Amicus Curiae:
Sarah Sherman-Stokes
Immigrants' Rights &
Human Trafficking Program
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
Tel. (617) 358-6272
Email: sstokes@bu.edu

Julie Dahlstrom
Immigrants' Rights &
Human Trafficking Program
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
Tel. (617) 353-2807
Email: jadahl@bu.edu

Additional counsel appear on signature page

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

In the matter of:	
Reynaldo CASTRO-TUM	**File No. 206 842 910**
In Removal Proceedings	

REQUEST TO APPEAR AS *AMICI 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), the following law clinic and non-profit organizations request the Board's leave to appear as Amici Curiae. This brief is filed by the foregoing law professors, law students and nonprofit organizations in support of the Respondent.

The Immigrants' Rights and Human Trafficking Program (hereinafter "the Clinic") at the Boston University School of Law advocates on behalf vulnerable immigrants in a broad range of complex legal proceedings before the immigration courts, state, local and federal courts and before immigration agencies. The Clinic also collaborates with local, state and national immigrants' rights and human rights groups to advance protections for vulnerable immigrants and survivors of human trafficking. The Clinic provides substantive legal and lawyering skills training to law students. Under the direction of law school professors and instructors who practice and teach in the field of immigration and human trafficking law, law students represent children and adults seeking protection in the United States including survivors of torture and trauma, survivors of domestic violence, abandoned and abused children, and the mentally ill and incompetent, including representation of detained and non-detained individuals in removal proceedings. The Immigrants' Rights and Human Trafficking Program has represented hundreds of immigrant clients since its inception.

Director of the Clinic Julie Dahlstrom supervises students representing vulnerable noncitizens and survivors of human trafficking before administrative agencies and the immigration court.

Associate Director of the Clinic, Sarah Sherman-Stokes supervises students representing noncitizens facing removal, with a special focus on survivors of torture and trauma, and the mentally ill and mentally incompetent. She has published and spoken widely on the intersections of mental illness, mental competence and immigration law and policy. In addition to teaching in the Clinic, she also teaches Immigration Law.

The Political Asylum/Immigration Representation Project, Inc. (PAIR) is a nonprofit organization and the leading provider of pro bono legal services to indigent asylum-seekers in Massachusetts and immigrants detained in Massachusetts. PAIR staff attorneys specialize in humanitarian forms of relief, such as asylum, withholding of removal, U Visa relief, and Special Immigrant Juvenile Status, along with general removal defense for detained and non-detained individuals. PAIR recruits, mentors and trains over 1,100 active volunteer attorneys from private law firms to represent, without charge, low-income clients, the majority of who are asylum-seekers who have fled from persecution throughout the world. At any given time, PAIR represents, through pro bono counsel, several hundred clients with active cases each year from over 90 countries worldwide. Most PAIR clients are survivors of torture and trauma, victims of domestic violence, abandoned and abused children, and the mentally ill and incompetent. The matter at issue in this case, the use of administrative closure to safeguard due process rights of Respondents, especially the fair adjudication of proceedings involving mentally incompetent, is central to the cases of many PAIR clients.

The Capital Area Immigrants' Rights (CAIR) Coalition strives to ensure equal justice for all immigrants at risk of detention and deportation in the D.C. metropolitan area and beyond through direct legal representation, know your rights presentations, impact and advocacy work, and the training of attorneys representing immigrants. The CAIR Coalition regularly sees detained immigrant men, women, and children who may be recent arrivals or have been in the United States for several years with significant community ties and are eligible under our immigration laws to pursue relief from removal. Routinely, as part of the delivery of legal services to detained immigrants, the CAIR Coalitions encounters and represents two specific immigrant populations: detained minors and mentally disabled immigrants, who because of particular personal and procedural factors, may require counsel to seek administrative closure. It is because of this experience that the CAIR Coalition joins as amicus curiae to support the authority of Immigration Judges to administratively close cases.

Because of their significant expertise in this area, the undersigned law professors, individuals and organizations are qualified to speak to the issues presented.[1]

[1] The following law students contributed to this *amicus* brief: Alyssa Marchetti, Boston University School of Law; Dan Ordorica, Boston University School of Law; and Laura Putnam, Boston University School of Law.

Respectfully submitted,

Sarah Sherman-Stokes
Immigrants' Rights &
Human Trafficking Program
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
Tel. (617) 358-6272
Email: sstokes@bu.edu

Julie Dahlstrom
Immigrants' Rights &
Human Trafficking Program
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
Tel. (617) 353-2807
Email: jadahl@bu.edu

Claudia R. Cubas
Capital Area Immigrants' Rights
(CAIR) Coalition
1612 K. St., N.W., Suite 204
Washington, DC 20006
Tel. (202) 331-3320
Email:
claudia.cubas@caircoalition.org

Anita Sharma
Political Asylum/Immigration
Representation
(PAIR) Project
98 N. Washington Street, Suite 106
Boston, MA 02114
Tel. (617) 742-9296
Email: asharma@pairproject.org

Deborah Anker
Sabrineh Ardalan
Sabrina Balgamwalla
Richard A. Boswell
Centro Legal de la Raza
Community Legal Services and Counseling Center
Community Legal Services in East Palo Alto
Esperanza Immigrant Rights Project
The Florence Immigrant and Refugee Rights Project
David E. Funke
Dolores Street Community Services
Niels Frenzen
Iris Gomez
Great Boston Legal Services
Jacklyn I. Gurany, Esq.
Lindsay M. Harris
Laila L. Hlass
Mary Holper
Kari Hong
Jennifer Lee Koh
Daniel M. Kowalski
Annie Lai
Karen Pita Loor
Amelia McGowan
MetroWest Legal Services
Helen Parsonage
Schuyler Pisha, Esq.
Christina L. Powers
Nina Rabin
Rocky Mountain Immigrant Advocacy Network
Ragini Shah
Heather Scavone
Maia Justine Storm
Maddie Thomson
Claire Valentin
Anna R Welch

INTRODUCTION

"Solomon"[2] had been diagnosed with paranoid schizophrenia and presented with significant mental health symptoms when he came to the attention of a legal service provider[3] in the summer of 2014. Solomon was an engineer who had lived as a Lawful Permanent Resident (LPR) in the United States for nineteen years before he began to show signs of mental illness.

Solomon was detained by Immigration and Customs Enforcement (ICE) following conviction for a non-violent criminal offense. Recognizing the severity of Solomon's mental illness, ICE reached out to a local non-profit organization for *pro bono* representation. ICE wanted to release Solomon to a more supportive environment. The non-profit organization conducted an intake with Solomon and saw that many indicia of incompetence were present in his case. Because of his disability, he was unaware whether he had family members or other supports in the area. He was also unaware of the nature or gravity of the proceedings against him. Because he had nowhere else to go, the non-profit got him a bed in a local shelter that could provide him with mental health treatment and case management services as he pursued his immigration case.

ICE transported Solomon to the shelter, and the non-profit began working on his case. However, they soon learned that ICE had not provided any of Solomon's relevant immigration paperwork to him or to his case managers at the shelter. He had not received a copy of his Notice to Appear, the immigration court charging document, nor had he received his Hearing Notice. As

[2] This name is a pseudonym to protect the client's confidentiality.
[3] This case example was provided by a partner organization, the Capital Area Immigrants' Rights (CAIR) Coalition, who has signed on to this brief.

the non-profit worked to learn when Solomon's next hearing would be held and to locate Solomon's family members, Solomon had a mental health breakdown.

The local non-profit filed a motion for termination or administrative closure while they worked to find appropriate safeguards that would ensure due process in Solomon's removal proceedings. Given the severity of Solomon's mental illness and concerns about his current competency, DHS attorneys agreed to join Solomon's attorney in requesting that the judge administratively close the case. This step both preserved the limited resources of the Court and the attorneys involved, and ensured that Solomon's attorney would be notified if Solomon's case was re-calendared. Solomon's story of mental illness and incompetence is not uncommon. See, e.g., Franco-Gonzalez, No. CV-10-02211 DMG (DTBx), 2013 WL 8116823, at *1 (C.D. Cal. May 3, 2013); Matter of M-J-K-, 26 I. & N. Dec. 773, 774 (BIA 2016); Matter of M-A-M-, 25 I. & N. Dec. 474, 483 (B.I.A. 2011). However, as explained below, without administrative closure as an available procedural safeguard, Solomon could not have proceeded with his case without a violation of his due process rights.

SUMMARY OF ARGUMENT

By regulation, an Immigration Judge ("IJ") is authorized to take "any action," consistent with applicable law, that is appropriate for the case. See 8 C.F.R. § 1003.10(b). IJs have broad discretion to use docket management tools to protect the Respondent's right to maximize judicial efficiency and protect the due process rights of Respondents. See Matter of M-A-M-, 25 I. & N. Dec. at 479; Matter of Taerghodosi, 16 I. & N. Dec. 260, 263 (B.I.A. 1977).

The authority to utilize one such docket management tool, administrative closure, is a necessary and well-established power of IJs and the Board of Immigration Appeals ("BIA"). Matter of Avetisyan, 25 I. & N. Dec. 688, 692 (B.I.A. 2012). Administrative closure has a long history in immigration proceedings as well as in federal court and before administrative agencies. Matter of Amico, 19 I. & N. Dec. 652, 654 n. 1 (B.I.A. 1988); Matter of Taerghodsi, 16 I. & N. Dec. at 263 (quoting Assoc. of Mass. Consumers, Inc. v. U.S. Securities and Exchange Comm'n, 516 F.2d 711, 714 (D.C. Cir. 1975)). In particular, it is a critical tool for ensuring the efficient and fair adjudication of proceedings involving mentally incompetent Respondents, and for protecting their statutory and due process rights. See Matter of M-A-M-, 25 I. & N. Dec. at 479. Without the authority to administratively close cases, Immigration Judges would be unable to adjudicate cases involving vulnerable parties fairly and efficiently.

Amici request that the Board:

First, find that Immigration Judges and the Board have the authority to order administrative closure in removal proceedings.

Second, recognize the well established authority of Immigration Judges and the Board to order administrative closure in cases involving mentally incompetent Respondents in particular.

Third, find that docket management devices other than administrative closure are often inadequate to promote "the expeditious, fair, and proper resolution of matters coming before Immigration Judges." 8 C.F.R. § 1003.12 (2017).

ARGUMENT

I. Immigration Judges and the Board of Immigration Appeals have the authority to order administrative closure.

No principle of administrative law is "more firmly established" than that of agency control over its own calendar. Matter of Taerghodsi, 16 I. & N. Dec. at 263 (quoting Assoc. of Mass. Consumers, Inc. v. U.S. Securities and Exchange Comm'n, 516 F.2d 711, 714 (D.C.Cir. 1975)). Administrative closure "is used to temporarily remove a case from an Immigration Judge's active calendar or from the Board's docket" and is "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. at 692. The Ninth Circuit Court of Appeals recently recognized the implied powers of IJs and the BIA to manage their dockets noting, "[f]rom the regulatory language, it is evident that IJs and the BIA are empowered to take various actions for docket management." Gonzalez-Caraveo v. Sessions, No. 14-72472 at *9 (9th Cir. Feb. 14, 2018). Administrative closure also has been described as, "a case management tool for the Immigration Judge's or the Board's administrative convenience and is not meant to provide benefits to either party." Matter of Joseph Elazari, A95 883 306 (B.I.A. Mar. 3, 2005), 2005 WL 698457. It is particularly valuable as it "avoids the repeated rescheduling of a case that is clearly not ready to be concluded." Matter of Marcal Neto, 25 I. & N. Dec. 169, 179 (B.I.A. 2010).

Administrative closure is not unique to Immigration Court practice, but is used widely by federal courts and administrative agencies. It is analogous to the way federal courts use stays in judicial proceedings to remove cases from the docket while issues significant to a proceeding are

pending. See CitiFinancial Corp. v. Harrison, 453 F.3d 245, 250 (5th Cir. 2006) ("[W]hen a district court 'administratively closes' a case, that action [is] equivalent to a stay . . . ."); see also Johnson v. Oldcastle Precast, Inc., 522 F. Supp. 2d 739, 740 (2007) (holding statute of limitations was tolled during period when case was administratively closed to allow defendants to pursue appeal); American Heritage Life Ins. Co. v. Orr, 294 F.3d 702, 715 (2002) (noting appropriate use of administrative closure while arbitration is pending because "the action is likely to remain dormant for an appreciable period of time"); Adamson v. Hayes, No. 12-17336, 2017 WL 3971458, at *2 (9th Cir. Sept. 8, 2017) (concluding that "administrative closure, pending [plaintiff's] restoration to competency, is a more appropriate disposition.").

Administrative agencies across the federal government employ similar case management and docketing procedures. See Pub. Warehousing Co., ASBCA No. 56116, 08-1 BCA ¶ 33,787 (asserting Armed Services Board of Contract Appeals' "inherent authority to stay proceedings"); 37 C.F.R. § 2.117 (allowing for suspension of proceedings before Trademark Trial and Appeals Board). Administrative closure is a widely used docketing procedure by which adjudicative bodies, including immigration courts, can manage cases to maximize efficiency. See Johnson v. Oldcastle Precast, Inc., 522 F. Supp. 2d 739, 741 (D. Md. 2007) ("An administrative closure is not a dismissal, and is done for purely administrative and record keeping purposes. It does not terminate an action.")

A. Administrative closure is a power inherent in the authority of IJs and the BIA.

The Supreme Court has long held that docket management techniques such as administrative closure are inherent to the nature of adjudicatory activity. See Landis v. North American Co., 299 U.S. 248, 254-55 (1936) ("[T]he 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.") Consistent with the conservation of limited judicial resources, the use of administrative closure has been employed by Federal Courts to "shelve pending, but dormant, cases . . . in circumstances in which a case, though not dead, is likely to remain moribund for an appreciable period of time." Lehman v. Revolution Portfolio L.L.C., 166 F.3d 389, 392 (1st Cir. 1999); see also Joseph J. Anclien, Broader is Better: The Inherent Powers of Federal Courts, 64 N.Y.U. ANN. SURV. AM. L. 37, 44-45 (2008) (noting that inherent powers of judiciary include authority to manage docket).

Administrative agencies have also recognized docket management tools such as administrative closure to be inherent in their roles as adjudicators. Indeed, they would be unable to efficiently fulfill their functions without the power to manage their own dockets. See Daniel Bress, Administrative Reconsideration, 91 Va. L. Rev. 1737, 1742 (2005) ("[I]t must be acknowledged that agencies do possess some amount of inherent power, at least for the same reason that many courts and commentators have said federal courts do: A system that required specific delineation of even the most minor exercises of power would unnecessarily hamstring agency operations.").

Agencies as diverse as the Federal Communications Commission, Armed Services Board of Contract Appeals, and the Environmental Protection Agency, among others, have recognized the inherent power to control their own dockets as a necessary means of judicial economy. See GTE Serv. Corp. v. F.C.C., 782 F.2d 263, 273–74 (D.C. Cir. 1986) ("Absent some unreasonable delay or significant prejudice to the parties, the Commission cannot be said to abuse its discretion merely by adopting procedures and timetables which it considers necessary to

effective treatment of complex and difficult problems." (citing Associated Press v. F.C.C., 448 F.2d 1095, 1106 (D.C. Cir.1971)); John Crescio, 5-CWA-98-004, 1999 WL 362862, at *1 (E.P.A. Feb. 26, 1999) ("[A] stay of proceedings is a matter of discretion for the presiding judge." (citing Landis v. North American Co., 299 U.S. 248, 254-55 (1936)); Bae Sys. Tactical Vehicle Sys. Lp, ASBCA No. 59491, 16-1 B.C.A. ¶ 36450 (holding that the Armed Services Board of Contract Appeals "has inherent authority to stay its proceedings."); Phoebe Putney Health Sys., Inc., No. 9348, 2014 WL 5787599, at *2 (F.T.C. Oct. 30, 2014) (noting that Federal Trade Commission exercises "our discretion to oversee this adjudication, comparable to the broad discretion of a court 'to stay proceedings . . .'" when deciding whether to grant a Motion to stay); Aerospace Mfg. Ctsystems, LLC, 23 BNA OSHC 1641 (No. 11-0315, 2011) ("Under Commission precedent, civil proceedings may be stayed pending the outcome of parallel criminal proceedings 'to permit disposition of cases 'with economy of time and effort for [the court], for counsel and for litigants.'" (quoting C & S Erectors Inc., 18 BNA OSHC 1052 (No. 96-1525, 1997))).

The use of administrative closure by the immigration court absent express statutory authority is unremarkable, and in setting out the parameters by which it may be granted, the Board has routinely validated its use. Matter of Avetisyan, 25 I. & N. Dec. at 696 (establishing criteria for evaluating motions to administratively close cases, including (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 IJ or the appeal is reinstated before the Board[4]). Indeed, administrative closure is a power incidental to routine docket management across courts and agencies. See Operating Policies and Procedures Memorandum 13-01, Continuances and Administrative Closure, from Brian M. O'Leary, Chief Immigration Judge, to All Immigration Judges, et al. (March 7, 2013) (hereinafter OPPM 13-01).

B. Administrative closure is a power implied by federal regulation.

Relevant regulations also imply the IJ's and BIA's powers to administratively close cases. The Immigration Judge is empowered to "grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the Respondent or the Service." 8 C.F.R. § 1240.6. Moreover, IJs have the authority to make removability determinations, rule on certain applications, and "to take any other action consistent with applicable law and regulations as may be appropriate." 8 C.F.R. § 1240.1(a)(1)(i)-(iv.). Finally, IJs are required to resolve the questions before them in a timely manner. 8 C.F.R. § 1003.10(b).

The BIA has similar power. See 8 C.F.R. § 1003.1(d) ("The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations."); 8 C.F.R. § 1003.1(d)(ii) ("[A] panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.") Administrative closure is an "administrative convenience" rather than a means to decide cases. Matter of Amico, 19 I. & N.

---

[4] Compare to the factors considered by the Environmental Protection Agency when considering whether to issue a stay: "whether or not the stay will serve the interests of judicial economy, result in unreasonable or unnecessary delay, or eliminate any unnecessary expense and effort; the extent, if any, of hardship resulting from the stay, and of adverse effect on the judge's Docket; and the likelihood of records relating to the case being preserved and of witnesses being available at the time of any hearing." In the Matter of: John Crescio, Respondent, 5-CWA-98-004, 1999 WL 362862, at *1 (E.P.A. Feb. 26, 1999).

Dec. at 654 n. 1. The power to administratively close is implied by the regulations as it is "consistent" with adjournments and an "appropriate" tool for resolving questions in a timely manner. See also Gonzalez-Caraveo v. Sessions, No. 14-72472 at *8-9 (9th Cir. Feb. 14, 2018) (citing 8 C.F.R. §§ 1003.1(d)(1)(ii), 1003.10(b) and confirming BIA citations in Matter of Avetisyan, 25 I. & N. Dec. 688 (BIA 2012) to 8 U.S.C. § 1229a(a)(3), (c)(1)(A); I.N.A. § 240(a), (c)(1)(a); 8 C.F.R. §§1003.14(a), 1240.1(a)(1)(i), 1240.11).

In fact, at 8 CFR § 1214.3 the federal regulations directly contemplate the use of administrative closure by both IJs and the BIA, and 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). Administrative closure is expressly contemplated by the regulations, as well as implied, providing ample regulatory basis for its use.

II. Administrative closure authority should not be withdrawn because it promotes efficient use of the court's limited resources in a time of expanding judicial dockets.

It is widely accepted that immigration courts are overburdened and in need of all available tools to promote efficient and fair adjudication. There are approximately 650,000 backlogged cases pending before the immigration courts. See Office of the Att'y Gen., 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 (Dec.

5, 2017), https://www.justice.gov/opa/press-release/file/1015996/download [hereinafter AG Memo]. As noted by the Attorney General, the orderly conclusion of these cases promote the public interest and the timely, fair and efficient administration of justice. Id. According to the Department of Justice, EOIR's caseload has doubled since 2011. See id. Now is not the time to dispense with effective and lawful tools of judicial economy that achieve the goals set out by the Attorney General to resolve the existing backload of cases.

As a regulatory tool, administrative closure can alleviate the pressure on overburdened courts by efficiently allocating the court's limited resources. Case closure temporarily removes the case from the court's docket when the judge anticipates that a relevant event will not occur for a period of time. See Matter of Avetisyan, 25 I. & N. Dec. at 692 ("Administrative closure may be appropriate to await an action or event that ... may not occur for a significant or undetermined period of time."). Administrative closure allows immigration courts to pragmatically focus their resources on immediately resolvable matters. See id. (reasoning that a judge's decision to administratively close a case "involves an assessment of factors that are particularly relevant to the efficient management of the resources of the Immigration Courts and the Board"). Should priorities change, the Department of Homeland Security may recalendar the case at any time. See id.

III. In cases of mentally incompetent Respondents, administrative closure conserves judicial and agency resources and protects the interests of all parties.

A. Administrative closure conserves judicial and agency resources.

Immigration Judges should be flexible when dealing with Respondents who have mental health issues, taking any action consistent with their authority under the INA and regulations that

is appropriate and necessary for the disposition of such cases. See Immigration Judge Benchbook, "Tools for the Immigration Judge: Mental Health Issues," citing 8 C.F.R. § 1003.10(b). This includes administratively closing cases where Respondents are unable to proceed in light of mental health issues and a corresponding inability to secure adequate safeguards, as required by INA § 240(b)(3). Id. The Board has recognized that administrative closure is appropriate where, in spite of the parties' best efforts to ensure appropriate safeguards, concerns remain, and the parties wish to explore other options such as seeking treatment for the Respondent. Matter of M-A-M-, 25 I. & N. Dec. at 483.

B. Administrative Closure is Particularly Necessary in Cases Involving Mentally Incompetent Detainees.

Detaining an individual in ICE custody has an estimated cost of $141 per day. Michelle Roberts, AP Impact: Immigrants Face Detention, Few Rights, San Diego Union-Tribune (Mar. 15, 2009), http://www.sandiegouniontribune.com/sdut-detained-immigrants-abridged-031509-2009mar15- story.html. The cost of detaining incompetent and mentally ill Respondents is even greater, especially as many of these Respondents are detained for months, or even years. See Christopher Klepps, What Kind of "Process" Is This?: Solutions to the Case-By-Case Approach in Deportation Proceedings For Mentally Incompetent Non-Citizens, 30 Quinnipiac L. Rev. 545, 574-575; see, e.g., Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *17 (C.D. Cal. Apr. 23, 2013) (noting that mentally incompetent Respondent Ibanga had been detained for 1466 days, more than four years). An expensive cadre of health care professionals, including doctors, nurses, mental health professionals, pharmacists, and other health care workers are required to meet the needs of mentally ill and incompetent detainees in

ICE custody. See Max Siegelbaum, Detention Centers, Bracing for Flood of New Arrivals, Are 'Set Up to Fail' Immigrants with Mental Illness, STAT (Dec. 16, 2016), https://www.statnews.com/ 2016/12/16/immigrants-mental-health/. In fiscal year 2015, ICE recorded 90,276 "mental health interventions" for immigrant detainees in ICE custody. See Detainee Health Care--FY2015, U.S. Immigr. & Customs Enforcement, Dep't of Homeland Sec., https://www.ice.gov/factsheets/_dhc-fy15 [https://perma.cc/P7BK-Y59J]. This is a staggering 64% increase in mental health interventions since fiscal year 2012. See Detainee Health Care--FY2012, U.S. Immigr. & Customs Enforcement, Dep't of Homeland Sec., http://www.ice.gov/factsheets/dhc-fy12.

Given the high cost of detaining and treating mentally ill and incompetent detainees, administrative closure is a particularly useful tool because this closure of the case allows parties to pursue more cost-efficient alternatives for the Respondent, including care and treatment outside of ICE detention. See M-A-M-, 25 I. & N. Dec. at 483 ("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."); see also Matter of Benitez-Lopez, A092 298 255, 2014 WL 3698191, at *3 (B.I.A. 2014) ("Administrative closure in cases involving competency issues may provide an opportunity for a Respondent to be restored to competency.").

When Solomon's case could not move forward without additional safeguards, his own attorney, the DHS attorneys, and the judge all agreed that administrative closure was the most efficient way to proceed. In this way, IJs can and should conserve judicial and agency resources by using administrative closure in cases involving mentally incompetent Respondents.

C. Administrative closure is necessary to protect the procedural and substantive due process rights of mentally incompetent Respondents.

In addition to promoting efficiency and the fair and orderly administration of justice, the Board has suggested that administrative closure is a particularly important tool for protecting the statutory and due process rights of mentally incompetent Respondents. See Matter of M-A-M-, 25 I. & N. Dec. at 479 (emphasizing that "the Fifth Amendment entitles aliens to due process of law" and therefore that "[a] removal hearing must be conducted in a manner that satisfies principles of fundamental fairness" as well as "the specific rights and privileges prescribed in the" INA.); Gutierrez v. Holder, 662 F.3d 1083, 1090 (9th Cir. 2011) ("A full and fair hearing is one of the due process rights afforded to aliens in deportation proceedings."). Furthermore, Section 504 of the Rehabilitation Act requires that EOIR make "reasonable modifications . . . to avoid discrimination on the basis of disability" against Respondents with cognitive disabilities and mental illnesses in immigration proceedings. 28 C.F.R. § 35.130; Franco-Gonzalez, No. CV-10-02211 DMG (DTBx), 2014 WL 5475097, at *1 (C.D. Cal. Oct. 29, 2014). One such reasonable accommodation, in cases in which no other safeguards are adequate, is administrative closure. For some mentally incompetent Respondents, administrative closure will be the only reasonable accommodation by which certain incompetent detainees can later meaningfully participate in their removal proceeding. See Franco-Gonzalez, 2013 WL 3674492, at *10; Matter of M-A-M-, 25 I. & N. Dec. at 483. Unless immigration courts have the tools to make appropriate modifications and to implement appropriate procedural safeguards, mentally incompetent Respondents will not have access to hearings that meet due process requirements or that satisfy the requirements of Section 504 of the Rehabilitation Act.

1. Mentally incompetent Respondents in immigration proceedings have due process rights guaranteed by the Supreme Court and by Statute.

All Respondents in removal proceedings are entitled to due process and to certain procedural protections by statute. Both the Fifth and the Fourteenth Amendment guarantee due process to noncitizens, including those "whose presence in this country is unlawful, involuntary, or transitory." Mathews v. Diaz, 426 U.S. 67, 77 (1976). Furthermore, the INA requires that Respondents in removal proceedings "shall have a reasonable opportunity to . . . present evidence on [their own] . . . behalf," and "to examine the evidence against [them], . . . and to cross examine witnesses presented by the government." INA § 240(b)(4)(B). The INA also guarantees that Respondents in removal proceedings "shall have the privilege of being represented . . . by such counsel, authorized to practice in such proceedings, as [they] . . . shall choose." INA § 242. However, statutory rights to examine evidence and select counsel cannot meaningfully be exercised by Respondents who are mentally incompetent. See also Hernandez-Gil v. Gonzales, 476 F.3d 803, 808 (9th Cir. 2007) ("[T]he statutory right to counsel exists so that the alien has a *competent* advocate acting on his behalf."). Overall, because the "liberty of an individual is at stake" in immigration proceedings, especially deportation proceedings, "[m]eticulous care must be exercised lest the procedure by which [a Respondent] . . . is deprived of that liberty not meet the essential standards of fairness." Bridges v. Wixon, 326 U.S. 135, 154 (1945).

It is especially important that courts take meticulous care to protect the rights of mentally incompetent individuals. The Supreme Court has repeatedly affirmed that courts must take specific steps to protect the procedural rights of mentally incompetent parties in judicial

proceedings. See Drope v. Missouri, 420 U.S. 162, 172 (1975) (holding that the prohibition against proceeding against an incompetent defendant "is fundamental to an adversary system of justice."); see also Matter of M-A-M-, 25 I. & N. Dec. at 478 ("Although immigration proceedings are civil in nature, the law regarding mental competency issues in criminal proceedings is well developed, and we consider it instructive."); Padilla v. Kentucky, 559 U.S. 356, 365 (2010) ("[D]eportation is nevertheless intimately related to the criminal process.").

2. The availability of appropriate safeguards and reasonable modifications protect the due process rights of mentally incompetent Respondents.

Mental incompetence limits Respondents' access to all of the procedural protections required by the INA and the Supreme Court. Mentally incompetent individuals may not be able to communicate effectively with their lawyers such that they have adequate representation by counsel as required by INA § 242. See Dusky v. United States, 362 U.S. 402, 402 (1960) (A defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . factual understanding of the proceedings against him"). Furthermore, mental incompetence may also prevent Respondents from accessing a "factual understanding of the nature and object of the proceedings" against them and from having "a reasonable opportunity to examine and present evidence and cross examine witnesses," both of which are required under INA § 240(b)(4)(B). Matter of M-A-M-, 25 I. & N. Dec. at 484; see also Massey v. Moore, 348 U.S. 105, 108 (1954) ("We have not allowed convictions to stand if the accused . . . was so unskilled, so ignorant, or so mentally deficient as not to be able to comprehend the legal issues involved in his defense."). Under Section 504 of the Rehabilitation Act, all public entities have a duty 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 . . . ." 29 U.S.C. § 794. Thus, under Section 504 of the Rehabilitation Act, the INA, and the United States Constitution, immigration courts must take steps to protect the rights of mentally incompetent Respondents. See Franco-Gonzalez, 2013 WL 3674492, at *1 (ordering that immigration courts and ICE implement systems to ensure that mentally incompetent Respondent's due process rights are protected).

3. Administrative closure is a necessary tool for safeguarding these rights.

An immigration judge must "prescribe safeguards to protect the rights and privileges" of a noncitizen if the judge "determines that . . . [the petitioner] lacks sufficient competency to proceed with the hearing." Matter of M-A-M-, 25 I. & N. Dec. 474, 478 (B.I.A. 2011) (citing INA § 240(b)(3)). Indeed, there are cases in which concerns about a party's competency to proceed remain even after the court and parties "undertake their best efforts to ensure appropriate safeguards." Matter of M-A-M-, 25 I. & N. Dec. at 483. In such cases, the ability to order administrative closure is critically important, where other attempts to safeguard the rights of a party have been ineffective. Id. In fact, administrative closure is the only such alternative tool the Board lists as appropriate in this situation. Id. Solomon's case is illustrative of administrative closure as a procedural safeguard. Use of this docketing tool not only allowed him to exercise his right to counsel, it also ensured that he received adequate notice and allowed his attorney time to seek out family members who could support him in his application for relief moving forward.

As an important tool for safeguarding the rights of incompetent parties, administrative closure thus allows judges to preserve the fundamental fairness of deportation proceedings. See

Matter of Benitez-Lopez, A092 298 255, 2014 WL 3698191 at *3 (B.I.A. May 29, 2014). Where a noncitizen will be unable to access a "full and fair hearing" due to incompetence, administrative closure allows courts to give that person the opportunity to be restored to competency by seeking medical treatment. Id. Furthermore, "mental competency is not a static condition." Matter of M-A-M-, 25 I. & N. Dec. at 480. Rather, "'[i]t can vary over time [and can] interfere with an individual's functioning at different times in different ways.'" Id. (citing Indiana v. Edwards, 554 U.S. 164, 175 (2008)). By temporarily removing cases from the docket in this way, IJs give Respondents the opportunity to be restored to competency such that they can participate fully in their hearings and access the rights guaranteed to them in the INA and by the Constitution. See Matter of Benitez-Lopez, 2014 WL 3698191 at *3.

IV. Continuances, termination and other similar dispositions are inadequate or insufficient docketing management tools for mentally incompetent Respondents.

The INA provides for safeguards for mentally incompetent Respondents in removal proceedings. See INA § 240(b)(3). Mentally incompetent Respondents may also be entitled to additional protections under Section 504 of the Rehabilitation Act. See Franco-Gonzalez, 2013 WL 3674492, at *5 (finding that Section 504 of the Rehabilitation Act does require the appointment of a Qualified Representative as a reasonable accommodation). In spite of these requirements, however, Immigration judges have remarkably few tools for implementing adequate safeguards for mentally incompetent Respondents. In Matter of M-A-M-, the Board acknowledged that there might be instances in which no safeguards are sufficient. 25 I. & N. Dec. at 483; see also OPPM 13-01. In such circumstances, "alternatives" may be pursued between the parties, but the only suggestion provided by the Board is administrative closure.

Matter of M-A-M-, 25 I. & N. Dec. at 483. In lieu of administrative closure, judges may pursue continuances or termination. But such remedies are either inadequate or insufficient in the case of mentally incompetent Respondents.

For example, there are many instances where continuances will be inadequate. Even where judges ensure access to counsel and other safeguards at trial, there are some incompetent Respondents who will still be unable to participate meaningfully due to the extent of their disability. See Matter of M-A-M-, 25 I. & N. Dec. at 475 (describing a Respondent who had "difficulty answering basic questions, such as his name and date of birth" and providing recommendations for cases where concerns remain about Respondents' competency even after safeguards have been explored.) Furthermore, many of these Respondents, especially those with significant cognitive disabilities, cannot be restored to competence during the time allowed by a continuance. See id. In many cases, it may take months or years for Respondents to be restored to competence while courts waste resources keeping their cases on the docket and, in the case of detained Respondents, spend money detaining and treating them while in custody. See, e.g., Matter of Avetisyan, 25 I. & N. Dec. at 689-90 (describing a case that a judge continued more than ten times over the course of more than two years while the Respondent's husband filed a petition for a visa on her behalf). In such situations, continuances are an inadequate docketing tool because they deny judges the ability to simply remove a case from the calendar until there is evidence that the Respondent will be competent to proceed. This was true in Solomon's case, where his attorney would not have received notifications about future proceedings against him if his case had been terminated. Rather, he could only access a fair trial and exercise his right to counsel through administrative closure.

Immigration Judges do have the authority to order termination in cases of mentally incompetent Respondents. See 8 C.F.R. § 1240.12(c) ("[t]he order of the immigration judge shall direct the Respondent's removal from the United States, or the termination of the proceedings, or other such disposition of the case as may be appropriate."); Exec. Off. of Immigr. Rev., U.S., Dep't of Justice Immigration Judge Benchbook (2016), https://www.justice.gov/eoir/immigration-judgebenchbook-mental-health-issues [https://perma.cc/BLZ3-D49Q] (explaining that termination may be appropriate "where Respondents are unable to proceed in light of mental health issues and a corresponding inability to secure adequate safeguards, as required by section 240(b)(3) of the Act."). Unfortunately, termination of proceedings is increasingly unavailable to mentally incompetent Respondents. See Matter of M-J-K-, 26 I. & N. Dec. at 778 (holding termination was inappropriate for mentally incompetent client). Even when it is available to Respondents, termination is not always in the Respondents' best interests. See Amelia Wilson, Natalie H. Prokop, & Stephanie Robins, Addressing All Heads of the Hydra: Reframing Safeguards for Mentally Impaired Detainees in Immigration Removal Proceedings, 39 N.Y.U. Rev. L. & Soc. Change 313, 357 (2015). Termination deprives mentally incompetent Respondents of relief and legal status. This leaves Respondents in limbo, exacerbating their mental illness. By contrast, administrative closure allows mentally incompetent Respondents to temporarily pause their cases to pursue competency restoration and then, ultimately, to return to court and pursue relief. Administrative closure may also allow Respondents to rely on outside sources rather than depend on accomodations provided by the Court. See Matter of M-J-K-, 26 I. & N. Dec. at 778 (B.I.A. 2016) (noting the need for counsel to locate family members of mentally ill Respondent).

CONCLUSION

Administrative closure is a docketing tool inherent to all adjudicative bodies and expressly contemplated by regulations promulgated under the INA. The BIA has also consistently affirmed its use. Administrative closure provides an important mechanism by which IJs and the BIA can ensure the efficient management of cases that come before them. As recognized by the BIA, it is particularly relevant and necessary as a safeguard in cases involving mentally incompetent Respondents, as it ensures their rights to due process when other tools are inadequate. As was the case for Solomon, administrative closure was both the most efficient method for the court to manage his case and also the only way to ensure his ability to exercise his right to counsel, notice, and other procedural rights and safeguards. It is for these reasons that the Board should find that there is sufficient authority supporting the use of administrative closure by IJs and the BIA, and that the Board should reaffirm administrative closure as necessary to ensure both administrative efficiency and due process rights of Respondents, and, in particular, mentally incompetent Respondents.

Respectfully submitted, this 15th day of February, 2018.

Sarah Sherman-Stokes

Sarah Sherman-Stokes
Immigrants' Rights &
Human Trafficking Program
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
Tel. (617) 358-6272
Email: sstokes@bu.edu

Julie Dahlstrom
Immigrants' Rights &
Human Trafficking Program
Boston University School of Law

765 Commonwealth Avenue
Boston, MA 02215
Tel. (617) 353-2807
Email: jadahl@bu.edu

Claudia R. Cubas
Capital Area Immigrants' Rights
(CAIR) Coalition
1612 K. St., N.W., Suite 204
Washington, DC 20006
Tel. (202) 331-3320
Email:
claudia.cubas@caircoalition.org

Anita Sharma
Political Asylum/Immigration
Representation
(PAIR) Project
98 N. Washington Street, Suite 106
Boston, MA 02114
Tel. (617) 742-9296
Email: asharma@pairproject.org

Reynaldo Castro-Tum

A 206 842 910

PROOF OF SERVICE

On Thursday, February 15, 2018, I, Sarah Sherman-Stokes mailed a copy of this Amicus Brief and any attached pages by email to:

AGCertification@usdoj.gov

and by overnight delivery to:

DHS/ICE Office of Chief Counsel - PHI
900 Market Street, Suite 346
Philadelphia, PA 19107

Reynaldo Castro-Tum
637 Holly Drive
Washington, PA 15301

and in triplicate by overnight delivery to:

Attorney General Jefferson Sessions
United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

Sarah Sherman-Stokes — Date

Sarah Sherman-Stokes
Associate Director
Immigrants' Rights &
Human Trafficking Program
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
Tel. (617) 358-6272
Email: sstokes@bu.edu

APPENDIX A*

Deborah Anker
Clinical Professor of Law and Founder & Director of Harvard Immigration and Refugee Clinical Program
Harvard Law School

Sabrineh Ardalan
Assistant Clinical Professor
Harvard Law School

Sabrina Balgamwalla
Assistant Professor (Clinical) and Director of Wayne State Asylum & Immigration Law Clinic
Wayne State Law School

Richard A. Boswell
Professor of Law
University of California, Hastings College of Law

Centro Legal de la Raza

Community Legal Services and Counseling Center

Community Legal Services in East Palo Alto

Esperanza Immigrant Rights Project

The Florence Immigrant and Refugee Rights Project

David E. Funke
Adjunct Professor of Law
Louis D. Brandeis School of Law

* Amici curiae appear in their individual capacities; institutional affiliations are provided here for identification purposes only.

Dolores Street Community Services

Niels Frenzen
Irmas Endowed Clinical Professor of Law
USC Gould School of Law

Iris Gomez
Staff Attorney
Massachusetts Law Reform Institute

Great Boston Legal Services

Jacklyn I. Gurany, Esq.
Attorney
Children's Law Center of Massachusetts

Lindsay M. Harris
Assistant Professor of Law & Co-Director of Immigration & Human Rights Clinic
University of the District of Columbia David A. Clarke School of Law

Laila L. Hlass
Professor of Practice
Tulane University Law School

Mary Holper
Associate Clinical Professor
Boston College Law School

Kari Hong
Assistant Professor
Boston College Law School

Jennifer Lee Koh
Professor of Law
Western State College of Law

Daniel M. Kowalski
Editor-in-Chief
Bender's Immigration Bulletin (LexisNexis)

Annie Lai
Assistant Clinical Professor of Law
UC Irvine School of Law

Karen Pita Loor
Clinical Associate Professor of Law
Boston University School of Law

Amelia McGowan
Adjunct Professor
Mississippi College School of Law Immigration Clinic

MetroWest Legal Services

Helen Parsonage
Adjunct Professor
Wake Forest School of Law

Schuyler Pisha, Esq.
Legal Director
Catholic Social Services of Fall River, Inc.

Christina L. Powers
Managing Attorney, Detained Representation
Pennsylvania Immigration Resource Center

Nina Rabin
Clinical Professor of Law
James E. Rogers College of Law, University of Arizona

Rocky Mountain Immigrant Advocacy Network

Ragini Shah
Clinical Professor of Law
Suffolk University Law School

Heather Scavone
Director of the Humanitarian Immigration Law Clinic, Assistant Professor of Law
Elon Law School

Maia Justine Storm
Executive Director
Lemkin House

Maddie Thomson
Attorney
Community Law Office LLC

Claire Valentin
Supervising Attorney
Children's Law Center of Massachusetts

Anna R Welch
Clinical Professor
University of Maine School of Law