his or her immigration case along, and a continuance permits the court to ensure the respondent's progress. By contrast, in cases where the outcome of an application or other pending case is entirely dependent on another agency's action, administrative closure allows the court simply to remove the case temporarily from its Master Calendar schedule until the manifestation of the action upon which completion is dependent and, crucially, avoid unnecessary and time-consuming interactions with the parties in the meantime. *See*, *e.g.*, *Avetisyan*, 25 I&N Dec. at 689–90; *cf. Matter of M-A-J-AXXX-XXX*, 274 (BIA 2015) (illustrating that parallel proceedings may be pending before state courts, USCIS, or both).

*Amici* are keenly aware of how much effort is expended by both courts and the DHS Office of Chief Counsel each time a case is recalendared before it is ready for adjudication. *See generally Hashmi*, 24 I&N Dec. at 786–87 (illustrating an example of wasteful recalendaring that could have been avoided by administrative closure while the respondent's I-130 petition was adjudicated). Each time the case is heard, staff and judges must set, reset, notify, and coordinate with all parties' counsel. On the agency's side, each appearance on the court's calendar similarly involves staff time in pulling the file and getting it to the assistant chief counsel; the ACC must then also spend time requesting any relevant files or petition information from the Service, and finally the ACC must review the file. Exacerbating these demands is the (in our experience, high) likelihood that the ACC who reviews the file is newly assigned to the case. Even more problematic, such unnecessary hearings negatively impact other cases whose merits are more ready for adjudication. These inefficiencies can be easily avoided through the judicious use of administrative closure, which permits the court and the parties to keep cases with no current business before the court off of its Master Calendar.

**Termination without prejudice**. Termination without prejudice under 8 C.F.R. § 1239.2(f) is also often a suboptimal mechanism relative to administrative closure. Most importantly, where an administratively closed case can be reinitiated by a mere motion to recalendar, a terminated case requires significantly more prosecutorial resources to return it to the court's docket. *See* 8 C.F.R. § 1003.23(b)(1)(i)-(ii) and (b)(3) (2017) (outlining the procedural and substantive elements of a motion to reopen). Also, per regulation, termination where a legally sufficient NTA has been issued and served is only available in instances where the respondent has a pending petition for naturalization. *See* 8 C.F.R. § 1239.2(f) (2017). Absent such circumstances, there is accordingly no other mechanism (besides dismissal or administrative closure) to fully halt removal proceedings while other valid forms of relief such as a visa application remain pending before USCIS.

Separately, it is our experience that DHS often prefers administrative closure in situations where the NTA is not facially defective but the agency simply cannot identify the recipient's current location in order to serve the NTA. Without the option of administrative closure, judges will undoubtedly be more likely to terminate proceedings based on insufficient notice, or in the alternative, issue unfounded *in absentia* orders. In the former context, ICE will be obligated to file motions to reopen proceedings—a more resource intensive process than simply filing a motion to recalendar an administratively closed case. *See* discussion, *supra*. In the latter context, the chances for remand—the most resource intensive procedural option in the immigration court context—increase exponentially. By contrast to these undesirable alternatives, administrative closure permits DHS to continue attempting to locate the alien and serve its valid NTA, and all parties can avoid the costly requirements associated with reopening, refiling, and/or remand.

**Dismissal without prejudice**. The final alternative to an administrative closure, a dismissal without prejudice under 8 C.F.R. § 1239.2(c), is also problematic for many of the same reasons as termination—in short, it precipitates a more significant resource expense once the government seeks to reinitiate proceedings. Moreover, a dismissal may wrongly imply a defect with the NTA, as dismissal would require DHS to issue, serve, and file it anew. Separately (and perhaps even more critical with respect to judicial economy), a dismissal without prejudice must be brought by the government's attorney. The mechanism of dismissal therefore fails to provide an adequate alternative to administrative closure in cases where the Immigration Judge should, in the interests of efficiency—and in some cases due process—pause the proceedings while ICE pursues service of the NTA.

## V. There is no reason to attach legal consequences to administrative closure.

Administrative closure is not an immigration benefit—rather, it is an administrative tool. Under U.S. immigration law, eligibility for immigration benefits derives from some form of immigration status—for example, that granted by possessing a visa. When some intervening event alters that status, e.g. expiration, a criminal offense, etc., the benefits that derived from it recede, and removal proceedings may commence. Once an individual is in removal proceedings, however, the application of a case management mechanism such as a continuance or administrative closure does not—and in any event should not—implicate the individual's substantive eligibility for an immigration status (or other benefit) otherwise available under the law. Of course, assuming a properly grounded and validly served NTA, it would be improper to use administrative closure to thwart an otherwise authorized removal ready for adjudication. That is why the standards set forth in *Avetisyan* and *W-Y-U-* limit the purposes for which an administrative closure is appropriate and allow for review of such decisions. However, to suggest

that administrative closure in and of itself confers some benefit on the respondent such that their eligibility for other benefits should be negatively (or, for that matter, positively) impacted misunderstands the fundamentally procedural nature of administrative closure.

As described above, Immigration Judges have the power under binding regulations to grant administrative closure, and the Attorney General accordingly lacks the authority to alter this power without proper notice-and-comment rulemaking. Therefore, in response to the last certified question, even if DOJ chooses to promulgate new regulations restricting the use of administrative closure, the Attorney General cannot take action on cases that are already administratively closed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on February 16, 2018, a true and correct copy of this *Amicus Curiae* Brief was served upon the following counsel of record electronically at AGCertification@usdoj.gov and by first class mail at the address below:

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Andrew Schwerin

**BEFORE THE ATTORNEY GENERAL**

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| Matter of | : | |
| Reynaldo CASTRO-TUM, | : | (b) (6) |
| *Respondent* | : | In Removal Proceedings |

On Review from the Board of Immigration Appeals

# BRIEF FOR NOT-FOR-PROFIT DIRECT LEGAL SERVICES ORGANIZATIONS AS *AMICI CURIAE*


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## INTEREST OF *AMICI CURIAE*

*Amici* are not-for-profit direct legal services organizations in New York, with clients at all stages of immigration proceedings. *Amici* are thus well-positioned to provide the perspective of thousands of immigrants who might be affected by the Attorney General's decision in this case. *Amici* include:

- The Legal Aid Society of New York ("LAS"), the nation's oldest and largest program providing direct legal services to low-income families and individuals. Founded in 1876, LAS has a long-standing proven track record of providing targeted services to meet the essential legal needs for the most vulnerable New Yorkers in all five boroughs of the City. LAS's legal program operates three major practices—Civil, Criminal, and Juvenile Rights—and receives volunteer help from law firms, corporate law departments and expert consultants, coordinated by LAS's Pro Bono program. LAS serves an annual caseload of more than 300,000 legal matters and benefits some two million low-income families and individuals in New York City through its law reform representation and the landmark rulings that have a Statewide and national impact. The Immigration Law Unit comprises a staff of 60 who represent immigrants in a comprehensive and interdisciplinary practice, including at the intersection of criminal and immigration law. (See generally Declaration of Hasan Shafiqullah, Attorney-in-Charge of the Immigration Law Unit ("Shafiqullah Decl.").)

- New York Legal Assistance Group ("NYLAG"), founded in 1990 to provide free civil legal services to low-income New Yorkers who would otherwise be unable to afford or receive legal assistance. It is one of the largest immigrant services providers in the State of New York. NYLAG is dedicated to providing New York's low-

income immigrant communities with comprehensive legal services, including direct representation in a wide range of immigration-related proceedings.

- The Asylum Clinic at New York Law School (the "NYLS Asylum Clinic"), created in 2017 to provide student representation, under faculty supervision, to immigrant clients in the New York Immigration Court and before the Newark and New York Asylum Offices. The NYLS Asylum Clinic also performs community outreach and education regarding immigration rights, engages in systemic advocacy, and develops immigration law resources for courts, attorneys, and clients.

- African Services Committee ( "ASC"), a multiservice agency based in Harlem and founded in 1981 by Ethiopian refugees. ASC is dedicated to assisting immigrants, refugees, and asylees from across the African Diaspora. ASC provides free and low-cost direct immigration representation, including through the Immigrant Community Law Center, a project launched in 2012 to serve immigrants of all backgrounds.

- Sanctuary for Families ("Sanctuary"), New York State's largest dedicated service provider and advocate for survivors of domestic violence, human trafficking, and related forms of gender violence. Each year Sanctuary provides legal, clinical, shelter, and economic empowerment services to approximately 15,000 survivors and their children. Sanctuary's Immigration Intervention Project provides free direct representation to thousands of immigrant survivors every year in a broad range of humanitarian immigration matters, including asylum, special rule cancellation of removal, Special Immigrant Juvenile Status, Violence Against Women Act self-petitions, and petitions for U and T nonimmigrant status.

- The City Bar Justice Center, the not-for-profit, legal services arm of the New York City Bar Association. Its mission is to leverage the resources of the New York City legal community to increase access to justice. Each year, the City Bar Justice Center assists more than 20,000 low-income and vulnerable New Yorkers to access critically needed legal services and matches over 1,200 cases with pro bono attorneys. Through direct representation and pro bono legal programs, the City Bar Justice Center's Immigrant Justice Project annually helps hundreds of immigrants who are at their most vulnerable: asylum seekers fleeing persecution, survivors of violent crimes and trafficking, and others seeking humanitarian protection.

- The Immigrant and Non-Citizen Rights Clinic at the City University of New York School of Law (the "CUNY Law School Clinic"), one of the first immigration clinics in the nation, providing legal services to non-citizens seeking to live in the United States without fear, exploitation, and subordination. The CUNY Law School Clinic and its students represent immigrant clients at all stages of immigration proceedings. Its clients include unaccompanied minors, domestic violence survivors, immigrants with cognitive disabilities or serious medical needs, asylum-seekers, and individuals subject to discriminatory immigration enforcement. CUNY Law School Clinic students support immigrant community organizations in non-litigation advocacy and help organize and raise awareness including through know-your-rights work.

- The New York Immigration Coalition (the "NYIC"), which represents over 200 organizational members and partners working on behalf of immigrants throughout New York State. The NYIC has taken a lead in coordinating legal services for immigrants, including acting as a liaison between legal service providers and federal

immigration agencies, running on-the-ground legal efforts, and, more recently, organizing and running a collaborative of nearly 70 groups to improve resources for legal services organizations

- Catholic Charities Community Services, NY ("CCCS"), which, since 1949, has provided direct human and legal services to over 170,000 people each year from all parts of New York City and the Lower Hudson Valley. These services are offered to all New Yorkers in need, regardless of religious belief. CCCS is a leading provider of refugee resettlement and immigration legal assistance in its service area, providing reception, reunification, integration, employment, and ESL assistance to refugees and asylees and direct legal representation to immigrant families, workers, and those seeking protection, including over 6,000 unaccompanied minors each year.

- Legal Services NYC ("LSNYC"), which fights poverty and seeks justice for low-income New Yorkers. For more than 40 years, LSNYC has helped clients meet basic needs for housing, access to high-quality education, health care, family stability, and income and economic security, including aiding immigrants and survivors of crime and violence attain lawful immigration status. LSNYC is the largest civil legal services provider in the country. Its neighborhood-based offices and outreach sites across all of New York City's five boroughs help more than 90,000 New Yorkers annually.

- Safe Horizon, which provides, through its Immigration Law Project, legal services to immigrants who are victims of crime, abuse, domestic violence, trafficking and torture in immigration court and administrative applications.

## SUMMARY OF ARGUMENT

Administrative closure is a docket management tool that has been utilized by Immigration Judges for decades. See Matter of Avetisyan, 25 I&N Dec. 688, 692 (BIA 2012) (citing administrative closure cases dating back to 1988). Using this device, Immigration Judges have been able to more effectively and efficiently manage their ever-growing caseloads, taking cases which are not appropriate for immediate resolution—for a variety of reasons—and placing them on the proverbial back burner. See infra Sections II, IV, V. This operates to the benefit of clients of *amici*, who are able to move forward with alternative avenues of relief, including various visa petitions, without the need for all parties to constantly reappear before an Immigration Judge. See Matter of Avetisyan, 25 I&N Dec. at 692 ("In general, administrative closure may be appropriate to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time."). The Department of Homeland Security (the "Department" or "DHS") also frequently benefits from the pause in proceedings. (See Shafiqullah Decl. ¶ 5.) Attorneys for respondents and attorneys for the Department are experiencing enlarged caseloads, and each extraneous appearance before an Immigration Judge adds to their burden and reduces their capacity to work on more pressing cases. (See Shafiqullah Decl. ¶ 12.)

The Attorney General has asked parties in the above-captioned case and interested *amici* to address whether administrative closure is appropriate and, if so, what standard should be applied by Immigration Judges. Matter of Castro-Tum, 27 I&N Dec. 187 (A.G. 2018). As explained in detail below, administrative closure is an essential and

integral procedural device that works to the benefit of all parties. The Board of Immigration Appeals (the "Board" or the "BIA"), acting pursuant to its lawful authority delegated by the Attorney General, interpreted the regulations governing the immigration court system and recognized the inherent importance of this tool. See Matter of Avetisyan, 25 I&N Dec. at 691 (citing, *inter alia*, 8 C.F.R. §§ 1003.1(d), 1003.10(b), 1240.1(a)(1)(iv), (c)). In doing so, the Board noted the important need of Immigration Judges to have flexibility in the management of their dockets. See id. at 693-96. While the Attorney General may conclude that he is empowered to alter this interpretation or even eliminate administrative closure altogether, he should not do so.

The Attorney General should maintain administrative closure as a procedural device and should also leave in place the current standard, as applied by the Board in Matter of Avetisyan, 25 I&N Dec. 688, and reaffirmed in Matter of W-Y-U-, 27 I&N Dec. 17 (BIA 2017). The current standard calls for Immigration Judges to balance various, non-exhaustive factors, including the impact on the parties and any objections to administrative closure, providing Immigration Judges with an appropriate level of discretion in the management of their dockets. See Matter of Avetisyan, 25 I&N Dec. at 696; Matter of W-Y-U-, 27 I&N Dec. at 18.

Finally, if the Attorney General does seek to eliminate administrative closure—which he should not do—he cannot retroactively apply this change to undo administrative closures already in place. See infra Section VII. Doing so would violate the due process rights of the parties to these cases, including many of *amici*'s clients, see infra Section I.A (giving examples), and in any event would add unwarranted burdens to the

immigration court system, see infra Section I.B (describing overwhelmed immigration courts).

## ARGUMENT

### I. Administrative Closure Is an Integral Part of the Immigration Court System, and Its Elimination Would Adversely Impact Clients of *Amici* and Strain an Already Overburdened System.

*Amici* represent some of the most vulnerable individuals in removal proceedings. Clients often have little to no resources, and many have appropriately and reasonably relied on administrative closure to pursue other avenues of relief or to manage personal and medical affairs. See infra Section I.A (listing examples). More often than not, administrative closure is sought with the support of DHS, which historically has recognized both the importance of the additional time administrative closure affords respondents and the value of providing some relief to DHS's own excessive caseload. (See Shafiqullah Decl. ¶ 5.)

Should the Attorney General seek to eliminate or drastically alter the framework for administrative closure, respondents, their counsel, DHS, and, importantly, Immigration Judges all stand to lose. The immigration court system is undisputedly overloaded, and any change that might add to this burden will be costly to all stakeholders.

#### A. The Elimination of Administrative Closure Would Adversely Impact Clients of *Amici*.

If the Attorney General reverses longstanding precedent from the BIA and eliminates administrative closure, many of *amici*'s clients will be adversely affected in at

least two ways: First, clients whose cases have been historically subject to administrative closure will be harmed if administrative closure is no longer available in their cases. Second, clients whose cases have been delayed due to the extraordinary backlog within immigration courts can expect their cases to be delayed even longer.

Many of *amici*'s clients are parties in cases currently subject to administrative closure. These cases were appropriately closed, consistent with the principles established by the Board, because of circumstances outside of the immigration court proceedings—such as pending visa applications or health-related issues—counseling in favor of delaying removal proceedings.

Examples of such clients include, without limitation:

- *Angel*[1] *and Chris: Angel and Chris are minor siblings and children of a US citizen. Angel and Chris fled their home country after a family member abused them. Angel and Chris are in removal proceedings but are also seeking Special Immigrant Juvenile Status (SIJS), which requires separate proceedings in family court, as well as consideration and approval by US Citizenship and Immigration Services (USCIS). If granted SIJS and related adjustment of status, Angel and Chris will no longer be subject to removal. The Immigration Judge administratively closed their cases pending adjudication of their applications for SIJS in state family court. Upon the grant of SIJS, LAS expects to move for termination of proceedings, in order to seek adjustment of status before USCIS.*

- *Pat: Pat was in the United States lawfully for more than 20 years, until 2006, when a visa petition, based on his/her mother's Lawful Permanent Residence status, was denied. Pat has no criminal record and paid taxes for more than two decades until a workplace injury and other health issues prevented Pat from continuing to work. DHS consented to administrative closure of Pat's case to allow Pat's adult, US citizen daughter to submit an immigrant visa petition on Pat's behalf. That application is now pending.*

[1] Client names have been replaced with gender-neutral pseudonyms in order to protect the clients' identities. These examples involve clients of one or more *amici*.

- *Mel: Mel is currently applying for a U-Visa, in light of the material assistance Mel provided to law enforcement in the investigation and prosecution of crimes of domestic violence committed against Mel. Mel's U-Visa application is currently pending with USCIS, and DHS did not oppose Mel's recent motion to administratively close Mel's case.*

- *Alex: Alex is in removal proceedings and has a pending I-751 application to remove the conditions on Alex's residence status following battery and extreme cruelty at the hands of his/her spouse. The Immigration Judge in Alex's case granted administrative closure pending the adjudication of Alex's I-751 petition, based partly on DHS's representation that adjudication of the I-751 petition would proceed more quickly if Alex's immigration court case were administratively closed.*

- *Lee: Lee has been in removal proceedings for several years but has been unable to effectively participate in the proceedings due to severe mental health issues. Lee has been diagnosed with schizophrenia and has experienced hallucinations on a number of occasions. Lee's case has been administratively closed while Lee is receiving treatment and until Lee is considered mentally competent to resume proceedings.*[2]

These cases represent only a few examples of *amici*'s clients who could be adversely affected by a decision in this matter to eliminate administrative closure. For each of these cases and future cases like them, the elimination of administrative closure could have lasting negative impact on an indigent immigrant, as well as heavy costs on an overburdened immigration system. In cases like these, where Immigration Judges have found administrative closure to be the most appropriate means of controlling their dockets, respondents would be required to repeatedly appear in front of Immigration Judges, often waiting hours for a five minute conversation between an Immigration Judge and attorneys for DHS and *amici*. (See Shafiqullah Decl. ¶ 6.) Respondents would then be excused and told to return for another date some months in the future, even if there is

[2] See Matter of M-A-M-, 25 I&N 474, 483 (BIA 2011) ("In some cases, even where the court and the parties undertake their best efforts to ensure appropriate safeguards [regarding competency], concerns may remain. In these cases, the Immigration Judge may pursue alternatives with the parties, such as administrative closure, while other options are explored, such as seeking treatment for the respondent.").

little prospect of a change in circumstances between hearings. Cf. TRAC, Ballooning Wait Times for Hearing Dates in Overworked Immigration Courts (Sept. 21, 2015), http://trac.syr.edu/immigration/reports/405/ [hereinafter TRAC, Ballooning Wait Times] (explaining that seventy-one percent of all scheduled hearings are master calendar hearings). For some individuals, who have been subject to serious violence and psychological trauma in the past, these frequent reappearances would create unnecessary strain. (See Shafiqullah Decl. ¶ 6.) The unnecessary appearances would also place a tremendous burden on attorneys for *amici*, potentially reducing the number of cases they are able to manage. (See id. ¶ 12.)

Moreover, many of *amici*'s clients have pending cases on overburdened dockets with little prospect of having their cases resolved quickly and efficiently. Eliminating administrative closure would create further congestion and backlog at the immigration courts, displacing those clients who are in need of speedy resolution of their cases. See TRAC, Ballooning Wait Times. These clients will face serious risk of having their cases languish on the immigration court dockets for longer still. One such example includes:

- *Max: Max is in removal proceedings but has applied for asylum relief. Due to circumstances outside Max's control, including the substantial backlog in the immigration court docket, Max's case has been pending for more than two years. Max has cancer and is generally in bad health, having suffered a stroke last year.*

Administrative closure serves important purposes and operates to the benefit of immigration courts, DHS, and many of *amici*'s clients, such as those described above. The Attorney General should not upend this procedural device, which has been in operation for many decades and, as far as we have been able to determine, has never been eliminated by prior administrations. See, e.g., Matter of Avetisyan, 25 I&N Dec. at 688

(citing Matter of Amico, 19 I&N Dec. 652, 653 (BIA 1988)) (dating the Board's published jurisprudence on administrative closure to 1988). Rather, as the immigration courts and DHS have already begun to do (see Shafiqullah Decl. ¶ 7), the government should evaluate cases individually to determine whether they should be recalendared, giving due consideration to the effects such actions will have on the parties to the cases, as well as to cases currently pending on the immigration courts' dockets.

### B. The Immigration Court System Cannot Absorb Cases Currently Subject to Administrative Closure.

The immigration court system is undisputedly overwhelmed. See, e.g., Memorandum from Attorney Gen. to the Exec. Office for Immigration Review 1 (Dec. 5, 2017), https://www.justice.gov/opa/press-release/file/1015996/download ("Dec. 2017 AG Mem.") (describing immigration courts' "backlog"); TRAC, Ballooning Wait Times (describing long wait times for hearing dates in "[o]verworked" and "overwhelmed" immigration courts); Stuart L. Lustig et al., Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey, 23 Geo. Immigr. L.J. 57 (2008). The current total number of pending cases across the country is over 650,000, and the number continues to grow despite efforts to address the immigration courts' backlog. See Dec. 2017 AG Mem. at 1; TRAC, Immigration Court Backlog Tool, Fiscal Year 2018, http://trac.syr.edu/phptools/immigration/court_backlog/. An average case takes nearly two years to be finalized. TRAC, Immigration Court Backlog Tool, Fiscal Year 2018. As of January 2018, more than 350,000 cases are subject to administrative closure. Elliot Spagat, Sessions Takes Aim at Judges Handling Immigration Cases, AP News (Jan. 6, 2018), https://www.apnews.com/9ce3e704a0c6457a958d410f001f0f22. It is unrealistic

to believe the current immigration court system, even with an anticipated expanded budget, could absorb these cases into its overburdened dockets.

The Executive Office for Immigration Review ("EOIR") has 58 courts nationwide, U.S. Gov't Accountability Office, Report to Congressional Requesters: Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges 10 (June 2017), https://www.gao.gov/assets/690/685468.pdf [hereinafter GAO, 2017 Report on Immigration Courts], and currently employs approximately 330 Immigration Judges, see U.S. Dep't of Justice, EOIR Immigration Court Listing (Feb. 12, 2018), https://www.justice.gov/eoir/eoir-immigration-court-listing, thus on average each Immigration Judge manages in excess of 2,000 active, pending cases. As of June 2017, 39% of then-sitting full-time Immigration Judges were eligible for retirement, which only further compounds the resource shortages facing the immigration court system. GAO, 2017 Report on Immigration Courts 34.

In 2016, Human Rights First estimated that at least 524 Immigration Judges were needed to clear the then-existing backlog of approximately 480,000 cases in 10 years, rather than the projected 30 years with the existing staffing. See Human Rights First, In the Balance: Backlogs Delay Protection in the U.S. Asylum and Immigration Court Systems 5, 19 (Apr. 2016), http://www.humanrightsfirst.org/sites/default/files/HRF-In-The-Balance.pdf. The EOIR, however, has requested only an additional $78.9 million for its 2018 budget, an 18.7% increase from the previous year, and is only adding about 100 new Immigration Judges. See Dec. 2017 AG Mem. at 1; U.S. Dep't of Justice, FY 2018 Budget Request at a Glance 2, https://www.justice.gov/jmd/page/file/968216/download.

The EOIR, notwithstanding the limited requested budget increase and hiring of additional Immigration Judges, would be quickly overrun, even more than it already is, from the over 50% increase in caseload that would result if all cases currently subject to administrative closure were added to the active docket.

## II. Immigration Judges and the Board Have the Authority to Order Administrative Closures, and This Authority Has Been Recognized for Decades by Both the Board and the Federal Courts.

### A. Immigration Judges and the Board of Immigration Appeals Have the Authority to Administratively Close Cases Before Them

Under the statutes and regulations governing the conduct of hearings under the Immigration and Nationality Act, Immigration Judges and the Board have both the obligation and authority to exercise their judgment in their review of decisions and in the administration of hearings, including through their use of administrative closure. Immigration Judges are to "conduct proceedings for deciding the inadmissibility or deportability of an alien," 8 U.S.C. § 1229a(a)(1), and are granted broad discretion to "regulate the course of the hearing" and to "take any other action consistent with application law and regulations as may be appropriate," 8 C.F.R. § 1240.1(a)(1)(iv), (c). "In deciding individual cases, an Immigration Judge . . . may take any action consistent with the [Immigration & Nationality] Act and regulations that is appropriate and necessary for the disposition of such cases." Matter of Avetisyan, 25 I&N Dec. at 691 (citing 8 C.F.R. § 1003.10(b)). Indeed, "[f]rom the regulatory language, it is evident that IJs and the BIA are empowered to take various actions for docket management," and "administrative closure is a tool that an IJ or the BIA *must be able to use*, in appropriate circumstances, as part of their delegated authority, independence, and discretion." Gonzalez-Caraveo v. Sessions, No. 14-72472, 2018 WL 846230, at *3-4 (9th Cir. Feb.

14, 2018) (citing Matter of Avetisyan, 25 I&N Dec. at 693-94; 8 C.F.R. §§ 1003.10(b), 1003.1(d)(1)(ii)) (emphasis added).

The Board, whose members "act as the Attorney General's delegates," 8 C.F.R. § 1003.1(a)(1), has explicitly held that "Immigration Judges and the Board have the authority . . . to administratively close proceedings under appropriate circumstances," in order to regulate the proceedings in their courtrooms. Matter of Avetisyan, 25 I&N Dec. at 694; accor [redacted], 2017 WL 1330158, at *2 (BIA Mar. 1, 2017) ("An Immigration Judge may appropriately use administrative closure to temporarily remove a case from his active calendar . . . .") [redacted], 2014 WL 3795507, at *1 (BIA June 16, 2014).

The Board has the authority to review decisions of Immigration Judges, 8 C.F.R. § 1003.1(b), and "questions involving the Board's jurisdiction are determined by the Board itself," Garcia v. Boldin, 691 F.2d 1172, 1181 (5th Cir. 1982). While the Board reviews an Immigration Judge's factual findings under a "clearly erroneous" standard, it reviews "questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*," 8 C.F.R. § 1003.1(d)(3), including the decision of an Immigration Judge to administratively close a case, see, e.g. [redacted], 2017 WL 4118929, at *1 (BIA June 21, 2017) ("Upon de novo review, we agree with the Immigration Judge that administrative closure . . . is not warranted.").

The Board further has the authority, as a delegate of the Attorney General, to independently order administrative closures. See, e.g. [redacted], 2017 WL 4418357, at *2 (BIA July 17, 2017) (deciding administrative

closure, while noting no record of respondents requesting administrative closure below); [redacted], 2016 WL 1084488, *2 (BIA Mar. 1, 2016) ("[T]he Board . . . may administratively close a matter . . . , so long as administrative closure is an appropriate disposition when considering the totality of the circumstances in a case."); Matter of Avetisyan, 25 I&N Dec. at 691-92. The Board may also consider requests for administrative closure in the first instance. See, e.g., Lee v. Lynch, 623 F. App'x 33, 34-35 (2d Cir. 2015) [redacted], 2016 WL 807199, at *1 (BIA Feb. 8, 2016).

B. Circuit Courts of Appeals Have Recognized the Validity of This Delegation of Authority.

The federal Circuit Courts of Appeals have uniformly recognized the authority of Immigration Judges and the Board to order administrative closures and the legitimacy of this delegation of authority from the Attorney General. See e.g., Gonzalez-Caraveo v. Sessions, 2018 WL 846230, at *3 ("From the regulatory language, it is evident that IJs and the BIA are empowered to take various actions [including administratively closing cases] for docket management."); Tello-Espana v. Sessions, No. 13-4452, 2017 WL 5195409, at *3 (6th Cir. Nov. 9, 2017); Hernandez-Castillo v. Sessions, 875 F.3d 199, 207 (5th Cir. 2017); Gonzalez-Vega v. Lynch, 839 F.3d 738, 740 (8th Cir. 2016) ("The IJ and BIA use this procedural convenience to control the immigration docket."); Lee, 623 F. App'x at 34-35; Vahora v. Holder, 626 F.3d 907, 917 (7th Cir. 2010) (characterizing administrative closure as a "procedural device" available to "person[s] performing quasi-judicial duties in the orderly management of the docket and the courtroom"); cf. Coreas v. Sessions, No. 17-1074, 2018 WL 272212, at *1 (4th Cir. Jan. 3, 2018). Even Circuit Courts of Appeals that have declined to exercise jurisdiction to review the Board's

decisions on administrative closures have recognized Immigration Judges' and the Board's authority to administratively close cases before them. See, e.g., Cayetano-Castillo v. Lynch, 630 F. App'x 788, 793 (10th Cir. 2015) (declining jurisdiction to review but stating that "[a]dministrative closure is a procedural tool created for the convenience of the Immigration Courts and the Board . . . used to temporarily remove a case from an [Immigration Judge's] active calendar or from the Board's docket" (internal quotation marks and citation omitted)). The Second Circuit has even suggested that the Board, on remand, consider using administrative closure as an alternative to a continuance in "'appropriate circumstances, such as where there is a pending prima facie approvable visa petition' [as] administrative closure would alleviate the IJ's concerns about granting an open-ended and lengthy continuance." Jaime v. Holder, 570 F. App'x 78, 78 (2d Cir. 2014) (citing Matter of Hashmi, 24 I&N Dec. 785, 791 n.4 (BIA 2009)).

### C. Immigration Judges and the Board of Immigration Appeals Have Inherent Authority to Manage Their Dockets Through Administrative Closure.

Immigration Courts and the Board are quasi-judicial bodies. See Martinez v. United States, CV 13-06844, 2014 WL 12607839, at *3 (C.D. Cal. Mar. 17, 2014) (characterizing the Immigration Court as a "judicial or quasi-judicial body" (internal quotation marks and citation omitted)); Dia v. Ashcroft, 353 F.3d 228, 235 (3d Cir. 2003) (describing the Board as a "quasi-judicial body"); Garcia v. Boldin, 691 F.2d 1172, 1181 (5th Cir. 1982) ("The Board . . . act[s] as a quasi-judicial body exercising appellate jurisdiction."). As such, the immigration courts and the Board "have a responsibility to function as neutral and impartial arbiters," as it is "well established that due process demands impartiality on the part of those who function in judicial or quasi-judicial

capacities." Abdulrahman v. Ashcroft, 330 F.3d 587, 596 (3d Cir. 2003) (internal quotation marks and citations omitted); see Marincas v. Lewis, 92 F.3d 195, 203 (3d Cir. 1996) (stating a "neutral judge"—there, a neutral Immigration Judge—is one of "two of the most basic of due process protections"). This is because "[w]hen Congress directs an agency to establish a procedure . . . , it can be assumed that Congress intends that procedure to be a fair one." Marincas v. Lewis, 92 F.3d 195, 203 (3d Cir. 1996) (citing Califano v. Yamasaki, 442 U.S. 682, 693 (1979)); accord Califano, 442 U.S. at 693 ("[T]his Court has been willing to assume a congressional solicitude for fair procedure, absent explicit statutory language to the contrary." (citing Greene v. McElroy, 360 U.S. 474, 507-508 (1959)).

In Matter of Avetisyan, the Board reiterated "the delegated authority of the Immigration Judges and the Board and their responsibility to exercise independent judgment and discretion in adjudicating cases and to take any action necessary and appropriate for the disposition of the case." 25 I&N Dec. at 693; see also Gonzalez-Caraveo, 2018 WL 846230, at *6 (citing Matter of Avetisyan, 25 I&N Dec. at 694-96) ("Avetisyan clearly directs that IJs conduct their own independent assessment, considering the Avetisyan factors, to determine whether a request for administrative closure should be granted."). Administrative closure is a "procedural device, not unlike the myriad other procedural devices employed by quasi-judicial bodies in administrative agencies and in the Executive Office for Immigration Review in particular." Vahora, 626 F.3d at 917. It "provides judges with a powerful tool to help them manage their dockets, by helping to focus resources on those matters that are ripe for resolution." EOIR, Operating Policies and Procedures Memorandum 13-01, at 4 (Mar. 7, 2013) [hereinafter

EOIR, OPPM 13-01],

https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/08/13-01.pdf.[3]

As Matter of Avetisyan and its progeny assert, any interference with the Immigration Judges' and the Board's authority to exercise independent judgment in adjudicating motions before it, including motions to administratively close proceedings, prevents Immigration Judges and the Board from resolving cases in a manner that is "timely, impartial, and consistent with the [INA]." 25 I&N Dec. at 691-93 (citing 8 C.F.R. § 1003.1(d)(1)); accor [redacted], 2017 WL 1330158, at *2 [redacted], 2016 WL 1084488, at *2; [redacted], 2014 WL 3795507, at *1; 8 C.F.R. §§ 1003.1(d)(1), 1003.10(b). Indeed, allowing either of the parties' objections to administrative closure to prevent an Immigration Judge or the Board from administratively closing cases "directly conflicts with the delegated authority of the Immigration Judges and the Board" in its fair and impartial adjudication of the proceedings. Matter of Avetisyan, 25 I&N Dec. at 693; see also Gonzalez-Caraveo, 2018 WL 846230, at *3 (holding that any interference would constitute an "impermissible violation of the IJ's and BIA's delegated authority and responsibility to adjudicate cases").

[3] Administrative closure is not limited to use in Immigration Courts. See, e.g., Ali v. Quarterman, 607 F.3d 1046, 1047 & n.2 (5th Cir. 2010) (recognizing administrative closure as a docket management tool); Acton v. Intellectual Capital Mgt., Inc., 15-CV-4004, 2015 WL 9462110 (E.D.N.Y. Dec. 28, 2015) (administratively closing case to await likely precedent-controlling U.S. Supreme Court and D.C. Circuit decisions); Gaeta v. Inc. Vill. of Garden City, No. 03-CV-2109, 2015 WL 13019612 (E.D.N.Y. Apr. 16, 2015) (civil case administratively closed to await resolution of related criminal proceedings), aff'd, 644 F. App'x 47 (2d Cir. 2016).

## III. *Matter of Avetisyan* Articulates a Reasonable Standard for Administrative Closure and Such Standard Should Survive the Attorney General's Review.

As described above, the purpose of administrative closure is to facilitate an Immigration Judge's regulation of the course of the immigration court proceedings. See 8 U.S.C. § 1229a(a)(1); supra Section II. Courts have consistently emphasized the importance of an immigration judge's "independent judgment and discretion" in making administrative closure decisions. Matter of Avetisyan, 25 I&N Dec. at 691, 697 (holding Immigration Judges and the Board may order administrative closure in appropriate circumstances over a party's objection); accor [redacted] (b) (6)

2014 WL 3795507, at *1; Hernandez-Castillo 875 F.3d at 209 (citing Matter of Avetisyan, 25 I&N Dec. at 696). It is therefore important that any standard applied be flexible and able to account for individual fact-specific cases.

Matter of Avetisyan provides an adequately flexible standard and allows for courts to consider "all relevant factors," in determining whether administrative closure is appropriate for each specific case. 25 I&N Dec. at 696. It sets forth a non-exhaustive list of factors for Immigration Judges and the Board to consider. See id. These factors include:

> (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings

> (for example, termination of the proceedings or entry of a removal order) when the case is recalendared before the Immigration Judge or the appeal is reinstated before the Board.

25 I&N Dec. at 696. In cases like those of Pat and Mel, discussed above, see supra Section I.A, Immigrations Judges using the Matter of Avetisyan standard will balance the reason administrative closure is being sought by respondents—*i.e.*, the need for time to pursue visa petitions outside of immigration court proceedings—against any concerns raised by DHS. The Immigration Judge will consider the anticipated duration of the closure, which in the cases of Pat and Mel, are indeterminate and dependent on factors outside of the parties' control, and balance these against the likely ultimate resolution of the removal proceedings, which, if Pat and Mel are successful in their visa applications, would be terminated. Balancing these factors make it clear that these cases should be administratively closed pending resolution of the visa petitions and that any other result would be a waste of resources for all parties.[4]

Importantly, under the Matter of Avetisyan standard, no one factor is determinative, and Immigration Judges may factor in other considerations when determining whether administrative closure is appropriate. Id. (directing Immigration Judges and the Board to "weigh all relevant factors presented in the case, including but not limited to" the enumerated factors). Matter of Avetisyan's import is its flexible standard, one that is sufficiently "useable" as to guide Immigration Judges in their

[4] A similar result is arrived at when considering the other cases described above. See supra Section I.A (describing cases of Angel, Chris, Alex, and Lee).

decisions but is also able to accommodate specific facts of each individual case. Hernandez-Castillo, 875 F.3d at 208; see also Matter of W-Y-U, 27 I&N Dec. 17 (BIA 2017) (affirming Matter of Avetisyan's flexible standard and providing additional guidance).

Matter of Avetisyan correctly holds that no party, including DHS, can prevent an Immigration Judge from administratively closing a case, as any such "veto power" would "directly conflict[] with the delegated authority of the Immigration Judges and the Board and their responsibility to exercise independent judgment and discretion in adjudicating cases and to take any action necessary and appropriate for the disposition of the case." 25 I&N Dec. at 692-93; accord Gonzalez-Caraveo, 2018 WL 846230, at *3 (citing Matter of Avetisyan, 25 I&N Dec. at 693) ("Allowing the Department or a petitioner to have absolute veto power over administrative closure is an impermissible violation of the IJ and BIA's delegated authority and responsibility to adjudicate cases.").

## IV. Immigration Judges and the Board Are the Most Appropriate Bodies in Which to Vest the Authority to Administratively Close Cases.

The Attorney General should not withdraw from Immigration Judges and from the Board the authority to administratively close proceedings. Alternatively, should the Attorney General conclude that Immigration Judges or the Board lack authority to order administrative closures, he should delegate that authority to Immigration Judges and the Board.[5]

[5] This amicus brief addresses the questions in the Attorney General's referral of this matter to his review, which the Attorney General describes as relevant to his consideration of the disposition of the present case. See Matter of Castro-Tum, 27 I&N Dec. 187 (A.G. 2018). To the extent that these questions (….continued)

As explained above, administrative closures provide Immigration Judges and the Board with a tool to use in appropriate circumstances to efficiently manage cases that are not ripe for resolution. See supra Section II. Allowing Immigration Judges and the Board to exercise their authority to order administrative closures, given their "large caseloads," permits them to effectively allocate their limited resources to "focus on cases where there is an active dispute." EOIR, OPPM 13-01, at 4. Withdrawing the authority to administratively close cases would be inconsistent with the INA's directive to Immigration Judges to "conduct proceedings" and "regulate the course of the hearing." 8 U.S.C. § 1229a(a)(1); 8 C.F.R. § 1240.1(c); cf. Dia, 353 F.3d at 234 (reviewing Attorney General's guidelines for inconsistency with the INA).

Indeed, administrative closures further the Attorney General's stated mission to "fairly, expeditiously, and uniformly administer[] the immigration laws," Dec. 2017 AG Mem. at 1, as temporarily closing cases dependent on outside factors over which neither the parties nor the court has control makes room for immigration judges "to fill those gaps [made available from having administratively closed cases taken off their docket] with new cases," EOIR, Operating Policies and Procedures Memorandum 91-1, at 7 (Jan. 11, 1991), https://www.justice.gov/sites/default/files/eoir/legacy/2001/09/26/91-1.pdf. Having capacity on their calendars to hear cases for which Immigration Judges and the Board can actually render immediate dispositions permit these adjudicators to "ensure[] the timely and impartial administration of justice." Dec. 2017 AG Mem. at 1-2.

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(continued….)

contemplate certain actions by the Attorney General, such as the delegation of authority, withdrawal of authority, or specification of legal consequences arising from the procedural status of a case, such actions should be taken only through the promulgation of regulations by notice-and-comment rulemaking procedures, see 5 U.S.C. §§ 551(4)-(7), rather than through the disposition of this case.

Administrative closure is a procedural tool, and Immigration Judges, as trial level judges, are in the "best position" to consider the facts and circumstances of each case to determine whether administrative closure is appropriate and to exercise their discretion accordingly. Doumegno v. Lynch, 640 F. App'x 571, 574 (8th Cir. 2016); accord Diallo v. Mukasey, 508 F.3d 451, 454 (8th Cir. 2007) (describing Immigration Judge as being in the "best position" to make fact determinations); Neli v. Ashcroft, 85 F. App'x 433, 438 (6th Cir. 2003) (stating Immigration Judge is in the best position to make decisions that "demand[] consideration of many factors"); Cifuentes-Villatoro v. Ashcroft, 71 F. App'x 750, 752 (9th Cir. 2003); Richard John Williams, A037 769 283, 2010 WL 3027545, at *1 (BIA July 2, 2010) (finding "Immigration Judge [to be] in the best position to make findings of fact"). A delegation of this authority otherwise, or withdrawal of this authority, would not be practicable and would run contrary to "the authority of the Immigration Judges and the Board and their responsibility to exercise independent judgment and discretion in adjudicating cases and to take any action necessary and appropriate for the disposition of the case." Matter of Avetisyan, 25 I&N Dec. at 693.

## V. **Administrative Closure Serves Specific Functions in Docket Management That Are Not Adequately Addressed Through the Use of Other Docket Management Tools.**

Administrative closure provides a specific and unique procedural tool to Immigration Judges in the management of their dockets. Although other regulations, including those identified by the Attorney General, at times meet the needs of Immigration Judges in the management of their caseloads, they are not—individually or collectively—a complete substitute for administrative closure.

A. Continuance Is a Related but Distinct Case Management Tool.

Consistent with 8 C.F.R. § 1003.29, Immigration Judges can grant a motion for a continuance "for good cause shown." This can be used to temporarily postpone an immigration proceeding at the request of either the government or the respondent or by an Immigration Judge *sua sponte*. See Matter of Avetisyan, 25 I&N Dec. at 691-92 (citing 8 C.F.R. §§ 1003.29 (continuances), 1240.6 (adjournments)). As with administrative closure decisions, Immigration Judges are granted "broad discretion" in granting continuances. Matter of W-Y-U, 27 I&N Dec. at 18 n.3.

A continuance is functionally similar to an administrative closure in that parties in immigration court proceedings can seek to temporarily adjourn a final hearing for "good cause." 8 C.F.R. § 1003.29. This might include reasons such as the need to gather evidence, see Matter of Sibrun, 18 I&N Dec. 354, 356-57 (BIA 1983), or to seek relief from removal outside of the immigration court proceedings, see Matter of Hashmi, 24 I&N Dec. at 788-94. In cases where alternatives forms of relief may be available, continuances, like administrative closures, promote judicial economy by avoiding unnecessary proceedings. See Matter of Avetisyan, 25 I&N Dec. at 691. And both administrative closure and continuances address the "need[] . . . to give the respondent an opportunity to apply for relief," which the Board and courts have recognized is critical and outweighs case-completion goals. Matter of Hashmi, 24 I& N at 787; see also Hashmi v. Attorney General of U.S., 531 F.3d 256 (3d Cir. 2008). But continuances are only practical when "additional action [that is] required of the parties . . . will be, or is expected to be, completed within a reasonably certain and brief amount of time." Avetisyan, 25 I&N Dec. at 691.

Where a final, fixed adjournment date cannot be determined, however, continuances can result in added burdens to the courts and to the parties, and administrative closure is more appropriate. Cf. id. at 697 (finding administrative closure to be appropriate where "numerous continuances" had already been granted to await adjudication of respondent's "prima facie approvable visa petition," which "ha[d] been pending before the DHS [*sic*] for a significant and unexplained period of time"). For clients Angel and Chris, discussed above, for example, there is no certain date for the adjudication of their SIJS applications, which are reliant on the schedules of both the family court and USCIS. See supra Section I.A. Had the Immigration Judge in their case opted for a continuance, as opposed to administrative closure, the Immigration Judge may have had to recalendar their case multiple times while their SIJS petitions were pending outside of immigration court. As a result, Angel and Chris would have been required to spend hours waiting for a brief calendar hearing, only to have their case continued for another few months or more, with no reason to believe that their SIJS applications would be approved in the period between hearings.

Mel, who is also discussed above, is a victim of abuse and is providing substantial assistance to law enforcement in connection with the prosecution of Mel's abuser. See supra Section I.A. Mel is now waiting for USCIS to adjudicate the U-visa application, a process which could take years to conclude. As with Angel and Chris, nothing would be

gained by requiring Mel's repeated appearance in immigration court while Mel is waiting for this application to be assessed.[6]

In cases involving clients like Angel, Chris, and Mel, administrative closure provides a better alternative to a continuance, or more likely multiple successive continuances, for both the court and the parties. See Matter of Hashmi, 24 I&N Dec. at 791 (noting that administrative closure "avoid[s] the repeated rescheduling of a case that is clearly not ready to be concluded").

B. Dismissals and Terminations Without Prejudice Are Likewise Distinctive, and DHS Would Lose Flexibility If Required to Rely Exclusively on These Tools.

A dismissal without prejudice pursuant to 8 C.F.R. § 1239.2(c) is granted at the request of the government for one of several enumerated reasons, *e.g.*, that the respondent is a US national or otherwise not deportable or that the respondent is deceased. See 8 C.F.R. § 293.2(a). The government can also seek a dismissal where "[c]ircumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government." Id. § 293.2(a)(7).[7]

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[6] In cases involving individuals like Angel, Chris, and Mel, where respondents would have to make multiple appearances in immigration court while their applications are pending before other bodies and outside of either the parties' or the immigration court's control, the party opposing administrative closure must provide a persuasive reason for the case to nevertheless remain on the Immigration Judge's docket. See Matter of W-Y-U-, 27 I&N Dec. 17, 20 (BIA 2017).

[7] Respondents have also been permitted to file motions for dismissal when they have a request for immigration relief pending. Se [redacted], 2016 WL 1358009, at *1 (BIA Mar. 9, 2016) (granting dismissal motion "so that [respondent] can pursue an immigrant visa abroad based on an approved provisional waiver of inadmissibility").

A termination of removal proceedings pursuant to 8 C.F.R. § 1239.2(f) is available where respondent can establish prima facie eligibility for naturalization and where the case involves "exceptionally appealing or humanitarian factors." Id. Termination is also available in cases where DHS has erroneously charged a respondent with removability and where a respondent has an approved (….continued)

Dismissals and terminations without prejudice provide similar relief for respondents as administrative closure. (See Shafiqullah Decl. ¶ 9.) Respondents whose removal cases have been dismissed are no longer required to regularly appear in immigration court and are able to pursue alternative forms of relief and address personal needs without the encumbrance of removal proceedings. (See id.)

DHS, however, often favors administrative closure over motions for dismissal or termination, opposing respondents' motions for these other forms of relief. (See Shafiqullah Decl. ¶ 9.) For example, in a case where the respondent has an application for an immigration benefit such as a U-Visa or SIJS pending before the USCIS, if the case is dismissed or terminated, and USCIS does not approve the application, DHS would have to re-serve and re-file the removal case, resulting in added burdens for the Department. (See id.) In contrast, if the case is administrative closed, and USCIS does not approve the application, DHS need only move to recalendar the case. (See id.) Thus, if administrative closure were no longer available, DHS would likely incur a greater burden as a result of the increased number of dismissals and terminations.

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(continued….)
application (such as for SIJS or on a family-based petition) and is eligible for immediate adjustment of status. (See Shafiqullah Decl. ¶ 8.)

## VI. **The Attorney General Should Clarify That a Recipient of an I-601A Provisional Waiver Should Not Be Ordered Removed *in Absentia*, While Traveling for a Consular Interview.**

In asking, in his third question, whether there should be different legal consequences where a case has been administratively closed, Matter of Castro-Tum, 27 I&N Dec. 187 (A.G. 2018), the Attorney General may be considering the impact of administrative closure on provisional waivers in connection with I-601A applications. Currently, USCIS instructs that I-601A applicants in removal proceedings must "resolve" their removal proceedings before traveling out of country for a consular interview. USCIS, Provisional Unlawful Presence Waivers: If You Are in Removal Proceedings (Jan. 5, 2018), https://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers. This typically requires respondents to have their removal proceedings terminated without prejudice. If immigrants in removal proceedings travel outside of the United States and their cases are recalendared for whatever reason while they are abroad, these immigrants might be ordered removed *in absentia*. (See Shafiqullah Decl. ¶ 10.)

Recently, the Department has challenged motions for termination even where respondents have received an approved provisional waiver under I-601A. (See id. ¶ 11.) This has created confusion regarding the appropriate implementation of provisional waivers received pursuant to I-601As and is need of clarification.

*Amici* urge that respondents in removal proceeding who have received I-601A provisional waivers after administrative closure should not be subject to *in absentia* orders if proceedings are recalendared in their absence, provided that their counsel advises the Immigration Judge and DHS regarding the reason for the respondent's

absence. Instead, the recipient of an I-601A provisional waiver should be permitted to travel to and from the United States for purposes of attending a consular interview. Upon returning as a lawful permanent resident, the respondent may then move for termination of removal proceedings.

## VII. Cases That Are Already Administratively Closed Must Remain Undisturbed by the Attorney General's Decision in This Matter.

As explained above, Immigration Judges and the Board have the authority to administratively close cases and are the appropriate bodies to exercise this authority. However, should the Attorney General determine that such power is unwarranted or unavailable, he must nevertheless leave closures in place for those cases already administratively closed. Any action to forcibly recalendar these cases en masse would result in a substantial burden on the already overwhelmed immigration court system and harm those individuals with active cases, including clients like Max, discussed supra section I, whose case has already been pending for more than two years. See also TRAC, Ballooning Wait Times. Reopening hundreds of thousands of cases and adding them to the immigration judge's docket would be in direct tension with the Attorney General's stated "[c]ommitment to the [t]imely and [e]fficient [a]djudication" of the "approximately 650,000 cases pending before the immigration courts." Dec. 2017 AG Mem. at 1. Introducing these administratively closed cases, which are administratively closed for fact-specific practical reasons—in many cases outside of the parties' and the court's control—would clog up the immigration courts' calendars and prevent these adjudicators from "ensuring that meritorious cases receive timely consideration," in accordance with the Attorney General's guidance. Dec. 2017 AG Mem. at 2.

Additionally, the Attorney General does not have the authority to engage in retroactive rulemaking and therefore may not alter the status quo for those cases already subject to administrative closures, including for many of *amici*'s clients. See Kirwa v. U.S. Dep't of Defense, No. 17-1793, 2017 WL 4862763, at *14 (D.D.C. Oct. 25, 2017) (stating agencies may not promulgate retroactive rules without express congressional authorization and that "even [agency] interpretations can be impermissibly retroactive if they 'change[] the legal landscape'" (second alteration in original) (quoting Arkema Inc. v. EPA, 618 F.3d 1, 7 (D.C. Cir. 2010))); see also De Niz Robles v. Lynch, 803 F.3d 1165, 1172-73 (10th Cir. 2015) (Gorsuch, J.) (holding the Board's decision cannot apply retroactively to the respondent). Consistent with the Supreme Court's decision in Bowen v. Georgetown University Hospital, regulatory bodies, including the Department of Justice, cannot promulgate rules retroactively without clear authority from Congress. 488 U.S. 204 (1988).

"[C]onstitutional protections sounding in due process and equal protection" act to constrain retroactive application of rulemaking of the type that would be implicated by the Attorney General in negating the authority from Immigration Judges and the Board to order administrative closures. See De Niz Robles, 803 F.3d at 1172 ("[T]he more an agency acts like a legislator—announcing new rules of general applicability—. . . the stronger the case becomes for limiting application of the agency's decision to future conduct."); see also Bowen, 488 U.S. at 471 ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."); Velasquez-Garcia v. Holder, 760 F.3d 571, 579 (7th Cir. 2014) (stating retroactivity analysis "applies equally to administrative rules"). The Supreme

Court has noted the particular concerns of applying rules retroactivity to immigrants, because as noncitizens who cannot vote, they are particularly vulnerable to adverse legislation. See INS v. St. Cyr, 533 U.S. 289, 315 n.39 (2001).

A rule is retroactive when it "attaches new legal consequences to events completed before its enactment." Velasquez-Garcia, 760 F.3d at 579 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994)) (internal quotation marks omitted). Determining whether a rule operates retroactively should be guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations," and a "commonsense, functional judgment" that a new provision attaches new legal consequences to events completed before its enactment leads to a finding of retroactivity. Martin v. Hadix, 527 U.S. 343, 357-58 (1999) (internal quotation marks and citations omitted). If an agency's rule "'effects a substantive change from the agency's prior regulation or practice,' then it is impermissibly retroactive." Kirwa, 2017 WL 4862763, at *14 (quoting Ne. Hosp. Corp. v. Sebelius, 657 F.3d 1, 14 (D.C. Cir. 2011)).

If the authority of Immigration Judges and the Board to order administrative closure were removed, the Attorney General would be effecting a "substantive change" to the agency's prior authority and practice of allowing Immigration Judges and the Board to exercise their independent judgments in ordering administrative closures. Kirwa, 2017 WL 4862763, at *14. In addition, the Attorney General would be "act[ing] like a legislator—announcing new rules of general applicability," rather than "like a judge—applying preexisting rules of general applicability to discrete cases and controversies," as this withdrawal of authority would apply generally to all Immigration Judges and the Board, without considerations for individual cases and controversies. See De Niz Robles,

803 F.3d at 1172. Automatically reopening all cases previously subject to administrative closure would require retroactively applying the Attorney General's new substantive rule to undo previously valid exercises of authority and would impose a new duty in respect to transactions or considerations already past. See Velasquez-Garcia, 760 F.3d at 579 (finding duty to file a visa within one year, rather than merely taking substantial steps toward filing, to be a new obligation for which retroactive application was impermissible). Prematurely recalendaring these cases under a new standard would upset "settled expectations" by all parties that their cases were temporarily off the active docket absent a motion to recalendar and an opportunity to challenge such a motion. Martin, 527 U.S. at 345; see also Landgraf, 511 U.S. at 282 (discussing impermissible retroactive effect of a legal change because it "would have an impact on private parties' planning").

## CONCLUSION

Administrative closure is a neutral and necessary vehicle for Immigration Judges to administer their dockets in the most efficient way possible in light of the priorities of the parties appearing before them. Its use has substantial resultant benefits for respondents including many of *amici*'s clients, who are enabled to pursue alternative forms of relief outside of immigration court while their cases are closed, as well as for DHS, which is able to better manage its own expansive caseload. The Attorney General should not only uphold the use of administrative closure but also endorse the multi-factor standard stemming from Matter of Avetisyan, 25 I&N Dec. 688, 692 (BIA 2012), as fair to the courts and the parties. Should the Attorney General decide not to retain this important tool—which *amici* submit would be a costly mistake in terms of DOJ, DHS, and respondent resources—the Attorney General must not void extant grants of

administrative closure, which would violate the due process rights of the parties to these cases, including many clients of *amici*, and would add unwarranted burdens to the already overwhelmed immigration court system.

Dated: February 16, 2018

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**UNITED STATES DEPARTMENT OF JUSTICE**
**OFFICE OF THE ATTORNEY GENERAL**

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| In the Matter of:<br><br>Reynaldo CASTRO-TUM,<br><br>*Respondent* | File No.: (b) (6)<br><br><br>February 16, 2018 |

**BRIEF BY *AMICI CURIAE* TAHIRIH JUSTICE CENTER, THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION (AILA), CENTER FOR GENDER & REFUGEE STUDIES (CGRS), ASISTA IMMIGRATION ASSISTANCE (ASISTA), AND THE ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE**

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## INTRODUCTION AND ISSUES PRESENTED

On January 4, 2018, the Attorney General referred the decision of the Board of Immigration Appeals in the matter of *Reynaldo CASTRO-TUM, Reynaldo Castro-Tum,* (b) (6) (b) (6) (BIA Nov. 27, 2017), to himself for review. *Matter of Castro-Tum*, 27 I&N Dec. 187 (A.G. 2018). The Attorney General invited interested amici to submit briefs on points relevant to the case and included a list of questions related to the specific issue of administrative closure. *Id.*

This brief addresses many of the questions raised by the Attorney General. We begin with a brief description of administrative closure, a longstanding docket control mechanism used by judges in immigration and other courts. We then explain how it is an important tool under the principles of administrative law, particularly in the U.S. immigration system where different agencies with different mandates must accommodate each other's independent decision-making timelines. Third, we show that administrative closure is an important tool for Immigration Judges who frequently adjudicate issues involving refugees and other victims of severe trauma who have fled to the U.S. escaping violence, persecution, and abuse. Both the psychological challenges for those persons—which may require additional time to address—and the fact that numerous and different government agencies are involved in these immigration decisions require that the Immigration Courts be able to use tools such as administrative closure to ensure that such persons are granted a full and fair hearing. Finally, we explain why continuances are not an adequate substitute for administrative closures because they are necessarily less efficient, more costly, and will clog the court docket if used when the basis for the abeyance is up to a third party and the timing of its decision is unknown. Moreover, the Department of Justice's recent guidance *discouraging* Immigration Judges from granting continuances (and at least suggesting associated job performance ramifications) demonstrates that administrative closure may be more essential than ever to efficiently manage court dockets and to meet due process requirements.

Also, to the extent that administrative closure is a prerequisite under certain rules for waivers, continuances do not suffice and only a formal rule-making could strip Immigration Courts of this tool. In sum, we urge the Attorney General to recognize the important role of administrative closure in the proper functioning of the Immigration Courts.

## STATEMENT OF INTEREST

Tahirih Justice Center is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls who survive gender-based violence. In five cities across the country, Tahirih offers legal and social services to women and girls fleeing all forms of gender-based violence, including human trafficking, forced labor, domestic violence, rape and sexual assault, and female genital cutting/mutilation. Since its beginning in 1997, Tahirih has provided free legal assistance to more than 20,000 individuals, many of whom have experienced the significant psychological and neurobiological effects of that trauma. Through direct legal and social services, policy advocacy, and training and education, Tahirih protects immigrant women and girls and promotes a world where they can live in safety and dignity. Tahirih amicus briefs have been accepted in numerous federal courts across the country, and here, Tahirih seeks to address questions raised by the Attorney General.

The American Immigration Lawyers Association (AILA), founded in 1946, is a nonpartisan, not-for-profit organization comprised of over 11,000 attorneys and law professors who practice and teach immigration law. AILA members provide professional services, continuing legal education, information, and additionally, representation for U.S. families, businesses, foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis. AILA has participated as amicus curiae in numerous cases. As a friend of the court, AILA hopes to provide a larger context for the questions posed by the Attorney General in order to promote the just administration of law.

The Center for Gender & Refugee Studies (CGRS), based at the University of California Hastings College of the Law, has a direct and serious interest in the development of immigration law and in the issues under consideration. Founded in 1999, CGRS provides legal expertise and resources to attorneys representing asylum-seekers fleeing gender-related and other harms, and is directly involved in national asylum law and policy across a wide range of issues. CGRS has a particular interest in the development of trauma-informed policies, practices, and jurisprudence that meet the needs of survivors of sexual violence and other abuse. Over the years, CGRS has provided technical assistance in many thousands of such cases. As recognized experts on asylum and law with a mission to advance domestic and international refugee and human rights, CGRS has a direct interest in the critical adjudicatory issues raised in this case, which will impact the fair and proper administration of law.

ASISTA Immigration Assistance (ASISTA) worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes, which were incorporated in the 1994 Violence Against Women Act (VAWA) and its progeny. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, legal services, and non-profit, pro bono, and private attorneys working with immigrant crime survivors. ASISTA has previously filed amicus briefs to the Supreme Court and to the Second, Seventh, Eighth, and Ninth Circuits.

The Asian Pacific Institute on Gender-Based Violence (formerly, Asian & Pacific Islander Institute on Domestic Violence) is a national resource center on domestic violence, sexual violence, trafficking, and other forms of gender-based violence in Asian and Pacific Islander communities. The Institute serves a national network of advocates and community-

based service programs that work with Asian and Pacific Islander and immigrant survivors, and is a leader on providing analysis on critical issues facing victims of gender-based violence in the Asian and Pacific Islander and in immigrant communities. The Institute leads by promoting culturally relevant intervention and prevention, expert consultation, technical assistance and training; conducting and disseminating critical research; and informing public policy.

## ARGUMENT

### I. ADMINISTRATIVE CLOSURE IS A LONG-STANDING DOCKET CONTROL TOOL USED BY IMMIGRATION AND OTHER JUDGES

Administrative closure is a widely used and long-accepted docket control mechanism that grew organically from the need to efficiently handle matters requiring input or decisions from actors not before the court. In the particular context of the Immigration Courts, it is a tool "used to temporarily remove a case from an Immigration Judge's calendar or from the [Board of Immigration Appeals'] docket," without the entry of a final order. *Matter of Gutierrez*, 21 I&N Dec. 479, 480 (BIA 1996); *see also Matter of Avetisyan*, 25 I&N Dec. 688, 694 (BIA 2012) ("Administrative closure is a tool used to regulate proceedings, that is, to manage an Immigration Judge's calendar"). It does not afford any immigration status or relief. It simply pauses the proceedings without resolution "to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time." *Avetisyan*, 25 I&N Dec. at 692. It is more efficient than ordering a series of continuances, because it frees the parties and the court from returning again and again for status hearings, and allows all parties to wait without further expense until the necessary out-of-court action is resolved. Significantly, in removal proceedings, either party, the Department of Homeland Security (DHS) or the individual, can move at any time to re-calendar a case that has been administratively closed by filing a motion to re-calendar.

Administrative closure is not unique to the Immigration Courts. In fact, courts throughout the country have long used this tool—whether termed "administrative closure" or not—for docket control when a relevant issue of a case is likely to be affected by the decision of another agency or tribunal. *See Mire v. Full Spectrum Lending Inc.*, 389 F.3d 163, 167 (5th Cir. 2004) ("District courts frequently make use of [administrative closures] to remove from their pending cases suits which are temporarily active elsewhere (such as before an arbitration panel) or stayed (such as where a bankruptcy is pending)."); *Avetisyan*, 25 I&N Dec. at 697, n.2 ("Administrative closure is not limited to the immigration context. It is utilized throughout the Federal court system, under a variety of names, as a tool for managing a court's docket."); *Penn-America Ins. Co. v. Mapp*, 521 F.3d 290, 293, 295 (4th Cir. 2008) ("[W]e recognized that the removal of a case from a court's 'active docket' is the functional equivalent of an administrative closing, which does not end a case on its merits or make further litigation improbable"). 1/ Other administrative agencies and administrative courts also recognize and use the tool. *See, e.g.*, *Thompson v. Potter*, EEOC DOC 05990378, 2001 WL 1594476, at *1 (EEOC Dec. 3, 2001) (administrative closure used in EEOC proceeding); Order at 6, *Sec. & Exch. Comm'n v. Durham*, No. 1:11-cv-00370-JMS-TAB (S.D. Ind. Aug. 9, 2016) (administratively closing matter until all appellate rights in another judicial body exhausted).

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1/ *See also Ali v. Quarterman*, 607 F.3d 1046, 1047–48 (5th Cir. 2010) (administratively closing a prisoner's Section 1983 challenge to prison policy, pending the outcome of a similar case in another district); *WRS, Inc. v. Plaza Entm't, Inc.*, 402 F.3d 424, 427 (3d Cir.2005) (case administratively closed based on plaintiff's bankruptcy filing and withdrawal of counsel); *CitiFinancial Corp. v. Harrison*, 453 F.3d 245, 250–51 (5th Cir. 2006) (judge granted a motion to compel arbitration and ordered the case "administratively dismissed from the active docket"); *Lehman v. Revolution Portfolio, LLC*, 166 F.3d 389, 392 (1st Cir.1999) ("We endorse the judicious use of administrative closings by district courts in circumstances in which a case, though not dead, is likely to remain moribund for an appreciable period of time.").

In the Immigration Courts, administrative closure grew out of the need to handle matters that could not efficiently be handled with continuances or other mechanisms. Relying on authority from Department of Justice (DOJ) regulations, 2/ and based on the need for an efficient tool to handle cases that await decisions or input from entities not before the court, the Immigration Courts have ordered, and the Board of Immigration Appeals (the Board) has reviewed, administrative closure going back at least three decades, beginning in 1988 or earlier. *See Avetisyan*, 25 I&N Dec. at 692; *Matter of Lopez-Barrios*, 20 I&N Dec. 203 (BIA 1990). Utilization of administrative closure over those many years has resulted in a well-established framework to apply a tool that can do what is required when other tools cannot. The Board has carefully articulated and Immigration Judges regularly apply the factors that circumscribe its appropriate use. *See Avetisyan*, 25 I&N Dec. at 696. Thus, there should be no concern that Immigration Courts arbitrarily or whimsically employ administrative closure, and there is no factual predicate that would justify its wholesale removal from the toolbox of the Immigration Judges. Indeed, in the present case, the Board reviewed and *overturned* an administrative closure order. *Reynaldo Castro-Tum*, [redacted] (BIA Nov. 27, 2017). Where there is no break in the system, there is no need to fix it.

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2/ The DOJ's regulations generally state that Immigration Judges "shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the [Immigration and Nationality] Act and regulations that is appropriate and necessary for the disposition of such cases." 8 C.F.R. § 1003.10(b). Board of Immigration Appeals members may also "take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case." 8 C.F.R. §1003.1(d)(1)(ii); *see also* 8 C.F.R. § 1240.1(a)(1)(iv) (as part of removal proceedings, Immigration Judges have the authority to any "action consistent with applicable law and regulations as may be appropriate").

## II. ADMINISTRATIVE CLOSURE IS AN ESSENTIAL ADMINISTRATIVE LAW TOOL IN THE CONTEXT OF THE U.S. IMMIGRATION SYSTEM

### A. Congress Divided Immigration Decision Authority Between Agencies, Requiring Agencies To Accommodate Other Agencies' Decision-Making Timelines.

Perhaps more than any other administrative law system in the U.S., the immigration system is a delicate balance between a number of different offices and agencies, each of whom has an important role to play. *See, e.g.*, 8 U.S.C. § 1103(a)(1) (describing the powers of the Secretary of Homeland Security under the Act in relation to those of the President, Attorney General, the Secretary of State, and others). Indeed, there are at least four agencies within DHS and the DOJ, with separate responsibilities, which are intimately involved in day-to-day immigration issues:

> 1) the Bureau of Citizenship and Immigration Services ("USCIS") which administers immigration benefits including processing citizenship applications [and] asylum requests; 2) the Bureau of Immigration and Customs Enforcement ("ICE") responsible for detention and removal, . . . 3) the Bureau of Customs and Border Protection ("CBP") which oversees ports, borders and inspections of aliens entering the United States, [and a] separate agency, [4] the Executive Office For Immigration Review ("EOIR"), within the Department of Justice, [which] administers immigration courts where removal proceedings occur.

*Lucaj v. Dedvukaj*, 749 F. Supp. 2d 601, 607–08 (E.D. Mich., 2010). Moreover, there are also other agencies such as the Department of Labor (DOL), for example, which have smaller, but also critical roles to play in immigration issues such as work-related visas.

Where Congress has thus split or shared authority, agencies may not ignore that differentiation. Indeed, the Executive Branch has long recognized this need. As Executive Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (Order) makes clear, "each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations and those of other Federal agencies." *Id.* at 51,736.

### B. To Efficiently Manage A Docket Within This Congressional Framework Involving Multiple Agencies, Immigration Judges Must Have Tools Such As Administrative Closure To Give Full Effect To The Decision Of Other Agencies.

While several agencies may be involved in a given immigration case and while there may be an "inherent tension between the conflicting needs to bring finality to the removal proceedings and to give the respondent an opportunity to apply for relief" he or she may deserve, *Matter of Hashmi*, 24 I&N Dec. 785, 787 (BIA 2009), no one agency may tie the hands of another. The agencies must coordinate their efforts, and no agency can or should interfere with the roles or responsibilities of another. For example, the decision to institute removal proceedings—or not—is a matter of prosecutorial discretion for DHS, and EOIR has no authority to challenge that decision. *See Matter of Ramirez-Sanches*, 17 I&N Dec. 503 (BIA 1980). However, once DHS has initiated proceedings, EOIR has the sole authority to conduct the proceedings, and DHS may not interfere with that process. *See* Section 240(a)(1),(3) of the Immigration and Nationality Act .

Likewise, Congress has given USCIS the authority to adjudicate immigrant visa petitions, naturalization petitions, asylum and refugee applications, and other cases at immigration service centers. *See* 6 U.S.C. § 271(b). Congress has also given USCIS *exclusive* authority over certain types of matters such as visas for victims of crime and human trafficking. *See* 8 C.F.R. § 214.14(c)(1) ("USCIS has sole jurisdiction over all petitions for U nonimmigrant status."); 8 C.F.R. § 214.11(b), (d) (noting that only USCIS may classify a non-citizen as a T-1 nonimmigrant). In fact, if EOIR were to remove a trafficking victim while her visa petition is pending, it would prevent the applicant from establishing eligibility for T visa status, as such status requires the applicant to be physically present in the United States. *See* U.S.C.

§ 1101(a)(15)(T)(II). USCIS also has exclusive authority to adjudicate claims for victims of domestic violence who self-petition under the Violence Against Women Act (VAWA). *See* 8 C.F.R. § 204.2(c)(6)(iii). If EOIR were to remove victims entitled to VAWA relief, they could face considerable hardship applying for relief, exacerbating the trauma they have suffered and undermining the Congressional intent in establishing these immigration benefits. *See* 8 U.S.C. § 1154(a)(1)(A)(v)(I) (providing that an applicant outside the U.S. must show that her spouse is an employee of the U.S. government or a member of the uniformed services, or subjected the applicant to qualifying abuse "in the United States"). Similarly, abused, neglected, or abandoned children who qualify for Special Immigrant Juvenile Status must obtain a predicate order from a state court and a petition adjudicated by USCIS before EOIR can make any decision that takes their right to relief into account. *See* 8 C.F.R. § 204.11. The reliance on state court procedures by Congress in connection with non-citizen children recognizes the necessity of comity between the Immigration Court and other courts and the *parens patriae* role of the state for juveniles within its jurisdiction. 3/ The availability of administrative closure is necessary for the process Congress created. *Cf. In Re Prudential-Bache Energy Income P'ship Sec. Litig.*, 815 F. Supp. 177, 183 (E.D. La. 1993)("Considerations of comity between federal courts and state courts and agencies have been important forces which have shaped many federal decisions from a policy standpoint.").

Indeed, for some forms of relief, the regulations require that an Immigration Judge administratively close a matter before USCIS can even *begin* to make its determination as to a particular claim for relief. *See* 8 C.F.R. § 212.7(e)(4)(iii) (stating that non-citizens in removal

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3/ *See Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (the state has "a *parens patriae* interest in preserving and promoting the welfare of the child").

proceedings are ineligible for relief under Form I-601A "unless the removal proceedings are administratively closed and have not been recalendared at the time of filing the Form I-601A").

All of these decisions by other agencies may have significant effect in removal proceedings conducted by Immigration Judges, and many, if not most, of them can be made only by the other agency or entity. To appropriately allow those agencies to do what Congress has required them to do, and to ensure that immigration relief is in fact available to those Congress has deemed eligible, Immigration Judges must be able to take other agency actions into account and to organize their dockets so as not to prematurely hear and rule on matters which may be significantly affected by those other agency actions. This is, in fact, one way the Immigration Courts have used administrative closure. As the Board held in *Avetisyan*, an important factor in the determination is "the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings." *Avetisyan*, 25 I&N Dec. at 696; *see also Gonzalez-Vega v. Lynch*, 839 F.3d 738, 740 (8th Cir. 2016). Indeed, the Board then illustrated this point:

> It may, for example, be appropriate for an Immigration Judge to administratively close removal proceedings where an alien demonstrates that he or she is the beneficiary of an approved visa petition filed by a lawful permanent resident spouse who is actively pursuing, but has not yet completed an application for naturalization. Similarly, it may be appropriate for the Board to administratively close proceedings on appeal where the alien establishes that he or she has properly appealed from the denial of a prima facie approvable visa petition, but the appeal has not been forwarded to the Board for adjudication. *Avetisyan*, 25 I&N Dec. at 696.

This is how administrative closure has largely been used. Thus, it has been used to pause proceedings when a removal proceeding could be affected by a decision on a visa application by another agency, *see, e.g.*, *Avetisyan*, 25 I&N Dec. at 688, when an Immigration Judge is awaiting feedback from another agency or third party related to the mental capacity of a non-citizen, *cf.*,

*Matter of M-A-M*, 25 I&N Dec. 474, 483 (BIA 2011), and when an employer intends to file a petition for an individual in removal proceedings but is awaiting Department of Labor action, *see, e.g.*, *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009); *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004).

Revoking 30-year-old authority that permits Immigration Judges to accommodate the timelines of other agencies is inconsistent with the statutory immigration scheme. Without the tool of administrative closure, Immigration Courts will be less able to effectively and efficiently carry out their role in immigration determinations, and more likely to interfere with the appropriate actions of other agencies. Administrative closure allows Immigration Judges to pause proceedings—without granting relief—while non-immigration-court decisions are made elsewhere. This practice encourages efficiency as it frees up docket space and resources for cases that are ready to proceed, and spares the court, the parties, the attorneys, and the interpreters the potentially useless exercise of taking and receiving evidence and making a removal decision where it may never be necessary. It also is critical to ensure that the Immigration Court does not act incompatibly and inconsistently with USCIS's role in the system.

## III. Administrative Closure is Especially Significant in Matters Involving Trauma

### A. Where immigration relief is predicated on escaping violence or other trauma, immigration proceedings must take that trauma into account.

Congress has established a variety of bases for immigration status in the United States for survivors of persecution, abuse, and violence. In addition, Congress has provided some kinds of immigration relief for survivors of trauma such as human trafficking, sexual abuse, and domestic violence. *See* 8 U.S.C. § 1101(a)(15)(T) (providing requirements for T visas); 8 USC § 1101(a)(15)(U) (providing requirements for U visas); 8 U.S.C. § 1154(a)(1)(A)(v) (providing VAWA relief); and 8 U.S.C. § 1101(a)(27)(J) (defining "special immigrant"). Not surprisingly,

asylum claims often involve facts of horrific suffering and trauma. Especially where the basis for immigration relief flows from what are often severely traumatic events, the processes by which relief determinations are made must take the effects of that trauma into account, including the effects on the victim's ability or competency to make a case. Administrative closure may be a necessary tool to enable the Immigration Courts to do just that.

One significant concern for survivors of violence or other trauma is mental competency. Indeed, the Immigration and Nationality Act requires safeguards to protect the rights and privileges of a mentally incompetent non-citizen. 8 U.S.C. § 1229a(b)(3)(2006); *see M-A-M-*, 25 I&N Dec. at 474. The "test for determining whether an alien is competent to participate in immigration proceedings" is "whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses." *Id.* at 479. However, "[m]ental competency is not a static condition. 'It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways.'" *Id.* at 480 (quoting *Indiana v. Edwards*, 554 U.S. 164, 175 (2008)). In some of these cases, "Immigration Judges can docket or manage the case to facilitate the respondent's ability to obtain medical treatment and/or legal representation." *M-A-M-*, 25 I&N Dec. at 481. In other cases, safeguards such as continuances may be insufficient, and "the Immigration Judge may pursue alternatives with the parties, *such as administrative closure*, while other options are explored, such as seeking treatment for the respondent." *Id.* at 483. (emphasis added)

There are also Constitutional considerations at stake: the Fifth Amendment entitles non-citizens to due process of law, including the right in removal proceedings to a full and fair hearing. *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Matter of M-D-*, 23 I&N Dec. 540, 542 (BIA

2002) (citing *Landon v. Plasencia*, 459 U.S. 21, 32–33 (1982)). Federal courts have explained that "assessing the competency of individuals subject to removal comes down to a balance between competing interests" including the "much-needed protection" of procedural due process. *Diop v. Lynch*, 807 F.3d 70, 76 (4th Cir. 2015) (citing *Rusu v. United States Immigration & Naturalization Serv.*, 296 F.3d 316, 320–22 (4th Cir. 2002)). Indeed, as the United States Court of Appeals for the Fourth Circuit explained, "[t]o order the removal of someone unable to participate meaningfully in his or her removal proceedings would make the whole process a charade." *Diop*, 807 F.3d at 76.

Trauma also has consequences that may fall short of what is defined as mental incompetence but which may still bear on whether administrative closure is an appropriate tool in an immigration matter. Recognizing that trauma may well affect survivors of domestic violence, the government itself has provided trauma-related training focused on domestic violence to the special unit of adjudicators tasked with evaluating those claims. 4/ Likewise, asylum officers receive training on how trauma can affect a survivor so they can more appropriately evaluate their statements. 5/ As we discuss below, the effects of trauma on those

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4/ *See* U.S. Dep't of Homeland Sec., U.S. Citizenship and Immigration Servs., *Report on the Operations of the Violence Against Women Act Unit at the USCIS Vermont Service Center Report to Congress* 13–14 (2010), https://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/vawa-vermont-service-center.pdf

5/ *See Fiadjoe v. Attorney Gen. of the United States*, 411 F.3d 135, 154 (3d Cir. 2005) ("Women who have been subject to domestic or sexual abuse may be psychologically traumatized. Trauma . . . may have a significant impact on the ability to present testimony.") (citing INS Guidelines, *Consideration for Asylum Officers in Adjudicating Asylum Claims from Women* (1995); *see also* USCIS, *Questions and Answers, USCIS Asylum Division Quarterly Stakeholder Meeting* 10 (Feb. 7, 2017), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AsylumQuarterlyEngagementQA02072017.pdf ("All asylum officers do receive training on interviewing survivors of torture and other severe trauma during their mandatory five-week training.").

fleeing violence, abuse, and persecution, may be serious, long-standing, and varied, and victims may require time and treatment before they can assist in recognizing and claiming the rights Congress has extended to them. In many circumstances in which trauma victims are entitled to immigration relief, a detailed declaration about the trauma is required, and many applicants need weeks or months of therapy before they can coherently discuss this trauma with their attorney, and in turn, start the process before another agency. An Immigration Judge's exercise of administrative closure while the appropriate agency adjudicates trauma-related matters furthers the government's interest in efficient and fair adjudication.

### B. Trauma Can And Does Affect The Ability Of Its Victims To Present Their Cases.

Non-citizens who enter the U.S. fleeing violence, persecution, and abuse and who may be exposed to more trauma during their journey to the U.S. often suffer psychological distress from these traumatic events. This distress can affect mental capacity and hamper their ability to show they are entitled to relief. The U.S. Department of Health and Human Services has recognized, for example, that victims of human trafficking can experience Post-Traumatic Stress Disorder (PTSD). Heather J. Clawson et al., U.S. Dep't of Health and Human Servs., Office of the Assistant Sec'y for Planning and Evaluation, *Treating the Hidden Wounds: Trauma Treatment and Mental Health Recovery for Victims of Human Trafficking* (2008), https://aspe.hhs.gov/system/files/pdf/75356/ib.pdf (DHHS 2008 Report). 6/ PTSD symptoms include among others (1) re-experiencing of the trauma in forms such as flashbacks, nightmares,

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6/ Carole Warshaw et al., Nat'l Ctr. on Domestic Violence, Trauma & Mental Health, *A Systematic Review of Trauma-Focused Interventions for Domestic Violence Survivors* 2 (2013), http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2013/03/NCDVTMH_EBPLitReview2013.pdf ("Some trauma survivors experience one or more of these [psychiatric] symptoms for a brief period of time, while others develop chronic posttraumatic stress disorder (PTSD), a disorder that is a common response to overwhelming trauma and that can persist for years").

and intrusive thoughts, (2) avoidance of trauma-related, or trauma-triggering, stimuli (such as certain people or places), and (3) heightened startle response and an inability to concentrate. *Id.* at 2 (citing Norah Feeny et al., *Posttraumatic Stress Disorder in Youth: A Critical Review of the Cognitive and Behavioral Treatment Outcome Literature,* 35 Professional Psychology: Research and Practice 466, 466–76 (2004)). PTSD symptoms can also cause victims of trauma to suffer problems with functioning, including difficulties concentrating and alterations in consciousness, such as disassociation. *Id.* Victims of human trafficking may also suffer from conditions such as anxiety, panic disorder, major depression, substance abuse, and eating disorders as well as a combination of these. *Id.* These trauma-related disabilities have real effects on testimony, on ability to recall, on ability to work with counsel, and on ability to provide relevant information. 7/

These effects from trauma may be especially pronounced in children and adolescents who have suffered traumatic events. "[A] substantial body of psychological and physiological research shows that childhood or adolescent exposure to trauma and/or violence negatively impacts cognitive, social, and biological development." U.S. Dep't of Homeland Sec., *Report of the DHS Advisory Committee on Family Residential Centers* 110 (2016), https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf; *see also* Maureen E. Cummings, *Post-Traumatic Stress Disorder and Asylum: Why Procedural*

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7/ *See* UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* ¶7, http://www.unhcr.org/3d58e13b4.pdf (2011) (recognizing that where an applicant has suffered past trauma, the persecution may have "hindered the applicant's and his/her psychological maturity remains comparable to that of a child."); Stuart L. Lustig, *Symptoms of Trauma Among Political Asylum Applicants: Don't Be Fooled*, 31 Hastings Int'l & Comp. L. Rev. 725 (2008), http://heinonline.org/HOL/PrintRequest?collection=journals&handle=hein.journals/hasint31&id=741&print=section&div=23&ext=.pdf&format=PDFsearchable&submit=Print%2FDownload (discussing negative impact of trauma in ability to recount events in courtroom settings).

*Safeguards are Necessary*, 29 J. Contemp. Health Law & Policy 9:2, (2013), https://scholarship.law.edu/cgi/viewcontent.cgi?article=1018&context=jchlp. "[C]hild trauma survivors' brain development and abilities will be developmentally behind children or adolescents of the same age without such a history of trauma." *Id.* 8/ This "developmental immaturity" can impact their ability to participate in certain types of legal proceedings. *Id.* For these reasons, federal policy makers and immigration authorities have long recognized that trauma may require special considerations for young non-citizens, such as additional time to allow a person to seek certain types of relief. In 2005, Congress gave all victims of child abuse, child sexual assault, and forms of abuse and neglect that constitute battering or extreme cruelty up until the age of 25 to file the child's VAWA self-petition for an immigrant visa. *See* VAWA 2005, Pub. L. No. 109–162 § 805(c), 119 Stat. 2960 (2006) (amending Immigration and Nationality Act § 204(a)(l)(D), codified at 8 U.S.C. § 1154). In VAWA's bi-partisan House Committee report, Congress explained that: "This section ensures that immigrant children who are victims of incest and child abuse get full access to VAWA protections . . . provides that alien child abuse and incest victims who would have qualified to self-petition as the minor children of U.S. citizens and permanent residents can file the petition until the aliens attain the age of 25. This allows child abuse victims time to escape their abusive homes, secure their safety, access

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8/ *See, e.g.*, Vidanka Vasilevski et al., *Wide-Ranging Cognitive Deficits in Adolescents Following Early Life Maltreatment*, 30 Neuropsychology 239 (2016) (finding that "the maltreated group [of adolescents] showed significant impairments on measures of executive function and attention, working memory, learning, visuospatial function and visual processing speed."); USCIS Asylum Div., Asylum Officer Basic Training Course ("AOBTC"), *Guidelines for Children's Asylum Claims* 32 (2009), https://www.safepassageproject.org/wp-content/uploads/2014/02/AOBTC-Lesson29_Guide_Childrens_Asylum_Claims.pdf ("Trauma can be suffered by any applicant, regardless of age, and may have a significant impact on the ability of an applicant to present testimony.").

services and support that they may need and address the trauma of their abuse." H.R. Rep. No. 109–233, at 115 (2005) (regarding language enacted and codified at 8 U.S.C. § 1154).

In addition to PTSD and other psychological distress, non-citizens may also suffer from issues of mistrust caused by trauma. The U.S. Department of Health and Human Services recognized that "[f]or some victims, the trauma induced by someone they once trusted results in pervasive mistrust of others and their motives" and "[f]or both law enforcement and service providers, getting victims to trust them and accept help is a huge obstacle." DHHS 2008 Report at 1, 3. Some non-citizens before the Immigration Courts have been betrayed by law enforcement and governments in their home countries and suffer loss of trust, making it especially difficult for them to pursue relief from governmental agencies or Immigration Courts in the U.S. *Id.* 9 Mistrust resulting from trauma may render a survivor incapable of understanding the nature and object of the proceedings and thus mentally incompetent. These are exactly the individuals for whom the Immigrations Courts are required to adopt appropriate safeguards – including administrative closure – to ensure fair hearings and just results.

Where Congress has expressly promised immigration status or other protection for eligible survivors of trauma, due process requires that those survivors not be prevented from making those claims due to the effects of trauma. Tools such as administrative closure can

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9 *See also Paramasamy v. Ashcroft*, 295 F.3d 1047, 1053 (9th Cir. 2002) ("That a woman who has suffered sexual abuse at the hands of male officials does not spontaneously reveal the details of that abuse to a male interviewer does not constitute an inconsistency from which it could reasonably be inferred that she is lying."); *Singh v. INS*, 292 F.3d 1017, 1023 (9th Cir.2002) ( noting that an individual "who has suffered abuse during interrogation sessions by government officials in [her] home country may be reluctant to reveal such information during [her] first meeting with government officials in this country") (quotation omitted); UNHCR, *Information Note on UNHCR's Guidelines on the Protection of Refugee Women* ¶ 72 (July 22, 1991), http://www.unhcr.org/en-us/excom/scip/3ae68cd08/information-note-unhcrs-guidelines-protection-refugee-women.html ("UNHCR Women Guidelines")(noting that women may be reluctant to disclose incidents of sexual abuse as a result of mistrust, shame, and trauma).

ensure that USCIS—the sole arbiter of those provisions—has adequate time to make its decisions, while providing Immigration Judges with an efficient means of pausing their own proceedings. The Attorney General should not discard this valuable tool and at least 30 years of practice.

## IV. CONTINUANCES ARE NOT AN ADEQUATE SUBSTITUTE FOR ADMINISTRATIVE CLOSURES

### A. In The Appropriate Circumstances, Administrative Closures Are More Efficient Than Continuances And Further DOJ's Interests In Efficiency.

The standards the Board has articulated for continuances and administrative closure orders are not identical. For administrative closure, a primary concern is efficiency; the decision "involves an assessment of factors that are particularly relevant to the efficient management of resources of the Immigration Courts." *Avetisyan*, 25 I&N Dec. at 695. 10/

Administrative closures arose as a docket control tool *because* continuances were not adequate to meet court needs. A continuance requires the parties, the court, the attorneys, and, often, interpreters to regularly return to report to the court, and is used when the time needed to

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10/ The Board listed the following factors to be considered when an administrative closure order is reviewed:

> In determining whether administrative closure of proceedings is appropriate, an Immigration Judge or the Board should weigh all relevant factors, including but not limited to: (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is recalendared before the Immigration Judge or the appeal is reinstated before the Board.

*Avetisyan*, 25 I&N Dec. at 688. In the event that a party opposes administrative closure, the "primary consideration" is whether that party "has provided a persuasive reason for the case to proceed and be resolved on the merits." *Matter of W-Y-U-*, 27 I&N Dec. 17, 19 (BIA 2017) (noting that "docket efficiency does not override an alien's invocation of procedural rights and privileges" (internal quotation and citation omitted)).

accomplish a goal (such as to obtain counsel) is reasonably predictable and/or the actions to be taken are under the control of one of the parties. In contrast, administrative closure is most often used when an important relevant decision is outside the control of the Immigration Court or the parties but is in the control of a third party (such as a sister agency like USCIS or DOL) and the timing of those steps is not predictable. In these circumstances, the docket efficiency created by pausing the case until there is reason for the Immigration Court to take it up again is far superior to requiring the judge, all the attorneys, the non-citizen, and often an interpreter, to regularly waste the time, resources, and calendar space to gather and report that everyone is still waiting for a third-party decision.

Like every agency, DOJ is interested in efficiency. Only a month ago, DOJ reiterated its interest in efficiency when it issued a memorandum regarding "case priorities and immigration court performance measures," which set specific timing and case completion goals to "ensure that a court is operating at peak efficiency." Mem. from James R. McHenry III, Director, EOIR 1, 4 (Jan. 17, 2018), https://drive.google.com/file/d/0B_6gbFPjVDoxNlFrbmdqUDVkcENlSE9LdUxsVnh2bG5OOFZz/edit ("the McHenry Memo"). But overturning 30 years of administrative closure would do just the opposite.

As of July 2017, the number of pending cases before Immigration Courts exceeded 600,000. Mem. from MaryBeth Keller, Chief Immigration Judge (July 31, 2017) https://www.justice.gov/eoir/file/oppm17-01/download ("the Keller Memo"). The Chief Immigration Judge attributed much of this backlog to "delays caused by granting multiple and lengthy continuances" which, "when multiplied across the entire immigration court system, exacerbate already crowded immigration dockets." The Keller Memo at 2.

A 2012 DOJ study found that in the cases in which continuances were issued, there were an average of four continuances and 368 days of delay for each case. *Id.* But if Immigration Judges can no longer order administrative closure in appropriate cases, the use of those inefficient continuances would skyrocket. Judges would have to set repeated court dates based on guesses about when decisions from sister agencies will be made. Each incorrect guess results in cost to the parties, lawyers, interpreters, and others who attend court only to learn that relevant information from third parties is still pending and another continuance is necessary. Moreover, each premature continuance hearing takes up valuable docket time delaying the consideration of other cases that are ready to proceed.

The seminal administrative closure case, *Avetisyan*, 25 I&N Dec. at 688, plainly illustrates how a series of continuances while another entity considered a matter can waste time and resources. There, the Immigration Court was confronted with a non-citizen who had married a man who was in the process of becoming a naturalized U.S. citizen and with whom she had a U.S. citizen child. At a hearing on November 15, 2006, the non-citizen explained that her husband was planning to file a visa petition on her behalf. The Immigration Judge therefore continued the hearing. Between that date and June 25, 2009, the Immigration Judge continued the hearing a total of **eight times**, yet on each date the visa petition was still not finalized, apparently in part because each time the parties returned to court, the DHS attorney had to take the file from the adjudicating body. *Id.* at 689–90. The Board found that the Immigration Judge properly exercised her authority when she finally ordered an administrative closure of the case explaining that the "record shows that the respondent is the beneficiary of a prima facie approvable visa petition . . . [and] despite the numerous continuances granted by the Immigration Judge, and through no apparent fault of the respondent or her petitioner husband, the visa

petition has been pending before the DHS for a significant and unexplained period of time." *Id.* at 697.

Administrative closure, which temporarily removes the case from a court's docket but does not provide the non-citizen with any sort of relief, avoids this waste and keeps the Immigration Court dockets focused on matters where final resolution can be timely made. The Board recognized this in *Hashmi*, noting that "[a]dministrative closure is an attractive option" where a non-citizen has a prima facie approvable application pending, "as it will assist in ensuring that only those cases that are likely to be resolved are before the Immigration Judge" and "avoid the repeated rescheduling of a case that is clearly not ready to be concluded." 24 I&N Dec. at 791, n. 4. If the DOJ's goal is to make the Immigration Court system more efficient, it should encourage Immigration Judges to use administrative closure in appropriate circumstances rather than revoke their authority to do so.

### B. Continuances Are Not An Adequate Substitute Where Regulations Require Administrative Closure.

As noted above, the immigration rules expressly mandate administrative closure in the context of certain waivers. For example, non-citizens are not even eligible for some forms of relief, such as I-601A waivers, until their removal proceedings are administratively closed. *See* 8 C.F.R. § 212.7(e)(4)(iii). This rule was put in place through notice and comment rulemaking, and with it, the DHS made receiving relief under an I-601A waiver specifically dependent on the availability of administrative closure. *See* 78 Fed. Reg. 536, 538 (Jan. 3, 2013) ("DHS has decided to allow aliens in removal proceedings to participate in this new provisional unlawful presence waiver process if their removal proceedings are **administratively closed** and have not been recalendared at the time of filing the Form I-601A.") (emphasis added).

It is not possible to strip Immigration Judges of their authority to administratively close cases under Section 212.7(e)(4(iii) except through a notice and comment rulemaking under the Administrative Procedure Act (APA), 5 U.S.C. § 551, et seq. Basic principles of administrative law state that a regulation promulgated through notice and comment rulemaking can only be repealed through the same notice and comment process. *See Perez v. Mortg. Bankers Assn.*, 575 U.S. ___, 135 S. Ct. 1199, 1206 (2015) (noting that "the D.C. Circuit correctly read § 1 of the APA to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.").

A continuance does not meet the regulatory requirement under Section 212.7(e)(4)( iii). Under *Perez* and the basics of administrative law, the Attorney General cannot unilaterally remove a category of relief provided by a regulation simply by removing a procedural tool on which the regulation relies. To amend the rule so that a continuance will suffice, the Attorney General must go through the same notice and comment rulemaking processes that established the regulation as it stands today.

### C. Continuances Are Not Adequate Substitutes For Administrative Closure Where EOIR Performance Policies Effectively Discourage Immigration Judges From Using Continuances.

As noted above, DOJ has recently released guidance to Immigration Judges relating to performance measures based on completion rates. The McHenry Memo established certain "Immigration Court Performance Measures"—deadlines for certain percentages of cases and issues to be completed. *See* McHenry Memo, App. A. Coupled with the earlier Keller Memo strongly discouraging continuances, the message seems clear that more continuances or any resolution other than "completion" will be seen by EOIR as signs of problems for Immigration Judges and the courts in which they work. Tying Immigration Judges' performance reviews to fewer continuances plainly incentivizes judges to prize speed over justice. DOJ cannot revoke

the separate tool of administrative closure under the fig leaf that judges can simply use continuances as an adequate substitute when DOJ has already warned that judges should not order more continuances. This kind of Hobson's choice is especially concerning in "an area where an administrative tribunal's decision to proceed immediately or to defer decision can affect an individual's liberty and thus infringe upon areas that courts are often called upon to protect." *Vahora v. Holder*, 626 F.3d 907, 918 (7th Cir. 2010) (internal quotations and citations omitted).

As several courts have recognized, this is not how an administrative court should operate. In *Hashmi*, the Immigration Judge denied the respondent's request for a fifth continuance while USCIS was still adjudicating his I-130 application, noting that the judge "was expected to complete cases in a reasonable period of time by meeting certain 'case completion goals' set by the Department of Justice." 24 I&N Dec. at 786–87. The Third Circuit reversed, finding the denial to be arbitrary and an abuse of discretion because it was "based solely on case-completion goals" rather than on the merits of the respondent's motion. *Hashmi v. Att'y Gen. of U.S.*, 531 F.3d 256, 261 (3d Cir. 2008). On remand, the Board further recognized that "compliance with an immigration judge's case completion goals . . . is not a proper factor in deciding a continuance request, and immigration judges should not cite such goals in decisions relating to continuances." *Hashmi*, 24 I&N Dec. at 793–94; *see also Mohammad v. Keisler*, 558 F. Supp. 2d 730, 732 (W.D. Ky. 2008) ("[A]s recognized by the Court in *Baig v. Caterismo*, '[a]ny artificial deadline imposed by [a court] would undermine the ability of the FBI and USCIS to fully and adequately discharge their duties'") (internal citation omitted).

Not only is denying Immigration Judges the discretion to use administrative closure inappropriate, it is counterproductive. Allowing Immigration Judges to continue exercising their

authority to administratively close cases where appropriate streamlines dockets by temporarily removing those cases that are not yet ready to proceed, frees up room for those cases that are, and does not have the same negative impacts on judicial performance reviews because the closed cases are essentially "paused" and would not be counted against the judges' completion goals. If the DOJ's goals are "fair and efficient docket management" and protecting due process "which Immigration Judges must safeguard above all," Keller Memo, it is crucial that judges are allowed to keep using this important and useful tool.

## CONCLUSION

Administrative closure is a widely used and long-accepted docket control mechanism to facilitate orderly and efficient decision-making in cases requiring input or decisions from actors not before the court. It has long been used by Immigration Courts to enable judges to efficiently await necessary input from sister agencies, including decisions that Congress placed exclusively with another agency such as USCIS. Administrative closure is an especially important safeguard Immigration Courts employ to provide a full and fair hearing for victims of trauma who face significant challenges in presenting their case not only to Immigration Courts but also to the other agencies who have exclusive jurisdiction to adjudicate their petitions and whose decisions the Immigration Courts must await before making deportation decisions. In appropriate circumstances there is no adequate substitute for administrative closure. Continuances, for example, in cases in which the Immigration Courts must await decisions from a sister agency, can result in inefficiency, a waste of judicial and other resources, and unnecessarily clogged dockets preventing consideration of other cases that are ripe for decision. Moreover, some rules require administrative closure, and not continuances, before a non-citizen can obtain certain forms of relief. Immigration Courts can therefore not be deprived of this important tool in these cases without formal rulemaking.

For all of these reasons, and as the Ninth Circuit explained in a decision that was published on February 14, 2018: "Like a motion to reopen or a motion for a continuance, administrative closure is a tool that an [Immigration Judge] or the [Board] must be able to use, in appropriate circumstances, as part of their delegated authority, independence, and discretion." *Gonzalez-Caraveo v. Sessions*, Case No. 14-72472, 10 (9th Cir. 2018).

Dated: February 16, 2018

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## CERTIFICATE OF SERVICE

I hereby certify that today, February 16, 2018, I delivered a true and correct copy of the foregoing Brief of Amici Curiae via FedEx Next Day Service to:

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**UNITED STATES DEPARTMENT OF JUSTICE**
**OFFICE OF THE ATTORNEY GENERAL**

| IN THE MATTER OF: | File No. (b) (6) |
|---|---|
| Reynaldo CASTRO-TUM, | |
| Respondent, | |
| In Removal Proceedings | |

# BRIEF OF AMICUS CURIAE CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

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COMES NOW AMICUS CURIAE, The Catholic Legal Immigration Network, Inc., (CLINIC), which writes in support of Respondent Reynaldo Castro-Tum ("Respondent") and in response to the Attorney General's certification of this matter to himself. In response to the request for amicus briefing, we write to explain that both Immigration Judges (IJs) and the Board of Immigration Appeals (BIA) are empowered to order administrative closure and that the Attorney General lacks authority to unilaterally "withdraw that authority." *Matter of Castro-Tum*, 27 I&N Dec. 187, 187 (A.G. 2018).

## STATEMENT OF INTEREST OF AMICUS CURIAE

The Catholic Legal Immigration Network, Inc. (CLINIC) is the largest nationwide network of nonprofit immigration programs, with over 300 affiliates in 47 states and the District of Columbia. Programs include training and supporting immigration legal agencies, advocating for humane immigration policies, and building the capacity of local programs. CLINIC also is a partner in providing pro bono representation to detained families and offers public education materials on immigrants' rights and Catholic teaching on migration. CLINIC's work draws from Catholic social teaching to promote the dignity and protect the rights of immigrants in partnership with its network. CLINIC staff are the authors of immigration law treatises, including *Provisional Waivers: A Practitioner's Guide* and *Representing Clients in Immigration Court* and *Representing Clients in Immigration Court*. Attorneys and accredited representatives at CLINIC and its affiliate agencies have represented thousands of immigrants for whom administrative closure was an essential feature of the efficient resolution of their immigration case.

## SUMMARY OF THE ARGUMENT

There is no meaningful dispute that IJs and the BIA may administratively close cases. They find that authority in a series of binding regulations of the Department of Homeland Security and the Department of Justice, in Settlement Agreements that continue to bind both agencies, and in various administrative and judicial decisions going back decades. Further, the Attorney General lacks authority to "withdraw" such power through a certified decision because: (1) the Department of Justice must engage in "Notice and Comment" to amend its regulations; (2) withdrawing authority to administratively close cases would violate several binding Settlement Agreements; and (3) if the respondent was not served with notice of these proceedings, the Attorney General lacks authority to order him removed and thus must terminate this proceeding.

## ARGUMENT

The regulations implementing the immigration statute, various still-binding settlement agreements, and a litany of published federal court decisions acknowledge and mandate that IJs and the BIA have the power to administratively close and re-calendar the cases on their dockets. The Attorney General lacks authority to "withdraw" such authority unilaterally and likely cannot do so in this case, in any event, because the respondent was apparently not served with notice of his hearing.

### 1. Various Sources of Authority Require the Maintenance of Administrative Closure as a Tool for IJs and the BIA to Manage Their Dockets.

Although administrative closure, a docket-controlling measure used by courts and administrative agencies, previously without much controversy, is not explicitly mentioned in the immigration statute, it is a well-authorized tool for the administration of justice. Most fundamentally, this authority springs from an Immigration Judge's duty to "exercise their

independent judgment and discretion" to "take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of [proceedings under 8 USC § 1229a]." 8 C.F.R. § 1003.10(b); *accord Matter of Avetisyan*, 25 I&N Dec. 688, 691 (BIA 2012); *Gonzalez-Caraveo v. Sessions*, __ F.3d __, No. 14-72472, 2018 WL 846230, at *6 (9th Cir. Feb. 14, 2018). Indeed, docket management tools such as administrative closure are so essential to the proper functioning of any court system that federal appellate courts uniformly recognize that district courts "obviously" have "inherent authority" to employ such tools, even if the practice of administrative closure does not appear in the Federal Rules of Civil Procedure. *See St. Marks Place Housing Co. v. U.S. Dept. of Housing & Urban Dev.*, 610 F.3d 75, 80 (D.C. Cir. 2010) ("First, and most obviously, district courts can choose when to decide their cases."); *Ali v. Quarterman*, 607 F.3d 1046, 1049 (5th Cir. 2010) (acknowledging a district court's administrative closure practice as stemming from its inherent authority to control its docket); *Penn-America Ins. Co. v. Mapp*, 521 F.3d 290, 295 (4th Cir. 2008) (acknowledging that a district court's administrative closure practice is not formalized in the Federal Rules of Civil Procedure or the court's local rules and otherwise speaking approvingly of the practice); *Penn W. Assocs. Inc. v. Cohen*, 371 F.3d 118, 128 (3d Cir. 2004) (acknowledging a district court's administrative closure practice); *Lehman v. Revolution Portfolio, LLC*, 166 F.3d 389, 392 (1st Cir. 1999) (same); *Fla. Ass'n for Retarded Citizens, Inc. v. Bush*, 246 F.3d 1296, 1298 (11th Cir. 2001) (same).

On this basis alone, the Attorney General should respect the independent discretion and judgment of Immigration Judges and the Board of Immigration Appeals and abandon any effort to make sweeping changes in the use of administrative closure. As several federal appellate judges have stated regarding their trial court counterparts, "it is incumbent upon us, as a

responsible and responsive reviewing court, to provide our colleagues with all reasonable means of efficiently and intelligently managing their caseloads." *Otis v. City of Chicago*, 29 F.3d 1159, 1173 (7th Cir. 1994) (Rovner, concurring); *St. Mark's Place Housing Co.*, 610 F.3d at 82 (favorably discussing the Otis concurrence).

### A. The Authority to Administratively Closure Cases is Guaranteed by a Series of Federal Regulations.

In addition to an Immigration Judge's inherent authority to engage in docket control, the practice of administrative closure has been expressly incorporated in a series of regulatory provisions that guide the Department of Justice and the Department of Homeland Security on how to adjudicate applications for certain kinds of benefits.

These regulations require that IJs and the BIA be empowered to control their own dockets with such measures, in most cases explicitly identifying administrative closure as the tool an IJ should use to remove a case from the court's docket.[1] In many cases this tool is a fundamental part of the process, and applying for benefits under various sections of the regulations is impossible without the ability to administratively close and later re-calendar proceedings.

***Provisional Waiver Regulations***

The most recently promulgated regulations discussing administrative closure are those implementing the provisional unlawful presence waiver, which enables immigrants to have their

[1] The agency is required to follow administrative regulations properly issued by the Attorney General, as they "have the force and effect of law" as to the BIA and the IJs. *Matter of H-M-V-*, 22 I&N Dec. 256, 261 (BIA 1998); *see also, e.g. Matter of Fede*, 20 I&N Dec. 35 (BIA 1989) (concluding the BIA lacks authority to entertain motions for attorneys' fees under the Equal Access to Justice Act because "[t]he Attorney General has determined that immigration proceedings do not come within the scope of the EAJA"); *Matter of* C-, 20 I&N Dec. 529, 532 (BIA 1992) ("[I]t is settled that the Immigration Judge and this Board lack jurisdiction to rule upon the constitutionality of the Act and the regulations.").

inadmissibility waived prior to consular processing, decreasing the cost and administrative involvement in the waiver process. In particular, the regulations describe immigrants as ineligible for the waiver if they are in removal proceedings "unless the removal proceedings are administratively closed and have not been re-calendared at the time of filing the application for a provisional unlawful presence waiver." 8 CFR § 212.7(e)(4)(iii). Thus, a necessary step for immigrants in removal proceedings who intend to seek the waiver is to request administrative closure from an Immigration Judge or the BIA. *See e.g. In re Blanco-Acuna*, 2016 WL 6519957, at *1 (BIA 2016) (describing the process of administrative closure before the filing of a Form I-601A).

With this regulation, the Secretary of Homeland Security incorporated administrative closure as a fundamental tool, necessary to the provisional waiver process. Indeed, DHS considered, and rejected, several proposals to permit people in removal proceedings to apply for a provisional waiver, relying on the desirability of the administrative closure regime. *See* Expansion of Provisional Unlawful Presence Waivers of Inadmissibility, 81 Fed. Reg. 50243, 50255 (Jul. 29, 2016).

For immigrants in removal proceedings, this regulation requires that an IJ first administratively close their proceedings. The regulation would make no sense if the Attorney General concludes that IJs in fact lack any authority to administratively close such cases. This reference to administrative closure in the regulation confirms what is already well known: IJs and the BIA have authority to administratively close cases.

***ABC Regulations***

To comply with the settlement agreement in *American Baptist Churches v. Thornburgh* 760 F. Supp. 796 (N.D. Cal. 1991), the Attorney General promulgated regulations describing the

use of administrative closure by IJs. Specific provisions describe how IJs are to treat the cases of certain *American Baptist Churches* ("ABC") class members whose cases were "administratively closed or continued." 8 CFR § 1240.70(f). The regulations also discuss how IJs are to treat cases for dependents "whose proceedings before EOIR were administratively closed or continued." 8 CFR § 1240.70(g).

Elsewhere, whether an ABC class member's case has previously been administratively closed determines whether an IJ will have jurisdiction to hear that person's application for "suspension of deportation or special rule cancellation of removal filed pursuant to section 309(f)(1)(A) or (B) of IIRIRA, as amended by NACARA." 8 CFR § 1240.62(b)(1).

As outlined below, administrative closure was a tool enshrined in the ABC settlement agreement, and it has since been incorporated into the agency's regulations implementing that agreement. Determining now that IJs and the BIA lack any statutory or regulatory authority to administratively close such cases will throw these regulatory schemes into complete chaos, making it nearly impossible to determine which agency has authority to decide which application for relief.

***HRIFA Regulations***

In implementing the Haitian Refugee Immigrant Fairness Act of 1998 ("HRIFA") the agency promulgated regulations that similarly outline how an IJ or the Board are to use administrative closure to comply with the statute. In particular, to allow immigrants to apply for HRIFA benefits the regulations command that

> "An alien who is in exclusion, deportation, or removal proceedings, or who has a pending motion to reopen or a motion to reconsider such proceedings filed on or before May 12, 1999, may request that the proceedings be administratively closed, or that the motion be indefinitely continued, in order to allow the alien to file such application with the Service as prescribed in paragraph (g) of this section. If the alien appears to be eligible to file an application for adjustment of status under this section, the Immigration Court or the

> Board (whichever has jurisdiction) **shall**, with the concurrence of the Service, **administratively close** the proceedings or continue indefinitely the motion."

8 CFR § 245.15(p)(4) (emphasis added). Further, when immigrants' removal proceedings have "been administratively closed" they must apply for HRIFA benefits with USCIS, rather than before the Immigration Court. 8 CFR § 245.15(g)(2). When the proceedings have been administratively closed, the agency must "make a request for re-calendaring or reinstatement to the Immigration Court that had administratively closed the proceeding, or the Board, as appropriate, when the application has been denied." 8 CFR § 245.15(r)(2)(ii).

***LIFE Act Regulations***

In implementing the LIFE Act the agency has also described administrative closure as a tool Immigration Judges can use. For example, a person in immigration court "who is prima facie eligible for adjustment of status under LIFE Legalization" is authorized "to request that the proceedings be administratively closed or that the motion filed be indefinitely continued, in order to allow the alien to pursue a LIFE Legalization application with the Service." 8 CFR § 245a.12(b). Similarly, if the Service grants the application and the person's court proceedings "were administratively closed, such proceedings shall be deemed terminated as of the date of approval of the application for adjustment of status by the district director." 8 CFR § 245a.20(a).

The Fifth Circuit has interpreted this regulation to permit individuals to seek administrative closure. *Sajan v. Mukasey*, 257 F. App'x 736, 739 (5th Cir. 2007) (unpublished). And it has held that an IJ's refusal to consider a request for administrative closure in compliance with the LIFE Act is reversible error. *Id.*

***NACARA Regulations***

Just like the HRIFA and LIFE Act regulations, the agency chose to empower IJs to administratively close eligible cases so immigrants could apply for benefits under the Nicaraguan

Adjustment and Central American Relief Act or NACARA (Title II of Pub.L. 105–100) ("NACARA"). 8 CFR § 1245.13(d)(3) (an IJ "shall ... administratively close the proceedings ..."). Then, if the application is denied by the Service, the Immigration Courts or the BIA must "re-calendar or reinstate the prior exclusion, deportation or removal proceedings." 8 CFR § 1245.13(m)(1)(ii).

These regulations provide guidance to IJs and to the USCIS on who has initial jurisdiction to hear NACARA applications. Without having their court cases administratively closed as contemplated by the regulations, individuals eligible for NACARA benefits would be unable to pursue their applications for relief before the USCIS and IJs would likely lack authority to consider them (because the USCIS had not first ruled on them). Implementing such a rule now would create substantial disorder and confusion for adjudicators.

***Regulations Implementing the T, V Nonimmigrant Visas***

Several nonimmigrant visa categories permit an immigrant in removal proceedings to seek administrative closure while awaiting a decision on their visa applications. For example, in implementing the "V visa" the DHS discusses in its regulations the process for administrative closure. It notes an immigrant in removal proceedings who believes she is eligible for a "V nonimmigrant visa" should

> "request before the immigration judge or the Board of Immigration Appeals, as appropriate, that the proceedings be administratively closed (or before the Board that a previously-filed motion for reopening or reconsideration be indefinitely continued) in order to allow the alien to pursue an application for V nonimmigrant status with the Service."

8 CFR § 1214.3; *see also* 8 CFR § 214.15(l) ("An alien who is already in immigration proceedings and believes that he or she may have become eligible to apply for V nonimmigrant status should request before the immigration judge or the Board, as appropriate, that the

proceedings be administratively closed (or before the Board that a previously-filed motion for reopening or reconsideration be indefinitely continued) in order to allow the alien to pursue an application for V nonimmigrant status with the Service."). Upon such a motion, if the immigrant appears to be eligible for the visa, the IJ or the BIA "shall administratively close the proceeding or continue the motion indefinitely" to allow the immigrant to pursue the visa. If the person is later found ineligible "the Service shall recommence proceedings by filing a motion to re-calendar." 8 CFR § 1214.3.

Similarly, a person eligible for a T visa who is in removal proceedings may move the Immigration Judge or the BIA to administratively closure the case, and the agency "may grant such a request to administratively close the proceeding or continue a motion to reopen or motion to reconsider indefinitely." 8 CFR § 1214.2(a). If the T visa application is later denied, "the Service may recommence proceedings that have been administratively closed by filing a motion to re-calendar with the immigration court or a motion to reinstate with the Board." *Id.*

***Re-Papering Regulations and Memoranda***

When Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Section 309 of that Act retroactively made certain immigrants ineligible for suspension of deportation. In particular, IIRIRA § 309(c)(5) retroactively changed the date that the clock stopped for calculating when a person had accrued seven years residence for suspension of deportation eligibility. However, Congress included a safety-net provision for people rendered ineligible for suspension of deportation because of the retroactive stop-time rule: in IIRIRA § 309(c)(3) Congress authorized the Attorney General to provide these individuals a chance to apply for cancellation of removal.

The Attorney General began implementing IIRIRA § 309(c)(3) by drafting a regulation that solved the retroactive application of the suspension of deportation timing rules. However, in the interim the Executive Office of Immigration Review issued a series of directives to the BIA to "administratively close removal proceedings of eligible aliens through a process called 'repapering.'" *Alcaraz v. I.N.S.*, 384 F.3d 1150, 1153 (9th Cir. 2004). For example, a December 7, 1999 Memorandum from INS General Counsel Bo Cooper entitled "Administrative Closure of Executive Office for Immigration Review Proceedings for Non–Lawful Permanent Resident Aliens Eligible for Repapering," outlined the procedure for seeking such "re-papering." Memorandum of Bo Cooper, General Counsel for the INS, dated Dec. 7, 1999 ("Cooper Memorandum"), reproduced in 77 *Interpreter Releases* 39, App. 1 (Jan. 10, 2000). That memorandum is still available online at http://www.usdoj.gov/eoir/chip4.pdf.

The Cooper Memorandum directed the BIA to administratively close cases where individuals were eligible for repapering. *Id.* at 2 ("The Board will *sua sponte* administratively close cases meeting the above criteria on a case-by-case basis.") (emphasis added).

On March 14, 2000, the BIA's vice-chair issued a separate memorandum describing how the agency would implement this statute, which included administrative closure. Memorandum of Lori L. Scialabba, Vice Chair of the BIA, dated March 14, 2000 ("Scialabba Memorandum"), available at http://www.usdoj.gov/eoir/chip6.pdf. The BIA also gave reassurances in a meeting with the American Immigration Lawyers Association liaison ("AILA") on March 20, 2000 that

> "[t]he Board will administratively close the proceedings of any alien who appears eligible for repapering in accordance with the criteria agreed to between INS and EOIR. The Board began closing the cases of non-LPRs who appear eligible for repapering on March 16, 2000."

March 20, 2000 EOIR/AILA Liaison Meeting Minutes. These minutes remain available on the DOJ's website at http://www.usdoj.gov/eoir/statspub/qaeoiraila.htm

Following the reassurances about the availability of administrative closure at this meeting, BIA Chairman Paul Schmidt issued another memorandum to BIA members again describing the use of administrative closure for repapering. Memorandum of Paul Schmidt, Chairman of the Executive Office of Immigration Review, dated Aug. 20, 2000 ("Schmidt Memorandum"). This memorandum remains available online at https://www.justice.gov/sites/default/files/eoir/legacy/2014/01/23/streamimplem.pdf. The Schmidt Memorandum describes the BIA's procedures for administratively closing cases and authorizes a single BIA judge to exercise the authority of the BIA for "Non–Lawful Resident Repapering cases [any cases in which the Attorney General is authorized to terminate deportation proceedings and reinitiate removal proceedings under section 309(c)(3) of IIRIRA]." *Id.* at 6.

The Department of Justice then proposed a final rule to allow for repapering. "Delegation of Authority to the Immigration and Naturalization Service to Terminate Deportation Proceedings and Initiate Removal Proceedings," 65 Fed. Reg. 71,273 (proposed Nov. 30, 2000). This proposed regulation has never been finalized. However, while the statute did not require the Attorney General to permit repapering in any specific cases, courts have interpreted the memoranda issued describing the practice of repapering to be "not contrary to clear congressional intent." *Kadriovski v. Gonzales*, 246 F. App'x 736, 740 (2d Cir. 2007). And while there still is no final rule implementing the repapering statute, courts have deferred to the agency's memoranda interpreting the statute. *Id.*

These examples demonstrate that administrative closure isn't just a tool the BIA and IJs are empowered to use. It is in fact incorporated into the adjudicative process for various forms of immigration relief, and whether a case has been or will be administratively closed is at times a

condition for determining whether the IJ or the USCIS have jurisdiction to hear certain applications for relief. Thus, there is no question the Attorney General should conclude that IJs and the BIA have authority to administratively close and re-calendar cases. Any other conclusion would conflict with 30 years of binding regulations and would cause serious chaos for IJs and the BIA tasked with complying with these regulations.

### B. Several Judicial Settlement Agreements Continue to Bind the Department of Justice to Administratively Close Cases.

In addition to the binding regulations that govern how the Department of Justice and the Department of Homeland Security are to implement the immigration statute, at least two settlement agreements continue to require the agency to keep "administrative closure" as an option available to immigration judges.

First, in settling the *ABC* case, the Department of Justice entered into a settlement agreement specifically authorizing class members to have their cases administratively closed. It states:

> "Unless an individual class member objects and waives the right to apply hereunder, upon signing of this agreement by the parties, Defendants agree to stay the deportation and, on or before January 31, 1991, ... to stay or administratively close the EOIR proceedings of any class member (unless they have been convicted of an aggravated felony), whose cases were pending on November 30, 1990, until the class member has had the opportunity to effectuate his or her rights under this agreement."

*Matter of Gutierrez-Lopez*, 21 I&N Dec. 479, 480 (BIA 1996). The BIA has described the *ABC* settlement as "designed to ameliorate systemic defects in the prior processing of Salvadoran and Guatemalan asylum claims by providing a fresh opportunity for most class members to present their applications." *Matter of Morales*, 21 I&N Dec. 130, 139 (BIA 1995) (*en banc*) (Lory Rosenburg Concurring).

The BIA has construed the requirements outlined in the *ABC* settlement agreement to mandate that the agency permit class members to seek administrative closure. *Gutierrez-Lopez*, 21 I&N Dec. at 480; *Morales*, 21 I&N Dec. at 137. Similarly, the Ninth Circuit has held that this agreement remains binding and that the agency must continue to comply with it, including permitting administrative closure. *Hernandez v. Lynch*, 625 F. App'x 336, 337 (9th Cir. 2015) (unpublished)

Second, the *Barahona* settlement agreement similarly requires Immigration Judges and the BIA to administratively close cases in certain instances. *See Barahona-Gomez v. Ashcroft*, 243 F.Supp.2d 1029, 1035-1036 (N.D. Cal 2002) *holding modified by Navarro v. Mukasey*, 518 F.3d 729 (9th Cir. 2008).[2] For example, when a case has been scheduled for hearing and there is no evidence the immigrant received notice, the *Barahona* agreement requires the IJ to administratively close the case. *Id.* p. 1035.

In both instances the United States has entered into binding settlement agreements with large classes of immigrants that require the Department of Justice to consider administratively closing their removal cases. The United States has not sought to vacate or modify either of these settlement agreements claiming the agency now believes it lacks authority to administratively close cases. Acting unilaterally to decree that administrative closure it outside the scope of an IJ's authority would violate both settlement agreements and up-end the adjudicative process agreed to by the parties there. Not only do IJs and the BIA have authority to administratively

[2] The Ninth Circuit's later modification of the class in *Barahona* had no effect on the administrative closure requirement. *Navarro v. Mukasey*, 518 F.3d 729 (9th Cir. 2008). Rather, the Ninth Circuit merely expanded the scope of the class identified in the *Barahona* settlement. *Id.* p. 736.

close cases, but both settlement agreements make clear the Attorney General lacks the power to unilaterally withdraw such authority.

### C. Both the BIA and the Federal Courts Have Consistently Recognized the Power to Administratively Close Cases.

Consistent with the guarantees found in both the federal regulations and the settlement agreements referenced *supra*, federal courts have consistently acknowledged the authority of IJs and the BIA to administratively close cases.

In one of its earliest decisions on the subject, the BIA acknowledged administrative closure as an "administrative convenience which allows the removal of cases from the calendar in appropriate situations." *Matter of Amico*, 19 I&N Dec. 652, 654 n.1 (BIA 1988); *Matter of Gutierrez-Lopez*, 21 I&N Dec. 479, 480 (BIA 1996) (same), *overruled on other grounds by Avetisyan*, 25 I&N Dec. 688. The BIA has also outlined the legal standard for whether and when to grant administrative closure. *Avetisyan*, 25 I&N Dec. at 693. And it has similarly provided a workable standard for IJs on when to re-calendar a previously-closed case. *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017).

The circuits have broadly agreed that the agency has authority to administratively close and re-calendar cases and that the federal courts can review such decisions for abuse of discretion. Most recently the Ninth Circuit held that not only does an IJ have authority to grant administrative closure, but that it is legal error to refuse to consider such a request. *Gonzalez-Caraveo,* 2018 WL 846230, at *6. The Ninth Circuit cited as authority the regulatory sections authorizing IJs and the BIA to manage their dockets. *Id.* At *5 n.5 *citing* 8 CFR §§ 1003.1(d)(1)(ii), 1003.10(b). The Ninth Circuit also offered a helpful distinction between administrative closure and prosecutorial discretion, noting that IJs sometimes use these terms interchangeably. *Id.* At *6 n.5. While the DHS has discretion to decline to prosecute cases, the

decision to administratively close is solely within the purview of the Department of Justice and can be done over the prosecution's objection. *Id.* at *6 n.5 *citing Avetisyan*, 25 I&N Dec. at 693.[3]

*Gonzalez-Caraveo* is only the latest in a line of recent federal court cases acknowledging that the standard for administrative closure is now well-settled enough that federal courts may review these decisions for abuse of discretion. The Second, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits had previously reached this same conclusion since the BIA published its decision in *Avetisyan*. *See Gonzalez-Vega v. Lynch*, 839 F.3d 738, 741 (8th Cir. 2016); *Duruji v. Lynch*, 630 Fed.Appx. 589, 592 (6th Cir. 2015) (unpublished); *Hernandez-Castillo v. Sessions*, 875 F.3d 199, 209 (5th Cir. 2017); *Llanos v. Holder*, 565 F. App'x 675, 675 (10th Cir. 2014) (unpublished); *Mi Young Lee v. Lynch*, 623 F. App'x 33, 34 (2d Cir. 2015) (unpublished) (reviewing "denial of administrative closure for abuse of discretion"); *Santos-Amaya v. Holder*, 544 Fed.Appx. 209, 209 (4th Cir. 2013) (unpublished *per curiam*); *Vahora v. Holder*, 626 F.3d 907, 918 (7th Cir. 2010). Notably, since the BIA published its decision in *Avetisyan*, no federal court has concluded that it lacks authority to review administrative closure determinations.

In the Eighth Circuit's decision in *Gonzalez-Vega*, the court confirmed that not only must an IJ consider administrative closure when a party requests it but that the BIA has a separate duty to consider requests to administratively close cases before it. *Gonzalez-Vega*, 839 F.3d at 741. Read together, both decisions make abundantly clear the view held by most circuits: IJs and the

[3] Administrative closure of immigration court proceedings is quite distinct from termination. While the regulations limit an IJ's authority to terminate proceedings, 8 CFR § 1239.2, administrative closure merely controls which cases on an IJ's docket should be heard first. *Arca-Pineda v. Attorney Gen. of U.S.*, 527 F.3d 101, 104 (3d Cir. 2008) (distinguishing between termination and administrative closure); *Aguirre v. Holder*, 728 F.3d 48, 53 (1st Cir. 2013) ("Administrative closure does not terminate the proceedings or result in a final order of removal").

BIA have authority to administratively close cases, but the refusal by either to consider such a request will be reversed by the circuit courts.

### 2. The Attorney General is Unable to "Withdraw" Administrative Closure Authority from IJs and the BIA.

#### A. The Department of Justice must engage in "Notice and Comment" to Amend its Own Regulations.

The Attorney General is not permitted to create a new federal rule without first complying with the advance notice and public comment requirements of the Administrative Procedure Act ("APA") *See* 5 U.S.C. § 553; *Matter of Ponce De Leon-Ruiz*, 21 I&N Dec. 154, 180 (BIA 1996) (Lory Rosenburg dissenting) (confirming that legislative rules created by the agency which affect substantive rights must first be subjected to public notice and comment). This is so whether the agency creates its new rule by promulgation of regulations or, as suggested here, merely by declaring the agency is abandoning a previously "settled understanding" of the scope of its authority. *Chrysler Corp. v. Brown*, 441 U.S. 281, 299, 99 S. Ct. 1705, 1716, 60 L. Ed. 2d 208 (1979); *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (concluding rulemaking is required if agency adopts a new position inconsistent with its own existing regulations).

The APA explicitly requires that notice of proposed rule-making be "published in the Federal Register" and must include:

> **(1)** a statement of the time, place, and nature of public rule making proceedings;
>
> **(2)** reference to the legal authority under which the rule is proposed; and
>
> **(3)** either the terms or substance of the proposed rule or a description of the subjects and issues involved.

5 U.S.C. § 553(b). The agency then must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without

opportunity for oral presentation." 5 U.S.C. § 553(c). The agency can dispense with notice-and-comment when it "for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). However, courts construe this exception narrowly, lest it outstrip the rule itself. *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 14 (D.D.C. 2009) (finding no exceptions to the notice-and-comment requirement applied where new immigration regulation created a substantive rule that affected participants' rights and enjoining the Department of Homeland Security from enforcing the regulation).

None of the narrow exceptions to the notice-and-comment requirement apply here. There is no reason engaging in a public process would burden the agency or be contrary to public interest. Rather, the new proposed rules would have vast implications for the administration of justice in Immigration Court and would substantially abrogate the rights of many participants in those proceedings. At a minimum the statute requires that such rules be crafted in the light of day through a fair and open process that permits full participation.

Each of the Attorney General's proposed courses of action (which would be accomplished by agency adjudication) manifestly interferes with the orderly implementation of DHS's current regulations (and the Department of State's ability to adjudicate immigrant visas). Such a move is undesirable as a matter of public policy[4] and entirely unlawful if accomplished without formal notice-and-comment rulemaking.

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[4] The action suggested in the certification order, "withdrawing" authority to administratively close cases will do more than merely create chaos for those tasked with enforcing the regulations. As a policy matter, the suggestion is untenable. DHS is not just an enforcement agency; it is statutorily an adjudicator. 8 U.S.C. § 1103(a)(1). Most of the regulatory references outlined above permit administrative closure so a benefit application may be adjudicated by the DHS. By usurping a separate agency's authority and putting all power in the hands of the Department of Justice, the Attorney General would trample on the orderly

### B. If the Respondent was not Served With Notice of These Proceedings, the Attorney General Lacks Authority to Proceed in This Case.

Even if the Attorney General had the authority to do what has been proposed, in a vacuum, it appears he lacks authority to do so in this case, because the respondent has likely not been served with process. Accordingly, the agency lacks jurisdiction to adjudicate questions about Mr. Castro-Tum's removability and should terminate removal proceedings.

When a person is placed into removal proceedings, they must be served with a Notice to Appear ("NTA"), which is necessary to inform him of certain affirmative duties he has under 8 USC § 1229(a)(1)(F). If the respondent is under 14 years old, such service must be on their parent. 8 CFR § 103.8(c)(2)(ii); *Matter of Cubor-Cruz*, 25 I&N Dec. 470, 471 (BIA 2011).

Without being notified of the obligations listed in the NTA, an immigrant is unable to comply with the law, including the requirement that he update his address with the DHS in writing and to notify the Immigration Court immediately by filing a Change of Address Form/Immigration Court (Form EOIR-33). *See Matter of M-R-A-*, 24 I&N Dec. 665, 674-75 (BIA 2008).

When a child has not been served with the Notice to Appear, the appropriate outcome is termination of proceedings, *Matter of Mejia-Andino*, 23 I&N Dec. 533, 536 (BIA 2002) (*en banc*), unless the DHS plans to re-serve the child with the Notice to Appear. *Matter of W-A-F-C-*, 26 I&N Dec. 880 (BIA 2016).

Here, the IJ had sufficient concerns about the propriety of service that he administratively closed the proceedings. As amici we do not have the benefit of examining the administrative record. However, to the extent the IJ believed as a matter of fact that service had not been proper,

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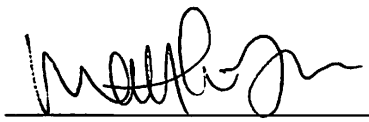
functioning of the asylum offices, USCIS Field Offices, the provisional waiver program, and the State Department's function.

the appropriate outcome here should have been to terminate proceedings. And, as the Attorney General now considers what to do with this case, there are significant concerns with a major policy change being announced with this young man's case as the vehicle.

Aside from the jurisdictional problems that may exist here if the respondent was not properly served, the Attorney General certifying *this* case to himself almost necessarily shields his decision from appellate review. Ordinarily when the BIA or the Attorney General decide a removal case, the federal courts can review the final order of removal to determine if the Department of Homeland Security met its burden, among other things. 8 USC § 1252(a)(5). But here the respondent, if he is unaware of these proceedings, has no ability to appeal an adverse determination. What is more, given that the Attorney General seeks to make a policy pronouncement about not just this case but all cases under the jurisdiction under the Executive Office for Immigration Review, it is highly inappropriate to do so in a case that is entirely insulated from appellate review.

## CONCLUSION

For these reasons, the Attorney General should conclude that IJs and the BIA have authority to control their own dockets and may do so through "administrative closure" orders. Any other conclusion would invalidate currently-binding regulations while skipping the mandatory process for doing so, would violate at least two settlement agreements that continue to bind the Department of Justice, and would throw the adjudicative process for numerous forms of relief into disarray. And it would do so in the context of a young man's case where the sole factfinder in these proceedings raised concerns about him even having been served with notice of these proceedings.



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## CERTIFICATE OF SERVICE

On February 16, 2018 I filed this brief and any attachments with the Department of Justice by submitting a copy via e-mail to AGCertification@usdoj.gov and mailed three copies via First Class Mail to United States Department of Justice Office of the Attorney General, Room 5114 950 Pennsylvania Avenue, NW Washington, DC 20530.

On February 16, 2018 I sent a copy of this brief and any attachments to the parties at the following addresses:

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Via FedEx Overnight mail.

Matthew L. Hoppock

**UNITED STATES DEPARTMENT OF JUSTICE**
**OFFICE OF THE ATTORNEY GENERAL**

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MATTER OF REYNALDO CASTRO-TUM,
*Respondent*

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Referred from:
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
(b) (6)

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# BRIEF OF AMICI CURIAE THE AMERICAN IMMIGRATION COUNCIL, ASISTA IMMIGRATION ASSISTANCE, HER JUSTICE, IMMIGRANT DEFENSE PROJECT, NORTHWEST IMMIGRANT RIGHTS PROJECT, AND SOUTHERN POVERTY LAW CENTER URGING VACATUR OF REFERRAL ORDER OR RECUSAL

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## INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the Attorney General's invocation of a Department of Justice regulation, 8 C.F.R. § 1003.1(h)(1)(i), directing the Board of Immigration Appeals ("Board") to refer the instant case to him. Although the Attorney General does not act as an adjudicator in the first instance, under § 1003.1(h)(1), the Board must refer to the Attorney General all cases that: (1) "[t]he Attorney General directs the Board to refer to him"; (2) "[t]he Chairman or a majority of the Board believes should be referred to the Attorney General for review"; or (3) "[t]he Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, refers to the Attorney General for review." Here, the Attorney General has referred the case to himself under the first subsection of the regulation.

At issue in this case is the longstanding practice of administrative closure, a docketing tool regularly employed "to temporarily remove a case from an Immigration Judge's active calendar or the Board's docket . . . to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time." *Matter of Avetisyan*, 25 I&N Dec. 668, 692 (BIA 2012) (citation omitted). A decision issued by the Attorney General pursuant to 8 C.F.R. § 1003.1(h)(1)(i) becomes binding precedent in immigration proceedings nationwide, and it remains

controlling unless and until each federal court of appeals or the Supreme Court vacates the decision.[1] According to the government, the outcome in this case potentially will affect over 350,000 cases.[2]

Remarkably, the Attorney General has chosen to invoke the referral regulation in this matter: the case of a young man whom the Department of Homeland Security ("DHS") placed in removal proceedings when he was a minor, who was not represented by counsel below, and who, to amici's knowledge, remains unrepresented today. The referral order sets out seven broad questions for the Attorney General's review, including whether "Immigration Judges and the Board have the authority . . . to order administrative closure" and, if they do, whether the Attorney General should withdraw that authority. *Matter of Castro-*

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[1] A respondent in removal proceedings may file a petition for review in a federal court of appeals only once a final administrative order of removal has issued. 8 U.S.C. §§ 1252(a) & 1101(a)(47)(B). Here, the Board initially vacated and remanded the order of the immigration judge ("IJ") administratively closing Castro-Tum's case. *See Matter of Castro-Tum* (b) (6) at *1 (BIA Nov. 27, 2017) ("BIA Decision"). If the Attorney General upholds the Board's order, ending administrative closure, Castro-Tum's case will require remand to the immigration court for entry of a removal order in the first instance, followed by any appeal to the Board, before a final order of removal could issue. At that point, Castro-Tum would be entitled to file a petition for review with the U.S. Court of Appeals for the Third Circuit challenging the Attorney General's decision on any applicable grounds. If the Attorney General vacates the Board's order, Castro-Tum's case will remain administratively closed and judicial review will not be available unless and until the case is re-calendared, the IJ orders removal, and the Board affirms the removal order. Similarly, in all other cases affected by the Attorney General's decision, respondents cannot challenge the decision in the court of appeals via petition for review in their respective circuits until their removal orders are administratively final (i.e., issued by an immigration judge and affirmed by the Board). *See* 8 U.S.C. §§ 1101(a)(47)(B), 1252(a), 1252(b)(9). Given this process, it likely would take years for each circuit court to resolve the legality of the Attorney General's decision, or for the Supreme Court to do so.

[2] Elliot Spagat, *Sessions takes aim at judges' handling of immigration cases*, Associated Press (Jan. 6, 2018), https://www.apnews.com/9ce3e704a0c6457a958d410f001f0f22.

*Tum*, 27 I&N Dec. 187, 187 (A.G. 2018) ("AG Decision"). These far-reaching questions are of vital importance to Castro-Tum and other participants in removal proceedings, including adjudicators, respondents, and DHS. They cannot be decided here, however, because due process requires a neutral decisionmaker in immigration proceedings, and the Attorney General's documented lack of neutrality disqualifies him from participation in this case.

The test for disqualification of an agency adjudicator is "whether 'a disinterested observer may conclude that [the adjudicator] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959), *cert. denied*, 361 U.S. 896 (1959)). In *Cinderella*, the D.C. Circuit held that disqualification is warranted where an agency head responsible for adjudicating a case has "ma[d]e speeches which give the appearance that the case has been prejudged." *Id.* at 590. Here, as set forth below, the Attorney General has made numerous public statements that, individually and collectively, demonstrate prejudgment of this particular case.

At least three categories of statements raise serious due process concerns. First, the Attorney General's recent public remarks—including an official speech and memorandum from less than a month before he referred this case to himself—

strongly suggest that he decided to end the practice of administrative closure before invoking the referral regulation in this case. Second, the Attorney General has expressed sustained bias toward unaccompanied children, a designation that applies to Castro-Tum. *See* BIA Decision at *1. Finally, the Attorney General's long history of public commentary on immigration, both as a United States senator and as Attorney General, reflects a predisposition to disfavor certain categories of noncitizens—particularly those who do not meet his standards for income, education, professional skills, and language ability, or whose family ties might provide a basis for immigration relief. He therefore lacks the requisite impartiality to decide at least one of the sweeping questions set out in the referral order: "what actions should be taken regarding cases that are already administratively closed?" *See* AG Decision at 187.

For all of these reasons, the Attorney General's public statements, considered under an objective standard, establish a "probability of actual bias" that "is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)); *see also Cham v. Att'y Gen. of the U.S.*, 445 F.3d 683, 694 (3d Cir. 2006) (stating that violation of due process occurs where "the violation of a procedural protection . . . had the *potential* for affecting the outcome of [the] deportation proceedings"). The appearance of prejudgment is heightened by the fact that the

Attorney General has targeted this case on his own referral, rather than at the request of the Board or a designated DHS official. 8 C.F.R. §§ 1003.1(h)(1)(ii) & (iii). In short, the Attorney General has referred to himself a matter that he may not adjudicate without offending constitutional safeguards. Due process requires that the Attorney General vacate the referral order or recuse himself from the case.

## INTEREST OF AMICI CURIAE[3]

The American Immigration Council (the "Council") is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council previously has appeared as an amicus curiae before the Attorney General, and regularly litigates issues relating to due process, removal defense, and government accountability before the Board and the federal courts. The Council has a direct interest in ensuring that decisions in removal proceedings are made by fair, impartial, and open-minded adjudicators who are shielded from political influences.

ASISTA Immigration Assistance ("ASISTA") worked with Congress to create and expand routes to secure immigration status for survivors of domestic

[3] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person (other than amici curiae, their counsel, or their members) contributed money that was intended to fund the preparation or submission of this brief.

violence, sexual assault, and other crimes, which were incorporated in the 1994 Violence Against Women Act and its progeny. ASISTA serves as liaison for the field with DHS personnel charged with implementing these laws. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, and legal services, non-profit, pro bono, and private attorneys working with immigrant crime survivors.

Since 1993, Her Justice has been dedicated to making quality legal representation accessible to low-income women in New York City in family, matrimonial, and immigration matters. Her Justice recruits and mentors volunteer attorneys from the City's law firms to stand side-by-side with women who cannot afford to pay for a lawyer, giving them a real chance to obtain legal protections that transform their lives. Her Justice's immigration practice focuses on representing immigrant survivors of gender-based violence pursuing relief under the Violence Against Women Act (VAWA), many of whom are in removal proceedings. Her Justice has appeared before Courts of Appeals and the United States Supreme Court in numerous cases as amicus.

Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center that supports, trains, and advises criminal defense and immigration lawyers, immigrants themselves, as well as judges and policymakers on the

intersection between immigration law and criminal law. IDP is dedicated to promoting fundamental fairness for immigrants at risk of detention and deportation based on past criminal charges and therefore has a keen interest in ensuring the integrity and fairness of agency removal proceedings.

The Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal organization dedicated to the defense and advancement of the legal rights of noncitizens in the United States with respect to their immigrant status. NWIRP provides direct representation to low-income immigrants placed in removal proceedings.

The Southern Poverty Law Center ("SPLC") has provided pro bono civil-rights representation to low-income persons in the Southeast since 1971. SPLC has litigated numerous cases to enforce the civil rights of immigrants and refugees to ensure that they are treated with dignity and fairness. SPLC also monitors and exposes extremists who attack or malign groups of people based on their immutable characteristics. SPLC is dedicated to reducing prejudice and improving intergroup relations. SPLC has a strong interest in opposing discriminatory governmental action that undermines the promise of civil rights for all.

## ARGUMENT

### I. Due Process Guarantees an Impartial Decisionmaker at Every Stage of Removal Proceedings, Including Review by the Attorney General

"[T]he Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). It is well-settled that "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities," including in the immigration context. *Abdulrahman v. Ashcroft*, 330 F.3d 587, 596 (3d Cir. 2003) (quoting *Schweiker v. McClure*, 456 U.S. 188, 195 (1982)). "[N]o person [may] be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Wang v. Att'y Gen. of the U.S.*, 423 F.3d 260, 269 (3d Cir. 2005) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)). In line with these principles, a respondent in removal proceedings is entitled to independent and impartial review "throughout all phases of [the] proceedings"—in hearings before the IJ, on appeal to the Board, and, on the rare occasion it occurs, on referral to the Attorney General. *Serrano-Alberto v. Att'y Gen.*, 859 F.3d 208, 213 (3d Cir. 2017).

The federal courts—including the U.S. Court of Appeals for the Third Circuit, where Castro-Tum would be required to file any petition for review in this case—have not hesitated to reject final orders of removal where the proceedings

before the IJ failed to satisfy constitutional requirements. These requirements include "a full and fair hearing" by a "neutral and impartial arbiter of the merits of [the] claim." *Abulashvili v. Att'y Gen.*, 663 F.3d 197, 207 (3d Cir. 2011) (quoting *Cham v. Att'y Gen.*, 445 F.3d 683, 691 (3d Cir. 2006)); *see also Marincas v. Lewis*, 92 F.3d 195, 203-04 (3d Cir. 1996) (describing review by impartial immigration judges as one of the most basic due process protections); *Serrano-Alberto*, 859 F.3d at 224 (concluding that "pervasive[ ]" and "egregious[ ]" conduct by the IJ constituted a violation of due process).

The Board has recognized that "the constitutional due process requirement that the hearing be before a fair and impartial arbiter" requires the recusal of IJs under certain circumstances. *Matter of Exame*, 18 I&N Dec. 303, 306 (BIA 1982). In *Matter of Exame*, the Board set out two situations in which recusal is required. First, an IJ must recuse where "it [is] demonstrated that [he] had a personal, rather than judicial, bias stemming from an 'extrajudicial' source which resulted in an opinion on the merits on some basis other than what the immigration judge learned from his participation in the case." *Id.* Second, even when the conduct at issue is internal to the proceedings, an IJ must recuse where "such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party." *Id.* (quoting *Davis v. Board of School Comm'rs*, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976)). An IJ's "conduct [is] improper . . .

whenever a judge appears biased, even if she actually is not biased." *Abulashvili*, 663 F.3d at 207.

The same constitutional requirements apply to the adjudication of removal proceedings by the Board, although the appellate context gives rise to different obligations and potential violations. A neutral Board ensures a layer of impartial review that is independent of both the IJ and the Attorney General. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 264-68 (1954) (holding Board must exercise its own discretion as provided in regulations and may not defer to the Attorney General in deciding the outcome of a case). In *Accardi*, the Attorney General had "announced at a press conference that he planned to deport certain 'unsavory characters'" and subsequently prepared a list of individuals he wished to have deported, including Accardi, which was circulated to employees of the Immigration Service and Board. *Id.* at 264. After the Board denied Accardi's application for suspension of deportation, Accardi challenged the decision on a petition for writ of habeas corpus, "charg[ing] the Attorney General with precisely what the regulations forbid him to do: dictating the Board's decision." *Id.* at 267. The Court held that it violates due process for the Board to "fail[ ] to exercise its own discretion, contrary to existing valid regulations." *Id.* at 268. The Court emphasized that this requirement "applies with equal force to the Board and the Attorney General," and that Accardi was entitled to a "fair hearing" and a decision

based solely on the record after the Board "exercised its own independent discretion." *Id.* at 267-68.

The due process principles discussed above "ha[ve] long been established by the Supreme Court," and courts have applied them in many contexts other than immigration proceedings. *Wang v. Att'y Gen.*, 423 F.3d 260, 269 (3d Cir. 2005). It is axiomatic that the right to an impartial decisionmaker is inherent in due process. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). This well-established principle "preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). "Fairness of course requires an absence of actual bias . . . [b]ut our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). Thus, in determining whether a decisionmaker possesses the requisite impartiality to adjudicate a matter, "[t]he inquiry is an objective one" that asks "not whether the [decisionmaker] is actually, subjectively biased, but whether the average [decisionmaker] in his position is 'likely' to be neutral." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009).

As a practical matter, the due process right to an impartial decisionmaker is secured by multiple overlapping safeguards, with the restraint of conscientious

decisionmakers playing a key role. For example, adjudicators routinely identify their personal and financial interests so they can be appropriately screened from matters that implicate those interests. *Cf. In re Murchison*, 349 U.S. at 136 ("[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."). Recusal, removal by agency superiors, and disqualification are all important tools. Although the appropriate protections vary by situation, their combined effect is "to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Marshall*, 446 U.S. at 242.

Where the Attorney General acts as an adjudicator in his own right, he is subject to the same constitutional requirements as any other agency decisionmaker—taking into account, of course, the specific requirements of the immigration context. *See Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (agency adjudicator may not prejudge or appear to prejudge a case); *Serrano-Alberto v. Att'y Gen.*, 859 F.3d 208, 213 (3d Cir. 2017). There is no exception to the impartiality requirement for immigration matters the Attorney General refers to himself. Yet, for the reasons discussed below, an exception would be required for the Attorney General to decide this case.

## II. The Attorney General Cannot Impartially Adjudicate This Case

### A. Due Process Bars Participation by an Adjudicator Whose Public Statements Show He Has Prejudged or Appeared to Prejudge a Case

In determining whether an adjudicator possesses the requisite impartiality, the ultimate question is whether he is "capable of judging a particular controversy fairly on the basis of its own circumstances." *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)). The adjudicator "enjoys a presumption of honesty and integrity," but that presumption may be rebutted on various grounds. *Harline v. Drug Enforcement Admin.*, 148 F.3d 1199, 1204 (10th Cir. 1998) (citing *Withrow*, 421 U.S. at 47).

The D.C. Circuit's decision in *Cinderella* sets out the standard that applies when public statements made by an agency head call into question the fairness of an adjudication in which the official is involved. In that case, the court considered whether then-Chairman of the Federal Trade Commission Paul Rand Dixon should have recused himself from an adjudication involving charges of false, misleading, and deceptive advertising "due to public statements he had previously made which allegedly indicated pre-judgment of the case on his part." *Cinderella*, 425 F.2d at 584-85. While the case was pending, Chairman Dixon had delivered a speech setting forth several examples of advertisements newspapers should reject as a

matter of ethics, including one that appeared to correspond to the facts of the pending case. *Id.* at 589-90. In analyzing whether the Chairman should have recused himself, the D.C. Circuit explained that "[t]he test for disqua[l]ification . . . [is] whether a disinterested observer may conclude that [the adjudicator] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Id.* at 591 (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959), *cert. denied*, 361 U.S. 896 (1959)). The court concluded that disqualification was required. *Id.* at 590-91. Separately, the court noted that public statements by an adjudicator risk "entrenching [him] in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." *Id.* at 590.

The test for disqualification set out in *Cinderella* is consistent with the standard for recusal adopted by the Board for "personal, rather than judicial, bias." *Matter of Exame*, 18 I&N Dec. 303, 306 (BIA 1982) (explaining that recusal is required where "it [is] demonstrated that the immigration judge had a personal, rather than judicial, bias stemming from an 'extrajudicial' source which resulted in an opinion on the merits on some basis other than what the immigration judge learned from his participation in the case"). However, the facts of *Cinderella* are instructive regarding the special concerns that arise when an agency head serves as

an adjudicator while simultaneously performing other official duties. These concerns are especially pronounced in relation to the Attorney General, who serves as an immigration adjudicator only rarely and spends the vast majority of his time in roles that do not just involve but depend on partiality, such as maintaining a political affiliation with the president.

Although courts have concluded in other contexts that "'the combination of investigative and adjudicative functions does not, without more, constitute a due process violation,'" they also have recognized that "[courts] are not precluded in a particular case from finding 'that the risk of unfairness is intolerably high.'" *Khouzam v. Att'y Gen.*, 549 F.3d 235, 258 (3d Cir. 2008) (quoting *Withrow*, 421 U.S. at 58). The nature of the Attorney General's competing roles is relevant to this inquiry.

### B. The Attorney General's Public Statements Raise an Unconstitutional Appearance of Bias in This Case

This case represents this Attorney General's first use of the referral authority under 8 C.F.R. § 1003.1(h)(1)(i), and one of the rare uses of such authority among recent holders of the office.[4]

[4] During the eight years of the Obama Administration, the Attorney General issued a decision in a referred case, on average, only once every two years. *See, e.g.*, *Matter of Chairez-Castrejon*, 26 I&N Dec. 796 (A.G. 2016); *Matter of Silva-Trevino*, 26 I&N Dec. 550 (A.G. 2015); *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011); *Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009).

Here, the Attorney General has chosen the case of Reynaldo Castro-Tum as the vehicle for a sweeping review of "issues relating to the authority to administratively close immigration proceedings." AG Decision at 187. At the time of his scheduled hearing before the IJ, Castro-Tum, whom DHS alleged to be a native and citizen of Guatemala, was 19 years old and previously had been designated as an unaccompanied child. BIA Decision at *1. After Castro-Tum failed to appear at the hearing, the IJ questioned the reliability of the address to which DHS had sent the Notice to Appear and declined to enter an in absentia removal order, instead administratively closing the case. *Id.* at *1-2. On appeal, the Board vacated the IJ's decision and remanded for further proceedings, reasoning that, in the absence of evidence that the address was unreliable, the "presumption of regularity" should apply. *Id.* at *2. To amici's knowledge, Castro-Tum was unrepresented in these proceedings, including at the time the Attorney General referred the case to himself.

The Attorney General has identified a number of far-reaching questions as "relevant to the disposition of [Castro-Tum's] case," including whether "Immigration Judges and the Board have the authority, under any statute, regulation, or delegation of authority from the Attorney General, to order administrative closure in a case." AG Decision at 187. Although no previous Attorney General has addressed these questions on referral, the Board has

considered the function of and authority for administrative closure on multiple occasions, including in its precedential decisions *Matter of W-Y-U-* and *Matter of Avetisyan*. In *Matter of W-Y-U-*, decided in April 2017, the Board explained:

> Administrative closure . . . is used to temporarily remove a case from an Immigration Judge's active calendar or from the Board's docket. It is a docket management tool that is used to temporarily pause removal proceedings. Administrative closure is not a form of relief from removal and does not provide an alien with any immigration status. After a case has been administratively closed, either party may move to recalendar it before the Immigration Court, as the respondent did here, or to reinstate the appeal before the Board.

27 I&N Dec. 17, 17-18 (BIA 2017) (citations omitted).

In *Matter of Avetisyan*, the Board explained that an IJ's authority to grant administrative closure stems from the authority "to regulate the course of the hearing and to take any action consistent with applicable law and regulations as may be appropriate." 25 I&N Dec. 688, 691, 694 (BIA 2012) (citing to the authority granted to immigration judges in 8 C.F.R. §§ 1240.1(a)(1)(iv), (c)). The Board also clarified that administrative closure may occur over the objection of either party, rejecting the previous contrary rule—which it viewed as giving DHS a unilateral veto over the IJ's ability to administratively close the case—as "troubling" and in conflict with the delegated authority of IJs and the Board. *Id.* at 690-694.

Against this backdrop, the Attorney General's referral of this case to himself raises serious due process concerns. The Attorney General has made public

statements over a period of many years, including in his official capacities as United States senator and Attorney General, that compromise his impartiality in this case. Three categories of statements, in particular, give rise to an unconstitutional potential for bias: (1) the Attorney General's statements expressing prejudgment as to the continued use of administrative closure by IJs and the Board; (2) the Attorney General's statements expressing bias toward unaccompanied children like Castro-Tum; and (3) the Attorney General's statements expressing a predisposition to disfavor certain categories of noncitizens whose interests are implicated in this case.

### 1. The Attorney General's public statements evidence prejudgment regarding whether to restrict or end administrative closure

The Attorney General's public statements strongly suggest prejudgment as to the continued availability of administrative closure, both in particular and as part of a larger set of practices that extend removal proceedings or allow noncitizens to remain in the United States. Because the Attorney General referred Castro-Tum's proceedings to himself "for review of issues relating to the authority to administratively close immigration proceedings," AG Decision at 187, these statements go to the heart of the case.

In remarks prepared for delivery on December 12, 2017, the Attorney General directly criticized the practice of administrative closure, stating: "As the

backlog of immigration cases grew out of control, the previous administration simply closed nearly 200,000 pending immigration court cases without a final decision in just five years—more than were closed in the previous 22 years combined."[5] By contrast, under the Trump Administration, "[w]e are completing, not closing, immigration cases."[6] The Attorney General noted that this change in priorities has corresponded with a change in "complet[ion]" rates: "[u]nder President Trump, our immigration judges completed 20,000 more cases this last fiscal year than in the previous one."[7] In the same speech, the Attorney General announced that he had issued a memorandum the previous week to the Executive Office for Immigration Review ("EOIR"), the agency that employs both IJs and members of the Board, "mak[ing] clear" that "cases are to be resolved either with a removal order or a grant of relief."[8] This memorandum, titled "Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest," instructs EOIR employees as follows: "The ultimate disposition for each case in which an alien's removability has been established must be either a removal order or a grant of relief or protection from removal

[5] Jefferson B. Sessions III, Att'y Gen., *Attorney General Sessions Delivers Remarks on the Administration's Efforts to Combat MS-13 and Carry Out its Immigration Priorities* (Dec. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-administrations-efforts-combat-ms-13-and-carry.

[6] *Id.*

[7] *Id.*

[8] *Id.*

provided for under our immigration laws, as appropriate and consistent with applicable law."[9]

These statements strongly suggest that the Attorney General had decided to end the practice of administrative closure as of December 2017—and, indeed, had taken steps to end it by issuing the memorandum to EOIR. Yet, less than a month after publicly stating that position, the Attorney General referred a case to himself purporting to consider, among other issues, whether "Immigration Judges and the Board have the authority . . . to order administrative closure" and whether, if they do, the Attorney General should withdraw that authority. AG Decision at 187. Proximity in time is significant in determining whether an official's public statements give rise to an appearance of prejudgment. *See Cinderella*, 425 F.2d at 590 n.10 ("In light of the timing of the speech in relation to the proceedings herein, we think the reasonable inference a disinterested observer would give these remarks would connect them inextricably with this case.").

These recent statements are consistent with the Attorney General's long history of opposition to any practice that extends removal proceedings, particularly where that extension authorizes or has the effect of allowing the respondent to remain in the United States. For example, in the following remarks as a senator,

[9] Office of the Attorney General, *Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest* (Dec. 5, 2017).

the Attorney General expressed the view that removal should occur immediately after adjudication by the agency, notwithstanding pending appeals:

> We have to simply understand that there is no right to be here after a final adjudication has occurred while your case is on appeal in the court of appeals. But we allow them to. We give them a right. . . . The court of appeals can override the adjudicating authority of the Immigration Service and allow the person to stay if they choose. We have had an abuse of that. We have had 10,000 such cases. With this amendment, we are going to see even more such cases.
>
> I suggest that we must get serious about immigration. The more we create appellate possibilities, the more we can confuse the law. The more we create exception after exception after exception, the more unable we are to operate a system effectively and fairly.
>
> The fair principle is, if you are adjudicated not to be here, you have no right to be here. But we give you a generous right to appeal to a court one step below the U.S. Supreme Court, but you have to go home until that court decision. If they override it, he can come back.
>
> I think that is preciously generous. I think that is fair and right, and it also provides that court, in narrow areas, to extend and allow a person to stay if they feel it is necessary to do so.

152 Cong. Rec. 9542 (2006) (statement of Sen. Sessions).

Here, the Attorney General's statements give rise to the appearance that he already has decided to restrict or end administrative closure. The questions set out in the referral order include whether the practice of administrative closure is authorized by law or delegated authority and, if it is discretionary, whether it should be continued. AG Decision at 187. But the Attorney General stated in remarks prepared for delivery on December 12, 2017 that the Trump

Administration is "completing, not closing, immigration cases," and he has directed his agency, which includes IJs and the Board, to resolve cases in ways that do not include administrative closure.[10]

The Attorney General's public statements also implicate the additional concern raised by the D.C. Circuit in *Cinderella*: public statements can "entrench [ ]" a decisionmaker in the "position which he has publicly stated" and "mak[e] it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." *Cinderella*, 425 F.2d at 590. That principle applies with particular force to an Attorney General who has an established record of remarks that make him an interested party, and who is associated with carrying out the anti-immigrant political agenda of rapid removals espoused by the current Administration.[11] Indeed, the December 12

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[10] *Attorney General Sessions Delivers Remarks on the Administration's Efforts to Combat MS-13 and Carry Out its Immigration Priorities* (Dec. 12, 2017).

[11] *See, e.g.*, *Transcript of Donald Trump's Immigration Speech* (Sept. 1, 2016), https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html ("According to federal data, there are at least two million, two million, think of it, criminal aliens now inside of our country, two million people criminal aliens. We will begin moving them out day one. As soon as I take office. Day one . . . Day one, my first hour in office, those people are gone."); Donald Trump (@realDonaldTrump), Twitter (Feb. 12, 2017, 3:34AM), https://twitter.com/realdonaldtrump/status/830741932099960834 ("The crackdown on illegal criminals is merely the keeping of my campaign promise. Gang members, drug dealers & others are being removed!"); Donald Trump (@realDonaldTrump), Twitter (April 18, 2017, 2:39AM), https://twitter.com/realdonaldtrump/status/854268119774367745 ("The weak illegal immigration policies of the Obama Admin. allowed bad MS 13 gangs to form in cities across U.S. We are removing them fast!); *President Trump Meeting with Cabinet* (June 12, 2017), https://www.c-span.org/video/?429863-1/president-touts-accomplishments-cabinet-meeting ("Great success, including MS-13. They're being thrown out in record numbers and rapidly. And, uh, they're being depleted. They'll all be gone pretty soon. So, you're right, Jeff. Thank you very much."); *Remarks by President Trump During Meeting with Immigration Crime Victims* (June 28, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-

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speech endorsing the practice of "completing, not closing, immigration cases" repeatedly references President Trump and informs the Department of Justice audience that the Attorney General is "looking forward to working with you to protect the American people and implement the President's ambitious agenda."[12] In light of the repeated public statements of the Attorney General and President Trump "entrenching" their position that immigrants should be deported as rapidly as possible, *see Cinderella*, 425 F.2d at 590, the "average [decisionmaker]" in the Attorney General's position is not "'likely' to be neutral" in an adjudication that requires him to either confirm or reject the positions taken in these previous official statements, *see Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009).

**2. The Attorney General's public statements evidence bias toward unaccompanied children like Castro-Tum, whom he associates with MS-13 gang activity and has long sought to remove from the United States**

A disinterested observer would conclude on at least two grounds that the Attorney General has prejudged Castro-Tum's case based on his previous

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immigration-crime-victims/ ("MS-13 is a prime target . . . We're getting them out as fast as we can get them out."); Donald Trump (@realDonaldTrump), Twitter (Feb. 6, 2018, 5:32AM), https://twitter.com/realdonaldtrump/status/960868920428253184 ("We must get the Dems to get tough on the Border, and with illegal immigration, FAST!"); *see also* Elizabeth Landers, *White House: Trump's tweets are 'official statements,'* CNN (June 6, 2017), https://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html.

[12] *Attorney General Sessions Delivers Remarks on the Administration's Efforts to Combat MS-13 and Carry Out its Immigration Priorities* (Dec. 12, 2017).

designation as an unaccompanied child. First, the Attorney General repeatedly has made public remarks associating unaccompanied children with the violent transnational gang MS-13, including in multiple official speeches over the past year. Some of these speeches were reported in the press,[13] and the references to unaccompanied children and MS-13 remain online in the prepared remarks posted on the Department of Justice website. Second, as both a senator and Attorney General, the Attorney General has expressed the strong view that unaccompanied children should not be allowed to remain in the United States. Both grounds give rise to a potential for bias that precludes his participation in this case.

Over the past year, the Attorney General has stated on multiple occasions that the unaccompanied child program is a tool of the violent transnational gang MS-13. In prepared remarks to law enforcement officials in Boston in September 2017, the Attorney General explained that "the gang is running rampant [in Central Islip, New York]: killing victims, traumatizing communities, and replenishing its ranks by taking advantage of the Unaccompanied Alien Child program."[14] In the

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[13] *See, e.g.*, Lauren Dezenski, *Sessions: Many unaccompanied minors are 'wolves in sheep's clothing,'* Politico (Sept. 21, 2017), https://www.politico.com/story/2017/09/21/jeff-sessions-border-unaccompanied-minors-wolves-242991; Joseph Tanfani, *Atty. Gen. Sessions says lax immigration enforcement is enabling gangs like MS-13*, L.A. Times (Apr. 18, 2017), http://www.latimes.com/politics/washington/la-na-essential-washington-updates-sessions-says-lax-immigration-1492527375-htmlstory.html; John Binder, *'Lax Immigration Enforcement' Led to MS-13 Growth, Sessions Says*, Breitbart (Apr. 18, 2017), http://www.breitbart.com/texas/2017/04/18/lax-immigration-enforcement-led-ms-13-growth-sessions-says/.

[14] Jefferson B. Sessions III, Att'y Gen., *Attorney General Sessions Gives Remarks to Federal Law Enforcement in Boston About Transnational Criminal Organizations* (Sept. 21, 2017),

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same speech, the Attorney General referred to these gang members as "wolves in sheep clothing" and stated that "[w]e are now working with the Department of Homeland Security and HHS to examine the unaccompanied minors issue and the exploitation of that program by gang members."[15] The Attorney General further asserted that the unaccompanied child program "continues to place juveniles from Central America into . . . gang controlled territory" and "is clearly being abused."[16] In April 2017, the Attorney General made similar claims in prepared remarks to the Organized Crime Council, explaining that, "[b]ecause of an open border and years of lax immigration enforcement, MS-13 has been sending both recruiters and members to regenerate gangs that previously had been decimated, and smuggling members across the border as unaccompanied minors."[17] These remarks evidence clear bias toward unaccompanied children and suggest that the Attorney General would apply a presumption of gang affiliation to Castro-Tum, despite the absence of any evidence in the record to that effect.

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https://www.justice.gov/opa/speech/attorney-general-sessions-gives-remarks-federal-law-enforcement-boston-about.

[15] *Id.*

[16] *Id.*

[17] Jefferson B. Sessions III, Att'y Gen., *Remarks by Attorney General Jeff Sessions at Meeting of the Attorney General's Organized Crime Council and OCDETF Executive Committee* (Apr. 18, 2017), https://www.justice.gov/opa/speech/remarks-attorney-general-jeff-sessions-meeting-attorney-general-s-organized-crime-council.

In determining whether an adjudicator's involvement in a case gives rise to a "probability of unfairness," the overall "relationships" and "[c]ircumstances . . . must be considered." *In re Murchison*, 349 U.S. 133, 136 (1955). Here, the Attorney General's statements about unaccompanied children correspond directly to the facts of Castro-Tum's case. The Attorney General has expressed the belief that a transnational gang that poses a grave threat to American security has appropriated the unaccompanied child program to smuggle members from Central America into the United States. Castro-Tum is alleged to be a native and citizen of Guatemala, a country where MS-13 operates, and was designated as an unaccompanied child. BIA Decision at *1. Although there is no evidence or allegation that Castro-Tum is a member of MS-13, the Attorney General's public statements would lead a disinterested observer to conclude that he has already decided whether Castro-Tum should be allowed to remain in the United States, given his previous designation as an unaccompanied child.

Further, the Attorney General has staked out a hardline position on the dismantling of MS-13, declaring it to be an enforcement priority in multiple official speeches over the past year. In his remarks in September 2017, the Attorney General stated: "We have issued mandates to the field that prosecutors renew their focus on immigration offenses—specifically where those criminals have a gang nexus, targeting violent crime offenses, and charging the most serious,

readily provable offense—all of which will ensnare criminal gangs."[18] He explained that the department had plans to "surge[ ] an additional 300 [Assistant U.S. Attorneys] to the field to specifically focus on violent crime and immigration, both of which will involve anti-MS-13 efforts."[19] In April 2017, the Attorney General pledged to take steps to "secure our border, expand immigration enforcement and choke-off supply lines."[20] These comments, combined with the Attorney General's repeated statements associating unaccompanied children with MS-13, "entrench[ ]" the Attorney General in a "tough on unaccompanied children" position that precludes fair judgment in this case. *See Cinderella*, 425 F.2d at 590.

In any case, the Attorney General's long history of advocating against unaccompanied children—from supporting bills to limit their protections as a senator to sharing public anecdotes of DACA recipients alleged to have committed crimes—creates a potential for bias that would mar any decision in the case he has referred to himself. For example, in February 2016, Senator Sessions and Senator Ron Johnson (R-Wis.) co-sponsored a bill titled "The Protection of Children Act" (S. 2541), which would have expedited removal proceedings for unaccompanied

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[18] *Attorney General Sessions Gives Remarks to Federal Law Enforcement in Boston About Transnational Criminal Organizations* (Sept. 21, 2017).

[19] *Id.*

[20] *Remarks by Attorney General Jeff Sessions at Meeting of the Attorney General's Organized Crime Council and OCDETF Executive Committee* (Apr. 18, 2017).

children and forbidden the use of taxpayer funds for attorneys in their cases, among other things.[21] In a statement in support of the bill, Senator Sessions explained: "[I]n recent months the number of purported unaccompanied alien children crossing our southern border has more than doubled. As a result, our nation's schools, hospitals, and social services are facing massive, unsustainable strain."[22] In the same press release, Senator Johnson specifically referenced the influx of unaccompanied children from Guatemala and the low repatriation rates to date.[23] The year prior to introducing that bill, Senator Sessions prepared an "Immigration Handbook" for Republican members that advocated "mandatory repatriation for unaccompanied alien minors" as a "common sense enforcement-only measure[ ]."[24]

In his current position, the Attorney General has continued to use his official role as a platform to oppose the interests of unaccompanied children. In remarks prepared for delivery only months before he referred Castro-Tum's case to himself, the Attorney General expressed the view that the DACA program has incentivized

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[21] Press Release, Sen. Ron Johnson, *Johnson, Sessions Introduce Bill Prompting Return of Unaccompanied Illegal Immigrant Children* (Feb. 24, 2016), https://www.ronjohnson.senate.gov/public/index.cfm/2016/2/johnson-sessions-introduce-bill-prompting-return-of-unaccompanied-illegal-immigrant-children.

[22] *Id.*

[23] *Id.*

[24] Sen. Jeff Sessions, *Immigration Handbook for the New Republican Majority* (Jan. 2015).

unaccompanied children to come to the United States and told two anecdotes that associated DACA recipients with criminality.[25]

Although these statements would raise impartiality concerns for any adjudicator tasked with deciding an unaccompanied child case, they are especially troubling here, given that the Attorney General has chosen Castro-Tum's case to undertake a generalized review of administrative closure that is not specific to either Castro-Tum or unaccompanied children. The Attorney General, unlike immigration judges and Board members, is not an ordinary adjudicator for whom an unaccompanied child case (or any other case) might arise in the normal course. Rather, the Attorney General reviews only those cases he or another designated official determines he should adjudicate. 8 C.F.R. § 1003.1(h)(1)(i). Although there is little case law addressing the referral authority itself—including its validity, scope, and the process required—the Third Circuit has suggested, in the context of rejecting the methodology used by Attorney General Mukasey in *Silva-Trevino*, that it "bear[s] mention" when the Attorney General takes an "unusual"

[25] Jefferson B. Sessions III, Att'y Gen., *Attorney General Jeff Sessions Delivers Remarks About Carrying Out the President's Immigration Priorities* (Oct. 20, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-about-carrying-out-presidents-immigration.

approach in matters of referral and adjudication. *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 470 n.11 (3d Cir. 2009).[26]

The circumstances here are "unusual" in the context of administrative closure. In the typical case, the IJ or Board employs administrative closure to temporarily remove a case from the docket to await the occurrence of an external event. *Matter of Avetisyan*, 25 I&N Dec. at 692 (citation omitted). For example, administrative closure can be "appropriate . . . where [a noncitizen] demonstrates that he or she is the beneficiary of an approved visa petition filed by a lawful permanent resident spouse who is actively pursuing, but has not yet completed, an application for naturalization." *Id.* at 696. Here, the Attorney General has invoked the self-referral authority—itself a relatively rare practice, *see* n.4, *supra*—to review a case that presents the following combination of unusual circumstances: (1) the respondent was designated as an unaccompanied child; (2) no record was developed because the IJ administratively closed the removal proceedings in absentia; (3) the Board ruled against the respondent, vacating the administrative closure order and remanding the case to the immigration court to send him a new Notice of Hearing ; and (4) the respondent was unrepresented by counsel throughout proceedings and, to amici's knowledge, is still unrepresented. *See* BIA

[26] With respect to impartiality itself, it is not necessary to look to the conduct of other Attorneys General to determine the usual practice, as bias is always a deviation from the norm. *Cf. Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

Decision at *1-3; AG Decision at 187. In short, the Attorney General has chosen a matter that is far from representative of administrative closure cases as the vehicle for his administrative closure review. The potential for bias is heightened by the unusual circumstances of the case.

### 3. The Attorney General's public statements evidence a predisposition to disfavor certain categories of noncitizens whose interests are implicated in the referral order

Over a period of many years, as both a senator and Attorney General, the Attorney General has expressed the view that certain categories of noncitizens—particularly those who do not meet his standards for income, education, professional skills, and language ability—should be excluded or removed from the United States. Here, the questions the Attorney General has identified for his review go far beyond the facts of Castro-Tum's case, implicating the interests of all noncitizens in removal proceedings that are administratively closed, as well as those who may be eligible for federal or state benefits and certain forms of immigration relief. AG Decision at 187. Yet the Attorney General has designated these issues as "relevant to the disposition of [Castro-Tum's] case." *Id.* Thus, to the extent the Attorney General's public statements address these matters, they directly bear on whether he possesses the requisite impartiality.

Moreover, one of the primary uses of administrative closure is to provide sufficient time for a noncitizen in removal proceedings to acquire eligibility to

adjust status through a family relationship. *See, e.g.*, *Matter of Avetisyan*, 25 I&N Dec. at 696. Because administrative closure often provides a path by which noncitizens in removal proceedings can acquire lawful status through family ties, the Attorney General's antipathy toward family-based immigration—which he typically refers to by the derogatory term "chain migration"—is relevant to any decision in this case.

The following statements, among others, reflect the Attorney General's deeply held views toward family-based immigration, immigrants, and the immigration system as a whole, all of which implicate the questions the Attorney General has identified for review in this case:

- "We should give priority to those who are likely to thrive here—such as those who speak English or are highly skilled—not someone chosen at random or who happens to be somebody's relative."[27]

- "Chain migration is going to increase until 2015. The portion of family-based migration versus merit-based migration will be worse than it is today, perhaps much worse. Think about that." 153 Cong. Rec. 13259 (2007) (statement of Sen. Sessions).

- "Well, if they are illiterate in their home country they're not likely to be a police officer the next week in the United States, are they?"[28]

- "We think under the bill that 70, 80 percent of the people entered will be low-skill immigrants. We know about two-thirds, over 60 percent at

[27] *Attorney General Sessions Delivers Remarks on the Administration's Efforts to Combat MS-13 and Carry Out its Immigration Priorities* (Dec. 12, 2017).

[28] Adam Serwer, *Jeff Sessions's Fear of Muslim Immigrants*, Atlantic (Feb. 8, 2017), https://www.theatlantic.com/politics/archive/2017/02/jeff-sessions-has-long-feared-muslim-immigrants/516069/.

least, of those who are here illegally today and are proposed for amnesty are high school dropouts. They do not have high school degrees. They are not going to be able to be highly successful in our workplace."[29]

- "The American people have known for more than 30 years that our immigration system is broken. It's intentionally designed to be blind to merit. It doesn't favor education or skills. It just favors anybody who has a relative in America—and not necessarily a close relative. That defies common sense. Employers don't roll dice when deciding who they want to hire. Our incredible military doesn't draw straws when deciding whom to accept. But for some reason, when we're picking new Americans—the future of this country—our government uses a randomized lottery system and chain migration."[30]

- "[A] central idea of the President's immigration reform proposal is switching to a merit-based system of immigration. That means welcoming the best and the brightest but banning and deporting gang members, identity fraudsters, drunk drivers, and child abusers—making them inadmissible in this country. This merit-based system would better serve our national interest because it would benefit the American people, which is what the Trump agenda is all about."[31]

- "The President is exactly correct about the changes we need to our immigration system. We have now seen two terrorist attacks in New York City in less than two months that were carried out by people who came here as the result of our failed immigration policies that do not serve the national interest—the diversity lottery and chain migration. The 20-year-old son of the sister of a U.S. citizen should not get priority to come to this country ahead of someone who is high-skilled, well

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[29] Center for Immigration Studies, *Implications of the Hagel-Martinez Amnesty Bill* (June 15, 2006), https://cis.org/Implications-HagelMartinez-Amnesty-Bill.

[30] Jefferson B. Sessions III, Att'y Gen., *Attorney General Sessions Delivers Remarks on National Security and Immigration Priorities of the Administration* (Jan. 26, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-national-security-and-immigration-priorities.

[31] *Id.*

educated, has learned English, and is likely to assimilate and flourish here."[32]

- "I think we are too far down the road of an entitlement mentality. This whole bill contemplates people having an entitlement to come to America, to bring in their parents and children, and they are entitled to have them ultimately be on Medicare and go to hospitals and be treated, even though they are not properly here." 152 Cong. Rec. 8553 (2006) (statement of Sen. Sessions).

- "In seven years we'll have the highest percentage of Americans, non-native born, since the founding of the Republic. Some people think we've always had these numbers, and it's not so, it's very unusual, it's a radical change. When the numbers reached about this high in 1924, the president and congress changed the policy, and it slowed down immigration significantly, we then assimilated through the 1965 and created really the solid middle class of America, with assimilated immigrants, and it was good for America. We passed a law that went far beyond what anybody realized in 1965, and we're on a path to surge far past what the situation was in 1924."[33]

- "Fundamentally, almost no one coming from the Dominican Republic to the United States is coming here because they have a provable skill that would benefit us and that would indicate their likely success in our society."[34]

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[32] Jefferson B. Sessions III, Att'y Gen., *Attorney General Sessions Issues Statement on the Attempted Terrorist Attack in New York City* (Dec. 11, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-issues-statement-attempted-terrorist-attack-new-york-city.

[33] Adam Serwer, *Jeff Sessions's Unqualified Praise for a 1924 Immigration Law*, Atlantic (Jan. 10, 2017), https://www.theatlantic.com/politics/archive/2017/01/jeff-sessions-1924-immigration/512591/ (describing interview between Sen. Sessions and Stephen Bannon of Breitbart).

[34] Sam Stein & Amanda Terkel, *Donald Trump's Attorney General Nominee Wrote Off Nearly All Immigrants From An Entire Country*, Huffington Post (Nov. 19, 2016), https://www.huffingtonpost.com/entry/jeff-sessions-dominican-immigrants_us_582f9d14e4b030997bbf8ded.

The Attorney General's long history of public statements, as both senator and Attorney General, conveys a deep-seated animus toward noncitizens that has persisted over many years. In particular, the Attorney General has displayed sustained hostility toward noncitizens who do not meet his standards for income, education, professional skills, and language ability, or whose family ties might provide a basis for immigration relief. A disinterested observer would have no trouble concluding that the statements above render him unable to fairly decide Castro-Tum's case. Were an IJ or member of the Board to express similar views, the federal courts would vacate the ensuing removal order, holding that the adjudicator's lack of impartiality violated basic principles of due process. *See* Section I, *supra*. At a minimum, an Attorney General who expresses such views must be held to the same standards as the Department of Justice employees he oversees; the Attorney General is not above the law.

## CONCLUSION

For the foregoing reasons, principles of due process bar the Attorney General from participating in the matter he has referred to himself. The Attorney General must vacate the referral order or recuse himself from this case.

Dated: February 16, 2018

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the instructions in the Attorney General's referral order dated January 4, 2018 because the brief contains 8,737 words, excluding the cover page, Table of Contents, Table of Authorities, signature block, Certificate of Compliance, and Certificate of Service.

Dated: February 16, 2018

/s/ R. Stanton Jones
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## CERTIFICATE OF SERVICE

I hereby certify that, on February 16, 2018, the foregoing brief was submitted electronically to AGCertification@usdoj.gov and in triplicate via FedEx to:

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Before the
United States Department of Justice
Attorney General Jefferson Sessions

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**BRIEF OF *AMICI CURIAE***
**KIDS IN NEED OF DEFENSE,**
**PUBLIC COUNSEL, AND**
**FREEDOM NETWORK USA**
**IN SUPPORT OF THE**
**RESPONDENT REYNALDO**
**CASTRO-TUM**

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## STATEMENTS OF INTEREST

Kids in Need of Defense ("KIND"), Public Counsel, and Freedom Network USA (FNUSA) (collectively, *Amici*) respectfully request leave to appear as *amici curiae* in response to the invitation of the Attorney General, and in support of Respondent Reynaldo Castro-Tum.

KIND is a national non-profit organization whose ten field offices provide free legal services to immigrant children who arrive in the United States unaccompanied by a parent or legal guardian, and face removal proceedings in Immigration Court. Since 2009, KIND has received referrals for over 15,800 children from 70 countries, and has trained and mentored *pro bono* attorneys at over 500 law firms, corporations, law schools, and bar associations. KIND also advocates for changes in law, policy, and practice to enhance protections for unaccompanied children. Many children served by KIND and its partners have endured serious harms, and many request and receive protection under United States law. KIND has a compelling interest in ensuring their access to the full measure of substantive and procedural protections that the law affords.

Public Counsel, based in Los Angeles, California, is the nation's largest not-for-profit law firm specializing in delivering *pro bono* legal services. Through a *pro bono* model that leverages the talents of thousands of attorney and law student volunteers, Public Counsel annually assists more than 30,000 families, children, and nonprofit organizations, and addresses systemic poverty and civil rights issues through impact litigation and policy advocacy. Public Counsel's Immigrants' Rights Project provides *pro bono* placement and direct representation to individuals and families—including unaccompanied children and asylum seekers—in the Los Angeles Immigration Court, the Board of Immigration Appeals, and the United States Court of Appeals for the Ninth Circuit. Public Counsel has a strong interest in ensuring that immigrants

receive the full and fair removal proceedings to which they are entitled, proceedings that often necessitate administrative closure's unique benefits.

FNUSA is the largest alliance of human trafficking advocates in the United States. Our 56 members work directly with human trafficking survivors in over 30 cities, providing comprehensive legal and social services, including representation in immigration cases. In total, our members serve over 1,000 trafficking survivors per year, over 75% of whom are foreign national survivors. FNUSA provides decision makers, legislators and other stakeholders with the expertise and tools to make a positive and permanent impact in the lives of all survivors. FNUSA provides training and advocacy to increase understanding of the wide array of human trafficking cases in the US, and the many forms of force, fraud and coercion used by traffickers. FNUSA has an interest in ensuring that the US immigration system implements policies and procedures that reduce re-traumatization of trafficking survivors and improve their access to justice.

*Amici* believe that their collective experiences can assist the Attorney General's analysis of the objectives that administrative closure may continue to serve in the conduct of removal proceedings, especially those involving unaccompanied alien children and other vulnerable immigrants.

## INTRODUCTION

For a child placed in proceedings alone, facing possible removal to a place of danger or deprivation, no court hearing is routine. For unaccompanied children and other vulnerable immigrants, administrative closure alleviates some of the pressures and burdens incident to removal proceedings. Immigration Judges and the Board of Immigration Appeals have benefited from the associated efficiency and flexibility. With a firm foundation in statute and regulation,

the practice has also been endorsed by the Board and the Chief Immigration Judge. In response to the questions posed by the Attorney General, *Amici* respectfully submit that the authority for administrative closure should be recognized and extended.

## DISCUSSION

### I. Congress Delegated Authority That Supports Administrative Closure Directly to Immigration Judges, as Reflected in Regulation, Board Precedent, and EOIR Guidance

The first question in the briefing invitation asks, in part, whether Immigration Judges and the Board have authority to administratively close cases "under any statute, regulation, or delegation of authority from the Attorney General." Authority to order administrative closure stems from the statutory authority to conduct proceedings that Congress delegated directly to Immigration Judges. An additional statute provides the Attorney General the ability to delegate powers such as authority for administrative closure. Regulations, case law, and agency guidance explicate this authority.

#### A. Authority to Order Administrative Closure Is Implied in Immigration Judges' Statutory Powers to Conduct Removal Proceedings, and Reflected in Regulations

The authority of Immigration Judges to conduct removal proceedings is a statutory power delegated directly by Congress. The term "immigration judge" is defined by statute to mean an appointee of the Attorney General "qualified to conduct specified classes of proceedings, including a [removal] hearing under section 240." INA § 101(e)(4); 8 U.S.C. § 1101(e)(4) (2009). Congress further provided that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien." INA § 240(a)(1); 8 U.S.C. § 1229a(a)(1). Implied within the direct statutory authority to conduct proceedings is the attendant power to schedule such proceedings and determine when a matter is ripe for decision.

EOIR regulations elaborate on this Congressional grant of authority. Specifically, in determining removability and specified applications for relief from removal, the Immigration Judge *may* "take any other action consistent with applicable law and regulations as may be appropriate," and *must* "regulate the course of the hearing." 8 C.F.R. § 1240.1(a)(1)(iv), (c) (2007). Further regulations provide that Immigration Judges and members of the Board, in hearing their respective matters, "shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases." 8 C.F.R. §§ 1003.10(b) (2014), 1003.1(d)(1)(ii) (2017). Such appropriate and necessary actions may include ordering administrative closure where it is found "necessary or, in the interests of justice and fairness to the parties, prudent to defer further action for some period of time." *Matter of Avetisyan,* 25 I&N Dec. 688, 691 (BIA 2012).

In parallel to the direct grant of authority from Congress to Immigration Judges, an additional statutory provision provides that the Attorney General *shall* "establish such regulations, . . . delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out" the Attorney General's powers under the Immigration and Nationality Act (INA). INA § 103(g)(2); 8 U.S.C. § 1103(g)(2) (2009). This provision is sufficient to support a delegation of administrative closure authority, in the event of any doubt that the power is included within the direct Congressional grant of section 240(a)(1).

B. Regulations Applicable to Certain Relief Applications Reflect the Utility of Administrative Closure as a Docket Management Tool

"Administrative closure is a procedural tool created for the convenience of the Immigration Courts and the Board." *Avetisyan*, 25 I&N Dec. at 690. Various DHS and EOIR regulations have expressly contemplated the use of administrative closure by persons in removal

proceedings who file certain applications with USCIS. For example, victims of severe forms of trafficking who are in removal proceedings may request administrative closure during the pendency of an application for T or T-1 nonimmigrant status. 8 C.F.R. § 214.11(d)(1)(i) (2017). Other regulations provide that nationals of specific countries who apply for adjustment of status during the pendency of immigration court proceedings may request administrative closure.[1]

C. The Board Has Used Its Authority to Order Administrative Closure and to Remand for Consideration of Administrative Closure

As noted above, the Board is "empowered by the Attorney General through regulation to resolve the questions before it on appeal in a manner that is timely, impartial, and consistent with the Act," *Avetisyan*, 25 I&N Dec. at 691, and to take any authorized action appropriate and necessary for the disposition of a case before it. 8 C.F.R. § 1003.1(d)(1)(ii). The Board has used this authority to timely resolve appeals and to manage its docket by administratively closing a matter in appropriate circumstances. In *Matter of Montiel*, the parties jointly moved the Board for administrative closure while the respondent's direct appeal from a criminal conviction remained pending. 26 I&N Dec. 555, 556 (BIA 2015). Applying the *Avetisyan* factors to the circumstances, the Board concluded that administrative closure was "warranted as a matter of administrative efficiency." *Id.* at 557. In other matters, the Board has urged DHS, on remand, "to consider agreeing to administrative closure" where there is a pending *prima facie* approvable visa petition. *Matter of Hashmi*, 24 I&N Dec. 785, 791 n. 4 (BIA 2009); *see also Matter of Rajah*, 25 I&N Dec. 127, 135 n. 10 (BIA 2009) (same).

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[1] *See, e.g.*, 8 C.F.R § 1245.13(d)(3)(i) (2003) (for certain nationals of Nicaragua and Cuba); 8 C.F.R. § 1245.15(p)(4) (2003) (for certain Haitian nationals); 8 C.F.R. § 1245.21(c) (2002) (for certain nationals of Vietnam, Cambodia and Laos); Adjustment of Status for Certain Aliens from Vietnam, Cambodia, and Laos in the United States, 67 Fed. Reg. 78667-01 (proposed Dec. 26, 2002) (codified at 8 C.F.R. § 245) ("Efficiency of the immigration court system is increased by requiring parties to agree to close a case administratively.")

D. The Chief Immigration Judge Has Endorsed the Use of Administrative Closure Through Procedural Guidance

Immigration Judges operate under the supervision and direction of the Chief Immigration Judge. 8 C.F.R. § 1003.9(b) (2007). The Chief Immigration Judge has the power to "direct the conduct of all employees assigned to the [Office of the Chief Immigration Judge ("OCIJ")] to ensure the efficient disposition of all pending cases," and the discretion "to set priorities or time frames for the resolution of cases, to direct that the adjudication of certain cases be deferred," and "otherwise to manage the docket of matters to be decided by the immigration judges." 8 C.F.R. § 1003.9(b)(3). The Chief Immigration Judge may also issue "operational instructions and policy," 8 C.F.R. § 1003.9(b)(1), such as Operating Policies and Procedures Memoranda (OPPM), which may be addressed to all Immigration Judges and all Immigration Court Staff.

In 2013, the Chief Immigration Judge issued OPPM 13-01, *Continuances and Administrative Closure*, to "assist Immigration Judges with fair and efficient docket management practices" and to "help judges focus the courts' scarce resources in an efficient manner."[2] Describing administrative closure as "a docketing tool that has existed for decades," the Chief Immigration Judge "strongly encouraged" its use in appropriate cases to "focus resources on those matters that are ripe for resolution." OPPM 13-01 at 3-4. This guidance and its basis in case law "provide[] judges with a powerful tool to help them manage their dockets." *Id.* at 4.

[2] Brian M. O'Leary, Chief Immigration Judge, Operating Policies and Procedures Memorandum 13-01: *Continuances and Administrative Closure* (March 7, 2013) at 2 (herein, "OPPM 13-01"). MaryBeth Keller, Chief Immigration Judge, *Operating Policies and Procedures Memorandum 17-01, Continuances,* EOIR (July 31, 2017) ("OPPM 17-01"), supplements and amends OPPM 13-01, but does not address administrative closure.

In addition, the Immigration Court Practice Manual, published by the Office of the Chief Immigration Judge in 2008, incorporates guidance on motions to recalendar administratively closed cases.[3]

## II. The *Avetisyan* and *W-Y-U-* Standards for Administrative Closure Furnish Appropriate Guidance and May Benefit from Refinement

The Attorney General's initial question includes an inquiry as to appropriate standards for administrative closure. *Avetisyan* furnished six non-exclusive factors for evaluating administrative closure, reversing prior precedent that had effectively given "a party, typically the DHS, [ ] absolute veto power over administrative closure requests." 25 I&N Dec. at 692 (reversing *Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996)). *Amici* agree that several of the *Avetisyan* factors "are particularly relevant to the efficient management of resources of the Immigration Courts." 25 I&N Dec. at 695. However, the fourth factor, "the anticipated duration of the closure," does not aid analysis, because administrative closure of *any* duration may "avoid the repeated rescheduling of a case that is clearly not ready to be concluded," and thereby promote efficient management of court resources. *Hashmi*, 24 I&N Dec. at 791 n.4. Furthermore, the duration of closure usually entails factors beyond the respondent's control, as in *Avetisyan* itself, where despite numerous continuances, a visa petition remained pending for an "unexplained period of time." 25 I&N Dec. at 697. Duration of closure is particularly inappropriate as applied to unaccompanied children and other vulnerable immigrants, whose cases may warrant long periods of closure for multiple reasons discussed below.

Five years later, the Board held that of the factors described in *Avetisyan,* the first factor, whether the party opposing administrative closure has provided a persuasive reason for proceeding on the merits, should be the primary consideration. *Matter of W-Y-U*, 27 I&N. Dec.

[3] Immigration Court Practice Manual, Chapters 2.1(b)(ii), 5.7(i), 5.10(t), Glossary (Administrative Closing) (November 2, 2017).

17, 20 (BIA 2017) (reinstating proceedings administratively closed at DHS' behest, to allow respondent's asylum application to go forward). In *W-Y-U*, the Board recognized that the interest in efficient use of court resources "does not override an alien's 'invocation of procedural rights and privileges.'" 27 I&N Dec. at 19 (citation omitted). To the extent that *W-Y-U* could be understood to accord greater weight to DHS's reasons for opposing administrative closure than to the reasons for the motion, such a reading is inconsistent with the Board's explicit focus on the "alien's 'invocation of procedural rights and privileges.'" *Id.*

## III. Authority for Administrative Closure Should Be Delegated if Lacking, and Should Not Be Withdrawn if Extant

The second question asks whether the Attorney General should delegate authority for administrative closure, if it is now lacking; or withdraw such authority, if currently in place. Whatever conclusions are drawn about the current extent of authority, the Attorney General should ensure that Immigration Courts and the Board are fully empowered to use administrative closure. This would serve the Attorney General's stated commitment to efficient adjudication and preserve judicial discretion. It would also minimize negative impacts of unnecessary court appearances on respondents, especially unaccompanied children, as discussed in section IV, *infra*. Moreover, withdrawing such authority without a clear legal basis would be disruptive to the operation of the Immigration Courts.

### A. Administrative Closure Facilitates the Efficient Resolution of Immigration Cases

The Attorney General has noted that "[t]here are approximately 650,000 cases pending before the immigration courts," despite recent efforts to reduce the caseload.[4] This backlog would only increase without the authority to order administrative closure, which efficiently

[4] Jefferson Sessions, Attorney General, Memorandum for the Executive Office for Immigration Review, *Renewing our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest*, EOIR (December 5, 2017) ( herein "December 5, 2017 Memo") at 1.

redirects resources to "[t]he ultimate disposition for each case in which an alien's removability has been established," which is "either a removal order or a grant of relief or protection from removal provided for under our immigration laws."[5]

The use of administrative closure throughout the federal courts, both in the immigration context and beyond, shows its proven utility for efficient management of a court's caseload. *See Avetisyan*, 25 I&N Dec. 690 n.2 (collecting cases). As one example, a federal district court administratively closed the indemnification portion of a declaratory judgment action between the insurer and the insured, pending factual resolution in a state court suit between the insured and the accident victim. *See Penn-America Ins. Co. v. Mapp*, 521 F.3d 290, 295-96 (4th Cir. 2008). In 2012, the Second Circuit tolled its immigration matters, observing that "it is wasteful to commit judicial resources" to cases where the government was unlikely to effect removal even if the government prevailed. *In re Immigration Petitions*, 702 F.3d 160, 160 (2d Cir. 2012).

The BIA has noted that administrative closure "will assist in ensuring that only those cases that are likely to be resolved are before the Immigration Judge. This will avoid the repeated rescheduling of a case that is clearly not ready to be concluded." *Hashmi*, 24 I&N Dec. at 791 n.4. Likewise citing the courts' large caseloads, the OCIJ encouraged the use of this "powerful tool" "to focus resources on those matters that are ripe for resolution," adding that "taking up valuable judge and court time on a case where a visa petition may be pending at DHS makes little sense." OPPM 13-01 at 4.

B. Administrative Closure Is Essential to Judges' Independent Discretion

Relatedly, judges' independent discretion extends to management of their dockets. "In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges *shall exercise their independent judgment and discretion* and may take any

[5] *Id.* at 2.

action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases." 8 C.F.R. § 1003.10(b) (emphasis added); *see* 8 C.F.R. §1240.6 (2013) (adjournment may be at the judge's instance). Independent discretion is no less important in Immigration Court than in the federal court system. *See, e.g.*, *St. Marks Place Housing Co., Inc. v. U.S. Dep't of Housing & Urban Dev.*, 610 F.3d 75, 80 (D.C. Cir. 2010) (noting that "most obviously, district courts can choose when to decide their cases").

C. The Withdrawal of Administrative Closure Authority Would Be Disruptive and Would Lack Clear Legal Basis

Because of the statutory and regulatory underpinning of administrative closure, it appears that the Attorney General is without power to unilaterally withdraw this tool. First, as discussed in section I *supra*, and as explained by the Sixth Circuit, "[i]n §1229a(a)(1), Congress granted IJs the power to 'conduct proceedings.' Thus, their powers to conduct removal proceedings are *not conferred by the Attorney General.*" *Abu-Khaliel v. Gonzales*, 436 F.3d 627, 634 (6th Cir. 2006) (emphasis added). The Sixth Circuit further explained that "[i]n our view, a necessary component of that power is the ability to decide when to conduct those proceedings, or when it is appropriate to delay a proceeding until a later time." *Id.* If the authority to order administrative closure is conferred by Congress, the Attorney General lacks authority to act in clear contravention of Congressional intent. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-448 (1987) ("The judiciary ... must reject administrative constructions which are contrary to clear congressional intent.").

Second, even if the Attorney General may withdraw authority for administrative closure, he may not do so without using the process of notice-and-comment rulemaking, absent good cause. Agency regulations expressly incorporate the use of administrative closure. *See, e.g.,* 8 C.F.R. §214.11(d)(1)(i). To withdraw the authority for administrative closure would disturb

the structure of regulations that incorporate the concept. *See, e.g., United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) ("In short, as long as the regulations [delegating discretion to the Board] remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner"). Moreover, withdrawal of authority for administrative closure would depart from decades of prior agency practice, and is subject to judicial review, but "an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Cardoza-Fonseca*, 480 U.S. at 446 n. 30.

In summary, for the reasons here and in section IV, removing this docket management device from the judges' toolbox would not further the courts' mission. The Attorney General should ensure that Immigration Judges and the Board are empowered to order administrative closure.

## IV. Cases Involving Unaccompanied Children Demonstrate the Value of Administrative Closure to the Fair and Efficient Processing of Removal Proceedings

The Attorney General's third question asks, in part, whether other docket management devices are, in any circumstances, inadequate to promote "expeditious, fair, and proper resolution of matters," citing 8 C.F.R. § 1003.12 (2017).[6] *Amici* respectfully submit that there are many such circumstances, frequently arising in cases involving unaccompanied children and other vulnerable respondents.

The stated aims are best served with an array of tools. Continuances or adjournments, granted for good cause shown or at the Immigration Judge's instance, 8 C.F.R. §§ 1003.29 (1994), 1240.6, are invaluable, particularly when parties can identify a date certain when the

[6] This *amicus* brief does not address the portion of the briefing invitation that asks if there should be differential legal consequences for cases that are administratively closed rather than continued.

matter will be ready to progress. However, using continuances to approximate administrative closure may entail multiple hearing dates that "strain overall court resources, including administrative and interpreter resources, and consume docket time that could otherwise be used to resolve additional cases." OPPM 17-01 at 2. Dismissal without prejudice, 8 C.F.R. § 1239.2(c) (2004), is available on enumerated grounds and at DHS's instance. Termination of proceedings, as under 8 C.F.R. § 1239.2(f), is highly effective to free the court's docket of cases not needing further attention, but often is not acceptable to DHS. Accordingly, if administrative closure were unavailable, these other tools would be unable to compensate.

There is no clearer example of the efficacy of administrative closure than cases of children placed in removal proceedings as "unaccompanied alien children" (UAC).[7] This is because a large proportion of UAC have compelling defenses to removal, yet stand at a marked disadvantage in an adversarial system for which they are poorly resourced. UAC and other vulnerable immigrants need and merit appropriate allowances of time to prepare for dispositive hearings in their cases. At the same time, the entire system – the court, the Department, and any persons supporting the UAC – can realize efficiency gains from eliminating unnecessary hearings. While UAC are among the most vulnerable immigrants, much of the following discussion may apply to other individuals such as all children, survivors of trauma, persons with mental illness, and persons not competent to participate in removal proceedings.[8]

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[7] An "unaccompanied alien child" (UAC) is defined by statute as a child under age 18, having no lawful immigration status, and having no parent present in the US or no parent available to provide care and physical custody. 6 U.S.C. § 279(g)(2) (2008). Some EOIR memoranda and many children's advocates use the term "unaccompanied child."

[8] *See, e.g.*, USCIS, Asylum Officer Basic Training Course, Children's Asylum Claims (Mar. 23, 2009), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson29_Guide_Children%27s_Asylum_Claims.pdf

A. Administrative Closure Is Valuable in UAC Cases Where a History of Harm Supports Entitlement to Relief but Inhibits Navigation of Removal Proceedings

During 2014, when arrivals of UAC in the United States surged to record levels, General John F. Kelly, then Chief of the Southern Command and later the Secretary of Homeland Security, described gang violence in the "Northern Triangle," the region from which 95% of the UAC originated:[9]

> Drug cartels and associated street gang activity in Honduras, El Salvador and Guatemala, which respectively have the world's number one, four and five highest homicide rates, have left near-broken societies in their wake. . . . Profits earned via the illicit drug trade have corrupted and destroyed public institutions in these countries, and facilitated a culture of impunity — regardless of crime — that delegitimizes the state and erodes its sovereignty, not to mention what it does to human rights.[10]

In addition to gang violence, violence and abuse in the home and by caregivers were among the leading reasons for migration identified through a 2013 study of unaccompanied children from the Northern Triangle and Mexico by the United Nations High Commissioner for Refugees (UNHCR). The study "demonstrate[d] unequivocally that many of these displaced children faced grave danger and hardship in their countries of origin," finding that a clear majority of their cases raise international protection concerns.[11]

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[9] *Facts and Data,* Office of Refugee Resettlement (January 22, 2013), https://www.acf.hhs.gov/orr/about/ucs/facts-and-data.

[10] *See* Exhibit A, John F. Kelly, *Central America drug war a dire threat to U.S. national security*, Air Force Times, Jul. 8, 2014.

[11] UNCHR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (2016), www.unhcr.org/en-us/about-us/background/56fc266f4/children-on-the-run-full-report.html?query=central american minors migration US reasons at 11; Kelly, *supra* note 10 at 6.

The same risks and harms that spur migration by UAC make many of these children eligible for protection, and support defenses against removal or claims for lawful status.[12] In UAC cases, statistically it is usually not the Immigration Judge who adjudicates the merits of a child's request for protection or status. Instead, as shown by government data on completed Immigration Court cases obtained by the Transactional Records Access Clearinghouse (TRAC) of Syracuse University, it is far more common for other adjudicators to decide a child's application for status, followed by an Immigration Judge's order concluding the proceedings.[13] In large part, this is because USCIS has initial or exclusive jurisdiction over many of the applications frequently made on behalf of UAC.

As further explained by TRAC, "One of the reasons that decisions in [immigration] court cases frequently take time, apart from the court's own backlog of cases, is because court proceedings may be adjourned waiting for another government body to act on applications under these provisions."[14] The BIA has held that "[a]s a general rule, there is a rebuttable presumption that an alien who has filed a *prima facie* approvable application with USCIS will warrant a favorable exercise of discretion for a continuance for a reasonable period of time." *Matter of*

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[12] *See, e.g.*, USCIS, *Humanitarian*, https://www.uscis.gov/humanitarian ("Some children who are here in the U.S. without legal immigration status may need humanitarian protection because they have been abused, abandoned or neglected by a parent."); *see also* TRAC Immigration, New Data on Unaccompanied Children (hereinafter, TRAC UAC Data) (summarizing "reasons children are allowed to stay"), trac.syr.edu/immigration/reports/359/.

[13] *Id.* ("Most of the time, whether these special forms of relief are granted is determined by some other government agency and not directly by an Immigration Judge . . . . When another agency has granted one of these forms of relief, the Immigration Judge typically will order the case "terminated," or close the case for "other" unspecified reasons, either through a decision or some form of administrative closure. . . . [W]hen the child has an attorney, "terminated" and "other" are the most common reasons recorded for closing a case and allowing the child to remain in the country."

[14] TRAC UAC Data, *supra* note 12.

*Sanchez Sosa*, 25 I&N Dec. 807, 815 (BIA 2012). Where a child is involved, denying sufficient time for these adjudication processes would result in a child otherwise eligible for relief being returned to harm or separated from caregivers. Serial adjournments can provide sufficient time, but are likely to produce superfluous hearings, especially where the time required for adjudication is indeterminate. Moreover, claims for humanitarian relief are labor-intensive, placing demands on children that they may be unequipped to meet in the short term. As discussed in more detail below, administrative closure is the most efficient and flexible tool available for managing the course of proceedings involving UAC and other vulnerable immigrants.

1. *Flexibility in the preliminary phase of special immigrant juvenile status*

During the two most recent fiscal years combined, USCIS approved over 26,000 petitions for special immigrant juvenile status (SIJS).[15] Each of those approvals represents a child or youth conclusively established to have a history of parental abuse, abandonment, neglect, or similar deprivation, and whose interests would be impaired by removal. INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27(J) (2014). Rather than ask the Immigration Courts or USCIS to venture determinations on child welfare, with attendant risks of legal error and inefficiency, Congress gave them recourse to the expertise of state juvenile courts.[16] By effectively outsourcing the first phase of SIJS matters to state tribunals, Congress preserved Immigration Court and USCIS

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[15] USCIS, *Number of I-360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ) by Fiscal Year and Case Status July 1 - Sept 30, 2017* (June 2017), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Citizenship/I360_sij_performancedata_fy2017_qtr4.pdf .

[16] *See, e.g.*, Final Rule, Special Immigrant Juvenile Status , 58 Fed. Reg. 42843-01 at 42846-47 (proposed Aug. 12, 1993) (codified at 8 C.F.R. § 204) ("[T]he decision concerning the best interest of the child may only be made by the juvenile court or in administrative proceedings authorized or recognized by the juvenile court. . . The Service does not intend to make determinations in the course of deportation proceedings regarding the "best interest" of a child.")

resources for questions of immigration law. Inherent in this Congressional plan is appropriate deference to the state juvenile court process.[17]

State court proceedings that establish prerequisites for SIJS can vary in duration from a few weeks to well over a year. The duration is hard to project with certainty, for many reasons. First, wait times for available hearing dates may vary on crowded state court dockets, and other state court priorities may not permit a given case to be expedited. Second, some states may impose a waiting period or residency period before a court action may be commenced. Third, satisfying a state court's due process requirements can be time-consuming, especially if notice to a necessary party is rejected, avoided, or otherwise difficult to effect. Fourth, the parent(s) or others whose conduct gave rise to the child's claim for protection may, intentionally or not, thwart progress. Fifth, state courts need sufficient time for inquiries, investigations, and research into matters raised by the child's request for factual findings. Sixth, an appropriate caregiver for the child may not be immediately available and willing to commence the state court process. Seventh, as a consequence of past harms including those inflicted by parent(s), a child may be unable to rapidly articulate underlying facts until establishing trust in the child's counsel and other support systems. These reasons are not exhaustive, but they exemplify how the time for obtaining SIJS findings is outside the control of the child and the Immigration Court. These reasons also display how state court involvement relieves the Immigration Court of responsibility for many functions necessary to administering the INA standard for SIJS.

In 2015, EOIR revised its guidance prioritizing the scheduling of UAC cases in response to the sharp rise in UAC arrivals.[18] Although that guidance was formally rescinded after "surge"

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[17] *See, e.g.*, 6 USCIS Policy Manual J.2(D)(4) (declining to "instruct[] juvenile courts on how to apply their own state law.").

dockets for UAC were abolished, the replacement January 31, 2017 guidance is silent on many topics covered in the 2015 guidance, which provided that a child's proceedings "must be administratively closed or reset for that [SIJS] process to occur in the appropriate state or juvenile court."[19] The Board has held likewise in an unpublished opinion.[20] A series of continuances can approximate the time needed by the state court, but at the cost of efficiency. If the final continuance in a series proves to be too long, it leaves excess time between the completion of the state court proceeding and the continued hearing date, unless a motion to advance the hearing date is granted.[21] Conversely, if the state court proceeding is not complete by the chosen hearing date, then one or more unnecessary interim hearings will burden the court, the government, and the child. In contrast, administrative closure can accommodate the variability inherent in the state court process, freeing time on the immigration judge's docket until the parties are ready to proceed. Also, as survivors of parental mistreatment and other trauma, special immigrant juveniles have specialized needs that are better protected by administrative closure, as further discussed, *infra.*

2. *Alternatives to termination pending SIJS-based adjustment of status*

A child who obtains the requisite state juvenile court order may file a SIJS petition with USCIS. A statutory deadline of 180 days should make adjudication times predictable, but in

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[18]Brian M. O'Leary, Chief Immigration Judge, Memorandum, *Docketing Practices Relating to Unaccompanied Children Cases and Adults With Children Released on Alternatives to Detention Cases in Light of the New Priorities* (Mar. 24, 2015).

[19] *Id.* at 2 (discussing reasons for length of state court processes).

[20] *See* Exhibit B, *Matter of N-R-R*, A XXX XXX 938 (BIA Dec. 14, 2015) ("Absent a compelling reasons, an Immigration Judge should continue proceedings to await adjudication of a pending state dependency petition in cases such as the one before us."), *available at* https://www.scribd.com/document/293858727/N-R-R-AXXX-XXX-938-BIA-Dec-14-2015.

[21] Motions to advance are disfavored. Immigration Court Practice Manual, Chapter 5.10(b) (November 2, 2017) .

practice, the deadline is often exceeded. In the recent past, most Immigration Courts terminated proceedings at the I-360 stage to allow USCIS to receive and adjudicate the child's status adjustment application. However, the visa category for juveniles from El Salvador, Guatemala, and Honduras became oversubscribed in May 2016, and the Department of State adopted January 1, 2010 as the cutoff I-360 filing date for SIJS-based status adjustments.[22] This created the impression of a six-year backlog in SIJS adjustments, and soon after, ICE adopted a practice of opposing termination for children from backlogged countries who had recently filed Form I-360. The State Department later explained that the 2010 date was selected for control purposes, and was not intended to approximate the date of applications being processed,[23] which has since moved to December 1, 2015 for the Northern Triangle. However, ICE may still oppose termination where a visa number is not immediately available. On the other hand, a series of continuances would inconvenience the court and the parties. The Board has also held, in an unpublished decision, that denying a continuance and ordering removal while SIJS-relating proceedings were in progress was "not a good utilization of Immigration Court and Board resources."[24]

Administrative closure provides the Immigration Judge with an efficient alternative. As the Visa Bulletin cutoff date approaches the child's priority date, the child (or government) may time a motion to recalendar so that the next hearing can be productive. The court may choose to terminate proceedings to allow the child to pursue adjustment of status before USCIS, or set a

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[22] United States Dep't of State, Visa Bulletin, No. 92, Vol. 9 (May 2016) at 4, 8.

[23] United States Dep't of State, Visa Bulletin, No. 94, Vol. 9 (July 2016) at 8. ("Readers should be aware that the establishment of the Employment Fourth preference Final Action date of January 1, 2010 does not mean that applicants are now subject to a wait in excess of six years.")

[24] Ex. B, *N-R-R*, A XXX XXX 938 (BIA Dec. 14, 2015) at 2.

date for adjudicating the adjustment in court. Should circumstances change during the period of administrative closure (for example, if the child elects to abandon the application, or if the government obtains evidence of inadmissibility), either party may move to recalendar in order to request action by the court. The court thereby avoids intervening hearings that serve no purpose, and the attendant motion practice to fix or change such hearings. By conserving governmental resources and minimizing impact on the child (as discussed below), administrative closure appears tailor-made for cases in this posture.

3. *Conserving court resources during asylum office adjudication*

By statutory mandate, USCIS must decide "any application for asylum filed by an unaccompanied alien child." INA § 208 (b)(3)(C); 8 U.S.C. § 1158(b)(3)(C) (2009). Removal proceedings will be terminated if USCIS grants the application, and if not, the child may pursue asylum or other relief before the immigration judge. The time needed for USCIS to schedule an interview, review the claim, and issue its decision varies. While the claim is pending before USCIS, the parties are unlikely to require the court's intervention, so administrative closure is appropriate. Courts may instead use continuances, but a selected hearing date may be too distant or too soon to match the asylum office's schedule.[25] As discussed below, administrative closure also avoids the impact on the child of extra hearings before a tribunal not currently determining the claim.

[25] It is uncontroversial that while an asylum application is pending before USCIS or the court, it is inappropriate to proceed on the merits and order the child's removal. *See* 8 C.F.R. § 208.9(a) (2011) (USCIS "shall adjudicate the claim of each asylum applicant whose application is complete"); § 1240.11(c)(3) (2013) (the immigration judge will decide a filed asylum application after an evidentiary hearing).

4. *Published guidance supports administrative closure for USCIS adjudication of visas for victims of trafficking or other crimes*

USCIS has exclusive jurisdiction over petitions for T and U nonimmigrant status, granted to certain immigrant victims of trafficking or serious crimes, respectively. 8 C.F.R. § 214.11(d); 8 C.F.R. § 214.14(c)(1). USCIS has referred to the relief they provide as a "critical tool for law enforcement."[26] The tool is equally critical for UAC, who may seek protection as principle applicants or as derivative beneficiaries, for instance, where caregivers are survivors of domestic violence or human trafficking. USCIS is now processing T visa applications filed about one year ago, and U visa petitions filed in August 2014.[27] DHS guidance expressly recognizes administrative closure as an appropriate mechanism to allow for adjudication of those applications during removal proceedings. If a U visa applicant is in removal proceedings, a joint motion to terminate without prejudice,[28] a continuance for good cause shown,[29] or administrative closure may be appropriate.[30] As to T visas, regulations expressly contemplate a request for administrative closure. 8 C.F.R. § 214.11(d)(8). In sum, all three mechanisms are contemplated, but administrative closure best balances the concerns, especially because T and U visa applicants present a high incidence of trauma, as further discussed below.

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[26] USCIS, *Information for Law Enforcement Agencies and Judges* (June 28, 2016), https://www.uscis.gov/tools/resources/information-law-enforcement-agencies-and-judges.

[27] USCIS, Processing Times, https://egov.uscis.gov/cris/processTimesDisplayInit.do.

[28] 8 C.F.R. § 214.14(c)(1)(i), (f)(1)(i).

[29] *Sanchez Sosa,* 25 I&N Dec. at 812-15.

[30] Peter Vincent, Principal Legal Advisor, Memorandum, *Guidance Regarding U Nonimmigrant Status (U visa) Applications in Removal Proceedings or with Final Orders of Deportation or Removal.* (Sept. 25, 2009).

### B. Administrative Closure Mitigates Special Hardships Characteristic of UAC Cases

The foregoing demonstrates how administrative closure promotes judicial economy and governmental efficiency, but it also furthers more compelling interests of fairness and due process. UAC in particular stand at a confluence of the challenges facing immigrants, trauma victims, and children – because UAC straddle all three categories. Congress has legislated "a special obligation to ensure that these children are treated humanely and fairly," recognizing the violence and trauma that many have fled.[31] EOIR's recently updated "Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children" (hereinafter, "EOIR Juvenile Guidelines") begin by stating that "[i]mmigration cases involving children are complicated and implicate sensitive issues beyond those encountered in adult cases." OPPM 17-03 at 2. Among such sensitive issues are those relating to children's needs, capacities, trauma survival, and dependency on adults.

The resolution of a child's removal proceedings requires adequate time, not only for adjudication of relief applications as described above, but also because building the child's case is labor- and time-intensive. Children are held to the same high bars for humanitarian relief as other litigants, yet limits are inherent in children's capacities and ongoing development. As advised in USCIS's asylum officer training materials, "[t]he needs of child asylum seekers are best understood if the applicant is regarded as a child first and an asylum seeker second."[32] The

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[31] 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008) (Sen. Feinstein, re the William Wilberforce Trafficking Victims Protection Reauthorization Act) ("This bill seeks to protect children . . . who have escaped traumatic situations such as armed conflict, sweatshop labor, human trafficking, forced prostitution, and other life-threatening circumstances.")

[32] USCIS, *Asylum Officer Basic Training Course*, Children's Asylum Claims at 12 (Mar. 21, 2009), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson29_Guide_Children%27s_Asylum_Claims.pdf.

materials review a number of factors in child development, and incorporate the principle that "children's needs are different from adults' due to their developmental needs, their dependence, including in legal matters, and their vulnerability to harm" so that governmental actions toward children must be tailored accordingly.[33] In short, a child may indeed be able to satisfy the high bar for legal relief, but may not be able to do so on a rapid timeframe. Children who lack prior experience of the adversarial system need time to develop an understanding of the process and trust in the professionals who advocate for them. As a principle drafter of the TVPRA explained, a child "usually knows nothing about US courts or immigration policies and frequently does not speak English . . . . The majority of these children have been forced to struggle through an immigration system designed for adults." 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008). As the American Bar Association has noted, due process demands that the respondent have an opportunity to participate meaningfully in his or her immigration proceedings,[34] and children lack that opportunity unless adequate time is afforded in keeping with their developmental stage, capacities, and well-being. Trauma and a history of violence exacerbate the gap that a child must bridge to participate in preparing a legal defense, and forcing the confrontation of traumatic facts is likely to be counterproductive.[35]

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[33] *Id.* at 11-14.

[34] American Bar Ass'n, *Ensuring Fairness and Due Process in Immigration Proceedings*, (Dec. 23, 2008), https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/immigration/2008dec_immigration.authcheckdam.pdf

[35] *See, e.g.*, H. Comm. on the Judiciary, 109th Cong., Dep't of Justice Appropriation Authorization Act, Fiscal Years 2006-2009, H.R. Rep. No. 109-233, at 116-117 (discussing provision enacted and codified at 8 U.S.C. § 1154) (provision "allows child abuse victims time to escape their abusive homes, secure their safety, access services and support that they may need and address the trauma of their abuse."); United States Conference of Catholic Bishops, *Care for Trafficked Children* (April 2006) at 4, available at: http://www.usccb.org/about/children-and-

Adequate continuances satisfy the child respondent's need for time and flexibility, but periodic court appearances are at best burdensome and at worst counterproductive. The EOIR Juvenile Guidelines also specify that judges should limit the number of times that children must be brought to court. OPPM 17-01 at 6. Administrative closure would meet that objective, while also balancing DHS's interest in the ability to address a material change in circumstances by moving to recalendar the proceedings.

A hearing affects not only the child, but also the adult(s) on whom the child depends for financial support and care. As children miss school, adults may miss work, often forfeiting pay and perhaps jeopardizing job security. Transportation costs to attend court can be significant for low-income families. Some UAC do not enjoy the care of close relatives, and their caregivers may feel unable to justify the burden of supporting the child's case, a lack of investment that is well beyond the child's control. Many children and their supporters, especially those with traumatic histories or fear for their future safety, experience the court date as a traumatic event, fearing that deportation or other sanctions are imminent. A salient example is a child with a pending U visa. Where a child respondent, or his or her parent, has suffered "substantial physical or mental abuse"[36] as a result of criminal activity, and where the child or parent has assisted law enforcement, those negative associations may also attach to immigration court hearings. Collectively, these costs are excessive when a scheduled hearing does not advance the case substantively.

As noted above, the burdens of unnecessary hearings also fall on the court and ICE in the form of wasted time and resources for scheduling, preparing, documenting, interpretation, and

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migration/upload/care-for-trafficked-children.pdf (describing impediments to capacity to trust in child trafficking victims). Therefore, special considerations for trafficked minors are also reflected in U.S. law.

[36] INA § 101(e)(4); 8 U.S.C. § 1101(e)(4) (2009).

the displacement of other cases needing the court's attention. Administrative closure has often been appropriately used to avoid these negative impacts, and should continue to be so used.

## V. If Administrative Closure Becomes Unavailable, Existing Orders of Administrative Closure Should Remain in Place for Reasons of Fairness and Judicial Economy

The Attorney General's final question was directed toward what should be done with cases that are currently administratively closed. As demonstrated above, the unavailability of administrative closure would be keenly felt, particularly among UAC and other vulnerable immigrants. In the event of an order rescinding administrative closure as a docket management tool, such rule should apply going forward only, and not to any pending administratively closed case. This is required by the strong presumption against retroactivity, the harms that would arise from retroactive application of a new rule, and the deference due to the judgment of Immigration Judges.

### A. The Fairness Considerations Behind the Presumption Against Retroactivity Are Particularly Important in the Context of Administrative Closure

Past administrative closure decisions should remain in place because of the fairness considerations underlying the well-settled, longstanding presumption against retroactive action. *See, e.g.*, *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994). The rationale behind this presumption reflects "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* at 270. Retroactive action unfairly imposes new burdens on persons after the fact, disturbing their reliance on settled policy. *Id.*

The presumption against retroactivity is not limited to criminal cases. As Justice Scalia noted, "since the beginning of the Republic and indeed since the early days of the common law: absent specific indication to the contrary, the operation of nonpenal legislation is prospective only." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 841 (1990) (Scalia, J.

concurring). The presumption also operates against "new provisions affecting contractual or property rights, *matters in which predictability and stability are of prime importance*." 511 U.S. at 271 (emphasis added).

Judicial disfavor of retroactive actions extends to the Executive Branch as well. In *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), for example, the Supreme Court held that agencies could not adopt retroactive rules without explicit congressional authorization.

The presumption against retroactivity has been applied numerous times in the immigration context. *See, e.g.*, *Chew Heong v. United States*, 112 U.S. 536, 559 (1884) (new provision of 1882 "Chinese Restriction Act" of 1882 requiring a certificate prepared when exiting the United States did not bar reentry of a laborer whose exit predated the certification requirement). In *I.N.S. v. St. Cyr*, 533 U.S. 289, 326 (2001), the Court found that 1996 statutory changes to the effects of entering into a plea agreement could not apply to persons who entered pleas before the enactment. The Court noted "significant and manifest" potential for unfairness in retroactive application that would have the effect of punishing individuals who relied "upon settled practice, the advice of counsel, and perhaps even assurances in open court" that entry of a plea would not foreclose relief from deportation. *Id.* at 323.

These principles require that currently administratively closed cases remain in that state regardless of any new prospective rule. Administrative closure is a long-established practice, and while described as a docket management tool, its effects are substantive and often life-changing. Specifically, as discussed above, many respondents rely on a period of administrative closure in order to wait for lengthy processes of adjudication or visa availability. In cases like these, retroactively dismantling administrative closure would introduce reliance on issuance of sufficient continuances, with all the uncertainty and administrative burden that entails. In many

cases, the relief sought is humanitarian in nature, and absent a reliable provision for adequate continuances, the loss of administrative closure could mean deportation to a country where the applicant could face serious harm or death. As discussed above, UAC are at particularly high risk for such collateral consequences, due to the large number of such children who experienced violence or other trauma that precludes their return to their former country.

B. The Considered Judgment of Immigration Judges Should Be Respected

An order of administrative closure reflects the adjudicator's determination, and at times the agreement of both parties, that its use was appropriate given the facts of the particular case. As the BIA has said, "the decision to administratively close proceedings . . . involves an assessment of factors that are particularly relevant to efficient management of resources." *Avetisyan*, 25 I&N Dec. at 695. The selection of administrative closure as the most effective docket management tool should not be set aside.

Moreover, recalendaring administratively closed cases would compel judges to revisit large numbers of cases that are currently in a stable posture. For example, recalendaring a case where an underlying petition remains pending would necessitate multiple continuances to effect the same result as the administrative closure. Furthermore, recalendaring administratively closed cases would increase the number of pending cases on the immigration docket, at a time when the courts are striving to control a large backlog. *See* December 5, 2017 Memo at 1-2. To avoid such disruption should the practice be discontinued prospectively, cases should remain administratively closed in accordance with the considered choice of the Immigration Judge.

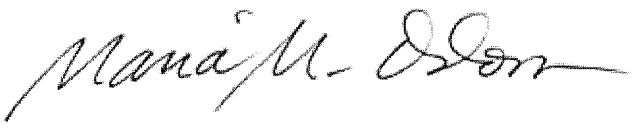
## CONCLUSION

Immigration Judges are burdened with extremely heavy caseloads, and have used administrative closure over the years to help manage their dockets efficiently and fairly. This salutary tool should remain at their disposal to help prevent the serious and often irreversible

harms that would result if administrative closure were not available. *Amici* respectfully urge the Attorney General to take into account the circumstances of many persons who admire this country precisely because of the fairness, efficiency, and reliability of its judicial and administrative procedures.

Dated: February 16, 2018

Respectfully submitted,



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# EXHIBIT

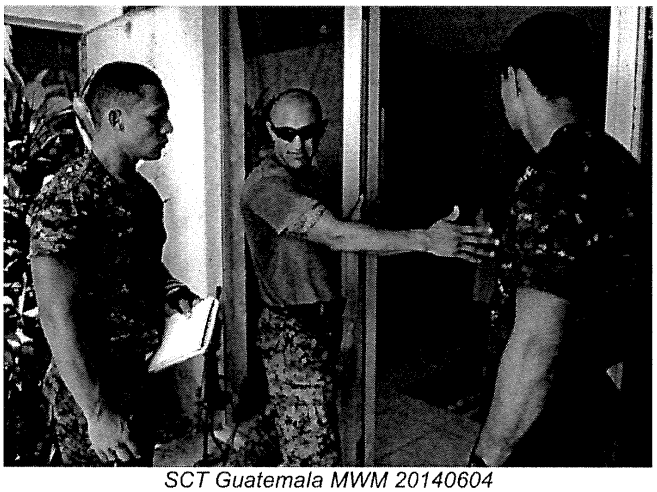
# A

# SOUTHCOM chief: Central America drug war a dire threat to U.S. national security

*By Gen. John F. Kelly*
*Jul. 8, 2014 - 06:00AM |*

airforcetimes.com

**SOUTHCOM chief: Central America drug war a dire threat to U.S. national security**



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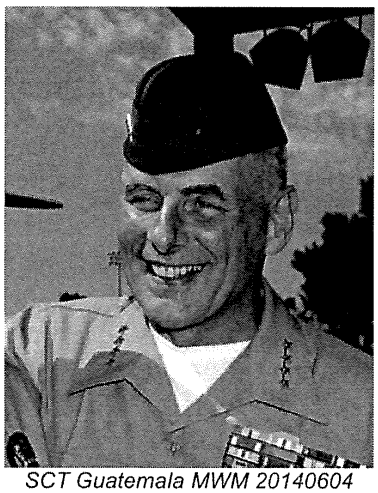

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Zoom

**Marine Corps Gen. John F. Kelly (Cpl. Tia Dufour/Marine Corps)**

After observing the transnational organized crime network for 19 months as commander of U.S. Southern Command, I see the only viable approach is to work as closely as we can with as many nations in the region. Our vision is of an economically integrated region that offers reasons for its people to build their futures at home instead of risking the dangerous and ultimately futile journey north. A region that offers economic opportunity, effective democratic institutions and governance, and safe communities is the key to their future and to our national security.

Drug cartels and associated street gang activity in Honduras, El Salvador and Guatemala, which respectively have the world's number one, four and five highest homicide rates, have left near-broken societies in their wake. Although there are a number of other countries I work with in Latin America and the Caribbean that are going in the same direction, the so-called Northern Triangle (Guatemala, El Salvador and Honduras) is far and away the worst off.

By U.N. statistics, Honduras is the most violent nation on the planet with a rate of 90 murders per 100,000 citizens. Guatemala's rate is 40. These figures become more shocking when compared to those of declared combat zones such as Afghanistan or the Democratic Republic of the Congo (28 in 2012). Profits earned via the illicit drug trade have corrupted and destroyed public institutions in these countries, and facilitated a culture of impunity — regardless of crime — that delegitimizes the state and erodes its sovereignty, not to mention what it does to human rights.

All this corruption and violence is directly or indirectly due to the insatiable U.S. demand for drugs, particularly cocaine, heroin and now methamphetamines, all produced in Latin America and smuggled into the U.S. along an incredibly efficient network along which anything — hundreds of tons of drugs, people, terrorists, potentially weapons of mass destruction or children — can travel so long as they can pay the fare. There are some in officialdom who argue that not 100 percent of the violence today is due to the drug flow to the U.S., and I agree, but I would say that perhaps 80 percent of it is.

More to the point, however, it has been the malignant effects of immense drug trafficking through these nonconsumer nations that is responsible for accelerating the breakdown in their national institutions of human rights, law enforcement, courts, and eventually their entire society as evidenced today by the flow of children north and out of the conflictive transit zone. The human rights groups I deal with tell me young

women and even the little girls sent north by hopeful parents are molested and raped by traffickers. Many in these same age groups join the 17,500 the U.N. reports come into the U.S. every year to work in the sex trade.

Clearly a region that is stable, safe and secure for its own citizens with a functioning legal justice system and police force, with an emerging middle class and real human rights opportunity, is what we want for these nations and is in our national security interests. Colombia is the present-day example of what should be and could be. If these nations were moving in this direction, they would be even stronger and more reliable partners. What is ironic to me is with all their problems they are still functioning democracies and appear to want to stay that way.

SOUTHCOM's efforts in the region are in large part focused on stemming the flow of illegal narcotics, although we have remarkable relationships with all our interagency partners. Heroic and often underappreciated law enforcement professionals like the DEA, FBI, Immigration and Customs Enforcement, Customs and Border Protection, Border Patrol and Treasury Department have numerous efforts focused on countering transnational organized crime in SOUTHCOM's assigned area of responsibility. We also have amazing relationships with every political and military official worthy of our attention, and very good mil-to-mil relationships even in nations that pull back from us politically.

The primary facilitator of this task is Joint Interagency Task Force South, which is responsible for fusing every intelligence source into a clear picture of detecting and monitoring the drug flow. Working with our closest ally in this effort, the Colombians, JIATF-South tracks the flow as it departs the source zone and moves by sea and air through the transit zone directly into the U.S.

Specific to Central America, JIATF-South orchestrates Operation Martillo, designed to interdict trafficking along the littorals on both sides of Central America. Even with few interdiction assets to speak of, the task force's efforts are wildly successful in a relative sense, although much of the take last year was due to Canadian, Dutch, French and British assets. This help is expected to drop off significantly. Unfortunately, over the next few years we will see fewer and fewer assets to detect, monitor and interdict, and the very same reality confronts our Canadian and European allies. This means even more cocaine and heroin making landfall in Honduras, Guatemala, the Dominican Republic, El Salvador and Mexico, exacerbating — if that is even possible — the problems these nations face today.

I have found over my years of working with partner nations around the globe that nothing changes countries for the good like working alongside the U.S. military in a close and continuous relationship. Nothing. Our training, our advice, our tactics, techniques and procedures, and just as importantly our values and good example change them for the good.

Take, for instance, Colombia, an amazing success story of bringing a country back from the same kind of brink Honduras and other Central American nations are facing today. Colombia did all of its own fighting and paid the vast majority of the bill itself. All we provided was advice, intelligence, surveillance and reconnaissance, and encouragement.

Another example is human rights, which are along the road to improvement in these countries not because of criticism, lecturing and censure, but because of U.S.-led conferences, seminars and training modules embedded in everything we do with them, most of which is conducted by junior officers and noncommissioned officers who bring their American ideals to every engagement. I challenge anyone to argue differently, unless of course one does not trust U.S. intentions in the region and also does not have faith in the decency of our military men and women.

Given our current fiscal and asset limitations in working with these partners, and I want to include Costa Rica, Panama, Nicaragua, the Dominican Republic, Colombia and Peru as well, SOUTHCOM's primary

effort is working closely with them on human rights issues, sharing information and intelligence, as well as building capacity within their security forces. We do this by treating them as equals, encouraging them where they are having success, and most importantly working with them where they need help.

Where I can work with a partner nation, as with Honduras and Operation Morazon, a nationwide interagency citizen security initiative, the majority of my support is centered on assisting the Hondurans with securing their borders — particularly the north coast, where we have helped them develop a "maritime shield" against the influx of tons of drugs weekly. This effort includes identifying for them the now over 100 illicit rural dirt airstrips, which they destroy, again with our help.

This package of planning and advising assistance, combined with some other factors, including the strong commitment of Honduras' new president and his national security team, has all but stopped airborne drug flights into Honduras. This effort is completely integrated into JIATF-South's operations, and we have the Hondurans working with the Guatemalans and the Nicaraguans in attempts to better secure land borders among all three. While the maritime shield might reduce the amount of drugs entering the country, it does not attack the proximate cause of unaccompanied minor migration, but it is a first step in an overall package.

SOUTHCOM is also improving defense institutional capacity in Central America, with Guatemala as the most recent example. Over the past two years we have worked with the Defense Institutional Reform Initiative and the William Perry Center to support the Guatemalan defense ministry's efforts to increase its defense sector governance capacity and transparency through development and promulgation of a new national security strategy, national defense strategy, and associated strategic planning and budgeting processes. This has already provided a return on investment: a finished Guatemalan national defense policy and an outcome-based 2014 budget built using a transparent, capabilities-based planning process.

We also conduct humanitarian-assistance/disaster-response activities designed to reduce widespread conditions such as human suffering, disease, hunger and privation. Our objectives are to improve basic living conditions in countries that have ungoverned spaces susceptible to exploitation.

These projects enhance the legitimacy of the host nation government by improving its capacity to provide its population with essential services. We want to erode the influence, control and support for transnational criminal organizations, drug trafficking organizations and violent extremist organizations. This would include denying, deterring and preventing these groups from exploiting ungoverned areas and vulnerable populations.

In comparison to other global threats, the near collapse of societies in the hemisphere with the associated drug and illegal alien flow are frequently viewed to be of low importance. Many argue these threats are not existential and do not challenge our national security. I disagree.

Transnational criminal organizations contribute to instability, breakdown of governance and lawlessness, not to mention the roughly 35,000 deaths and $200 billion that drug use (primarily heroin, coke and meth) costs America every year. I believe that the mass migration of children we are all of a sudden struggling with is a leading indicator of the negative second- and third-order impacts on our national interests that are now reality due to the nearly unimpeded flow of drugs up the isthmus, as well as the unbelievable levels of drug profits (approximately $85 billion) available to transnational criminal organizations to buy police departments, court systems and even governments.

Violent criminal organizations, including gangs and groups engaged in trafficking, take advantage of the region's patchy development and fledgling democracies to threaten government operations and human security. The complex challenges facing Central America cannot be resolved by military means alone, but without appropriate application of U.S. military support it will remain fertile ground for every threat to regional security and stability.

There are solutions. And going forward we have to start with something akin to a new approach to Central America that balances prosperity, governance and security, and funding that has to involve every agency of the U.S. government.

**Kelly is commander of U.S. Southern Command in Miami.**

# EXHIBIT

# B

**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
*Office of the Clerk*

*5107 Leesburg Pike, Suite 2000*
*Falls Church, Virginia 22041*

**Salmon, Rebeca E.**
**A Salmon Firm, LLC**
**P.O. Box 1614**
**Norcross, GA 30091**

**DHS/ICE Office of Chief Counsel - ATL**
**180 Ted Turner Dr. SW, Suite 332**
**Atlanta, GA 30303**

**Name: R[redacted]-R[redacted], N[redacted]** **A [redacted]-938**

**Date of this notice: 12/14/2015**

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.

Userteam: Docket





Cite as: N-R-R-, AXXX XXX 938 (BIA Dec. 14, 2015)

File: A[redacted]938 – Atlanta, GA

Date: DEC 14 2015

In re: N[redacted] R[redacted] R[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rebeca E. Salmon, Esquire

APPLICATION: Continuance; remand

The respondent, a native and citizen of Guatemala, appeals from the Immigration Judge's decision dated June 3, 2015, denying her request for a continuance and ordering her removed from the United States to Guatemala. The Department of Homeland Security has not responded to the appeal. The record will be remanded.

At a hearing on May 15, 2015, the 17-year-old respondent indicated through counsel that she intended to seek Special Immigrant Juvenile (SIJ) status. The matter was continued until June 3, 2015, at which time the respondent filed a motion to continue on the basis that a dependency petition had been filed in state court. The respondent did not provide a copy of the petition but instead provided evidence that a guardianship hearing on the petition was scheduled for June 18, 2015. The Immigration Judge concluded that the respondent did not establish good cause for a continuance, declined to further continue proceedings, and ordered the respondent removed to Guatemala.

On appeal, the respondent argues that the Immigration Judge (1) erred in requiring her to produce her juvenile state dependency petition because doing so would violate the Alabama Juvenile Code and the petition is unnecessary to establish her prima facie eligibility for SIJ status; (2) violated her due process rights to a fair opportunity to apply for available relief and to equal protection under the law, and (3) abused her discretion by refusing to grant the respondent a continuance to allow her to file for SIJ status.

The respondent has submitted evidence on appeal showing that, subsequent to the Immigration Judge's decision, the dependency petition in fact was granted in state court on July 13, 2015, and that she filed a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) and an Application to Register Permanent Residence or Adjust Status (Form I-485) with United States Citizenship and Immigration Services (USCIS). The respondent requests that the case be remanded based on this proffered evidence.

Considering the new evidence that the respondent's dependency petition was granted and her application for SIJ status is now pending with USCIS, we will remand these proceedings to allow the respondent to request a continuance or administrative closure while she pursues SIJ status with USCIS. *See Matter of Sanchez Sosa*, 25 I&N Dec. 807, 815 (BIA 2012) ("As a general rule, there is a rebuttable presumption that an alien who has filed a prima facie approvable application with the USCIS will warrant a favorable exercise of discretion for a continuance for a

reasonable period of time.") (internal citation omitted); *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) (discussing the standards for administratively closing proceedings); *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) (setting forth a framework to analyze whether good cause exists to continue proceedings to await adjudication by USCIS of a pending family-based visa petition).

Because the record will be remanded for further proceedings based on the filing of the I-360 petition and the I-485 application, the issues raised by the respondent on appeal in this case are moot. However, in view of the recurring nature of the issues raised in this case, we note that we find it was error to have denied a continuance in this case where there was no dispute that a dependency petition had been filed in the appropriate state court and a timely hearing scheduled on the guardianship petition. As evidenced in this case, aside from other issues presented, denial of the continuance was not a good utilization of Immigration Court and Board resources. Absent compelling reasons, an Immigration Judge should continue proceedings to await adjudication of a pending state dependency petition in cases such as the one before us.[1]

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings and the entry of a new decision.

FOR THE BOARD

[1] We separately note that guidance provided to Immigration Judges by the Chief Immigration Judge states that if an unaccompanied child is seeking SIJ status, "the case must be administratively closed or reset for that process to occur in state or juvenile court." *See* Memorandum from Brian M. O'Leary, Chief Immigration Judge, to Immigration Judges (Sept. 10, 2014) (Docketing Practices Relating to Unaccompanied Children Cases in Light of New Priorities).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ATLANTA, GEORGIA

File: A[redacted]-938 June 3, 2015

In the Matter of

N[redacted] R[redacted]-R[redacted] ) IN REMOVAL PROCEEDINGS
)
RESPONDENT )

CHARGE: INA Section 212(a)(6)(A)(i), as amended - in that she is an alien present in the United States without being admitted or paroled or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATION: A motion to continue.

ON BEHALF OF RESPONDENT: REBECA E. SALMON, Esquire
PO Box 1614
Norcross, Georgia 30091

ON BEHALF OF DHS: KELLY FOWLER, Assistant Chief Counsel
Department Of Homeland Security
180 Spring Street SW, 3rd Floor
Atlanta, Georgia 30303

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 17-year-old female native and citizen of Guatemala who was issued a Notice to Appear on January 26, 2014. See Exhibit No. 1.

At a Master Calendar hearing held on May 13, 2015, the respondent appeared

represented by counsel to enter written pleadings. See Exhibit No. 2. The written pleadings conceded proper service of the charging document, admitted all allegations, conceded the one charge on a 212(a)(6)(A)(i) and the Court designated Guatemala as the country of removal in the event that that should become necessary. The Court found removability to be established. See Section 240 (c)(1)(A) of the Act. The issue before the Court concerns the respondent's request for a motion to continue.

A motion to continue can be granted for a good cause. The issue that presents before this Court today is that the respondent would like for the Court to continue the case based upon an underlying application for dependency in Alabama. Now this issue has come up on repeated occasions with this particular firm and she, the respondent's counsel, has presented the Court with an unpublished decision in another case which is irrelevant to the matter at bar at this time.

In any event, the allegation is that the dependency petition is of a confidential nature and, therefore, cannot be tendered over to the Court. The Court is of the opinion that the TVPRA includes the agencies of the United States Government, including EOIR, that are charged with the responsibility of protection of our juveniles. This is the reason why we have a juvenile docket. And without a copy of that dependency petition, we cannot determine whether that application that is pending is actually well founded. This is the same, and it was stated in the record earlier, as an application for an I-130. The respondent has the burden to show that there is a viable application that is pending outside of the agency in order to pursue, in this Court's opinion, successfully a motion to continue.

The respondent has declined to present that document and has specifically indicated that she would not turn it over to the Court and, therefore, the motion to continue is without good cause. For this reason, the Court will deny the motion to

continue.

There are no applications other than that before the Court. The respondent will be ordered removed to Guatemala on the charges contained in the Notice to Appear.

June 3, 2015

***Please see the next page for electronic signature***

MADELINE GARCIA
Immigration Judge

//s//

Immigration Judge MADELINE GARCIA

garciama on August 31, 2015 at 4:20 PM GMT

## CERTIFICATE OF SERVICE

I hereby certify that I have, this 16th day of February 2018, caused to be served the foregoing BRIEF OF KIDS IN NEED OF DEFENSE, PUBLIC COUNSEL, AND FREEDOM NETWORK USA AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT by causing copies of same to be delivered by United States mail, postage prepaid, to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania A venue, NW
Washington, DC 20530

Reynaldo Castro-Tum
(b) (6)
[redacted]

DHS/ICE Office of Chief Counsel - PHI
900 Market Street, Suite 346
Philadelphia, PA 19107

Christopher Kelly, Chief
Immigration Law and Practice Division
Office of the Principal Legal Advisor
ICE Headquarters - Potomac Center North
500 12th Street, SW, MS 5900
Washington, DC 20536

Joseph F. Venouskas

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

| | | |
|---|---|---|
| **In the matter of:** | ) | |
| **Reynaldo CASTRO-TUM** | ) | **File No** (b) (6) |
| **In Removal Proceedings** | ) | |

**REQUEST TO APPEAR AS *AMICUS CURIAE* AND *AMICUS CURIAE* BRIEF**

***INTEREST OF AMICUS CURIAE AND REQUEST FOR APPEARANCE***

Pursuant to the BIA Practice Manual, §2.10 and 8 C.F.R. §1292.1(d) and the call of the question, the following law clinics and non-profit organizations request the Board's leave to appear as Amicus Curiae. This brief is filed with the collaboration of the foregoing law professors, law students and nonprofit organizations in support of the Respondent.

The Loyola Immigrant Justice Clinic (hereinafter "LIJC"), Co-Directed by Emily Robinson and H. Marissa Montes, is a community-based collaboration of Loyola Law School, Loyola Marymount University, Homeboy Industries Inc., and Dolores Mission Church. LIJC's dual-pronged mission is to advance the rights of the indigent immigrant population in East Los Angeles through direct legal services, education, and community empowerment, while teaching law students effective immigrants' rights lawyering skills in a real-world setting. LIJC focuses on providing representation to individuals who are unable to obtain immigration legal services elsewhere with an emphasis on immigrants with certain immigration and criminal complications who reside in the East Los Angeles area.

The Immigration Practice Clinic, Directed by Clinical Professor of Law, Karla McKanders, at Vanderbilt Law School is a clinic that provides immigration services to vulnerable low-income immigrants from all over the world before the immigration agencies, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) and federal courts in humanitarian immigration cases.

The clinical directors supervise the clinical students in the provision of immigration legal services for indigent low-income immigrants.

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AMICUS BRIEF

## I. ADMINISTRATIVE CLOSURE IS A WELL-ESTABLISHED DOCKET MANAGEMENT TOOL GRANTED TO THE IMMIGRATION JUDGES AND THE BOARD OF IMMIGRATION APPEALS THROUGH STATUTE AND REGULATIONS

It is well established that immigration judges and the Board of Immigration Appeals (the "Board") have the authority to administratively close cases within their jurisdiction. immigration judges and the Board exercise their powers and duties delegated by the Attorney General of the United States ("Attorney General") though regulations.[1] Administrative closure of a case is the used to temporarily remove the case from an immigration judge's calendar or from the Board of Immigration Appeals' docket.[2]

Immigration judge's authority to administratively close cases stems from various federal regulations. Specifically, immigration judges have the authority to exercise their independent judgement and discretion, and to take *any action* consistent with their authority.[3] Courts have interpreted this regulation to include the authority to administratively close cases within their jurisdiction.[4] Immigration cases are undoubtedly under the jurisdiction of immigration courts. Removal proceedings are commenced by the Department of Homeland Security ("DHS") through the filing of a Notice to Appear.[5] Once the Notice to Appear is filed, this act vests jurisdiction with the immigration court to begin removal proceedings.[6]

The immigration judge's ability to take any action consistent with their authority allows broad discretion in using tools to efficiently manage their docket.[7] For example, immigration

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[1] *Matter of Avetisyan*, 25 I. & N. Dec. 688, 691 (2012)
[2] *In re Guitierrez-Lopez*, 31 I. & N. 479, 479 (1996) (overruled on other grounds)
[3] 8 C.F.R. §§ 1003.10, 1241.1 (emphasis added)
[4] *See e.g. Avetisyan*, 25 I. & N. at 691
[5] *See Id.*
[6] 8 C.F.R. § 1003.14; *Matter of Avetisyan*, 25 I. & N. at 691
[7] *See Matter of Avetisyan*, 25 I. & N. at 691-92.

judges have the discretion to grant parties continuances for good cause.[8] Likewise, the judges also have the ability to administratively close cases within their discretion to efficiently manage their docket.[9]

Lastly, administrative closure does not affect DHS's ability to carry its duties and pursuing removal proceedings of aliens. Administrative closure does not result in a final order.[10] After a case has been administratively closed, DHS may move to recalendar it before the immigration judge, reinstate the appeal before the board, or seek immediate review of a judge's to administratively close a case by filing an interlocutory appeal.[11] The ability to use administrative closure is expressly articulated by regulations and reinforced through case law.

## II. BOARD OF IMMIGRATION APPEAL PRECEDENT HAS ARTICULATED AN APPROPRIATE STANDARD FOR ADMINISTRATIVE CLOSURE

### A. The Board's precedent case Matter of Avetisyan establishes well - reasoned factors that provide Immigration Judges appropriate guidance and discretion to determine if a case should be administratively closed.

The standard set forth in the Board's 2012 precedent case, Matter of Avetisyan,[12] has provided immigration courts clear guidance on when administrative closure is an appropriate remedy. This section discusses how the Board, through its decisions, as evaluated importance of the Matter of Avetisyan factors and as an administrative body determined the factors that best suit the realities of case processing through immigration courts. To determine if closure is

[8] *Id*; 8 C.F.R. § 1003.29; *See also* 8 C.F.R. § 1214.3 which provides, "[a]n alien who is already in immigration proceedings and believes that he or she may have become eligible to apply for V nonimmigrant status *should* request before the immigration judge or the Board of Immigration Appeals, as appropriate, that the proceedings be administratively closed (or before the Board that a previously-filed motion for reopening or reconsideration be indefinitely continued) in order to allow the alien to pursue an application for V nonimmigrant status with the Service." (emphasis added).
[9] *Matter of W-Y-U*, 27 I. & N. Dec. 17 (2017)
[10] *Matter of Avetisyan*, 25 I. & N. at 695
[11] *Id.* (citing *Bravo-Perdroza v. Gonzales*, 475 F.3d 1358, 1360 (9th Cir. 2007)
[12] *Matter of Avetisyan*, 25 I. & N. at 688

appropriate, Avetisyan requires immigration judges and the Board to employ a totality of the circumstance standard. In setting forth this standard, the Board in Avetisyan provides a nonexclusive list of six factors to consider:

> "(1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings . . . when the case is recalendared."[13]

Since 1990, the Board has grappled with the appropriate standard for administrative closure. Prior to the administrative closure standard in Avetisyan, in Lopez-Barrios the Board established a rigid test that relied solely on whether there was opposition to the administrative closure to close a case.[14].Under this rigid standard, an immigration judge was required to deny the motion if either party opposed it. This standard was unduly restrictive and limited the immigration judges' discretion, which is contrary to a judge's exercise of independent judgment and discretion vested in it under Title VIII of the Code of Federal Regulations.[15]

The following considers each of the Matter of Avetisyan factors and how the Board has developed a workable standard that aligns with the realities of the immigration judges' responsibilities and docket management. One concern with the Lopez-Barrios standard was that

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[13] *Id.* at 696
[14] *Matter of Lopez-Barrios*, 20 I. & N. Dec. 203 (BIA 1990).
[15] 8 C.F.R. § 1003.10(b) "In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases."

an immigrant responding to immigration proceedings ("respondent") would procure an unfair advantage if they were granted of administrative closure as opposed to a removal in absentia for his or her failure to attend a hearing. The Avetisyan factors (2) and (5) directly address this concern. Factor (2) requires consideration of the underlying reasons for requesting administrative closure to ensure that the immigration judge properly consider all of the factors underlying the request. This standard provides a more robust inquiry instead of a strict standard in which opposition provides the only indicator for denying administrative closure. Also, factor (5) requires the judge to evaluate the responsibility of either party in contributing to any delays, which directly addresses the concern that the respondent will receive an unfair benefit when his or her conduct may have contributed to unnecessary delay of process or from an immigration judge rendering a decision on the case's merits. When there is unnecessary delay, under this test the immigration judge may use this as a factor to deem that there is no strong support administrative closure. In addition, this factor allows the court the opportunity to ensure fairness in considering the reason behind the delay that may waste the court's time.

The other Avetisyan factors demonstrate that the Board has evaluated circumstances that are pertinent to ensuring a fair and correct decision is rendered to administrative close a case. Factor (1) allows the immigration judge to consider if there is any value to the motion at all. This factor will be used to investigate if there have been any nefarious acts by either party in the attempt to gain administrative closure. Factor (2) ensures that the opposition is heard and that the immigration judge carefully consider the reason for opposing the administrative closure. Factor (3) allows immigration judge to determine if the respondent's other forms of relief that may be filed before DHS United States Citizenship and Immigrant Services ("USCIS") have merit or if

those claims will merely result in a delay of process.[16] Evaluating the substance of other forms of relief ensures that, if the respondent's other petitions have merit, immigration court is not spending its time determining a matter that will be determined by another unit within the immigration system.

Factor (4), evaluating the anticipated duration of the closure, is helpful when determining how long the case may remain on the immigration judge docket without the ability to resolve it. Without evaluating this factor, administrative resources are utilized for multiple continuances for each party a long period of time in an already severely backlogged system until the other application or petition process is resolved.[17] This factor also allows the court to use its authority to clear its docket and allow for a 'pause' the matter until the court can resolve the matter on its merits without other delays.[18] Lastly, factor (6) grants the court the power to handle matters quickly and prevent technicalities from delaying removal proceedings. If the immigration judge knows that the removal proceeding would be determined one way or the other, this allows them to prevent administrative closure and make a speedy decision to create finality in the matter.

The Avetisyan decision assures that the power of discretion entrusted to the immigration judge is properly exercised in the best interest of immigration proceedings. Hence, the Board provided a non-exhaustive list of several factors to consider as guidance. It has been a longstanding tradition to bestow the utmost confidence in the Board's judicial process in this case the Board has been evaluating this remedy since 1990s and the power of judicial system in which appeals from the immigration judge to the Board receive deference in evaluating how to

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[16] *Matter of Ajmal Hussain Shah Hashmi*, 24 I. & N. Dec. 785, 793 (BIA 2009) (when the primary delay to the removal proceedings was caused by the file transferring between units in the immigration system).
[17] U.S. Gov't Accountability Off., GAO-17-438, *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges* 20-1 (2017)
[18] *Matter of W-Y-U-*, 27 I. & N. at 18

develop the proper standard. This should remain the tradition when applied to administrative closure as well.

B. The Board's precedent case W-Y-U clarifies how Immigration Courts should engage in the appropriate application of Avetisyan test.

The Avetisyan factors have helped immigration judges decrease their courtroom backlogs; allocate the appropriate focus on the matters they can resolve; and ensure that cases are not delayed. These factors have continuously been supported through precedent and have been refined in the Board's 2017 decision W-Y-U.[19] In W-Y-U, the Board determined that the primary consideration in evaluating the motion for administrative closure is whether the opposition has provided the court with a persuasive reason to deny a request for the closure – of primary concern is whether respondent has a form of immigration relief available.[20]

Since Administrative closure is a "docket management tool that is used to temporarily pause removal proceedings…. [and] is not a form of relief from removal and does not provide an alien with any immigration status,"[21] administrative closure is akin to the judge simply continuing a matter without adding a burden on DHS to re-prosecute the matter if administrative closure is granted.[22] While the court's efficiency is a concern, W-Y-U held that the efficiency of the court is secondary to a party's interest in having the case decided on its merits because respondents in removal proceedings do in fact have a right to seek asylum and other forms of relief from removal. This means that Avetisyan factor (2)'s suggestion to inquire into the basis for any opposition to administrative closure should be given more weight than other factors, and

[19] *Matter of W-Y-U-*, 27 I. & N. at 17.
[20] *Matter of W-Y-U-*, 27 I. & N. at 17
[21] *Id.* at 18
[22] American Immigration Council, *Practice Advisory: Administrative Closure and Motions to Recalendar* 5 (2017)

the court's efficiency should not be accorded the same weight as other whether there is an ultimate form of immigration relief available.

In addition, this decision held that an immigration judge should not consider or even review DHS's enforcement priority categories when determining whether to grant administrative closure. The Board reasoned that prosecutorial discretion rests solely with the Department and that for an immigration judge to incorporate enforcement priorities developed by another branch of government would be to insert his or her authority in a matter that is outside of his or her jurisdiction. It follows that a party's opposition to the administrative closure should not a determinative factor for the court to evaluate as DHS enforcement priorities remain in its sole discretion and holding otherwise would unlawful expand the court's jurisdiction over immigration matters.

Lastly, there is some concern that an alien will be permitted to remain in the United States of America unlawfully when administrative closure is unwarranted. This statement is not aligned with the realities of how an immigration case is processed through the court when multiple agencies are involved. A key example is when a respondent is in both removal proceedings and has a pending the visa petition unit in the alien's U Visa status with DHS USCIS. When a U visa is granted, a respondent is unable to adjust status until removal proceedings are concluded. The respondent must wait until DHS approves his or her U Visa petition to adjust her status. Presently, there are 110, 511 applications for I-918 petition for U Nonimmigrant status pending as of the fourth quarter of the 2017 fiscal year.[23] There are only 10,000 U visa petitions granted per fiscal year. Once the U visa application is approved, a respondent whose case has been administratively closed must recalendar the removal

[23]https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2017_qtr4.pdf.

proceedings to have the matter determined on its merits to then be able to adjust status. To not allow immigration judges to grant these administrative closures would prevent them from utilizing their independent judgement and discretion which obstructs them from evaluating the forms of relief in which respondent's may be statutorily entitled.

## III. REMOVAL OF ADMINISTRATIVE CLOSURE VIOLATES AN IMMIGRANT'S FIFTH AMENDMENT CONSTITUTIONAL RIGHT TO DUE PROCESS IN REMOVAL PROCEEDINGS

The loss of administrative closure as a docket-management tool would provoke due process challenges from immigrants in removal proceedings. Immigration proceedings, despite lacking the full body of constitutional protections, must still conform to the Fifth Amendment's due process requirements.[24] These rights extend to providing a "full and fair hearing" for aliens in deportation proceedings, and apply in circumstances where the hearing is so unfair as to prevent a reasonable presentation of the alien's case.[25] There are three main concerns with due process violations in the immigration contexts: (1) the likelihood of irreparable harm; (2) the impact of due process violations on immigrants with diminished mental capacity to challenge their removal from the United States; and (3) the impact of the court's inability to grant administrative closure on immigration judge's role as a neutral arbiter. Due process is a constitutional mechanism to ensure that full and fair hearings are granted to protect unjust deprivation of rights without process.

### A. Without administrative closure, immigrants in removal proceedings will face irreparable harm.

Irreparable harms are likely to be suffered by immigrants in proceedings without the practical scheduling assistance administrative closure offers, and accommodation of those respondents

[24] Salgado-Diaz v. Gonzales, 395 F.3d 1158, 1162 (9th Cir. 2005) (as amended); Vasha v Gonzales, 410 F.3d 863, 872 (6th Cir. 2005)
[25] Gutierrez v. Holder, 662 F.3d 1083, 1091 (9th Cir. 2011)

with diminished mental capacity would be required to satisfy statutory requirements. Additionally, the loss of administrative closure would effectively deny countless immigrants in proceedings access to counsel, greatly increasing the number of petitioners wrongly denied relief. Removal of administrative closure would simply increase the federal government's expenditures in operating immigration courts, while reducing the accuracy of immigration court decisions and eroding the process owed to respondents.

Without the opportunities for case development administrative closure provides, respondents in proceedings stand to suffer significant, irreparable harms, particularly where the alternative would be removal. As demonstrated in Matter of Avetisyan, administrative closure allows courts to delay decisions until additional factual information can be obtained or relief outside its jurisdiction is granted, rather than burdening respondents with repetitive court-appearances or outright removal.[26] "An injury is irreparable 'if it cannot be undone through monetary remedies.'"[27] "Even when a later money judgment might undo an alleged injury, the alleged injury is irreparable if damages would be difficult or impossible to calculate."[28]

The immigration judge's decision to remove an individual from the United States presents, in itself, a huge risk of irreparable harm. Absent other considerations, removal from the United States damages an immigrant's well-being.[29] Removal is an emotional affair, and courts have found that the emotional distress suffered through removal can contribute to the irreparable harm suffered when evaluating violations of due process.[30] The social upheaval which results from removal adds to these concerns.

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[26] *Matter of Avetisyan,* 25 I&N at 688
[27] *Scott v. Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010) (citing *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir.1987)).
[28] *Id.*
[29] *Coyotl v Kelly*, 261 F.Supp.3d 1328, 1343-44 (N.D. Georgia 2017)
[30] *Id.*

More significantly, separation of a respondent from their family can be an irreparable harm. In Kahn v Elwood, the a federal court held that deportation of a twenty-year-old would cause irreparable harm, because he had spent a quarter of his life in the US and because his family would remain behind.[31] These are not uncommon occurrences; many immigrants in removal proceedings are part of families with mixed immigration status, citizens and non-citizens, and thousands of parents have been separated from their citizen children through such proceedings heightening the risk of irreparable harm should a full and fair immigration hearing not be provided through access to administrative closure.[32]

B. Without administrative closure, immigrants in removal proceedings with diminished mental capacities or other disabilities will have their rights violated.

Immigrants in proceedings with diminished mental capacities are particularly vulnerable to suffering irreparable harm during their immigration proceedings and administrative closure is instrumental to protecting their statutory and due process rights.[33] Specifically, the loss of administrative closure, and the resulting increase in immigrants appearing in court, will increase federal expenditures under Section 504 the Rehabilitation Act.[34] This Act prohibits the exclusion of any disabled person from any federally-funded activity, including the immigration courts,[35]

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[31] Kahn v Elwood, 232 F.Supp.2d 344 (M.D. Penn 2002). See also, Sanchez v. Sessions, 857 F.3d 757, 759 (7th Cir. 2017) (holding that deportation would cause irreparable harm where it would remove a father's ability to provide for his minor, citizen children).

[32] Sara Satinsky et. al, Family Unity, Family Health: How Family-Focused Immigration Reform Will Mean Better Health for Children and Families. Human Impact Partners, https://humanimpact.org/wp-content/uploads/2017/09/Family-Unity-Family-Health-2013.pdf.

[33] *Franco-Gonzalez v. Holder*, 767 F.Supp.2d 1034, 1042 (C.D. Cal. 2010); *See also* Matter of M-A-M-, 25 I & N Dec. 474, 479 (B.I.A. 2011).

[34] 29 U.S.C.A §794 (2016).

[35] Id.; *Franco-Gonzalez v. Holder*, 767 F.Supp.2d 1034, 1042 (C.D. Cal. 2010); *see also Memorandum from Brian M. O'Leary, Chief Immigration J., Exec. Office for Immigration Review (EOIR), U.S. Dept. of Justice (DOJ), to all immigration judges (Apr. 22, 2013), available at http://nwirp.org/Documents/ImpactLitigation/EOIRDirective04-22-2013.pdf (The EOIR is required to provide counsel to mentally-incompetent immigrants, as well as provide speedy bond hearings.)*

and so would necessitate accommodation be provided to disabled immigration respondents.[36] For example, when the immigration court determines an individual is has diminished mental capacity, the court must take certain steps, including appoint counsel, to ensure the individuals due process rights are not violated.[37] In addition, under the Immigration and Nationality Act, the Attorney General "shall prescribe safeguards to protect the rights and privileges" of respondents for whom it is "impracticable" to be present at removal proceedings by reason of mental incompetency.[38] A failure to provide accommodation would constitute irreparable harm each time the respondent appears in court, as they would be denied equal access to the courts solely because of their diminished mental capacity and/or disability.[39] The elimination of unnecessary court appearances through the use of administrative closure would be particularly useful, both to preserve the rights of immigrants with diminished mental capacity or other disabilities under both the Rehabilitation Act and the Immigration and Nationality Act which will ultimately impacts their access to the immigration courts.

Indeed, an argument can be made that the removal of administrative closure would place a unique burden on respondents that require the court's accommodation because of their diminished mental capacity or disability. Under Rodde, the Ninth Circuit held that an attempt by

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[36] Although this brief focuses primarily on they duty to provide reasonable accommodations to mentally incapacitated individuals, Section 504 of the Rehabilitation Act requires immigration courts to provide reasonable accommodation to any person qualified as disabled under the Act. *Franco-Gonzales,* 767 F. Supp. 2d at 1051. Reasonable accommodations that are provided in courts include, but are not limited to, sign interpreters and auxiliary aids. *See* U.S. Dis. Court, Central Dis. Of Cal. *Guidelines for Providing Accommodations for Trial Participants with Communication Disabilities, Jurors, and Members of the Public*, G-122A http://court.cacd.uscourts.gov/CACD/Forms.nsf/0b2b50f03ce1d589882567c80058610a/909f5d3acbdd802988256c71006b0e6f/$FILE/G-122A.pdf (accessed Feb. 13, 2018).

[37] *See Franco*-Gonzalez, 767 F.Supp.2d at 1056-58; *see also Franco-Gonzalez v. Holder*, 2013 WL 3674492 at *5 (C.D. Cal. Apr. 23, 2013).

[38] INA § 240(b)(3).

[39] 29 U.S.C.A §794 (2016); *see also* Fialka-Feldman v. Oakland University Bd. of Trustees. 678 F.Supp2d 576, 588 (E.D. Mich 2009) (A university student would suffer irreparable harm absent an injunction If a reasonable accommodation in campus housing were not provided.)

Los Angeles County to remove a rehabilitation center was subject to preliminary injunction.[40] This was because the center provided a unique set of services for its patients, with comparable facilities not being easily-accessible to those needing its services.[41] Parallels can be drawn to administrative closure when courts seek to accommodate individuals with diminished mental capacity and/or disability. In cases where the respondent has a diminished mental capacity, administrative closure can be used to provide time for development of accommodation to ensure the individual has a full and fair hearing.[42] A blanked elimination of administrative closure will inhibit compliance with under both the Rehabilitation Act and the Immigration and Nationality Act.

C. Without administrative closure, immigrants' due process right to have access to immigration attorneys is diminished.

Access to counsel is essential for immigrants' success in immigration proceedings, and administrative closure allows for attorneys to better represent more clients.[43] Reports documenting the impact of access to immigration attorneys demonstrate how immigration attorneys facilitate access to forms of relief and assist with court management of unwieldy dockets. A 2016 study noted that only 6.5% of respondents manage to properly file the proper immigration forms without representation, making access to counsel all but essential for immigrants to be heard.[44] Additionally, it is much easier for judges to quickly dispose of unrepresented cases than closed ones, a harm which blatantly threatens those unrepresented immigrants in proceedings' access to due process.

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[40] *Rodde v. Bonta*, 357 F.3d 988, 990-91 (9th Cir. 2004)
[41] *Id.*
[42] *See Matter of M-A-M-,* 25 I&N Dec. at 474.; *See also* 29 U.S.C.A §794 "all public entities have a dity to make reasonable modifications to their procedures in order to ensure that "no qualified individual with a disability" will be "excluded from the participation in [or] denied the benefits of…any program or activity….".
[43] *Asylum Representation Rates Have Fallen Amid Rising Denial Rates*, http://trac.syr.edu/immigration/reports/491/.
[44] *With the Immigration Court's Rocket Docket Many Unrepresented Families Quickly Ordered Deported.* Syracuse University. http://trac.syr.edu/immigration/reports/441/.

While respondent's immigration proceedings lack a right to counsel, the court advisals provide that a respondent has a right to an attorney at no expense to the government. The median time to close cases when respondents were unrepresented was 24-60 days, in contrast to the 286 days given to those represented.[45] In short, the cases of immigrants without counsel are disposed of far quicker than those who are represented, effectively denying those respondents a full and fair hearing to present their cases.

In all, the above concerns paint a picture of an immigration court system heavily reliant on administrative closure to continue providing equitable results for the immigrants within the courts. Respondents are vulnerable, and the high risks involved in deportation make them prone to suffering irreparable harms. The loss of administrative closure would remove one of the few buffers they possess. The same can be said for those petitioners who are disabled, whose harms would be amplified should they be required to frequently appear in court. Finally, the time to pursue remedies through administrative closure allows for attorneys to better represent more immigration petitioners, vastly improving their ability to access the courts. Removal of administrative closure would remove these benefits, provoking due process concerns.

D. Without administrative closure, Immigration Judge's role as a neutral arbiter will erode.

On December 6, 2017, the Attorney General issued a memorandum to all EOIR employees, directed at mainly immigration judges, providing several principles to guide in the adjudication of immigration court cases to serve national interest.[46] On January 17, 2018, EOIR issued a memorandum outlining specific priorities and goals in accordance with the Attorney

[45] *Id.*
[46] Memorandum for the Executive Office of Immigration Review: Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest (December 2017)

General's principles.[47] Now effective, these goals include case completion goals applied to each individual court as a whole, and all court employees to share responsibility accordingly to meet such goals.

Historically, immigration judges were exempt from such performance evaluations due to concern that it would negatively impact the judges' decisions, potentially affecting the outcome of cases, and thus infringing upon an individual's due process to a meaningful opportunity to be heard. From the fiscal years of 2002 to 2009, EOIR has utilized case completion goals for both detained and non-detained cases. However, in fiscal year 2010, case completion goals for non-detained cases were eliminated because by having goals for all cases resulted in essentially counting every type case as a "priority," therefore it prevented EOIR from effectively allocating its resources for actual priority cases.[48] The case completion goals were proposed only as a "guideline," an aspirational goal to help manage overall caseload in particular court locations. Although, they were never explicitly directed to a judge's individual performance evaluation, it was indeed become a heavy burden upon immigration judges as the "immigration courts are faced with the challenge of adjudicating their caseload (all cases awaiting adjudication) in a timely manner, while at the same time ensuring that the rights of the immigrants appearing before them are protected."[49] The recent 2018 memorandum by EOIR brings back case completion goals for non-detained cases for the first time since its failure in 2010 and while

[47] Executive Office for Immigration Review Memorandum: Case Priorities and Immigration Court Performance Measures (January 2018)
[48] U.S. Government Accountability Office, Report to Congressional Requesters, Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges (June 2017), available at https://www.gao.gov/assets/690/685022.pdf
[49] U.S. Government Accountability Office, Report to the Chairman, Committee on Finance, U.S. Senate, Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement (August 2006), available at https://www.gao.gov/assets/260/251155.pdf

emphasizing that the goals be met "while maintaining due process," it does not provide any guidance to immigration judges on how to reconcile such competing interests.

Although EOIR's case-completion goals were not mandatory and only existed to serve as a guideline to assist immigration judge in managing their calendars, it has shown to be an actual and real influence upon immigration judge's case outcome. In *Hashmi v. AG of the United States*, the Third Circuit found that the immigration judge's denial of the respondent's final continuance request was arbitrary and an abuse of discretion because it was "based solely on case-completions goals, rather than the specific facts and circumstances of the case."[50] On remand, BIA issued a precedential decision, specifically mandating that "compliance with an Immigration Judge's case completion goals however, is not a proper factor in deciding a continuance request, and Immigration Judge should not cite such goals in decisions relating to continuances.[51] Similarly, removal of administrative closure as a docket management tool in midst of the current massive court backlog and the revival of case completion goals for essentially all cases will adversely impact the immigration judge's role as a neutral arbiter to ensure an immigrants' Fifth Amendment due process right to a full and fair hearing.

Immigration judges will feel compelled to curtail proceedings in order to dispose of cases more rapidly instead of considering each case as a set of unique facts, interpretation, and application of law, when rendering a decision. The INA §240(b)(4)(B) requires that a respondent be given a "reasonable opportunity" to examine and present evidence. Given the fact that for most respondents, English may not be their first language and that evidence may have to obtained from other countries, a strict time frame for completion of cases without a tool of docket management, would interfere with a judge's ability to ensure that such opportunity to

[50] *Hashmi v. AG of the United States,* 531 F.3d 256, 261 (3d Cir. 2008)
[51] *In re Hashmi*, 24 I. & N. Dec. 785, 793-794 (B.I.A. 2009)

examine and present evidence is respected. Furthermore, due process rights will be violated as immigration judges are more compelled to bypass proper court proceedings through distortion of the separation of functions of the immigration judge's role as a neutral arbiter and DHS's role as a prosecutor. When the judge abandons his role as an unbiased arbiter of fact and law, and becomes a prosecutor, the court contravenes its responsibilities as a neutral fact finder.

In *Abulashvili v. AG of the United States*, the Third Circuit held the foreign citizen' due process rights were violated when the immigration judge assumed the role of the government's attorney by taking over the cross-examination at the hearing after determining that the government was not adequately prepared.[52] Immigration judges are increasingly being "confronted with an exponential growth in their caseloads."[53] Immigration judges are placed in an "impossibly demanding and challenging" position having to balance these massive caseloads and the difficulty of ascertaining credibility of each unique case given barriers of language and culture.[54] The immigration judge's directing of cross-examination, gave the strong impression that she was on the government's side, and by ignoring crucial parts of the respondent's testimony, the immigration judge abrogated its duty to function as a neutral, impartial arbiter and to refrain from taking on the role of advocate for either party. Furthermore, it encroached upon the DHS trial attorney's function to investigate and cross-examine witnesses. Similarly, these violations of an immigrant's due process right to a full and fair hearing, will only become more rampant without adequate docket management tools such as the right of immigration judges to administratively close cases.

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[52] *Abulashvili v. AG of the United States,* 663 F.3d 197, 199 (3d Cir. 2011)
[53] *Id.* at 208
[54] *Id.*

## IV. ADMINISTRATIVE CLOSURE IS THE MOST EFFECTIVE METHOD OF PRESERVING BOTH PARTIES' INTERESTS

### A. Administrative closure is a vital tool in a backlogged court system.

It is no secret that immigration courts face an increasing backlog of cases and a decline in the rate at which cases are completed. There are several causes for this backlog, such the increased legal complexity of cases, inadequate resources and the increased usage of continuances. While there are many factors involved, one main driver of case backlogs is the sheer number of unresolved cases that remain on court dockets each year.[55]

A U.S. Government Accountability Office study found that from 2009 to 2015, new cases filed in immigration courts per year actually declined by about 20 percent, from 256,000 cases to 202,000 cases respectively.[56] Even in the face of this decline, overall annual caseloads within the immigration courts continue to increase significantly.[57] Between 2006 and 2015 annual court caseloads have increased from approximately 517,000 cases to around 747,000 cases.[58] A large contributor to this trend has been the increasing amount of pending cases that remain open from the previous year. The amount of pending cases grew by an average of 38,000 cases per year from 2010 to 2015, resulting in a total of around 437,000 pending cases at the start of fiscal year 2015.[59] Therefore, pending cases accounted for over half of the total caseload in 2015.

Increasing backlogs have caused severe delays in the scheduling of hearings. With court resources unable to keep pace with growing caseloads, immigration judges are forced to schedule hearings further into the future. As of February 2, 2017, some courts had master calendar hearings scheduled as far out as May 2021 and individual merit hearings as far into the future as

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[55] [55] U.S. Gov't Accountability Off., Supra, Note 19 at 20-1.
[56] *Id.* at 21.
[57] *Id.*
[58] *Id.* at 20.
[59] *Id.* at 22.

February 2022.[60] These delays have caused strain on already limited immigration court resources, as well as on respondents in removal proceedings and their representatives.

Administrative closure is a vital tool for courts to relieve overcrowded dockets that has been used with growing frequency and has accounted for an increasing number of initial case completions each year.[61] Administrative closure now accounts for over twenty percent of yearly case completions within the courts,[62] with 48,285 cases administratively closed in 2016 alone.[63] This increase is striking when compared to 2006, when administrative closure accounted for only two percent of total case completions.[64]

Recognizing it as useful docket management tool, courts have recently urged DHS trial attorneys to consider administrative closure as an alternative to other docket management tools such as filing motions to continue.[65] Administrative closure has allowed immigration courts to make decisions about the efficient use of resources, by preventing unnecessary court appearances from taking up valuable docket time.

B. Administrative closure streamlines court function by facilitating essential representation by counsel for immigrants.

Without access to administrative closure, pro bono immigration counsel, legal clinics and legal services organizations would, because of the greater frequency of time spent in court on single clients, have to reduce the number of cases they undertake. Given that there is already a chronic nationwide shortage of immigration attorneys able to take on cases, this would lead to an

[60] *Id.*
[61] *Id.* at 25.
[62] *Id.*
[63] Office of Planning, Analysis & Statistics, Exec. Office for Immigration Review, *FY 2016: Statistics Yearbook* C5 (2017)
[64] U.S. Gov't Accountability Off., Supra, Note 19 at 25.
[65] *Hashmi*, 24 I.&N. at 791 n.4; *Matter of Rajah*, 25 I&N Dec 127, 135 n.10 (2009).

overall drop in immigrant representation.[66] This is especially apparent in regions where there is a lack of immigration attorneys.[67] Without administrative closure to effectively manage dockets, countless respondents would lose the benefits of counsel and, by proxy, their otherwise-meritorious immigration claims.

Lack of representation is extremely harmful to an immigrant's chances of resolving their cases on the merits and access to the proper forms of immigration relief. A quick look at asylum statistics reveals that the gulf in outcome between unrepresented asylum-seekers and asylum-seekers is significant. In asylum proceedings, respondents are roughly five times more likely to obtain favorable results when they are represented by an attorney.[68] In 2017, only 10% of those unrepresented in asylum cases succeeded, compared to a 45.6% rate of those who did have representation.[69] These rates vary widely between nations of origin. However, even the lowest nation listed, Mexico, boasts a 15% difference in outcome with counsel; the most dramatic nation, Ethiopia, has a 55% difference.[70] The gulf in outcome is always significant.[71] Differences in the outcomes of unaccompanied minors with counsel are similarly high. Data from 2005-2017 indicates a 9% rate of issuing removal orders when juveniles are represented, compared to 44% when they are unrepresented.[72] In addition, having attorneys in the immigration courts significantly helps the courts with docket management as attorneys are able to help their clients

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[66] Jonathan Berr*, It's a Good Time to be an Immigration Lawyer*, CBS News, February 13, 2017 https://www.cbsnews.com/news/donald-trump-policies-good-for-immigration-lawyers/; *Report of the Special Committee on Immigration Representation*, New York State Bar Association, June 23 2012 http://www.nysba.org/immigrationreport/.

[67] Ingrid Eagly & Steven Shafer, Access to Counsel in Immigration Court, American Immigration Council, September 28 2016 https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

[68] Asylum Representation Rates Have Fallen Amid Rising Denial Rates, http://trac.syr.edu/immigration/reports/491/

[69] *Asylum Representation Rates Have Fallen Amid Rising Denial Rates*, Syracuse University, http://trac.syr.edu/immigration/reports/491/.

[70] *Id.*

[71] *Id.*

[72] Representation for Unaccompanied Children in Immigration Court. Syracuse University. http://trac.syr.edu/immigration/reports/371/.

navigate through the system instead of the court having to explain everything to parties before them.

C. Without administrative closure, immigrants' due process right to have access to immigration attorneys is diminished.

If immigration courts are no longer empowered with the discretion to grant administrative closure, the remaining docket management tools would leave insufficient and inadequate alternatives that would only exacerbate case backlogs. If the authority to utilize administrative closure is withdrawn, courts will not only have to find alternative docket management methods for future cases, but also the thousands of cases that currently remain in administrative closure, if they were reopened. Such a large flood of reopened cases would overwhelm an already stressed system and would have devastating impacts for all parties involved in removal proceedings. Immigration judges would face increasing caseloads, further limiting their ability to provide quality hearings and adjudications, leading to a greater likelihood of due process challenges. Respondents would also face challenges obtaining representation, as pro bono attorneys see their resources diminished by additional and unnecessary court appearances.

Without the ability to administratively close cases, courts and immigration attorneys will inevitably turn to continuances as an alternative. While continuances provide a delay in proceedings, allowing for the adjudication of a benefit outside immigration court, the time allowed is shorter than administrative closure and cases remain on court dockets.[73] These continuances are a primary contributor to the number of cases left pending on court dockets at the end of each year, further encumbering an already strained court system.[74] Multiple

[73] American Immigration Council, *Practice Advisory: Administrative Closure and Motions to Recalendar* 5 (2017).
[74] U.S. Gov't Accountability Off., Supra, Note 5 at 69.

continuances also results in wasted EOIR and DHS resources that could be otherwise be put towards cases that can be quickly resolved by a removal order or immediately available relief.

Cases with multiple continuances have been shown to take longer to complete than cases with no or fewer continuances.[75] In 2015, cases with no continuances took an average of 175 days to complete, while cases with four or more continuances took an average of 929 days.[76] Additionally, the number of cases with four or more continuances has risen steadily, increasing from only 9 percent of all cases in 2006, to 20 percent of all cases in 2015.[77]

Due to the uncertain time frames and backlogs in DHS USCIS visa adjudications, respondents may be required to return to court several times to seek a continuance before their case can be resolved. In Hashmi, the respondent's removal proceeding was continued 4 times over the course of 18 months, while the court waited for USCIS to adjudicate an I-130 petition.[78] Additionally, DHS was forced to obtain the respondent's file from USCIS before every court appearance, since one file is shared for removal proceedings and visa petitions.[79] Inefficiencies in this process led to further delays in both the court proceeding and the respondents I-130 petition adjudication.[80] Even after these lengthy continuances, the respondent's I-130 petition was still pending when the court denied a request for a fifth continuance.[81] The BIA ruled that the immigration judge improperly denied the continuance, due to the heavy reliance on case completion goals in its determination.[82]

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[75] *Id.* at 68.
[76] *Id.* at 69.
[77] *Id.*
[78] *Hashmi*, 24 I. & N. at 786.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.* at 793-94.

Hashmi illustrates the inadequacy of continuances to deal with delays that are outside of both the court's and the respondent's control. Had the case been administratively closed, there would have been no need for multiple continuances and the court could have dedicated its resources towards a case ready to be resolved.

Uncertain delays, similar to Hashmi, are seen in the adjudication of various visa applications, the jurisdiction for which is vested with USCIS. As noted, at the end of fiscal year 2017 there were 110,511 pending U visa applications.[83] There is an annual cap, as only 10,000 visas are awarded every year.[84] For an applicant in removal proceedings, it is impossible to predict when their U-visa application will be approved. It is in the interest of all parties to temporarily close cases, such as these, to await USCIS adjudication, instead of requiring periodic court appearances. Courts will benefit by having additional time to dedicate to cases that are priorities for enforcement and DHS and USCIS will also avoid the unnecessary delays caused by the frequent transfer of case files between agencies. Without administrative closure, Respondents will be denied access to visas they are entitled to, such as Special Immigrant Juvenile Status (SIJS), which requires the applicant to be physically present at the time of filing,[85] meaning removal would cut off their eligibility for relief.

Cases which qualify for administrative closure will also likely be able to show cause for a continuance, due to the similarity of factors taken into account for both determinations. Motions for both continuances and administrative closure require judges to consider factors such as the

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[83] USCIS, Number of Form I-918, *Petition for U Nonimmigrant Status, by Fiscal Year, Quarter and Case Status 2009-2017* (January 19, 2018), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2017_qtr4.pdf.

[84] *Victims of Criminal Activity: U Nonimmigrant Status*, USCIS (August 25, 2017), https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status.

[85] *Green Card Based on Special Immigrant Juvenile Classification*, USCIS (November 30, 2017), https://www.uscis.gov/green-card/sij.

reason behind the motion, opposing counsel response, the likelihood that the respondent's application outside the removal proceeding will succeed, and the party responsible for the delay.[86] Additionally, courts are unable to consider case completion goals when deciding on a motion to continue, leaving judges with no choice but to grant these motions or face a challenge on appeal.[87]

By withdrawing the authority of administrative closure, many of the cases that would otherwise be taken off of the court's docket, would instead have to be managed through an inefficient series of continuances, as was seen in Hashmi. This will greatly increase the number of pending cases, as the delays caused by these continuances add to case backlogs.

Administrative closure allows courts to avoid these issues, by temporarily removing cases not ready for resolution from court dockets. Only once the adjudication outside immigration court has been resolved is a case reopened and placed back on the courts schedule.

Administrative closure has become an incredibly useful tool that allows judges the discretion to manage proceedings efficiently as possible. It has the benefit of allowing the court to adjust for prolonged delays, without the disadvantage of adding to case backlog, that comes with granting continuances. Administrative closure is also similar to termination, in that it removes a case from the court's docket, but it does not require the added work of DHS having to file a new NTA in order to resolve a matter. Additionally, administrative closure has clear standards and allows immigration judges to hear arguments both for and against closure.[88] While action is certainly required to address the many issues that immigration courts currently face,

[86] *Avetisyan*, 25 I&N at 696; *Hashmi*, 24 I&N at 790.
[87] *In re Hashmi*, 24 I. & N. 793-794
[88] *Id.* at 696.

withdrawing the authority of administrative closure will only be a hindrance to resolving case backlogs and a detriment to all involved in removal proceedings.

## V. CONCLUSION

Based on the arguments presented above, the below listed interested parties respectfully requests that the Attorney General find that immigration judges and the Board have the authority to rule on administrative closure motions, maintain that authority, and that the correct standard has already been established through precedent.

Respectfully submitted,

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**UNITED STATES DEPARTMENT OF JUSTICE**
**OFFICE OF THE ATTORNEY GENERAL**
**WASHINGTON, D.C.**

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|---|---|---|
| **In the Matter of:** | § | |
| | § | |
| **CASTRO-TUM, Reynaldo** | § | **File No.** (b) (6) [redacted] |
| | § | |
| **Respondent** | § | |
| | § | |


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# *AMICI CURIAE* BRIEF OF GONZALEZ OLIVIERI, LLC, IMMIGRATION COUNSELING CENTER, INC., AND FIEL HOUSTON, INC.

## INTEREST OF *AMICI CURIAE*

*Amici curiae* Gonzalez Olivieri, LLC, immigration law firm, as well as the Immigration Counseling Center, Inc. and FIEL Houston, Inc., legal non-profit organizations, are all involved in assisting, counseling, representing immigrants and promoting advocacy of their rights and privileges under the laws of the United States.

In this matter, the Attorney General has issued an invitation for the submission of additional briefs from interested parties to assist in the "review of issues relating to the authority of the [Board of Immigration Appeals and immigration judges] to administratively close" removal proceedings. *See Matter of Castro-Tum*, 27 I&N Dec. 187 (A.G. 2018).

The above-referenced firm and organizations assist immigrant clients in removal proceedings whose ability to successfully obtain relief from removal and regularize their legal status is contingent on the availability of administrative closure.

Proposed *amicus curiae's* immigrant clients include DACA recipients, victims of crime eligible for "U" nonimmigrant visas, domestic violence victims eligible for relief under the Immigration and Nationality Act ("INA"), as amended by the Violence Against Women Act ("VAWA"), and immigrants with approved I-130 petitions who are *prima facie* eligible for adjustment of status or consular processing.

Proposed *amici curiae*, hereby move the Attorney General for leave to submit the enclosed brief in response to the Attorney General's invitation. The questions posed by the Attorney General in *Matter of Castro-Tum, supra* are of great import to the undersigned *amici curiae* who represent and assist countless immigrants in regularizing their legal status and coming into conformity with the U.S. immigration laws. The expertise and familiarity of the undersigned *amici curiae* with the situations of various immigrants will assist the Attorney General in resolving this matter.

For the aforementioned reasons, proposed *amici* respectfully request leave of the Attorney General to file the accompanying brief.

## INTRODUCTION AND ISSUES PRESENTED

On January 4, 2018, the Attorney General issued an invitation to interested members of the public to file *amicus curiae* briefs addressing four questions: (1) whether the BIA and immigration judges have authority to order administrative closure in a case, and if so, whether the standard that is articulated by the BIA in two precedential decisions is correct; (2) whether the Attorney General should delegate the authority to administratively close cases if he determines neither the BIA or immigration judges have such authority presently, or alternatively, if the Attorney General decides both have the authority, should he withdraw it; (3) whether there are docket management devices other than administrative closure that could adequately promote efficiency and proper resolution of cases; and (4) what actions should be taken regarding cases that are administratively closed if the Attorney General decides that the BIA and immigration judges lack the authority to close cases.

*Amici curiae* respectfully submit this brief to assist the Attorney General in adjudicating these four issues of great importance to the administration of the removal proceedings and nation's immigration laws.

## ARGUMENT

### I. The BIA and immigration judges have the authority to order administratively close cases under applicable federal regulations, and the BIA has announced a reasonable standard for assessing whether administrative closure is warranted

An Immigration Judge ("IJ") exercises the powers and duties delegated by federal law to the Attorney General. *See* 8 C.F.R. § 1003.10(b). This lawful authority encompasses the regulation of the course of proceedings and any action consistent with applicable law and regulations as may be appropriate. *See* 8 C.F.R. § 1240.1(a)(1)(iv). Federal regulation also provides the same general

authority to the Board of Immigration Appeals ("BIA"). *See* 8 C.F.R. § 1003.1(d)(1).

This broad authority rightly encompasses the power for the BIA and IJs to administratively close cases on their docket. Administrative closure is a docket management tool that enables the BIA and IJs to effectively execute their statutory and regulatory duty to ensure the fair and proper administration of the immigration law. Furthermore, administrative closure is not an innovation of the immigration courts; it exists, albeit under varied names, in the federal court system and is used as an instrument to promote judicial economy and the fair resolution of matters before a court. *See e.g. Ali v. Quarterman*, 607 F.3d 1046, 1047-48 (5th Cir. 2010).

As the BIA has rightly noted, "administrative closure may be appropriate to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time." *Matter of Avetisyan*, 25 I&N Dec. 688, 692 (BIA 2012). Given the prevailing interest of promoting judicial economy and the necessity of agency-courts having the means necessary to properly execute their statutory and regulatory duties, the creation of administrative closure is a reasonable and proper interpretation of the general authority granted to the BIA in 8 C.F.R. § 1003.1(d) and to IJs in 8 C.F.R. § 1003.10(b). *See Auer v. Robbins*, 519 U.S. 452 (1997).

Furthermore, the BIA, in *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017), has articulated a reasonable standard for determining whether administrative closure is warranted. The multi-factor inquiry as applied to each case assesses the merits of closure individually, considering the likely availability of relief, the legal basis for requesting or objecting to closure, the likelihood that the relief sought will be granted, and more. As such, the balanced approach ensures that the court can effectively use its limited resources by removing active cases that can be resolved in other ways and also protects against granting administrative closure in cases where it is not warranted.

## II. If the Attorney General were to find that the BIA and IJs lack the authority to order a case administratively closed, he should delegate the authority; or, in the alternative, if he does find that administrative closure is within the scope of their power, he should not withdraw it

Pursuant to 8 C.F.R. § 1003.1(d) and 8 C.F.R. § 1003.10(b), the BIA and IJs, respectively derive their authority from powers delegated by the Attorney General. However, if the Attorney General were to find that a plain reading of 8 C.F.R. § 1003.1(d) and 8 C.F.R. § 1003.10(b) does not include power to order administrative closure, he should grant it for reasons previously stated, which includes the interest of judicial economy, justice, fairness to the parties, and assuring a proper and fair disposition in all immigration cases.

However, if the Attorney General does conclude that the BIA and IJs possess the authority to order administrative closure, he should not retract such authority. A withdrawal of the power to administratively close cases would be deeply problematic for at least two principal reasons.

First, as the Attorney General himself acknowledged, there are an "estimated 11 million people in the United States" who are undocumented and without legal status.[1] Furthermore, there is a backlog of more than "600,000 cases pending" before immigration courts.[2] Given the limited number of IJs throughout the United States and the dates for court hearings of aliens being docketed for several years in the future, the removal of administrative closure as a docket management tool will prove to be a disaster and cause an even greater, unmanageable backlog of cases, as well as unnecessarily increase the dockets of IJs already inundated with regular matters that do not warrant administrative closure.

Second, the elimination of administrative closure would harm some especially vulnerable

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[1] *See* Jeff Sessions, U.S. Attorney General, *Remarks to the Executive Office for Immigration Review* (Oct. 12, 2017), available at https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.

[2] *Id.*

immigration populations that Congress has sought to protect. For instance, victims of crime "U" non-immigrant visa applicants, victims of trafficking "T" non-immigrant visa applicants, self-petitioners under VAWA, Special Immigrant Juveniles, Unaccompanied Alien Children seeking asylum, just to name a few. *See* INA § 101(a)(15)(U); 8 C.F.R. § 214.14; INA § 101(a)(15)(T); 8 C.F.R. § 214.11; INA § 101(a)(15)(J); INA § 101(a)(51); INA §§ 204(a)(1)(A)(iii)-(iv) and (B)(ii)-(iii); TVPRA § 235(d)(7)(B).

All aforementioned groups of immigrants have a right to seek certain legal status or file self-petitions before the United States Citizenship and Immigration Services ("USCIS") and outside of the jurisdiction of the immigration courts. However, they often find themselves in removal proceedings, because while they are awaiting adjudication of their applications, they are in the country without permission.

Ability of the IJ or the BIA to administratively close these types of cases allows the USCIS time to complete their task and, consequently assist the IJ or the BIA in resolving removal matter as well. Specifically, in the event of a grant of a benefit sought proceedings can be terminated, as person obtains lawful immigration status and no longer in the country illegally. In the event of a denial, it allows the court to complete proceedings and order either eventual removal or adjudicate application where jurisdiction lies with the IJ or the BIA.

Similarly, there are other types of cases where administrative closure is prescribed as a way to accomplish processing of certain applications filed before the USCIS. Specifically, in those cases where immigrant is in proceedings and has an approved I-130 immigrant visa petition, especially one submitted on behalf of the immediate relatives of U.S. citizens with visas immediately available, but who are unable to benefit from adjustment of status, absent administrative closure of their proceedings, such aliens are ineligible to seek provisional I-601A

waivers. *See* 8 C.F.R. § 212.7(e); *see also* Form I-601A, Instructions for Application for Provisional Unlawful Presence Waiver.

Without the I-601A waiver, aliens would face years of separation from their family to await the adjudication of the regular I-601 waiver. This would effectively deprive United States citizens and permanent residents of spouses, parents, and children for a long periods of time. As a result, administrative closure is vital to these applicants and absent such mechanism, their eligibility to seek such a waiver will be rendered meaningless.

In sum, because both the IJs and the USCIS are only able to exercise jurisdiction in certain situations where, in some instances, proceedings has to be administratively closed, administrative closure remains a necessity to the ability of certain aliens Congress intended to protect to obtain relief and also for the effective management of immigration court dockets by allowing aliens *prima facie* eligible for relief to seek available relief before the USCIS. As such, the power of IJs and the BIA to use administrative closure, should not be withdrawn.

## III. Other docket management devices, aside from administrative closure, do not promote the objective of 8 C.F.R. § 1003.12

8 C.F.R. § 1003.12 requires the "expeditious, fair, and proper resolution of matters coming before immigration judges." While federal regulation provides IJs with other docket management tools, such as continuances under 8 C.F.R. § 1003.29 and motions to terminate under 8 C.F.R. § 1239.2(f), such devices alone are inadequate to promote judicial economy.

While a continuance for good cause is a useful device,[3] it lacks the utility of administrative closure. Administrative closure removes the matter from the immigration court's active docket; in so doing, either party to the proceedings retains the right to file a motion to re-calendar to return

[3] *Amici curiae* contend, in response to the Attorney General's question, that differing legal standards for eligibility for an I-601A provisional waiver based on whether a case has been administrated closed or continued is arbitrary; further, it weakens the utility of a continuance for good cause as a docket management device.

the matter to the court's docket. *Matter of Avetisyan*, *supra* at 295.

It better serves the purpose of 8 C.F.R. § 1003.12 for an alien in removal proceedings who, for example, U-visa, T-visa, or VAWA eligible to be granted administrative closure instead of a continuance. While good cause can be shown in both instances if the alien is *prima facie* eligible, a factor beyond the control of the applicants and the courts is the length of time it may take the USCIS to adjudicate said applications. Therefore, continuances would require the court to leave the action on its calendar, potentially adjudicate multiple motions for continuance, and use limited resources on matters that could be left off indefinitely, so as to allow the USCIS to finish case processing based on their timelines.

On the other hand, termination of proceedings is only allowed only in certain and very limited circumstances and most definitely an insufficient instrument for purposes of efficient administration of judicial authority by the immigration courts. *See* 8 C.F.R. § 1239.2(f).

In sum, administrative closure is a useful instrument for the IJs and the BIA to have in its arsenal, in addition to other means of managing the immigration case dockets.

## IV. If the Attorney General finds that the BIA and IJs do not have the authority to order administrative closure and does not delegate such authority, cases that have already been administratively closed should only be re-calendared if necessary

In the event that the Attorney General finds that the BIA and the IJs lack the general power to administratively close cases, and does not confer such authority, cases already closed should not all be re-calendared.

*Amici curiae* respectfully maintains that cases, such as those where immigrants have with due diligence sought relief, such as an I-601A waiver, U-visa, T-visa, or VAWA I-360 petition, etc. and have such filings pending with the USCIS, should not be re-calendared. Rather the Department of Homeland Security, mindful of the increasing backlog of immigration cases, should

use limited federal resources to re-calendar only those cases where individuals have not diligently applied for the relief sought, which served as the basis for administrative closure of their cases.

Presently, there an estimated 350,000 cases that have been administratively closed.[4] If all such cases were re-calendared indiscriminately, on one hand the backlog of immigration cases would increase to nearly a million, which given the limited number of the IJs, would cause an even greater delay in the final adjudication of immigration cases; and on the other hand, will punish those immigrants that conscientiously have taken proactive steps to apply for benefits they are eligible to seek before the USCIS, only to possibly be denied relief sought as a result of re-docketing of their cases before the IJs or the BIA.

Therefore, if the Attorney General decides not delegate authority to administratively close cases to the IJs or the BIA, those cases that have already been administratively closed should only be re-calendared if they do not meet certain standards, as outlined above.

## CONCLUSION

*Amici curiae* prays the Honorable Attorney General finds that administrative closure is a legitimate docket management tool within the authority of the BIA and the IJs that serves an important function in a proper disposition of immigration cases, and in so finding, does not remove that authority, given the devastating consequences such a decision would have on the immigrants that are in removal proceedings, the immigration courts and the ability of the IJs and the BIA to effectively manage their dockets amid an increasing number of individuals being placed into removal proceedings.

[4] http://web.archive.org/web/20180108214923/http://www.foxnews.com/politics/2018/01/05/sessions-to-review-docket-practice-used-by-immigration-judges-to-set-aside-cases-indefinitely.amp.html

Respectfully submitted,

GONZALEZ OLIVIERI, LLC

Date: February 14, 2017

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and complete copy of the foregoing Amicus Curiae Brief was duly served upon the U.S. Department of Justice by delivering or mailing same on February 14, 2018 to:

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

| Case No. | EDCV 17-2048 PSG (SHKx) | Date | February 26, 2018 |
|---|---|---|---|
| Title | Inland Empire – Immigrant Youth Collective et al. v. Kirstjen Nielsen et al. | | |

| Present: The Honorable | Philip S. Gutierrez, United States District Judge |
|---|---|

| Wendy Hernandez | Not Reported |
|---|---|
| Deputy Clerk | Court Reporter |
| Attorneys Present for Plaintiff(s): | Attorneys Present for Defendant(s): |
| Not Present | Not Present |

**Proceedings (In Chambers):** **Order GRANTING Plaintiffs' motion for class certification and GRANTING Plaintiffs' motion for a classwide preliminary injunction**

Before the Court are a motion for class certification and a motion for a classwide preliminary injunction, both filed by Plaintiffs José Eduardo Gil Robles, Ronan Carlos De Souza Moreira, and Jesús Alonso Arreola Robles ("Plaintiffs"). *See* Dkts. # 39 ("*Cert. Mot.*"), 40 ("*PI Mot.*"). Defendants Kirstjen Nielsen, James McCament, Mark J. Hazuda, Susan M. Curda, Thomas D. Homan, David Marin, and Kevin K. McAleenan ("Defendants") oppose the motions, *see* Dkts. # 53 ("*Cert. Opp.*"), 54 ("*PI Opp.*"), and Plaintiffs timely replied, *see* Dkts. # 57 ("*Cert. Reply*"), 58 ("*PI Reply*"). The Court held a hearing in these matters on February 26, 2018. Having considered the moving papers and oral arguments, the Court **GRANTS** Plaintiffs' motion for class certification and **GRANTS** Plaintiffs' motion for a classwide preliminary injunction.

## I. Background

This action stems from the termination of Plaintiffs' Deferred Action for Childhood Arrivals ("DACA"). They allege that "their permission to live in the United States and employment authorization [have been] arbitrarily stripped away . . . since President Trump took office, without any notice, reasoned explanation, or opportunity to be heard." *Cert. Mot.* 1:5–8.

### A. The DACA Program

The Court previously outlined the history and features of the DACA program in its order granting Plaintiff Arreola's motion for a preliminary injunction. *See* Dkt. # 31 ("*Arreola Order*"), at 1–2.

Deferred action is a longstanding form of administrative action by which the Executive Branch decides, for humanitarian or other reasons, to refrain from seeking a noncitizen's removal and to authorize his or her continued presence in the United States. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999). On June 15, 2012, the Department of Homeland Security ("DHS") announced DACA, a deferred action program for young immigrants who came to the United States as children and are present in the United States without formal immigration status, in a memorandum issued by Secretary Janet Napolitano ("the Napolitano Memo"). *See Declaration of Dae Keun Kwon*, Dkt. # 16-4 ("*Kwon Decl.*"), ¶ 10, Ex. 9 ("Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children") at 2 ("*Napolitano Memo*"). Although DHS announced on September 5, 2017 that it was "winding down" the DACA program, officials confirmed that the same program rules would continue to apply until its end. *Cert. Mot.* 5:17–20.

Under DACA, young immigrants who entered the United States as children and meet specified educational and residency requirements, and who pass extensive criminal background checks, are eligible to receive deferred action. *See Napolitano Memo* at 1–2. A necessary predicate for DACA eligibility is that an individual must lack a lawful immigration status. *See Kwon Decl.* ¶ 21, Ex. 20 ("National Standard Operating Procedures (SOP): Deferred Action for Childhood Arrivals (DACA)") at 44 ("*DACA SOP*"). In addition, DACA recipients cannot have been convicted of a felony, a significant misdemeanor, or three or more other misdemeanors. *See Napolitano Memo* at 1. Deferred action under DACA is granted to qualifying individuals for a period of two years, subject to renewal. *See id.* at 2–3.

DHS's DACA Standard Operating Procedures ("the DACA SOP") set forth the procedures that U.S. Citizenship and Immigration Services ("USCIS") must follow in both granting and terminating DACA. *See DACA SOP* at 16; *see also Colotl v. Kelly*, 261 F. Supp. 3d 1328, 1334 (N.D. Ga. 2017) ("The SOP states that it is applicable to all personnel performing adjudicative functions and the procedures to be followed are not discretionary.").

B. DACA Revocation

Ron Thomas, an official within USCIS, previously attested that the agency "automatically terminates DACA" upon the issuance of a Notice to Appear ("NTA")[1] in immigration court, a

[1] An NTA is issued as a predicate step to commencing removal proceedings. *See* 8 U.S.C. § 1229(a) ("In removal proceedings under section 1229a of this title, written notice (in this section referred to as a 'notice to appear') shall be given in person to the alien . . ."). In general, "[a]liens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Arizona v. United States*, 567 U.S. 387, 396 (2012); *see also* 8 U.S.C. §§ 1182(a), 1227(a).

practice that has been in place since 2013. *See Declaration of Ron Thomas*, Dkt. # 23-2 ("*Thomas Decl.*"), ¶ 4. He also illustrated the scope of automatic DACA terminations, noting that "a more fulsome review of all automatic terminations of DACA would . . . involve a manual review of hundreds of cases." *Id.* ¶ 5.

Plaintiffs argue that automatic terminations following the issuance of an NTA are "unlawful," noting two "systemic policies and practices." *Cert. Mot.* 6:4–5. First, Plaintiffs contend that the "practice of revoking DACA without providing notice, a reasoned explanation, an opportunity to be heard prior to revocation, or a process for reinstatement where the revocation is in error" violates the DACA SOP, which "do not allow for termination without notice in the vast majority of cases, including in Plaintiffs' and the proposed class members." *Id.* 6:6–14. Second, Plaintiffs note that the practice of revoking DACA automatically upon the issuance of an NTA is fundamentally unsound because all DACA recipients necessarily could be charged with unlawful presence. *See id.* 6:15–25.

C. Plaintiffs' Histories

*i. Plaintiff José Eduardo Gil Robles*

Plaintiff Gil has lived in the United States since 1998 when, at the age of five, he entered the country without inspection at a border crossing. *See Declaration of José Eduardo Gil Robles*, Dkt. # 39-4 ("*Gil Decl.*"), ¶ 1. He eventually settled in Minnesota and graduated from high school in the Minneapolis area, and has five younger siblings, all of whom were born in the United States and are U.S. citizens. *Id.* ¶¶ 2–3. Gil first applied for DACA in 2015; it was granted in August of that year and was valid until August 2017. *Id.* ¶¶ 8–9. In April 2017, he applied for DACA renewal, which was approved and valid until August 13, 2019. *Id.* ¶ 10. Using the work authorization that accompanies DACA, Gil first worked as a baker and then began employment with a logistics company. *Id.* ¶ 11. He also obtained a Social Security Number and a driver's license. *Id.* ¶ 13.

The parties do not dispute that Gil was arrested in September 2017; however, they characterize the nature of that arrest very differently. Plaintiffs assert that Gil was "charged with a misdemeanor for driving on a cancelled license, which is still pending." *Cert. Mot.* 7:4–5; *Gil Decl.* ¶ 14. To supplement this assertion, Plaintiffs have provided the declaration of Gil's attorney, as well as emails from an Assistant Minneapolis City Attorney indicating that Gil was charged "with the misdemeanor offense of Driving After Cancellation"—*not* "the gross misdemeanor offense of Driving After Cancellation" or "a weapons violation"—and a copy of the complaint issued after his arrest. *See Declaration of Maria Teresa Trafton*, Dkt. # 57-5 ("*Trafton Decl.*"), ¶¶ 1–3, Exs. A, B. Defendants counter that Gil was "arrested and charged

with two felonies, including First Degree Assault and transferring a firearm without a background check to a prohibited person." *Cert. Opp.* 2:23–24; *see also Declaration of Jeremy Anderson*, Dkt. # 53-1 ("*Anderson Decl.*"), ¶ 6.[2] Plaintiffs note that "a minor traffic offense, such as driving without a license," is not, according to a USCIS list of frequently asked questions relating to DACA, "considered a misdemeanor for purposes of this process." *Kwon Decl.* ¶ 20, Ex. 19 at 20. Defendants, however, assert that the more severe offenses with which they claim Gil was charged made him an "enforcement priority," which prompted his DACA termination. *Cert. Opp.* 2:25–27; *Anderson Decl.* ¶ 10.

In any event, Gil was released on bond after the immigration judge determined that he was not a danger to the community. *Gil Decl.* ¶¶ 19–20. However, while in detention, Gil received a notice from USCIS terminating his renewed DACA based on the issuance of an NTA by Immigration and Customs Enforcement ("ICE"). *Gil Decl.* ¶¶ 22–23, 30, Ex. B. The notice reported that his DACA and employment authorization "terminated automatically as of the date [his] NTA was issued." *Id.* ¶ 30, Ex. B. No additional notice or explanation was provided, and he was not provided a chance to respond. *Id.* ¶ 23.

*ii. Plaintiff Ronan Carlos De Souza Moreira*

Plaintiff Moreira was born in Brazil and entered the United States in 2006, along with his two brothers and mother, on a visitor's visa. *See Declaration of Ronan Carlos De Souza Moreira*, Dkt. # 39-3 ("*Moreira Decl.*"), ¶ 1. His mother is a Legal Permanent Resident and his older brother is a U.S. citizen. *Id.* ¶ 5. Moreira attended public schools in Marietta, Georgia and graduated from high school in 2012. *Id.* ¶ 2. He first applied for DACA in 2013, and applied for and received renewals in 2015 and 2017. *Id.* ¶ 7. In August 2014, after leaving college due to his finances and working several temporary jobs, Moreira began his employment at a flooring company, eventually becoming a manager. *Id.* ¶¶ 4, 9.

Although both parties contend that Moreira was arrested in November 2017, they again dispute the nature of the offense with which he was charged. Plaintiffs claim that he was "charged with a misdemeanor for possession of an altered identification document, but has not been convicted." *Cert. Mot.* 8:1–2; *Moreira Decl.* ¶¶ 12–14. Defendants contend that this assertion is "incorrect[]," and that instead Moreira "was arrested for Forgery in the First Degree,

[2] Specifically, Defendants claim that Gil "and his companions were engaged in felonious and dangerous behavior, including shooting at people with a BB gun from a car." *Anderson Decl.* ¶ 7. Gil conceded that "one of the passengers in the car when [he] was pulled over had a toy pellet gun and had supposedly shot it from the car window," but at the time of his bond hearing, his lawyer "explained to the judge that the pellet gun was a toy, not a firearm, and that it was not [his]," and that he "did not touch the pellet gun or shoot it." *Gil Decl.* ¶ 18.

a felony." *Cert. Opp.* 3:1–2, 3 n. 1; *see also Declaration of Derrick A. Eleazer*, Dkt. # 53-1 ("*Eleazer Decl.*"), ¶ 3. Plaintiffs counter that although Moreira "was initially arrested on suspicion of forgery, he was never charged with that crime," and provide the criminal accusation filed against Moreira that supports this contention. *Cert. Reply* 4:9–12; *see also Declaration of David Hausman*, Dkt. # 57-3 ("*Hausman Decl.*"), ¶ 2, Ex. A.

As with Gil, Defendants assert that "on the basis of [these] criminal activities . . . [Moreira] had become an enforcement priority," and so ICE issued an NTA. *Eleazer Decl.* ¶ 5. Also like Gil, although Moreira was released on bond, he received a notice from USCIS terminating his DACA due to the NTA, with no additional explanation and without being given an opportunity to respond. *Moreira Decl.* ¶¶ 16, 18–19, 26, Ex. B.

*iii. Plaintiff Jesús Alonso Arreola Robles*

Plaintiff Arreola's background was recounted in the Court's order granting his motion for a preliminary injunction. *See Arreola Order* at 2–3. His experience resembles those of Gil and Moreira in many of the relevant particulars.

*iv. Putative Class Members*

Plaintiffs assert that their experiences "are representative of DACA terminations nationally," and that their counsel are aware "of at least 17 individuals around the country who, in the last ten months alone, have had their DACA and work authorization terminated without notice, a reasoned explanation, or an opportunity to respond, even though they continue to be eligible for DACA." *Cert. Mot.* 8:12–18; *see also Declaration of Katrina L. Eiland*, Dkt. # 39-13 ("*Eiland Decl.*"), ¶¶ 2–14.

Furthermore, Plaintiffs suggest that, "[g]iven that there are currently nearly 700,000 DACA recipients across the country, there are likely at least dozens—if not many more—in the same situation whose stories have not reached Plaintiffs' counsel." *Cert. Mot.* 8:18–21. They point to news stories suggesting that federal immigration authorities are applying increased scrutiny to DACA recipients, "presumably looking for a reason to hold them and revoke their DACA status." *Id.* 9:3–9; *see also Eiland Decl.* ¶¶ 21, 23, Exs. 6, 8. They also note a memorandum issued by former DHS Secretary John Kelly ("the Kelly Memo"), which read that "Department personnel should prioritize removable aliens" who have only been "charged with," not necessarily convicted of, "any criminal offense that has not been resolved." *Id.* ¶ 18, Ex. 3 at 2. Although DACA recipients are expressly exempt from the Kelly Memo's expanded priorities, *see Colotl*, 261 F. Supp. 3d at 1343 ("[T]he Kelly Memo, by its own terms, has no application to

the DACA program."), Plaintiffs claim that USCIS has nevertheless targeted individuals who remain eligible for DACA, in violation of the DACA SOP. *Cert. Mot.* 10:7–10.

Defendants argue that the relevant details of at least three of the identified class members are distinct from Plaintiffs'. Jessica Colotl, for instance, is mentioned by Plaintiffs as a potential class member. *See Eiland Decl.* ¶ 7. Defendants note that she "is not subject to DACA termination" because, following the issuance of a preliminary injunction in a separate action, USCIS reinstated her previous DACA grant, which subsequently expired. USCIS denied Colotl's renewal request "after providing her with notice of its intent to do so, and an opportunity to respond." *Cert. Opp.* 3:12–17. Felipe Abonza Lopez, also cited by Plaintiffs, *see Eiland Decl.* ¶ 11, "had his DACA terminated automatically through the issuance of an NTA after [Customs and Border Protection ("CBP")] encountered him engaged in alien smuggling." *Cert. Opp.* 3:18–22.[3] Lastly, Daniel Ramirez Medina, another putative class member, *see Eiland Decl.* ¶ 13, "had his DACA terminated automatically after DHS issued him an NTA based on statements he made indicating gang affiliation." *Cert. Opp.* 4:1–6; *see also Declaration of Michael A. Melendez*, Dkt. # 53-1 ("*Melendez Decl.*"), ¶¶ 4–5.[4]

D. Procedural History

Plaintiffs Inland Empire – Immigrant Youth Collective and Arreola originally filed their class action complaint on October 5, 2017. *See* Dkt. # 1. The following month, on November 20, 2017, the Court granted Arreola's motion for a preliminary injunction, enjoining USCIS's decision to terminate his DACA. *See Arreola Order* at 15–16.

Plaintiffs now move to certify a class under Federal Rule of Civil Procedure 23(b)(2), consisting of

> [a]ll recipients of Deferred Action for Childhood Arrivals ("DACA") who, after January 19, 2017, have had or will have their DACA grant and employment authorization revoked without notice or an opportunity to respond, even though they have not been convicted of a disqualifying criminal offense.[5]

[3] Plaintiffs counter that "like Mr. Arreola, Mr. Abonza Lopez was not charged with any crime, and USCIS terminated his DACA based on the issuance of an NTA charging him with unlawful presence." *Cert. Reply* 4:16–18.

[4] Plaintiffs contend that "[p]roposed class member Daniel Ramirez Medina likewise was never charged with any crime, and USCIS terminated his DACA based on an NTA charging him with unlawful presence." *Cert. Reply* 4:19–24.

[5] In their first amended complaint, Plaintiffs also propose an "Enforcement Priority" Class. *See* Dkt. # 32, ¶ 169. However, that proposed class is not at issue in the pending motion. *See Cert.*

*Cert. Mot.* 3:6–10. They also ask this Court "to grant a classwide preliminary injunction; vacate and enjoin Defendants' unlawful revocation of Plaintiff[] Gil's, Plaintiff Moreira's, and proposed class members' DACA and work permits; and enjoin Defendants from revoking Plaintiffs' and proposed class members' DACA and work permits pursuant to their unlawful policies and practices in the future." *PI Mot.* 2:14–18.

## II. Legal Standard

### A. Motion for Class Certification

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citing *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). "In order to justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Dukes*, 564 U.S. at 348–49 (internal quotation marks omitted).

In a motion for class certification, the burden is on the plaintiffs to make a prima facie showing that class certification is appropriate, *see In re N. Dist. of Cal. Dalkon Shield IUD Liab. Litig.*, 693 F.2d 847, 854 (9th Cir. 1982), and the Court must conduct a "rigorous analysis" to determine the merit of plaintiffs' arguments. *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). Plaintiffs must be prepared to "prove" that there are "*in fact*" sufficiently numerous parties or that common questions exist, and frequently this will require some "overlap with the merits of the plaintiff's underlying claim." *Dukes*, 564 U.S. at 350 (emphasis in original). Rule 23 does not, however, grant the court license to "engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 465–66 (2013). "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 466 (citing *Dukes*, 564 U.S. at 351 n. 6).

Federal Rule of Civil Procedure 23 governs the maintenance of class actions in federal court. Rule 23(a) ensures that the named plaintiffs are "appropriate representatives of the class whose claims they wish to litigate." *Dukes*, 564 U.S. at 349. Plaintiffs must satisfy all of Rule 23(a)'s four requirements—numerosity, commonality, typicality, and adequacy—and at least one of the requirements of Rule 23(b). *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979–80 (9th Cir. 2011).

### B. Motion for Preliminary Injunction

*Mot.* 3 n. 2.

A preliminary injunction is an "extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689 (2008). A party seeking a preliminary injunction must make a "clear showing" of: (1) a likelihood of success on the merits, (2) a likelihood of irreparable injury to the plaintiff if injunctive relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) an advancement of the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20, 22 (2008).

## III. Discussion

### A. Motion for Class Certification

Plaintiffs move to certify a class under Rule 23(b)(2), which can be maintained if the Rule 23(a) factors are satisfied and "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

As a threshold matter, in their opposition to class certification, Defendants devote a considerable amount of ink to describing, among other things, the Immigration and Nationality Act ("INA") and the powers vested to DHS regarding immigration policy; deferred action and prosecutorial discretion; and USCIS's authority to grant DACA and CBP's and ICE's abilities to issue NTAs. *See Cert. Opp.* 7:17–13:7. Some of this information is useful at the class certification stage; specifically, when it is "relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 568 U.S. at 466. However, beyond that limited function, these arguments will not be used for the purpose of assessing the merits of Plaintiffs' claims generally, because "[w]hether class members could actually prevail on the merits of their claims is not a proper inquiry in determining" preliminary questions relating to class certification. *Stockwell v. City & Cty. of S.F.*, 749 F.3d 1107, 1112 (9th Cir. 2014) (internal quotation marks omitted).[6]

The Court will first consider the Rule 23(a) factors before examining whether Rule 23(b)(2) is satisfied.

#### *i. Rule 23(a)*

[6] Defendants vigorously contest the Court's jurisdiction over this action. *See Cert. Opp.* 4:8–19; *PI Opp.* 6:6–13:17. Because the Court concludes that it has jurisdiction, *see* Part III.B.i.a below, it will proceed with consideration of class certification.

The Court will analyze each of Rule 23(a)'s four requirements—numerosity, commonality, typicality, and adequacy—in turn.

*a. Numerosity*

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). There is no fixed number which satisfies the numerosity requirement; it "requires examination of the specific facts of each case and imposes no absolute limitations." *General Tel. Co. of Nw., Inc. v. Equal Emp't Opportunity Comm'n*, 446 U.S. 318, 330 (1980). In general, however, "courts find the numerosity requirement satisfied when a class includes at least 40 members." *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010). When, as here, plaintiffs seek injunctive or declaratory relief, "the numerosity requirement is relaxed and plaintiffs may rely on the reasonable inference arising from plaintiffs' other evidence that the number of unknown and future members of [the proposed class] is sufficient to make joinder impracticable." *Sueoka v. United States*, 101 F. App'x 649, 653 (9th Cir. 2004); *see also Arnott v. U.S. Citizenship & Immigration Servs.*, 290 F.R.D. 579, 586 (C.D. Cal. 2012) ("[W]ith . . . additional future members likely to be added, Plaintiffs have shown sufficient numerosity to satisfy the requirements of Rule 23(a)(1).").

Here, "Plaintiffs' counsel is aware of at least 17 DACA recipients who, in the last ten months alone, have had their DACA terminated without notice or process, despite remaining eligible for the program," and estimates that, given the increased rate of DACA revocations and increased scrutiny on the part of federal immigration authorities, there are likely "at least dozens—if not many more—who have already had their DACA terminated." *Cert. Mot.* 11:25–12:5. Since filing their motion, Plaintiffs "have learned of five additional individuals who have had their DACA terminated without process despite remaining eligible, bringing the total number of known affected DACA recipients to 22." *Cert. Reply* 9 n. 8; *see also Second Declaration of Katrina L. Eiland*, Dkt. # 57-1 ("*Second Eiland Decl.*"), ¶¶ 3–8.

*1. Identified Class Members*

To begin, Defendants challenge whether the identified DACA recipients can be properly considered as members of the proposed class. *See Cert. Opp.* 17:20–18:1. As discussed above, Defendants suggest that Plaintiffs Gil and Moreira were charged with felonies and so *have* been "convicted of a disqualifying criminal offense," which thus puts them outside the definition of the proposed class. However, the evidence provided by Plaintiffs in the form of arrest records and declarations creates at least the plausible suggestion that Defendants are "attempt[ing] to rely on improper post hoc rationalizations." *Cert. Reply* 4:25–26. The same inference applies to proposed class members Abonza Lopez and Medina, both of whom, Plaintiffs maintain, have *not*

committed disqualifying criminal offenses and are thus proper class members. Consequently, the Court cannot assume, as Defendants do, that "at least seven of the 17 individual Plaintiffs . . . are not properly considered members of the class Plaintiffs seek to certify." *Cert. Opp.* 17:20–22.

Defendants also challenge whether even proposed class members who have *not* committed disqualifying offenses can properly be included in the class. As they explain, "Plaintiffs indicate only that they are aware that these individuals lost DACA despite having no 'disqualifying criminal convictions,' which . . . is insufficient to determine whether each individual received process or whether the DACA SOP provides for process prior to termination in their cases." *Id.* 18:2–6. As a result, Defendants claim that "each claim would have to be assessed individually." *Id.* 18:7–8. The Court disagrees.

Whether the DACA SOP permit automatic revocation in cases where a DACA recipient has committed no disqualifying offense is essentially a merits question, and not one that ought to be fully resolved at this time. However, it can nevertheless be considered because numerosity "overlap[s] with the merits of the plaintiff's underlying claim." *Dukes*, 564 U.S. at 350.

Defendants assert that the relevant guidelines permit automatic termination of DACA whenever immigration authorities issue an NTA. *See Cert. Opp.* 11:19–12:6 ("[P]ursuant to the DACA SOP and Appendix I, and in conjunction with the NTA Memo, when USCIS discovers certain conduct that suggests DACA should be terminated, USCIS should refer such conduct to ICE, who may issue an NTA that automatically terminates DACA, with no additional notice or opportunity to respond."). The Court, however, has previously rejected this argument, noting that "Defendants point to no provision in the DACA SOPs that permits automatic termination as a result of an NTA based on unauthorized presence." *Arreola Order* at 11. Indeed, the Court determined that "[t]here appears to be only one narrow circumstance in which automatic termination based on an NTA is appropriate—when an NTA is issued after USCIS determines that a disqualifying offense or public safety concern is deemed to be 'Egregious Public Safety' ["EPS"]." *Id.* (citing *DACA SOP* at 137).[7] Otherwise, "'unless there are criminal, national security, or public safety concerns,' the DACA termination guidelines prescribe the issuance of a Notice of Intent to Terminate and require that '[t]he individual should be allowed 33 days to file a brief or statement contesting the grounds cited.'" *Arreola Order* at 11 (quoting *DACA SOP* at 137–38) (alteration in original); *see also Gonzalez Torres v. U.S. Dep't of Homeland Sec.*, No. 17cv1840 JM(NLS), 2017 WL 4340385, at *3 (S.D. Cal. Sept. 29, 2017) ("[E]xcept in EPS

[7] An EPS case is defined by USCIS and ICE as a case "where information indicates [that an] alien is under investigation for, has been arrested for (without disposition), or has been convicted of" murder, rape, sexual abuse, firearms trafficking, human rights violations, or various other serious offenses. *See Kwon Decl.* ¶ 22, Ex. 21 at 3–4.

cases, the DACA SOP requires notice and an ability to contest the [Notice of Termination] before DACA status may be terminated.").

Similarly, Defendants argue that "DACA also terminates automatically if a DACA recipient travels outside the United States . . . without first receiving advance parole" or if "DHS deems a DACA recipient an enforcement priority or when USCIS finds that a person is an EPS concern but ICE declines to issue an NTA." *Cert. Opp.* 15:4–9. While these assertions are both true to an extent—the "enforcement priority" exception *also* requires a "process of referring the case to multiple entities for various determinations prior to termination," *Colotl*, 261 F. Supp. 3d at 1342—Defendants do not claim that any of the identified class members either left the country impermissibly or received proper process after being deemed enforcement priorities.

Defendants do not suggest, and there is no indication in the record, that either the named Plaintiffs or any of the proposed class members received an NTA on the basis of an EPS determination, because they left the country without following the proper procedure, or were deemed an enforcement priority and received the required determination process. Therefore, because Plaintiffs did not commit disqualifying criminal offenses, they were entitled to notice and an opportunity to respond, and so are properly members of the proposed class.

*2. Potential Class Members*

Even if all 22 of the identified class members are included, however, satisfaction of the numerosity requirement is not a foregone conclusion. As mentioned, the Ninth Circuit has noted that numerosity is "satisfied when a class includes at least 40 members," *Rannis*, 380 F. App'x at 651, and smaller classes have been deemed insufficient. *See, e.g.*, *Harik v. California Teachers Ass'n*, 326 F.3d 1042, 1051 (9th Cir. 2003) (rejecting classes of seven, nine, and ten members because "[t]he Supreme Court has held fifteen is too small"); *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988) ("As a general rule, classes of 20 are too small, classes of 20–40 may or may not be big enough depending on the circumstances of each case, and classes of 40 or more are numerous enough."). However, in addition to the 22 identified members, Plaintiffs have made a compelling case that the number is likely higher, *see Cert. Mot.* 11:28–12:5, and "courts have held that [w]here the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied." *Cervantez v. Celestica Corp.*, 253 F.R.D. 562, 569 (C.D. Cal. 2008) (alteration in original and internal quotation marks omitted).

Plaintiffs also note that their "proposed class also includes individuals who *will have* their DACA terminated without notice or process, despite continuing to be eligible, if Defendants' policies and practices are not enjoined." *Cert. Mot.* 12:19–21 (emphasis in

original). Considering that there are hundreds of thousands of DACA recipients across the country, and the admission that USCIS "automatically terminates DACA" upon the issuance of an NTA, *Thomas Decl.* ¶ 4, the Court agrees that an inference of future class members is reasonable. Moreover, the presence of future class members renders joinder inherently impractical, thus satisfying the numerosity requirement's fundamental purpose. *See, e.g.*, *Sueoka*, 101 F. App'x at 653 ("Because plaintiffs seek injunctive and declaratory relief, the numerosity requirement is relaxed and plaintiffs may rely on the reasonable inference arising from plaintiffs' other evidence that the number of unknown and future members of proposed [class] is sufficient to make joinder impracticable."); *Ali v. Ashcroft*, 213 F.R.D. 390, 408–09 (W.D. Wash. 2003) (quoting *National Ass'n of Radiation Survivors v. Walters*, 111 F.R.D. 595, 599 (N.D. Cal. 1986)) ("[W]here the class includes unnamed, unknown future members, joinder of such unknown individuals is impracticable and the numerosity requirement is therefore met, regardless of class size.") (internal quotation marks omitted); *Hawker v. Consovoy*, 198 F.R.D. 619, 625 (D.N.J. 2001) ("The joinder of potential future class members who share a common characteristic, but whose identity cannot be determined yet is considered impracticable."); *Smith v. Heckler*, 595 F. Supp. 1173, 1186 (E.D. Cal. 1984) ("[S]pecial consideration applies to actions seeking declaratory or injunctive relief against conduct that is likely to cause future harm. Joinder in the class of persons who may be injured in the future has been held impracticable, without regard to the number of persons already injured.").

Courts within this Circuit have certified classes with a similar number of known class members, particularly when, as here, the class might also include unknown present and future class members. *See, e.g.*, *Saravia v. Sessions*, No. 17-cv-03615-VC, 2017 WL 5569838, at *21 (N.D. Cal. Nov. 20, 2017) (certifying nationwide class of unaccompanied minors based on evidence of 15 known members and likelihood of future members); *Chief Goes Out v. Missoula Cty.*, No. CV 12-155-M-DWM, 2013 WL 139938, at *3 (D. Mont. Jan. 10, 2013) (certifying class of 18 members because "small classes may satisfy the numerosity requirement where, as here, the class includes both ascertainable members and a fluid composition of future, unidentified members"). Based on the class members identified by Plaintiffs and the likelihood of both unknown and future members, the Court concludes that joinder is impracticable, and so the numerosity requirement is satisfied.

*b. Commonality*

Under Rule 23(a)(2), Plaintiffs must show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This means that the class members' claims must "depend on a common contention." *Dukes*, 564 U.S. at 350. "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation."

*Id.* "[E]ven a single [common] question will do." *Id.* at 359 (internal quotation marks omitted). Thus, Rule 23(a)(2) requires not just a common question, but one that is "capable of classwide resolution." *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1052 (9th Cir. 2015). The Ninth Circuit has held that "in a civil-rights suit, [] commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001).

Here, Plaintiffs have identified a number of legal questions common to the proposed class, including whether Defendants' practice of terminating DACA without notice and an opportunity to be heard violates their internal rules and the Administrative Procedure Act ("APA"), and whether the practice violates the due process clause of the U.S. Constitution. *Cert. Mot.* 14:14–15:4. These common issues are sufficient to satisfy the requirement's permissive standard. *See Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 257 (C.D. Cal. 2008) ("Courts have found that a single common issue of law or fact is sufficient to satisfy the commonality requirement."). The Court also agrees with Plaintiffs that the class members share a common core of facts, such as the DACA program's requirements and procedures. *See Cert. Mot.* 15:11–16. As for the requirement that class members "have suffered the same injury," *Dukes*, 564 U.S. at 349–50, the narrow tailoring of the class definition—to include only those individuals who lost their DACA without notice and did not commit disqualifying criminal offenses—ensures commonality of injury. Given this commonality, should the Court decide that Defendants' practices violate the APA or due process clause, the requested relief—a nationwide injunction preventing termination of DACA pursuant to those practices—would benefit the entire class. Therefore, the common answers to the legal questions presented would "drive the resolution of the litigation." *Ellis*, 657 F.3d at 981 (quoting *Dukes*, 564 U.S. at 350).

In opposition, Defendants primarily argue that "[d]etermining whether an individual's DACA terminated because of the issuance of an NTA or because of some other discretionary decision would require precisely the type of individualized analysis the Supreme Court recognized could prevent a finding of commonality." *Cert. Opp.* 20:22–25 (citing *Dukes*, 564 U.S. at 350). This argument, though, is premised on a flawed assumption—specifically, that automatic termination of DACA is acceptable in a variety of circumstances, such that the proposed class definition is impermissibly overbroad. While there are some instances in which the DACA SOP might permit automatic termination of a potential class member's DACA—for example, if the class member received an EPS designation or traveled abroad without following the proper procedure—the Court agrees with Plaintiffs that such cases likely constitute a "very small number of individuals." *Cert. Reply* 6 n. 5. Plaintiffs note that, as a practical matter, most individuals who are deemed EPS would have also been convicted of a disqualifying crime and would therefore be excluded from the class definition; indeed, Defendants have not identified a single potential class member whose DACA was terminated due to EPS but did *not* commit a

disqualifying criminal offense. *See id.* 6:17–22. Furthermore, even if the proposed class were to include some members whose DACA were properly terminated, this alone would not defeat certification, because "[w]here the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012); *see also Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) ("Differences among the class members with respect to the merits of their actual document fraud cases, however, are simply insufficient to defeat the propriety of class certification. What makes the plaintiffs' claims suitable for a class action is the common allegation that the INS's procedures provide insufficient notice."). The Ninth Circuit has noted that "even a well-defined class may inevitably contain some individuals who have suffered no harm as a result of a defendant's unlawful conduct." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016); *see also id.* (distinguishing between "the possibility that an injurious course of conduct may sometimes fail to cause injury to certain class members" and "a flaw that may defeat predominance, such as the existence of large numbers of class members who were never *exposed* to the challenged conduct to begin with") (emphasis in original).[8]

This same analysis applies to DACA recipients who are reclassified as enforcement priorities. According to the DACA SOP,

> If after consulting with ICE, USCIS determines that exercising prosecutorial discretion after removal has been deferred under DACA is not consistent with the Department of Homeland Security's enforcement priorities, and ICE does not plan to issue an NTA, the officer should refer the case to HQSCOPS [Headquarters Service Center Operations], though [sic] the normal chain of command, to determine whether or not a NOIT [Notice of Termination] is appropriate.

*DACA SOP* at 138. At that point, DACA may be terminated without additional notice or an opportunity to respond, but *only if* this procedure is followed. *See Colotl*, 261 F. Supp. 3d at 1342; *DACA SOP* at 138 (titling this section "Enforcement Priority – DACA *Not* Automatically Terminated") (emphasis added). Defendants claim that some proposed class members, including Plaintiffs Gil and Moreira, had their DACA terminated because they were determined to be enforcement priorities. However, there is no indication that the above procedure was followed in their cases, which would mean that the automatic termination of their DACA grants would be

[8] For this reason, the Court declines Plaintiffs' invitation to "modify the class definition," *Cert. Reply* 6 n. 5, even though it retains this prerogative. *See Armstrong*, 275 F.3d at 871 n. 28 ("Where appropriate, the district court may redefine the class.").

subject to the same legal questions as other class members. In addition, even if this procedure *were* followed in some class members' cases, that alone would not preclude certification.[9]

Whatever factual dissimilarities that may exist among the proposed class members do not prevent class certification; as Plaintiffs note, their claims "challenge Defendants' common termination policies and practices as categorically violating the APA and the Due Process Clause—not the agency's ultimate exercise of discretion with respect to each recipient." *Cert. Mot.* 16:15–19. Because these issues create common legal questions amenable to common answers, Rule 23(a)'s commonality requirement is satisfied.

*c. Typicality*

Rule 23(a)(3) requires that the named Plaintiffs' claims be typical of the claims of the class. *See* Fed. R. Civ. P. 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). The danger that this requirement is meant to guard against is that "absent class members will suffer if their representative is preoccupied with [claims or defenses] unique to it." *Ellis*, 657 F.3d at 984. To meet the typicality requirement, Plaintiffs must therefore establish that other class members have the same or similar injury as them; that the action is based on conduct that is not unique to them as the named Plaintiffs; and that other class members have been injured by the same course of conduct. *See id.*

The Court agrees that Plaintiffs' claims are typical of the claims of the proposed class. Each Plaintiff, like each member of the proposed class, had valid DACA and work authorization that USCIS terminated without notice or an opportunity to be heard, and now claims that this practice violates the APA and the due process clause. *See Cert. Mot.* 17:11–16. Plaintiffs' claims are thus reasonably co-extensive with the other class members'.

Defendants' challenge to the typicality requirement, by their admission, "essentially mirrors its argument that Plaintiffs failed to meet their commonality requirement." *Cert. Opp.* 22 n. 9. This is not surprising, since "[t]he commonality and typicality requirements of Rule

[9] Defendants also suggest another commonality obstacle: that "[o]ther putative class members may be in removal proceedings as a result of termination of their DACA by NTA issuance, and some may even have an administratively filed order of removal or have already been removed." *Cert. Opp.* 21:17–20. However, an individual who is in removal proceedings is still eligible for DACA, *see Napolitano Memo* at 3, and so may challenge the legality of future revocation. As for those who have already been removed, Plaintiffs note that "individuals who obtain a lawful immigration status or are deported have no need for DACA." *Cert Reply* 8 n. 7.

23(a) tend to merge" because "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Tel.*, 457 U.S. at 157 n. 13. Consequently, Defendants' typicality challenge fails to the same extent as their commonality challenge. Even if the named Plaintiffs' individual cases contain some factual variations, that does not change the fact that all are challenging the legality of Defendants' DACA revocation practices under the APA and due process clause. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) ("The particular characteristics of the Petitioner or any individual detainee will not impact the resolution of this general statutory question and, therefore, cannot render Petitioner's claim atypical"); *Ali*, 213 F.R.D. at 409 (citing *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 914 (9th Cir. 1964)) ("[T]ypicality is not defeated if there are legal questions common to all class members."). As discussed above, Defendants' contention that Plaintiffs Gil and Moreira were eligible for automatic revocation because of their enforcement priority findings is inconsistent with the DACA SOP, which specifically indicates that DACA is *not* automatically terminated in those situations. *See DACA SOP* at 138. If their DACA grants were terminated without following the proper procedure, or if the enforcement priority finding was a post hoc rationalization, then their challenges under the APA and due process clause would be "reasonably coextensive" with the other class members'; again, "they need not be substantially identical." *Hanlon*, 150 F.3d at 1020.

Because Plaintiffs' claims raise the same legal issues as the proposed class members', and because minor factual variations need not prevent certification, the Court concludes that the typicality requirement is satisfied.

*d. Adequacy*

Rule 23(a)(4) requires Plaintiffs to show that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Representation is adequate when the class representatives do not have any conflicts of interest with other class members, and the Court is confident that the representative plaintiffs will prosecute the action "vigorously on behalf of the class." *Evon*, 688 F.3d at 1031. A district court should evaluate whether the class representatives have a sufficient stake in the outcome of the litigation, and whether the class representatives have interests antagonistic to the unnamed class members. *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992). In addition, the district court should inquire into the zeal and competence of class representatives' counsel. *See id.*

To begin, neither Defendants nor the Court questions the competence of Plaintiffs' counsel, who have acquitted themselves well during this litigation and have demonstrated the

experience and resources necessary to pursue this matter to completion. *See Declaration of Jennifer Chang Newell*, Dkt. # 39-3 ("*Newell Decl.*"), ¶¶ 2–27. Plaintiffs further note that "[a]ttorneys from the ACLU Immigrations' Rights Project and ACLU of Southern California have been appointed class counsel and successfully litigated similar class action lawsuits in this district and in courts across the country." *Cert. Mot.* 18:11–19; *see also Rodriguez*, 591 F.3d at 1111; *Garcia v. Johnson*, No. 14-cv-01775-YGR, 2014 WL 6657591, at *15 (N.D. Cal. Nov. 21, 2014) (finding Plaintiffs' counsel "experienced in protecting the interests of noncitizens and handling complex and class action litigation, including litigation on behalf of immigration detainees").

Instead, Defendants challenge the adequacy of the named Plaintiffs. They suggest that "the three named Plaintiffs are not properly part of the class that Plaintiffs seek[] to certify," *Cert. Opp.* 24:15–16, and although it is true that this Court issued a preliminary injunction restoring Arreola's DACA, *see Arreola Order* at 15–16, as discussed above, the fact that Gil and Moreira were purportedly designated as enforcement priorities does not alter their challenges to Defendants' practices under the APA and due process clause. Defendants also argue that class certification is inappropriate because "the claims of each of the named Plaintiffs is subject to dismissal," *Cert. Opp.* 24:10–25, and cite to *Lierboe v. State Farm Mutual Automobile Insurance Co.*, 350 F.3d 1018 (9th Cir. 2003), in which the Ninth Circuit determined that a class could not be certified when the class representative did not have standing. *Id.* at 1022–23. However, as discussed in Part III.B.i.a below, the Court concludes that it has jurisdiction to hear this case, and it has not ruled to dismiss any of the named Plaintiffs from this action. Accordingly, *Lierboe* does not present the Court with a compelling reason to deny certification.

Finally, Defendants suggest that proposed class members might have "divergent interests," noting that at least two of the identified class members have already initiated proceedings on their own behalves, and that "many other putative class members, even with ongoing removal proceedings, may be able to reapply for DACA and could receive additional process." *Cert. Opp.* 24:26–25:14. As to the first point, the Court does not see how other suits undertaken by potential class members create divergent interests here, and Defendants do not identify any specific conflict. As for the *possibility* that class members might reapply for DACA and receive additional process in the future, "this circuit does not favor denial of class certification on the basis of speculative conflicts." *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003). Moreover, even if some class members receive relief in the future, certification under Rule 23(b)(2) is "appropriate for cases where plaintiffs bring a class action on behalf of a shifting population." *Perez-Olano*, 248 F.R.D. at 259 (internal quotation marks omitted).

In short, because the Court concludes that the named Plaintiffs and their counsel will

fairly and adequately protect the interests of the class, the adequacy requirement of Rule 23(a) is satisfied.

*ii. Rule 23(b)(2)*

Because the four requirements of Rule 23(a) are satisfied, the Court will now consider whether certification is appropriate under Rule 23(b)(2).

Certification of a class under Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The Ninth Circuit has held that "'it is sufficient' to meet the requirements of Rule 23(b)(2) [when] 'class members complain of a pattern or practice that is generally applicable to the class as a whole.'" *Rodriguez*, 591 F.3d at 1125 (quoting *Walters*, 145 F.3d at 1047). Rule 23(b)(2) "was adopted in order to permit the prosecution of civil rights actions." *Walters*, 145 F.3d at 1047; *see also Lyon v. U.S. Immigration & Customs Enf't*, 308 F.R.D. 203, 213 (N.D. Cal. 2015). "The rule does not require [the Court] to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez*, 591 F.3d at 1125; *see also Dukes*, 564 U.S. at 360 ("The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.") (internal quotation marks omitted).

*a. Proposed Class*

The Court agrees that "Rule 23(b)(2)'s requirements are plainly met" here. *Cert. Mot.* 21:23. Plaintiffs ask the Court to declare that Defendants' termination policies and practices, which have impacted the proposed class, are unlawful, and to enjoin USCIS from enforcing unlawful DACA terminations and unlawfully terminating DACA in the future. *See generally PI Mot*. Plaintiffs contend that

> [t]his relief would benefit Plaintiffs as well as all members of the proposed classes in the same fashion. No individual class member would be entitled to a different injunction or declaratory judgment. The requested relief would address these policies or practices in a single stroke, and thus the proposed class plainly warrants certification under Rule 23(b)(2).

*Cert. Mot.* 22:4–8. The Court agrees. *See Parsons v. Ryan*, 754 F.3d 657, 689 (9th Cir. 2014) ("[E]very [member] in the proposed class is allegedly suffering the same (or at least a similar) injury and that injury can be alleviated for every class member by uniform changes in . . . policy and practice."); *Rodriguez*, 591 F.3d at 1126 (certifying class of immigrant detainees under Rule 23(b)(2) where "relief from a single practice is requested by all class members").

The Court also agrees that nationwide certification is appropriate, given the centralized nature and scope of Defendants' practices. The potential class members identified by Plaintiffs come from various states, including Texas, Louisiana, Georgia, Minnesota, South Dakota, North Carolina, New Jersey, and California. *See Cert. Mot.* 22:17–20; *Eiland Decl.* ¶¶ 2–14; *Second Eiland Decl.* ¶¶ 3–8. Furthermore, there are currently nearly 700,000 DACA recipients in all 50 states, *see Eiland Decl.* ¶ 48, Ex. 33, and Defendants have indicated that USCIS has a practice of automatically terminating individual DACA grants upon the issuance of an NTA. *See Thomas Decl.* ¶ 4. Accordingly, to certify a class that is *not* nationwide in scope might result in the application of unlawful practices based solely on geographic location, a piecemeal situation that would lead to arbitrary results. *See Arnott*, 290 F.R.D. at 589 (quoting *Califano*, 442 U.S. at 702) (certifying nationwide class after noting that "the interests of judicial efficiency, economy, and equity weigh in favor of class certifications that offer relief 'dictated by the extent of the violation established, not by the geographical extent of the plaintiff class'"); *Gorbach v. Reno*, 181 F.R.D. 642, 644 (W.D. Wash. 1998) ("[A]nything less [than] a nationwide class would result in an anomalous situation allowing the INS to pursue denaturalization proceedings against some citizens, but not others, depending on which district they reside in.").

*b. Ascertainability*

Defendants challenge certification under Rule 23(b)(2) on ascertainability grounds, arguing that "[n]ot only must the challenged practice apply to all class members, but it must be readily ascertainable that the practice has injured every member." *Cert. Opp.* 13:16–17. To begin, the cases cited by Defendants for this proposition are inapposite, because each concerned, in whole or at least in part, class certification under Rule *23(b)(3)*, not *23(b)(2)*. *See Santos v. TWC Admin. LLC*, No. CV 13-04799 MMM (CWx), 2014 WL 12558009, at *11 (C.D. Cal. Aug. 4, 2015); *Colapinto v. Esquire Deposition Servs., LLC*, Nos. CV 09-07584 SJO (PLAx), SACV 10-00297 SJO (PLAx), 2011 WL 913251, at *7 (C.D. Cal. Mar. 8, 2011); *Flores v. CVS Pharmacy, Inc.*, No. 2:07-cv-05326-JHN-Ex, 2010 WL 3656807, at *7 (C.D. Cal. Sept. 7, 2010). As for Rule 23(b)(2), the Ninth Circuit has not yet ruled whether the judicially implied ascertainability requirement applies to it, *see In re Yahoo Mail Litig.*, 308 F.R.D. 577, 597 (N.D. Cal. 2015), but other circuits have concluded that it does *not*. *See Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016) ("The decisions of other federal courts and the purpose of Rule 23(b)(2) persuade us that ascertainability is not an additional requirement for certification of a

(b)(2) class seeking only injunctive and declaratory relief."); *Shelton v. Bledsoe*, 775 F.3d 554, 563 (3d Cir. 2015) ("The nature of Rule 23(b)(2) actions, the Advisory Committee's note on (b)(2) actions, and the practice of many [] other federal courts all lead us to conclude that ascertainability is not a requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief."); *Shook v. El Paso Cty.*, 386 F.3d 963, 972 (10th Cir. 2004) ("[M]any courts have found Rule 23(b)(2) well suited for cases where the composition of a class is not readily ascertainable; for instance, in a case where the plaintiffs attempt to bring suit on behalf of a shifting [] population."); *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972) (determining that ascertainability is a requirement under Rule 23(b)(3) but not Rule 23(b)(2)).

However, even if the ascertainability requirement were to apply to this proposed class, the Court concludes that it would be satisfied because it is "administratively feasible" to ascertain whether an individual is a member. *Greater L.A. Agency on Deafness, Inc. v. Reel Servs. Mgmt. LLC*, No. CV 13-7172 PSG (ASx), 2014 WL 12561074, at *5 (C.D. Cal. May 6, 2014). As discussed above, this is not a case where rigorous, individualized inquiries are necessary. Membership in the class is defined by (1) the nature of an individual's DACA revocation, and (2) whether that individual has been convicted of a disqualifying criminal offense. Accordingly, the definition is "precise, objective, and presently ascertainable." *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998). That some administrative effort is required does not preclude certification. *See, e.g.*, *Moreno v. Napolitano*, No. 11 C 5452, 2014 WL 4911938, at *6–7 (N.D. Ill. Sept. 30, 2014) (quoting *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 539 (6th Cir. 2012)) ("[T]he size of the potential class and the need to review individual files to identify its members are not reasons to deny class certification.").[10]

[10] Defendants also argue that the proposed class is overbroad because it "captures individuals for whom it is necessary to analyze their claims on a case by case basis to determine whether they have similarly been impacted by the policy challenged by the putative class." *Cert. Opp.* 14:12–14; *see also id.* 15:1–17:7 ("The Court here would have to determine not just that an individual's DACA was terminated without advance notice and an opportunity to respond, but the reason why no advance notice and opportunity to respond was provided, and what process was followed prior to termination."). These arguments, as discussed earlier in this order, are based on the flawed premise that automatic DACA termination is a common and permissible feature of the program. However, as the Court has concluded both here and in its prior order, *see generally Arreola Order*, automatic termination is only permissible in what appears to be a relatively small subset of cases. Therefore, the Court is not concerned with overbreadth.

In summation, because the declaratory and injunctive relief sought by Plaintiffs and proposed class members would remedy their injuries as a whole, the Court concludes that certification under Rule 23(b)(2) is appropriate.[11]

*iii. Rule 23(g)*

Plaintiffs' counsel seek to be appointed as Class Counsel. *See Cert. Mot.* 23:12–13.

Under Rule 23(g) of the Federal Rules of Civil Procedure, a district court must appoint class counsel at the time the class is certified, unless otherwise provided by statute. *See* Fed. R. Civ. P. 23(g). The class counsel must fairly and adequately represent the interests of the class, and the court must review the counsel's work in investigating claims, experience in handling class action litigation, and the resources counsel will commit to representing the class. *See* Fed. R. Civ. P. 23(g)(1).

As discussed in Part III.A.i.d above, Plaintiffs' counsel have previously litigated a number of similar class actions, including cases involving immigration law. *See Garcia*, 2014 WL 6657591, at *15. They have also demonstrated that they possess the experience and resources needed to pursue this matter to completion, *see Newell Decl.* ¶¶ 2–27, and have thus far served Plaintiffs well during the course of this litigation. Defendants have provided no challenges to their qualifications, and the Court sees no reason not to appoint Plaintiffs' counsel as Class Counsel.

*iv. Summation*

Because the Court concludes that the proposed class satisfies the requirements of Rule 23(a) and Rule 23(b)(2), it **GRANTS** Plaintiffs' motion for class certification.

[11] The Court's conclusion here is consistent with the decisions of a number of courts that have certified nationwide classes under Rule 23(b)(2) in similar actions challenging the federal government's administration of immigration programs. *See, e.g.*, *Walters*, 145 F.3d at 1053 (affirming certification of nationwide class of individuals challenging adequacy of notice in document fraud cases); *Wagafe v. Trump*, No. C17-0094-RAJ, 2017 WL 2671254, at *16 (W.D. Wash. June 21, 2017) (certifying nationwide class of naturalization applicants challenging national security screening procedures); *Arnott*, 290 F.R.D. at 589 (certifying nationwide class of immigrant investors challenging USCIS's retroactive application of new rules); *Santillan v. Ashcroft*, No. C 04-2686 MHP, 2004 WL 2297990, at *12 (N.D. Cal. Oct. 12, 2004) (certifying nationwide class of lawful permanent residents challenging delays in receiving documentation of their status).

B. Motion for Preliminary Injunction

Much of the discussion that follows mirrors the arguments and analyses presented in the Court's previous order granting Plaintiff Arreola's motion for a preliminary injunction. *See generally Arreola Order*. Defendants repeat many of the same contentions that the Court previously rejected, and give few reasons why it should revise the conclusions it reached at that time. The Court will nevertheless address the arguments for and against the issuance of a preliminary injunction.

*i. Likelihood of Success on the Merits*

*a. Jurisdiction*

As a threshold matter, Defendants challenge this Court's ability to review the revocation of class members' DACA, based on the APA and other statutes.

*1. APA*

Although the APA permits judicial review of agency actions where "there is no other adequate remedy in a court," 5 U.S.C. § 704, Defendants note that the APA precludes review of agency decisions that are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and that the Supreme Court has held that "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Defendants therefore conclude that "individual DACA terminations, especially where based on issuance of NTAs, fall squarely within that category of agency discretion for which judicial review is improper." *PI Opp.* 12:18–20.

The Court disagrees. The jurisdictional bar cited by Defendants applies only where there is "no meaningful standard against which to judge the agency's exercise of discretion." *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868 (9th Cir. 2003) (quoting *Heckler*, 470 U.S. at 830). By contrast, a court can review an agency decision when, like here, there are "statutes, regulations, established agency policies, or judicial decisions that provide a meaningful standard against which to assess" an agency's action. *Mendez-Gutierrez*, 340 F.3d at 868; *see also ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1069 (9th Cir. 2015) (quoting *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003); *Socop-Gonzalez v. Immigration & Naturalization Serv.*, 208 F.3d 838, 844 (9th Cir. 2000)) ("Even where statutory language grants an agency 'unfettered discretion,' its decision may nonetheless be reviewed if regulations or agency practice provide a 'meaningful standard by which this court may review its exercise of discretion.'").

Here, the decision to revoke DACA is governed by both the Napolitano Memo and the DACA SOP, and the Ninth Circuit has repeatedly found that APA jurisdiction exists where "discretion has been legally circumscribed by various memoranda." *Alcaraz v. Immigration & Naturalization Serv.*, 384 F.3d 1150, 1161 (9th Cir. 2004); *see also Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 719 (9th Cir. 2011) (looking to an agency's interim certification standards to "supply the standard against which we can judge the agency's decision-making"); *Mendez-Gutierrez*, 340 F.3d at 868 (noting that the absence of a specific statute or regulation "does not . . . mean that there are no meaningful standards against which to evaluate" an agency's decision where other rules and regulations apply). Other courts that have similarly examined the Napolitano Memo and DACA SOP have also concluded that they contain the sort of detailed policy directives that provide courts with the standards needed to review DACA revocation. *See Gonzalez Torres*, 2017 WL 4340385, at *5 (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Alcaraz*, 384 F.3d at 1162) ("Defendants' failure to follow the termination procedures set forth in the DACA SOP is arbitrary, capricious, and an abuse of discretion."); *Colotl*, 261 F. Supp. 3d at 1340 ("Defendants' argument that § 701(a) of the APA bars this Court from reviewing an agency's non-discretionary review process fails."); *see also Texas v. United States*, 809 F.3d 134, 170 (5th Cir. 2015) (determining that the "grant of lawful presence and accompanying eligibility for benefits is a substantive rule").

In its prior order, the Court noted that Plaintiffs "challenge[] USCIS' determination that [] DACA should be automatically terminated based on CBP's issuance of an NTA, not any eventual enforcement decision in removal proceedings." *Arreola Order* at 5. Because DACA eligibility and revocation are governed by the aforementioned regulations, the Court has a meaningful standard with which to scrutinize the agency's decision, and so judicial review is not barred by the APA. *See Ramirez Medina v. U.S. Dep't of Homeland Sec.*, No. C17-0218RSM, 2017 WL 5176720, at *8 (W.D. Wash. Nov. 8, 2017) ("Defendants' alleged failure to follow the procedures detailed in the DACA SOP does not implicate agency discretion. Therefore, the jurisdiction-stripping provisions of . . . § 701(a) are not applicable to prevent this Court from determining whether Defendants complied with their non-discretionary procedures.").

*2. Section 1252(g)*

Defendants also point to § 1252(g) for their jurisdictional claim, which mandates that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien." 8 U.S.C. § 1252(g). The Supreme Court has explained that § 1252(g) is "directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *Reno*, 525 U.S. at 944 n. 9. Accordingly, Defendants

assert that "because issuance of an NTA and termination of DACA are steps 'leading up to' a final order of removal, they are squarely within the scope of 8 U.S.C. § 1252(g)." *PI Opp.* 8:3–4.

Defendants interpret § 1252(g) too broadly, as evidenced by the Supreme Court's *Reno* decision. There, in response to the "unexamined assumption that § 1252(g) covers the universe of deportation claims—that it is a 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review,'" the Supreme Court opined that "what § 1252(g) says is much narrower." *Reno*, 525 U.S. at 482. It concluded that "[t]he provision applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Id.* (emphasis in original). Section 1252(g) does *not* preclude review of "many other decisions or actions that may be part of the deportation process." *Id.* Consistent with this guidance, the Ninth Circuit has narrowly construed § 1252(g), distinguishing between the narrow category of actions that courts cannot review and those adjacent actions that are within their jurisdiction. In *Alcaraz*, for example, the Ninth Circuit held that even a claim closely related to the initiation of removal proceedings is not barred by § 1252(g), so long as it does not challenge the decision to commence proceedings itself. *Alcaraz*, 384 F.3d at 1160–61; *see also Catholic Soc. Servs. v. Immigration & Naturalization Serv.*, 232 F.3d 1139, 1150 (9th Cir. 2000) ("[Section 1252(g)] applies only to the three specific discretionary actions mentioned in its text, not to all claims relating in any way to deportation proceedings.").

Here, Plaintiffs challenge neither the issuance of NTAs nor the CBP's decisions to commence removal proceedings. Instead, they challenge the USCIS's separate and independent decision to revoke DACA *on the basis of an NTA*, which is independent of the limited category of decisions covered by § 1252(g). *See Ramirez Medina*, 2017 WL 5176720, at *6 ("[T]he Court ultimately finds that none of the statutes relied upon by Defendants applies to the narrower issues presented in this case; specifically, whether Defendants complied with their own non-discretionary procedures."); *Gonzalez Torres*, 2017 WL 4340385, at *4–5.

Furthermore, the Ninth Circuit has held that while § 1252(g) precludes review of the three specified discretionary decisions, it does *not* bar review of legal questions relating to those discretionary decisions. *See United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc) ("The district court may consider a purely legal question that does not challenge the Attorney General's discretionary authority, even if the answer to that legal question—a description of the relevant law—forms the backdrop against which the Attorney General later will exercise discretionary authority."); *see also Madu v. U.S. Attorney Gen.*, 470 F.3d 1362, 1368 (11th Cir. 2006) ("While this provision bars courts from reviewing certain exercises of discretion by the attorney general, it does not proscribe substantive review of the underlying

legal bases for those discretionary decisions and actions."). Here, Plaintiffs bring their legal challenges under the APA and the due process clause. These are the sorts of purely legal questions that, although related to a discretionary decision, are nevertheless permitted by the Ninth Circuit.

Because Plaintiffs mount legal challenges to decisions that are not within the limited category of discretionary actions enumerated by the statute, the Court concludes that § 1252(g) does not deprive it of jurisdiction over their claims.

*3. Sections 1252(a)(5) and 1252(b)(9)*

Lastly, Defendants contend that "[t]o the extent that Plaintiffs have any viable claims, the REAL ID Act, codified at 8 U.S.C. §§ 1252(a)(5) and 1252(b)(9), bars them from raising those claims in district court, even before a final order of removal issues." *PI Opp.* 9:1–3. Section 1252(a)(5) requires that "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter." 8 U.S.C. § 1252(a)(5). Section 1252(b)(9) further provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9). As one court characterized this statutory scheme, it was designed to "put an end to the scattershot and piecemeal nature of the review process that previously had held sway in regard to removal proceedings." *Aguilar v. U.S. Immigration & Customs Enf't*, 510 F.3d 1, 9 (1st Cir. 2007).

However, although the Supreme Court has explained that the purpose of § 1252(b)(9) is "to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals," it "applies only '[w]ith respect to review of an order of removal under subsection (a)(1).'" *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 313 (2001). Section 1252(a)(1), like § 1252(a)(5), refers to "[j]udicial review of a final removal" order. 8 U.S.C. § 1252(a)(1); *see also Singh v. Gonzalez*, 499 F.3d 969, 978 (9th Cir. 2007) ("By virtue of their explicit language, both §§ 1252(a)(5) and 1252(b)(9) apply only to those claims seeking judicial review of orders of removal.").

Plaintiffs do not seek judicial review of orders of removal; indeed, their challenges are independent of any removal proceedings. *See Gonzalez Torres*, 2017 WL 4340385, at *5 ("Plaintiff brings a procedural challenge to termination of his DACA status, an issue independent from any removal proceedings."). Furthermore, the Ninth Circuit has held that

§ 1252(b)(9) does not deprive district courts of jurisdiction where a claim could not have been litigated in removal proceedings and the noncitizen would otherwise "have had no legal avenue to obtain judicial review of this claim." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016); *see also Mamigonian v. Biggs*, 710 F.3d 936, 945 (9th Cir. 2013) (permitting an APA action where the immigration judge "would be without jurisdiction" to adjudicate the claim and so "review would be unavailable" to plaintiff). An immigration judge in a removal proceeding does *not* have the power to grant or deny deferred action, or to review or reverse an agency's decision to revoke it. *See Gonzalez Torres*, 2017 WL 4340385, at *6 ("[A]n immigration judge has no jurisdiction to reinstate DACA status."); *see also Napolitano Memo* at 2–3 (conveying power to grant DACA to agencies); *Matter of Quintero*, 18 I. & N. Dec. 348, 350 (B.I.A. 1982) ("[N]either the immigration judge nor the Board may grant [deferred action] status or review a decision of the District Director to deny it."). Therefore, Plaintiffs could not have challenged the revocation of their DACA statuses at a removal proceeding, and so under Ninth Circuit precedent, jurisdiction is not barred.

Plaintiffs here are not challenging a final removal order, and the action they bring is premised on claims that could not have been brought in removal proceedings. Therefore, §§ 1252(a)(5) and 1252(b)(9) do not apply and do not deprive this Court of jurisdiction.

*b. Merits of Plaintiffs' Claims*

Because the Court again concludes that it has jurisdiction over this action, it will now consider the merits of Plaintiffs' claims.

*1. APA Claim*

Plaintiffs argue that "Defendants' practice of terminating DACA based solely on the issuance of an NTA charging the DACA recipient with presence without admission or overstaying a visa is arbitrary and capricious and contrary to law in violation of the APA." *PI Mot.* 9:9–12. The Court agrees.

Under the APA, "agency action must be based on non-arbitrary, 'relevant factors.'" *Judulang v. Holder*, 565 U.S. 42, 55 (2011) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)). The "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Judulang*, 565 U.S. at 53. "When reviewing an agency action, [the Court] must assess, among other matters, 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.* (quoting *State Farm*, 463 U.S. at 43).

The Court agrees with Plaintiffs that this case is analogous to that which the Supreme Court considered in *Judulang*. *See PI Mot.* 9:20–10:3. There, the Supreme Court considered a Board of Immigration Appeals ("BIA") rule governing eligibility for a form of relief—suspension of deportation—which, like DACA, was not provided for in the INA and was therefore discretionary. *See Judulang*, 565 U.S. at 46–47. Despite this discretionary quality, the Supreme Court nonetheless determined that the rules applied by the agency must reflect reasoned decisionmaking, admonishing that "[a] method for disfavoring deportable aliens that bears no relation to these matters—that neither focuses on nor relates to an alien's fitness to remain in the country—is arbitrary and capricious." *Id.* at 55. The BIA's rule was invalidated because it was based on "a matter irrelevant to the alien's fitness to reside in this country," which indicated that "the BIA ha[d] failed to exercise its discretion in a reasoned manner." *Id.* at 53.

Plaintiffs make a compelling argument that, like the BIA's invalidated rule in *Judulang*, the decision to automatically terminate their DACA and its accompanying employment authorization based on the issuance of an NTA fails the requirements of the APA. First, based on the Napolitano Memo and the DACA SOP, a noncitizen's deportability due to unauthorized presence in the United States—the basis for NTAs—provides no relevant basis for terminating DACA. These guidelines enumerate the relevant considerations for a DACA grant, and not only is unauthorized presence an unmentioned factor, but the program was *specifically designed* for persons without lawful immigration status. *See, e.g.*, *DACA SOC* at 44 (indicating that an individual "may be favorably considered for DACA if" he/she "[e]ntered without inspection" or his/her "lawful immigration status expired"). The program's rules also make clear that even noncitizens who are, have been, or will be placed in removal proceedings are nonetheless eligible for DACA. *See Napolitano Memo* at 2; *DACA SOP* at 71 ("Individuals in removal proceedings may file a DACA request."); *Kwon Decl.* ¶ 17, Ex. 16 (Statement of Assistant Secretary Michael Dougherty and Acting Director James McCament) at 2 ("The 2012 memorandum also made clear that individuals could be considered for DACA even if they were already in removal proceedings or were subject to a final removal order."). The same is true for individuals with final removal orders, and even individuals who have "reenter[ed] the United States illegally after having been removed or after leaving voluntarily under an order of removal." *See DACA SOP* at 74–75.

Furthermore, if an NTA is issued against an applicant while her application is pending with USCIS—even if the NTA is based on a public safety concern—DACA can still be conferred on the applicant. *See Kwon Decl.* ¶ 22, Ex. 21 (November 7, 2011 Policy Memorandum titled "Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens") at 4 ("ICE's issuance of an NTA allows USCIS to proceed with adjudication . . . taking into account the basis for the

NTA."); *DACA SOP* at 93 (providing that if ICE accepts a case referred to it by USCIS during the DACA application process, then the "DACA Team will follow the standard protocols outlined in the November 7, 2011 NTA memorandum"). In such cases, USCIS is required to review all relevant circumstances, and may still grant a DACA request despite an NTA "[i]f a DACA requestor has been placed in proceedings on a ground that does not adversely impact the exercise of prosecutorial discretion." *DACA SOP* at 75; *see also id.* at 74 ("Final removal orders . . . should be reviewed carefully to examine the underlying grounds for removal.").

Accordingly, the Court agrees that "given that the filing of an NTA against a DACA applicant, or even the issuance of a final order of removal against a DACA applicant, does not render the individual ineligible for the program, DHS' practice of automatically terminating DACA on this basis is arbitrary and irrational." *PI Mot.* 12:1–4.

Finally, there is the issue of departure. Agencies are free to change course and depart from a prior decision, but they are also "obligated to supply a reasoned analysis for the change." *State Farm*, 463 U.S. at 42; *see also Federal Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[T]he agency must show that there are good reasons for the new policy."). Here, in the case of each class member, DHS made a determination (and, in cases like the named Plaintiffs' where renewal was granted, multiple determinations) that the individual was eligible for and warranted a DACA grant. These decisions, pursuant to the relevant guidelines, were based on background checks and a review of the applicant's documentation. However, in each case, although the class member had not been charged with or convicted of a disqualifying criminal act, DHS's decisions were reversed and DACA was revoked—in Plaintiffs' words, "the agency [] abruptly chang[ed] course" even though "each [] class member continue[d] to be eligible for DACA." *PI Mot.* 13:22–24. The only explanation for this reversal provided to Plaintiffs was that their DACA was "terminated automatically" due to the NTA. *Kwon Decl.* ¶ 9, Ex. 8; *Moreira Decl.* ¶ 26, Ex. B; *Gil Decl.* ¶ 30, Ex. B. The Court maintains that "USCIS's one-sentence explanation fails to provide good reasons for the agency's change in position, as required by the APA." *Arreola Order* at 10; *see also Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) (quoting *Fox Television Stations*, 556 U.S. at 516; *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015)) (explaining that an agency is "required to provide a 'reasoned explanation . . . for disregarding' the 'facts and circumstances' that underlay its previous decision"). In its prior order, the Court continued:

> [G]iven that *all* DACA recipients are necessarily removable due to their unauthorized presence, [t]he agency's reliance on an NTA citing [class members'] presence without admission simply fails to explain, much less justify, the agency's decision to reverse course and terminate [their] DACA. Such an

> arbitrary and unexplained decision fails to address [class members'] substantial reliance interests, which also runs counter to the Supreme Court's mandate.

*Arreola Order* at 10–11 (emphasis in original and internal quotation marks omitted); *see also Fox Television Stations*, 556 U.S. at 515 (holding that an agency must "provide a more detailed justification" when "its prior policy has engendered serious reliance interests that must be taken into account").

In opposition, Defendants contest the conclusions the Court reached when it issued Plaintiff Arreola's preliminary injunction and maintain that DHS did not violate its internal guidelines, asserting that "[w]hen a case is referred by USCIS, ICE may issue an NTA that automatically terminates DACA, with no additional notice or opportunity to respond." *PI Opp.* 19:6–8. Despite Defendants' disagreement, the Court repeats what it stated previously: the DACA SOP do not support this assertion. There are, as discussed throughout Part III.A above, only a few, narrow circumstances in which DACA can be terminated automatically, without notice and an opportunity to be heard. Defendants point to no provision in the DACA SOP that permits automatic termination as a result of an NTA based on unauthorized presence. They discuss ICE's and CBP's authority to issue NTAs, *see PI Opp.* at 18:25–19:8, and note that "there is no provision permitting USCIS to reverse ICE's decision," *id.* 19:14–15, but such assertions are not relevant—the issue is not whether DHS or its component agencies can issue NTAs, but instead whether USCIS can terminate DACA automatically solely on that basis.[12] The Court maintains that it cannot. Although an NTA filed on the basis of an EPS designation *can* result in automatic DACA termination, *see DACA SOP* at 137, "if the disqualifying criminal offense is non-EPS" then "[t]he individual should be allowed 33 days to file a brief or statement contesting the grounds cited in the Notice of Intent to Terminate." *Id.*; *see also Gonzalez Torres*, 2017 WL 4340385, at *6 (noting that NTAs based on an EPS designation and NTAs based on unauthorized presence "are not fungible, or 'flip sides of the same coin'"). Defendants contend that "it takes a particularly strained reading of the Napolitano Memo and DACA SOP to find that ICE and CBP cannot issue NTAs that have the effect of terminating DACA." *PI Opp.* 20:1–3. For the reasons discussed throughout this order, the Court disagrees.

Defendants also suggest that they have *not* reversed policy by automatically terminating DACA upon the issuance of an NTA, and hence that *Fox Television Stations* is inapposite. *See*

[12] Defendants argue that the Court's prior conclusion "relies on a starkly oversimplified consideration of the NTA decision process," and provide additional information as to how NTAs are issued. *PI Opp.* 20:16–22:19. Again, neither Plaintiffs nor the Court suggest that the NTA process itself is arbitrary or capricious, but instead that the decision to automatically terminate DACA solely on the basis of an NTA is inconsistent with the applicable guidelines and regulations.

*PI Opp.* 22:21–24:6. They note that "[t]he initial grant of DACA is heavily qualified with warnings that it is not protection from removal or a change in legal status, and that it may be terminated at any time, specifically for subsequent criminal activity." *Id.* 22:26–23:1. Accordingly, "[t]he automatic termination of Plaintiffs' DACA . . . is well within DACA SOP policy and practice, and demonstrates that there is no change in policy or practice as it applies to the putative class or individuals," *id.* 23:4–8, and therefore any variations merely constitute an "evolving analysis" that the Ninth Circuit has excluded from *Fox Television Stations* analysis. *Sierra Club v. Bureau of Land Mgmt.*, 786 F.3d 1219, 1226 (9th Cir. 2015).

To begin, the Court disagrees that no change in policy has occurred. Arbitrariness can be found not only in a change of official written policy, which may not have occurred here, but also through "a significant showing that analogous cases have been decided differently," which certainly has been made here. *LeMoyne-Owen Coll. v. National Labor Relations Bd.*, 357 F.3d 55, 61 (D.C. Cir. 2004); *see also California Pub. Utils. Comm'n v. Federal Energy Regulatory Comm'n*, 879 F.3d 966, 978 (9th Cir. 2018) (finding that the Federal Energy Regulatory Commission acted arbitrarily when it departed without explanation from a policy employed in previous decisions). However, even accepting Defendants' conclusion leads to another obstacle, one discussed in the Court's prior order: that Defendants' practices are unpersuasive and not entitled to deference. *See Arreola Order* at 12. Defendants cite to *Chemehuevi Indian Tribe v. Brown*, No. ED CV 16-1347-JFW (MRWx), 2017 WL 2971864 (C.D. Cal. Mar. 30, 2017), in which the court determined that an agency's "consistent practice . . . in an area within its expertise is itself entitled to at least traditional deference under *Skidmore v. Swift & Co.* due, in part, to the agency's specialized experience." *Id.* at *8 n. 9 (citation omitted). Defendants also point to fourteen instances when DACA was automatically terminated due to an NTA, as evidence of "consistent practice." *See Thomas Decl.* ¶ 5. The Court, as it concluded previously, "does not find this availing." *Arreola Order* at 12. Even accepting fourteen instances out of thousands of DACA terminations as a "consistent practice," Defendants imply that such a practice is only entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and is therefore due "respect only insofar as [it has] the power to persuade, which is a function of the thoroughness evident in [its] consideration and the validity of [its] reasoning." *Resident Councils of Wash. v. Leavitt*, 500 F.3d 1025, 1037 (9th Cir. 2007) (internal quotation marks omitted). The Court cannot afford this practice much respect given that "it apparently conflicts with the plain language of the DACA SOPs," and would permit the issuance of an NTA to automatically terminate DACA "notwithstanding the fact that the individual continues to be eligible for DACA and that all DACA recipients, by definition, lack lawful immigration status." *Arreola Order* at 12.

In short, either the practice at issue constitutes an arbitrary and impermissible change in agency policy, or it conflicts with applicable regulations in such a way as to be entitled to little

deference from this Court. Either way, the Court finds the practice problematic and not immune from APA scrutiny.

In summation, Defendants' opposition does not sway this Court from its previous conclusion that Plaintiffs make "a compelling argument that the decision to terminate [] DACA was arbitrary and capricious and in violation of the APA." *Arreola Order* at 13. Therefore, Plaintiffs have demonstrated a likelihood of success on the merits.[13]

*2. Due Process Claim*

Because the Court concludes that Plaintiffs' APA claim satisfies the first requirement of the preliminary injunction inquiry, it need not consider their due process claim at this time.

*ii. Irreparable Injury*

In granting Plaintiff Arreola's preliminary injunction, the Court concluded that "the deprivation of Plaintiff's earnings and job opportunities caused by the loss of his DACA and [accompanying employment authorization] constitutes irreparable harm." This conclusion also applies to the class as a whole. Plaintiffs have provided evidence that, "like Plaintiffs, 91 percent of DACA recipients were employed, including at top Fortune 500 companies," and that 69 percent of DACA recipients reported that their earnings "helped [them] become financially independent." *PI Mot.* 20:1–5; *see also Eiland Decl.* ¶ 31, Ex. 16 at 2–3. In addition, 94 percent of DACA recipients surveyed stated that, because of DACA, they "pursued educational opportunities that [they] previously could not." *Eiland Decl.* ¶ 31, Ex. 16 at 4. After losing his DACA and employment authorization, Plaintiff Arreola lost his job as a cook at Chateau Marmont and could no longer work as a driver for Uber or Lyft, as he had previously done. *See Declaration of Jesus Alonso Arreola Robles*, Dkt. # 16-3 ("*Arreola Decl.*"), ¶ 40. Plaintiff Gil lost his job with a logistics company, *see Gil Decl.* ¶ 24, and Plaintiff Moreira can no longer work or drive. *See Moreira Decl.* ¶ 20. Defendants have given no reason to doubt that the loss of DACA and employment authorization will have a similarly deleterious effect on the other class members.

[13] Defendants also suggest that employment authorization must be treated differently than DACA, arguing that "to reinstate individual EADs [Employment Authorization Documents] would violate DHS regulations that operate independent of, and superior to, DACA policy." *PI Opp.* 3:16–17. However, as the Court discussed in its prior order, it does not agree with Defendants and concludes that automatic revocation of employment authorization in these cases is inconsistent with the applicable regulations. *See Arreola Order* at 11 n. 2.

The Ninth Circuit has held that "loss of opportunity to pursue [one's] chosen profession" constitutes irreparable harm. *Enyart v. National Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) ("We have frequently recognized the severity of depriving a person of the means of livelihood."). Moreover, the Ninth Circuit has specifically found irreparable harm in a similar case involving DACA recipients. *See Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (finding irreparable harm where professional opportunities are limited); *see also id.* ("The irreparable nature of Plaintiffs' injury is heightened by Plaintiffs' young age and fragile socioeconomic position. Setbacks early in their careers are likely to haunt Plaintiffs for the rest of their lives."). Furthermore, each of the named Plaintiffs has demonstrated that his earnings are used to support his family, *see Arreola Decl.* ¶¶ 2–5, 16; *Gil Decl.* ¶¶ 12, 26; *Moreira Decl.* ¶¶ 6, 10, which also suggests irreparable harm. *See Gonzalez Torres*, 2017 WL 4340385, at *6 ("The potential harm caused by Defendants' conduct includes the loss of employment, a core benefit under DACA. The deprivation of employment impacts Plaintiff's ability to financially provide for himself and his family.").

In addition, Plaintiffs note that "losing DACA has rendered many proposed class members' ineligible for driver's licenses, which in the vast majority of states are conditioned on showing lawful presence in the United States." *PI Mot.* 21:19–21; *see also Eiland Decl.* ¶ 32, Ex. 17 at 2. This likely explains why 90 percent of DACA recipients obtained driver's licenses or state identification cards for the first time after receiving DACA. *Eiland Decl.* ¶ 42, Ex. 27 at 4. The Court should also consider the emotional pain to which the named Plaintiffs have attested, *see Arreola Decl.* ¶ 40; *Gil Decl.* ¶ 26; *Moreira Decl.* ¶¶ 20, 22, which is also a cognizable form of irreparable injury. *See Chalk v. U.S. Dist. Ct.*, 840 F.2d 701, 709–10 (9th Cir. 1988) (noting that a plaintiff's injury is "emotional and psychological—and immediate" and that "[s]uch an injury cannot be adequately compensated for by a monetary award after trial"); *Colotl*, 261 F. Supp. 3d at 1343–44 ("Plaintiff's emotional distress caused by this insecurity is another factor in determining that Plaintiff will suffer irreparable injury without the entry of a preliminary injunction which compels Defendants to comply with DHS's SOP prior to denying Plaintiff her application to renew her DACA status or terminating that status.").

Defendants do not dispute that Plaintiffs and class members have suffered or will suffer injury as a result of losing DACA, and indeed concede that "the loss of the ability to work is a significant harm." *PI Opp.* 24:15. The Court therefore concludes that the loss of DACA constitutes irreparable harm for Plaintiffs and class members.

*iii. Balance of Hardships and Public Interest*

The remaining two factors—balance of hardships and the public interest—merge when, as here, the government is the opposing party. *See Nken v. Holder*, 556 U.S. 418, 435.

There is undoubtedly a strong interest to be found in the effective and efficient enforcement of the nation's immigration laws. *See, e.g.*, *Reno*, 525 U.S. at 490–91 ("[T]he consequence of delay . . . in deportation proceedings . . . is to permit and prolong a continuing violation of United States law."). However, as the Court previously concluded, this interest does not outweigh the ongoing harm that Plaintiffs and class members have experienced or will experience as a result of losing their DACA grants and employment authorization, especially given that the Court is "simply requiring Defendants to comply with DHS's written procedures as to the adjudication of DACA applications and the termination of DACA status. There can be no harm to Defendants in requiring them to follow their own written guidelines, but the harm to Plaintiff by Defendants' failure to do so is significant." *Colotl*, 261 F. Supp. 3d at 1344. In addition, the Court again notes "the public interest that exists in ensuring that the government complies with its obligations under the law and follows its own procedures." *Arreola Order* at 15; *see also Brewer*, 757 F.3d at 1069 ("[I]t is clear that it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law, especially when there are no adequate remedies available.") (alterations in original); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Colotl*, 261 F. Supp. 3d at 1344 ("[T]he public has an interest in government agencies being required to comply with their own written guidelines instead of engaging in arbitrary decision making."). Lastly, Plaintiffs note the significant financial contributions of DACA recipients, both to their families—71 percent of DACA recipients surveyed report that their increased earnings have allowed them to help their families financially, *Eiland Decl.* ¶ 31, Ex. 16 at 3—and to the United States. *See, e.g.*, *id.* ¶ 34, Ex. 19 at 2 (estimating that "ending DACA would result in a loss of $460.3 billion from the national GDP over the next decade" and "would remove an estimated 685,000 workers from the nation's economy"). The public interest would not be served by eliminating class members' abilities to support their families and contribute to the national economy.

In opposition, Defendants argue that class members' injuries are "outweighed by the need for Defendants to pursue removal for individuals like the named Plaintiffs who have misused the trust given to them with the administrative grace of DACA." *PI Opp.* 24:15–17. However, Plaintiffs do not seek a permanent reinstatement of their DACA grants, but only the notice and process that is required by the DACA SOP and other regulations. If indeed any class members have misused the trust given to them, then that can be determined and addressed through proper adjudication. Defendants suggest that "the efficacy of [this] additional process . . . is questionable because DHS and its components have already exercised prosecutorial discretion to end the putative class members' DACA by deciding instead to place them into removal

proceedings." *Id.* 24:22–25. Questionable or not, Plaintiffs do not seek a guarantee of continued DACA, but merely the ability to be heard and the privilege of receiving fair and nonarbitrary treatment. As the Court previously concluded, "the public has a strong interest in ensuring that the nation's immigration laws are robustly—*and fairly*—enforced." *Arreola Order* at 15 (emphasis in original).

In short, the Court concludes that the harm to Plaintiffs and class members caused by automatic DACA termination and the consequent risk of employment loss and financial instability outweighs Defendants' interest in immigration enforcement, particularly given the Court's skepticism as to the fairness and legality of Defendants' practices. If Defendants placed their trust in Plaintiffs and class members through the act of deferred action, then Plaintiffs and class members in turn placed their trust in Defendants to only revoke DACA through a fair, nonarbitrary, and consistent process. It is in the public's interest that the expectations of both Defendants *and* Plaintiffs are realized, which requires equitable enforcement of the nation's immigration laws.

*iv. Summation*

Because Plaintiffs have demonstrated a likelihood of success on the merits of their APA claim and the existence of irreparable harm, and because neither a balancing of the hardships nor the public interest favors Defendants, the Court **GRANTS** Plaintiffs' motion for a classwide preliminary injunction.

## IV. Conclusion

For the foregoing reasons, the Court **GRANTS** Plaintiffs' motion for class certification and **GRANTS** Plaintiffs' motion for a classwide preliminary injunction.

### A. Class Certification

The Court hereby **CERTIFIES** the following class under Rule 23(b)(2):

> All recipients of Deferred Action for Childhood Arrivals ("DACA") who, after January 19, 2017, have had or will have their DACA grant and employment authorization revoked without notice or an opportunity to respond, even though they have not been convicted of a disqualifying criminal offense.

The Court also **APPOINTS** the moving Plaintiffs as Class Representatives and Plaintiffs'

counsel from the ACLU Immigrants' Rights Project and the ACLU of Southern California as Class Counsel.

B. Scope of Preliminary Injunction

Defendants and their agents, employees, assigns, and all those acting in concert with them are enjoined as follows:

1. It is hereby **ORDERED** that Defendants are preliminarily enjoined from terminating grants of Deferred Action for Childhood Arrivals ("DACA") and related employment authorization documents ("EADs") of class members absent a fair procedure that complies with the Department of Homeland Security ("DHS") DACA Standard Operating Procedures as well as the Memorandum from Janet Napolitano, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), *available at* https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretionindividuals-who-came-to-us-as-children.pdf, and which includes, at a minimum, notice, a reasoned explanation, and an opportunity to be heard prior to termination.

2. It is hereby **ORDERED** that Defendants are preliminarily enjoined from terminating grants of DACA and related EADs based solely on the issuance of a Notice to Appear ("NTA") that charges the DACA recipient as removable due to his or her presence in the United States without admission or having overstayed a visa.

3. It is hereby **ORDERED** that Defendants' decisions after January 19, 2017 to terminate the DACA grants and EADs of class members, without notice, a reasoned explanation, or an opportunity to respond prior to termination, are preliminarily enjoined. Defendants immediately will restore those individuals' DACA and EADs, subject to their original date of expiration.

4. It is hereby **ORDERED** that Defendants accept and adjudicate any applications to renew DACA by individuals whose DACA grant and EAD would have expired on or before March 5, 2018, but were unable to apply for or obtain a renewal as a result of Defendants' unlawful revocation decision, consistent with the terms of this Order.

C. Implementation Procedures

5. Within seven days of this order, the parties will meet and confer to develop a notice that explains the requirements of this Order and provides class members with contact information for Class Counsel. Within 14 days of this Order, Defendants will send the notice to all individuals

whose DACA grant and EAD was revoked after January 19, 2017 without advance issuance of a Notice of Intent to Terminate ("NOIT") and provide copies of those notices to Class Counsel.

Within 14 days of this Order:

6. Defendants shall identify all DACA recipients whose DACA grant and EAD was revoked after January 19, 2017 without issuance of a NOIT and determine if they have been convicted of a disqualifying criminal offense. If the individual has not been convicted of a disqualifying criminal offense, Defendants immediately will restore the individual's DACA grant and issue the individual a new EAD.

7. If the individual's restored DACA grant and EAD have expired as of the date of this Order or will expire on or before March 5, 2018, Defendants will permit the individual 60 days from the date of this Order to submit a DACA renewal application to U.S. Citizenship and Immigration Services. If the individual's restored DACA grant and EAD expired on or before the date of this Order, Defendants temporarily will restore that individual's DACA grant and EAD for the 60-day period to submit a renewal application.

8. Defendants shall provide Class Counsel with a list of all DACA recipients whose DACA grant and EAD was revoked after January 19, 2017 without issuance of a NOIT. That list shall include the following information for each person:

- Name, Alien Number, Mailing Address, and Phone Number;
- The date the individual's most recent DACA grant and EAD was granted;
- The date the individual's most recent DACA grant and EAD was set to expire;
- The date the individual's most recent DACA grant and EAD was revoked;
- Whether the individual was found to have a disqualifying criminal conviction and, if so, what conviction(s);
- If applicable, the date the individual's DACA grant and EAD was restored.

For each such person, Defendants also will provide Class Counsel with copies of the Notices of Action previously terminating the person's DACA grant and EAD, as well as the Notices of Action and EADs for individuals whose DACA grants and EADs are restored pursuant to this

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

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Order, including those DACA grants and EADs that are temporarily restored pursuant to paragraph 7.

**IT IS SO ORDERED.**