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UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

In the Matter of: Reynaldo CASTRO-TUM, *Respondent*	File No.: A 206 842 910 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*, A206 842 910 (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).

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*, A206 842 910 (BIA Nov. 27, 2017). Where there is no break in the system, there is no need to fix it.

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*

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).

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