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EOIR # SL971530

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

)	
In the Matter of:)	
)	
Reynaldo Castro-Tum)	File No.: A 206-842-910
)	
In removal proceedings)	
)	

AMICI CURIAE BRIEF OF RETIRED IMMIGRATION JUDGES AND
FORMER MEMBERS OF THE BOARD OF IMMIGRATION APPEALS

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INTERESTS OF AMICI

Amici curiae are retired Immigration Judges and former members of the Board of Immigration Appeals, who seek to address the Attorney General's certified questions regarding administrative closure. *Amici* were appointed to serve at immigration courts around the United States and with the Board, and at senior positions with the Executive Office of Immigration Review. From their many combined years of service, *amici* have intimate knowledge of the operation of the immigration courts, including the importance of various procedural mechanisms to maintain efficient dockets. As explained in detail, administrative closure, when used judiciously, is a critical tool for immigration judges in managing their dockets. Without tools like administrative closure, immigration judges would be hampered, unable to set aside those matters that do not yet require court intervention and thus prevented from focusing on the removal cases that demand immediate attention.

In particular, the **Honorable Sarah M. Burr** served as a U.S. Immigration Judge in New York from 1994 and was appointed as Assistant Chief Immigration Judge in charge of the New York, Fishkill, Ulster, Bedford Hills and Varick Street immigration courts in 2006. She served in this capacity until January 2011, when she returned to the bench full-time until she retired in 2012. Prior to her appointment, she worked as a staff attorney for the Criminal Defense Division of the Legal Aid Society in its trial and appeals bureaus and also as the supervising attorney in its immigration unit. She currently serves on the Board of Directors of the Immigrant Justice Corps.

The **Honorable Jeffrey S. Chase** served as an Immigration Judge in New York City from 1995 to 2007 and was an attorney advisor and senior legal advisor at the Board from 2007 to 2017. He is presently in private practice as an independent consultant on immigration law, and

is of counsel to the law firm of DiRaimondo & Masi in New York City. Prior to his appointment, he was a sole practitioner and volunteer staff attorney at Human Rights First. He also was the recipient of the American Immigration Lawyers Association's annual pro bono award in 1994 and chaired AILA's Asylum Reform Task Force.

The **Honorable Bruce J. Einhorn** served as a United States Immigration Judge in Los Angeles from 1990 to 2007. He now serves as an Adjunct Professor of Law at Pepperdine University School of Law in Malibu, California, and a Visiting Professor of International, Immigration, and Refugee Law at the University of Oxford, England. He is also a contributing op-ed columnist at D.C.-based *The Hill* newspaper. He is a member of the Bars of Washington D.C., New York, Pennsylvania, and the Supreme Court of the United States.

The **Honorable Cecelia M. Espenoza** served as a Member of the Executive Office for Immigration Review ("EOIR") Board of Immigration Appeals from 2000-2003 and in the Office of the General Counsel from 2003-2017 where she served as Senior Associate General Counsel, Privacy Officer, Records Officer and Senior FOIA Counsel. She is presently in private practice as an independent consultant on immigration law, and a member of the World Bank's Access to Information Appeals Board. Prior to her EOIR appointments, she was a law professor at St. Mary's University (1997-2000) and the University of Denver College of Law (1990-1997) where she taught Immigration Law and Crimes and supervised students in the Immigration and Criminal Law Clinics. She has published several articles on Immigration Law. She is a graduate of the University of Utah and the University of Utah S.J. Quinney College of Law. She was recognized as the University of Utah Law School's Alumna of the Year in 2014 and received the Outstanding Service Award from the Colorado Chapter of the American Immigration Lawyers

Association in 1997 and the Distinguished Lawyer in Public Service Award from the Utah State Bar in 1989-1990.

The **Honorable Noel Ferris** served as an Immigration Judge in New York from 1994 to 2013 and an attorney advisor to the Board from 2013 to 2016, until her retirement. Previously, she served as a Special Assistant U.S. Attorney in the Southern District of New York from 1985 to 1990 and as Chief of the Immigration Unit from 1987 to 1990.

The **Honorable John F. Gossart, Jr.** served as a U.S. Immigration Judge from 1982 until his retirement in 2013 and is the former president of the National Association of Immigration Judges. At the time of his retirement, he was the third most senior immigration judge in the United States. Judge Gossart was awarded the Attorney General Medal by then Attorney General Eric Holder. From 1975 to 1982, he served in various positions with the former Immigration Naturalization Service, including as general attorney, naturalization attorney, trial attorney, and deputy assistant commissioner for naturalization. He is also the co-author of the National Immigration Court Practice Manual, which is used by all practitioners throughout the United States in immigration court proceedings. From 1997 to 2016, Judge Gossart was an adjunct professor of law at the University of Baltimore School of Law teaching immigration law, and more recently was an adjunct professor of law at the University of Maryland School of Law also teaching immigration law. He has been a faculty member of the National Judicial College, and has guest lectured at numerous law schools, the Judicial Institute of Maryland and the former Maryland Institute for the Continuing Education of Lawyers. He is also a past board member of the Immigration Law Section of the Federal Bar Association. Judge Gossart served in the United States Army from 1967 to 1969 and is a veteran of the Vietnam War.

The **Honorable William P. Joyce** served as an Immigration Judge in Boston, Massachusetts. Subsequent to retiring from the bench, he has been the Managing Partner of Joyce and Associates with 1,500 active immigration cases. Prior to his appointment to the bench, he served as legal counsel to the Chief Immigration Judge. Judge Joyce also served as an Assistant U.S. Attorney for the Eastern District of Virginia, and Associate General Counsel for enforcement for INS. He is a graduate of Georgetown School of Foreign Service and Georgetown Law School.

The **Honorable Edward Kandler** was appointed as an Immigration Judge in October 1998. Prior to his appointment to the Immigration Court in Seattle in June 2004, he served as an Immigration Judge at the Immigration Court in San Francisco from August 2000 to June 2004 and at the Immigration Court in New York City from October 1998 to August 2000. Judge Kandler received a Bachelor of Arts degree in 1971 from California State University at San Francisco, a Master of Arts degree in 1974 from California State University at Hayward, and a Juris Doctorate in 1981 from the University of California at Davis. Judge Kandler served as an assistant U.S. trustee for the Western District of Washington from 1988 to 1998. He worked as an attorney for the law firm of Chinello, Chinello, Shelton & Auchard in Fresno, California, in 1988. From 1983 to 1988, Judge Kandler served as an assistant U.S. attorney in the Eastern District of California. He was also with the San Francisco law firm of Breon, Galgani, Godino from 1981 to 1983. Judge Kandler is a member of the California Bar.

The **Honorable Carol King** served as an Immigration Judge from 1995 to 2017 in San Francisco and was a temporary Board member for six months between 2010 and 2011. She previously practiced immigration law for ten years, both with the Law Offices of Marc Van Der

Hout and in her own private practice. She also taught immigration law for five years at Golden Gate University School of Law and is currently on the faculty of the Stanford University Law School Trial Advocacy Program. Judge King now works as a Removal Defense Strategist, advising attorneys and assisting with research and writing related to complex removal defense issues.

The **Honorable Lory D. Rosenberg** served on the Board from 1995 to 2002. She then served as Director of the Defending Immigrants Partnership of the National Legal Aid & Defender Association from 2002 until 2004. Prior to her appointment, she worked with the American Immigration Law Foundation from 1991 to 1995. She was also an adjunct Immigration Professor at American University Washington College of Law from 1997 to 2004. She is the founder of IDEAS Consulting and Coaching, LLC., a consulting service for immigration lawyers, and is the author of Immigration Law and Crimes. She currently works as Senior Advisor for the Immigrant Defenders Law Group.

The **Honorable Susan Roy** started her legal career as a Staff Attorney at the Board of Immigration Appeals, a position she received through the Attorney General Honors Program. She served as Assistant Chief Counsel, National Security Attorney, and Senior Attorney for the DHS Office of Chief Counsel in Newark, NJ, and then became an Immigration Judge, also in Newark. Sue has been in private practice for nearly 5 years, and two years ago, opened her own immigration law firm. Sue is the NJ AILA Chapter Liaison to EOIR, is the Vice Chair of the Immigration Law Section of the NJ State Bar Association, and in 2016 was awarded the Outstanding Prop Bono Attorney of the Year by the NJ Chapter of the Federal Bar Association.

The **Honorable Paul W. Schmidt** served as an Immigration Judge from 2003 to 2016 in Arlington, Virginia. He previously served as Chairman of the Board of Immigration Appeals from 1995 to 2001, and as a Board Member from 2001 to 2003. He authored the landmark decision *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1995) extending asylum protection to victims of female genital mutilation. He served as Deputy General Counsel of the former INS from 1978 to 1987, serving as Acting General Counsel from 1986-87 and 1979-81. He was the managing partner of the Washington, D.C. office of Fragomen, DelRey & Bernsen from 1993 to 1995, and practiced business immigration law with the Washington, D.C. office of Jones, Day, Reavis and Pogue from 1987 to 1992, where he was a partner from 1990 to 1992. He served as an adjunct professor of law at George Mason University School of Law in 1989, and at Georgetown University Law Center from 2012 to 2014 and 2017 to present. He was a founding member of the International Association of Refugee Law Judges (IARLJ), which he presently serves as Americas Vice President. He also serves on the Advisory Board of AYUDA, and assists the National Immigrant Justice Center/Heartland Alliance on various projects; and speaks, writes and lectures at various forums throughout the country on immigration law topics. He also created the immigration law blog immigrationcourtside.com.

The **Honorable Polly A. Webber** served as an Immigration Judge from 1995 to 2016 in San Francisco, with details in facilities in Tacoma, Port Isabel, Boise, Houston, Atlanta, Philadelphia, and Orlando. Previously, she practiced immigration law from 1980 to 1995 in her own private practice in San Jose. She was a national officer in AILA from 1985 to 1991 and served as National President of AILA from 1989 to 1990. She has also taught immigration and nationality law at both Santa Clara University School of Law and Lincoln Law School.

The **Honorable Gustavo D. Villageliu** served as a Board of Immigration Appeals Member from July 1995 to April 2003. He then served as Senior Associate General Counsel for the Executive Office for Immigration Review until he retired in 2011, helping manage FOIA, Privacy and Security as EOIR Records Manager. Before becoming a Board Member, Villageliu was an Immigration Judge in Miami, with both detained and non-detained dockets, as well as the Florida Northern Region Institutional Criminal Alien Hearing Docket 1990-95. Mr. Villageliu was a member of the Iowa, Florida and District of Columbia Bars. He graduated from the University of Iowa College of Law in 1977. After working as a Johnson County Attorney prosecutor intern in Iowa City, Iowa he joined the Board as a staff attorney in January 1978, specializing in war criminal, investor, and criminal alien cases.

ARGUMENT

I. Immigration Judges and the Board have inherent and delegated authority to order administrative closure in a case

The authority of Immigration Judges and the Board of Immigration Appeals (the “BIA”) to order administrative closure derives from a judge’s inherent authority to manage proceedings before the court. This inherent authority has been recognized by the U.S. Supreme Court, and lower federal courts have acknowledged administrative closure as a legitimate tool for exercising it. Moreover, this Department has specifically directed Immigration Judges to use administrative closure in a number of regulations. Accordingly, the Department cannot abrogate administrative closure without—at the very least—further rulemaking, as explained below.

Immigration Judges, like federal judges, need a broad range of tools, including administrative closure, to ensure the efficient use of judicial resources and to minimize backlog. Stripping Immigration Judges of the power to order administrative closure will only impede

efficiency in the adjudication of removal proceedings. For this reason and others, *amici* urge the Department not to take that step.

A. Federal courts have recognized that judges possess an inherent authority to order administrative closure.

All judges, including Immigration Judges, possess an inherent authority to manage their dockets. In 1936, the U.S. Supreme Court acknowledged this authority, explaining that “the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). “How this can best be done,” the Court observed, “calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Id.* at 254–55 (citations omitted). Administrative closure is one of the many tools both federal judges and Immigration Judges use to maintain this balance.

By referring to administrative closure as a “docket-management tool,” federal courts have recognized that—like the power to stay proceedings—the power to order administrative closure is “incidental” to a court’s inherent authority to control its docket. *Ali v. Quarterman*, 607 F.3d 1046, 1047 n.2 (5th Cir. 2010) (citation omitted); *Penn-America Ins. Co. v. Mapp*, 521 F.3d 290, 295 (4th Cir. 2008) (citation omitted); *see also CitiFinancial Corp. v. Harrison*, 453 F.3d 245, 250 (5th Cir. 2006) (referring to administrative closure as a “case-management tool”). The U.S. Court of Appeals for the First Circuit has explained that administrative closure “is used in various districts throughout the nation in order to shelve pending, but dormant, cases.” *Lehman v. Revolution Portfolio L.L.C.*, 166 F.3d 389, 392 (1st Cir. 1999). In *Lehman*, the First Circuit “endorse[d] the judicious use of administrative closings by district courts in circumstances in

which a case, though not dead, is likely to remain moribund for an appreciable period of time.”
Id.

B. Regulations establishing and governing Immigration Judges ratify their inherent authority to order administrative closure.

The legal framework establishing Immigration Judges indicates that they possess the same inherent authority to manage their dockets as federal judges, including the authority to order administrative closure. In the Immigration and Nationality Act, Congress defined an Immigration Judge as “an attorney whom the Attorney General appoints as an administrative *judge* . . . qualified to conduct specified classes of proceedings.” 8 U.S.C. § 1101(b)(4) (2017) (emphasis added). Specifically, Congress authorized Immigration Judges to “conduct proceedings for deciding the inadmissibility or deportability of an alien.” *Id.* at § 1229a(a)(1). Consistent with its designation of Immigration Judges as judges authorized to conduct proceedings, Congress granted Immigration Judges the power to “administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses.” *Id.* at § 1229a(b)(1). Furthermore, Congress authorized Immigration Judges to issue subpoenas and impose civil monetary sanctions for contempt—tools also used by Article III judges to ensure the smooth operation of court proceedings. *Id.*

Building on this statutory authorization, the relevant regulation promulgated under the Immigration and Nationality Act specifically grants Immigration Judges the authority to “exercise their *independent* judgment and discretion.”¹ 8 C.F.R. § 1003.10(b) (2017) (emphasis

¹ The historical shift from using Special Inquiry Officers to Immigration Judges to adjudicate removal proceedings further demonstrates the independence with which Immigration Judges are intended

added). This regulatory provisions further provides that, “[i]n deciding the individual cases before them,” Immigration Judges “may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.” *Id.*; *see also id.* at § 1003.1(d)(1)(ii) (granting the same authority to the BIA). By regulatory and statutory design, then, Immigration Judges are independent adjudicators with the authority to take a broad range of actions to appropriately manage the cases before them. *See Gonzalez-Caraveo v. Sessions*, No. 14-72472, slip op. at 14 n.4 (9th Cir. Feb. 14, 2018) (explaining that Immigration Judges’ authority to order administrative closure is supported by these federal regulations).

More specifically, the Department of Justice (“DOJ”) has equipped Immigration Judges with the explicit regulatory authority to pause proceedings. In 1987, DOJ promulgated a regulation ratifying the inherent authority for Immigration Judges to grant continuances. 52 Fed. Reg. 2,921, 2,938 (Jan. 29, 1987) (codified at 8 C.F.R. § 1003.29 (2017)); *see also* 8 C.F.R. § 1240.6 (2017) (allowing Immigration Judges to order postponement and adjournment of hearings). Administrative closure is a type of continuance that stays in place indefinitely. The duration of this type of continuance is set by the completion of a process separate and apart from

to operate. In 1973, the Department of Justice authorized the use of the term Immigration Judge and the wearing of judicial robes at immigration hearings. Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 Notre Dame L. Rev. 655, 673 (2006); *see also* 38 Fed. Reg. 8,590, 8,590 (Mar. 30, 1973). In updating the Judges’ title and appearance, “the Justice Department recognized what had certainly been clear to aliens for significantly longer—that the power to adjudicate these disputes had such a significant effect on individual rights that the adjudication should take place before a neutral judge.” Durham, 81 Notre Dame L. Rev. at 673. With the power to adjudicate removal proceedings comes the inherent power to manage one’s docket, including by the use of administrative closure.

removal proceedings. When Immigration Judges administratively close a case that cannot move forward until an outside process is completed, it allows them to focus on other cases before their court without having to repeatedly recalendar inactive proceedings.

DOJ has recognized this type of continuance, and its utility, by issuing a number of regulations involving the use of administrative closure. In 2001, for example, DOJ directed Immigration Judges to administratively close cases in which the immigrant “appears eligible to file for relief under [Legal Immigration Family Equity] Legalization.” 8 C.F.R. § 245a.12(b)(1) (2017); 66 Fed. Reg. 29,661, 29,674 (June 1, 2001). Similarly, in 2003, DOJ promulgated a regulation instructing Immigration Judges to administratively close cases in which the immigrant “appears eligible for V nonimmigrant status.” 8 C.F.R. § 1214.3 (2017); 68 Fed. Reg. 9,823, 9,836 (Feb. 28, 2003). Another regulatory provision allows victims of severe forms of human trafficking to request administrative closure of removal proceedings “to allow the alien to pursue an application for T nonimmigrant status,” relief created by the Victims of Trafficking and Violence Protection Act. 8 C.F.R. § 1214.2 (2017); 68 Fed. Reg. 9,823, 9,836 (Feb. 28, 2003).²

Additionally, the Department of Homeland Security (“DHS”) has mandated the use of administrative closure to allow respondents to proceed with administrative relief from removal.

² Furthermore, a variety of regulatory provisions provide procedural instructions for when an administratively-closed case should be deemed terminated or moved to be reopened. Regulations providing for relief under the Legal Immigration Family Equity (“LIFE”) Act of 2000, the Haitian Refugee Immigrant Fairness Act of 1998, and the Nicaraguan Adjustment and Central American Relief Act of 1997 each state that if an immigrant’s application for relief is approved, the administratively-closed case will be deemed terminated as of the date of approval. 8 C.F.R. §§ 245a.20(a)(1), 1245.15(q)(1), 1245.13(l) (2017). They each also provide that if the application is denied, the government shall request to recalendar the administratively closed case. *Id.* at §§ 245a.20(e)(2)(i), 1245.15(r)(2)(ii), 1245.13(m)(1)(ii).

In 2013, DHS amended regulations regarding waivers of certain grounds of inadmissibility to explicitly allow immigrants, after removal proceedings have been administratively closed, to file an application for a provisional unlawful presence waiver. 78 Fed. Reg. 535, 577 (Jan. 3, 2013) (codified at 8 C.F.R. § 212.7(e)(4)(v) (2017)). If the case has not been administratively closed, U.S. Citizenship and Immigration Services (“USCIS”) is prohibited from evaluating the immigrant’s application for a provisional unlawful presence waiver (titled Form I-601A). Accordingly, in such cases, without the power of administrative closure to pause removal proceedings to allow these waiver applications to be processed, Immigration Judges would be forced to unnecessarily hear cases in which an immigrant may otherwise be eligible for relief—in other words, Immigration Judges could expend time and resources adjudicating the case and entering an order of removal, only to have USCIS grant a provisional unlawful presence waiver after the fact.

Underscoring its endorsement of administrative closure, in 2016 DHS explicitly rejected a commenter’s suggestion that it eliminate the requirement that removal proceedings be administratively closed before an immigrant can apply for a provisional waiver of inadmissibility. 81 Fed. Reg. 50,243, 50,255 (July 29, 2016). In response to the comment, DHS stated that DOJ “instructs its [I]mmigration [J]udges to use available docketing tools to ensure fair and timely resolution of cases.” *Id.* DHS further stated that it “believes that current processes provide ample opportunity for eligible applicants to seek a provisional waiver, while improving the allocation of government resources and ensuring national security, public safety, and border

security.” *Id.*³ Both in the context of waivers of inadmissibility and in general, the use of administrative closure to manage the immigration court’s docket is vital to allocating judicial resources efficiently.

II. The Board’s decisions in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), and *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017), articulate the appropriate standard for administrative closure.

A. The legal standard set forth in *Avetisyan* and *W-Y-U-* gives the Immigration Judge the correct degree of independence in deciding motions for administrative closure.

The former legal standard for administrative closure under *Matter of Gutierrez* allowed one party—usually, but not necessarily DHS—“veto power” over a motion for administrative closure. 21 I&N Dec. 479, 480 (BIA 1996); *Avetisyan*, 25 I&N at 692. *Avetisyan* rejected this veto power, instead allowing the Immigration Judge to evaluate a motion on several factors, including “the basis for any opposition to administrative closure.” 25 I&N at 696. This was further clarified in *Matter of W-Y-U-*, which held that the “the primary consideration for an Immigration Judge in determining whether to administratively close or recalendar proceedings is whether the party opposing administrative closure *has provided a persuasive reason* for the case to proceed and be resolved on the merits.” 27 I&N Dec. at 20 (BIA 2017).

³ In addition, in 2002 DOJ restricted the use of administrative closure through notice and comment rulemaking. 67 Fed. Reg. 78,667, 78,673 (Dec. 26, 2002). A provision in one narrow circumstance providing for the adjustment of status for certain nationals of Vietnam, Cambodia, and Laos stated that unless USCIS consented to an immigrant’s request for administrative closure, “the [I]mmigration [J]udge or the Board may not defer or dismiss the proceeding in connection with [the immigrant’s application for relief].” 8 C.F.R. § 245.21(c) (2017). By limiting the use of administrative closure in this specific scenario, DOJ implicitly acknowledged that Immigration Judges have the inherent authority to use administrative closure.

Although the legal standard under *Avetisyan* and *W-Y-U-* is proper for several reasons, *amici* focus on the degree to which it confirms the role of the Immigration Judge as an independent and neutral arbiter and as the manager of its own docket. *See* 8 U.S.C. § 1101 (b)(4); 8 C.F.R. § 1003.10(b) (mandating judges to exercise “independent judgment and discretion”) (cited by *Avetisyan*, 25 I&N at 691). Removal proceedings involve significant rights, including “the right to stay and live and work in this land of freedom,” and “the right to rejoin [one’s] immediate family.” *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (internal citations and quotations omitted).⁴ It follows that the respondent’s *substantive* rights are intertwined with the *procedural* rules and mechanisms. “[A]n administrative tribunal’s decision to proceed immediately or to defer decision can affect an individual’s liberty and thus infringe upon areas that courts often are called upon to protect.” *Vahora v. Holder*, 626 F.3d 907, 918 (7th Cir. 2008); *see also Matter of A-A-*, 22 I&N Dec. 140, 147 n.5 (BIA 1998) (“Deportation proceedings involve the potential deprivation of a significant liberty interest and must be conducted according to the principles of fundamental fairness and substantial justice.”) (Rosenberg, J, concurring in part and dissenting in part). Given the gravity of the rights involved, it is imperative that Immigration Judges have the independence and discretion to act in their best judgment.

To afford either party “veto power” over a motion to administratively close—as was allowed under *Gutierrez*—cuts against the judicial independence that is essential to the judge’s

⁴ *Plasencia* discussed deportation proceedings, which were replaced with removal proceedings under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub.L. 104–208, 110 Stat. 3009–546 (codified as amended in scattered sections of 8 U.S.C.). The *Plasencia* court’s discussion of deportation and their bearing on individual rights is wholly applicable to the issue of removal proceedings.

role as a neutral arbiter, and interferes with efficient docket management. Indeed, Circuit Courts of Appeals have criticized the BIA's legal standards that granted the DHS unilateral veto power over other motions. In the context of a qualified motion to reopen, the Sixth Circuit in *Sarr v. Gonzales* rejected "the government's contention that *Velarde* gives the government *unbridled discretion amounting to an absolute veto* to block consideration of a motion to reopen." 485 F.3d 354, 363 (6th Cir. 2007) (emphasis added); *see also Ahmed v. Mukasey*, 548 F.3d 768, 772-73 (adopting *Sarr*). And on the issue of a motion to continue, the BIA in *Hashmi* addressed how to properly weigh DHS opposition: "Government opposition that is reasonable and supported by the record may warrant denial of a continuance. On the other hand, unsupported opposition does not carry much weight. The Immigration Judge should evaluate the Government's objection, considering the totality of the circumstances." *Matter of Hashmi*, 24 I&N Dec. 785, 791 (BIA 2009).

Avetisyan and *W-Y-U-* reflect this sensible aversion to one-sided vetoes, giving judges a degree of independence to decide motions for administrative closure. Notably, the judge's discretion is not unbounded: the framework articulated in *Avetisyan* and refined in *W-Y-U-* obligates the judge to articulate a reasoned opinion and renders it subject to appellate review. *See Avetisyan*, 25 I&N at 695 & n.5. These cases also reflect the Board's recognition of the importance of administrative closure in allowing for fair and efficient completion of cases, and underscore the authority of the Immigration Judge to make such a decision without undue interference from either of the parties.

Moreover, appellate review of denial of administrative closure does not stop at the BIA; it can go further to the federal Circuit Courts of Appeals. Circuit courts have held that *Avetisyan*'s framework supplies a "sufficiently meaningful [legal] standard" for judicial review. *Gonzalez-*

Caraveo, No. 14-72472, slip op. at 13, 14. The prior law under *Gutierrez* did not. *Id.* at 14-15. This “meaningful standard” makes for more efficient proceedings at the higher levels of appeal. Whereas the BIA lacks the jurisdiction to resolve due process claims, due process violations can be challenged in the Circuit Courts. *Garcia-Ramirez v. Gonzales*, 423 F. 3d 935, 938 (9th Cir. 2005). Giving the parties and the immigration courts a meaningful standard focuses the analysis on the factors and gives courts a firmer framework by which to evaluate possible violations of due process.

Of course, appeal is not the only way to control any inappropriate use of administrative closure. The Office of the Chief Immigration Judge, currently staffed with 21 Assistant Chief Immigration Judges (“ACIJs”), is empowered to “provide[] overall program direction and establish[] priorities for approximately 350 Immigration Judges located in approximately 60 immigration courts throughout the Nation.”⁵ This power includes reviewing the performance of individual Immigration Judges. In *amici*’s experience, ACIJs pay close attention to trends that indicate that an Immigration Judge is not efficiently managing her docket. Accordingly, if an Immigration Judge were to use administrative closure inappropriately, we would expect an ACIJ to notice this trend and consult with the judge on any necessary corrections.

B. The facts and disposition of the case at bar show that the legal standard under *Avetisyan* and *W-Y-U* is working correctly.

Administrative closure is often used to address the situation where an event that could dispose of removal proceedings is outside of the parties’ and the court’s control. *See infra*,

⁵ U.S. Department of Justice, *Office of the Chief Immigration Judge*, <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios> (last visited Feb. 14, 2018).

Sections IV-V (answering the third certified question). In *amici*'s experience, it is not typically used *sua sponte* to address possible defects in the address on a Notice of Hearing, as it was in the instant case. Reynaldo Castro-Tum, A 206-842-910 (BIA Nov 27, 2017). This mismatch between the routine use of administrative closure and the facts presented makes this case a poor vehicle for reconsidering administrative closure as a tool for managing dockets across the board.

As the record demonstrates, Castro-Tum was personally served with a Notice to Appear ("NTA") in June of 2014. Reynaldo Castro-Tum, A 206-842-910, at 1 (BIA Nov 27, 2017). Subsequently, four Notices of Hearing were sent to him by mail at the same address. *Id.* at 1 n.2. After he failed to appear for his hearing in April, 2016, the Immigration Judge harbored some doubts about the reliability of the address used in the Notices of Hearing. *Id.* at 2. The judge ordered the case administratively closed, *sua sponte* and over the objection of DHS. *Id.*

The issue at the heart of this case is the reliability of the address used. DHS is allowed to allege that proper notice of hearing was given and to provide the court with its basis for its belief that the address was correct. *See Matter of Lopez-Barrios*, 20 I&N Dec. 203, 204 (BIA 1990). If the Immigration Judge is satisfied with the notice, then an in absentia hearing may be held. *Id.* If the notice is not sufficient, then termination is appropriate. *Id.* But whether the case is terminated or not turns on whether DHS is able to meet its burden of proof—not on an outside event, such as respondent's pending visa application or other type relief whose outcome could dispose of the removal proceedings.

In light of these atypical facts, the Immigration Judge's decision to use administrative closure in this case should not be used as a justification for abrogating administrative closure in all circumstances. Indeed, on appeal, the Board vacated the Immigration Judge's decision and remanded the case. This case thus demonstrates that the legal framework established under

Avetisyan/W-Y-U works properly. At most, this case is a routine instance of a lower judge erring, and being corrected on appeal. Overhauling the law on administrative closure will not eliminate these errors at the trial level, and such trial-level errors should not be used as a justification for sweeping changes in the law.

III. Fundamental principles of administrative law hold that the Attorney General cannot change the regulations that grant this authority without proper notice and comment rulemaking.

Several specific regulations ratify the inherent authority of Immigration Judges to administratively close removal proceedings, and in fact require administrative closure in certain circumstances. Accordingly, the Attorney General cannot withdraw the authority for administrative closure for a simple reason: where a regulation was issued through notice and comment rulemaking, it cannot be rescinded without notice and comment. *See* 5 U.S.C. § 553(b)–(e). Such rulemaking requires notice in the Federal Register of the terms of and legal basis for the proposed change, a period for interested persons to comment, consideration of such comments, and publication of the new rule no less than 30 days before its effective date. *Id.*

As described above, Immigration Judges’ authority to manage their dockets is reflected in numerous regulations. For starters, 8 C.F.R. § 1003.29 ratifies the inherent authority for Immigration Judges to grant continuances. This provision was enacted by notice and comment rulemaking in 1987. 52 Fed. Reg. 2921, 2931, 34 (Jan 29, 1987) (codified as 8 C.F.R. § 3.27); *see supra*, Section I.B (describing how administrative closure is a type of continuance). 8 C.F.R. § 1240.6, a similar provision allowing Immigration Judges to manage their dockets by granting reasonable adjournments, was enacted—again, by notice and comment rulemaking—in 1997. 62 Fed. Reg. 10,312, 10368 (March 6, 1997) (enacted as 8 C.F.R. § 240.6).

Aside from 8 C.F.R. §§ 1003.29 & 1240.6, other provisions rely on the power of administrative closure and thus would need to be revised through rulemaking if administrative closure were abrogated. By way of example, 8 C.F.R. § 212.7(e)(4)(v) provides that an alien is not eligible for a waiver inadmissibility if she is in removal proceedings, unless the removal proceedings have been administratively closed.⁶ If the Attorney General wants to alter these regulations by abrogating administrative closure, he must afford notice and comment. *See* 5 U.S.C. § 553(b)–(e). This was precisely the mechanism through which interested parties attempted—unsuccessfully—to alter 8 C.F.R. § 212.7(e)(4)(v). *See* 81 Fed. Reg. 50,244, 50,255 (July 29, 2016).⁷ This past practice serves as useful guidance and undercuts any attempt to change the rules without adhering to the rulemaking process

A. Practical docket management considerations weigh in favor of retaining administrative closure.

Part of an Immigration Judge’s responsibility is to manage her docket. Though ministerial in some respects, case management can have a significant effect on the substantive rights of individuals subject to removal proceedings. *See supra*, Section II.A (citing *Vahora*, 626 F.3d at 918). It can also bear on the government’s interest in adjudicating cases to a final decision.

As *amici* well know, a judge’s calendar is a puzzle with many moving parts. Each time a case is scheduled on the court's calendar, the judge and her staff devote time to identify a block

⁶ This provision was enacted by notice and comment rulemaking in 2013. 78 Fed. Reg. 536 (Jan. 3, 2013).

⁷ As explained in footnote 3, *supra*, in 2002 DOJ restricted the use of administrative closure through notice and comment rulemaking. 67 Fed. Reg. 78,667, 78,673 (Dec. 26, 2002). That rulemaking also underscores the need to engage in notice and comment before abrogating Immigration Judges’ authority to order administrative closure.

of time that can accommodate the hearing date, then coordinate the date with the parties' counsel, and, when the date is closer, notify the parties' counsel. (Immigration Judges often refer to a *touch down* when a case is scheduled on the calendar.)

Moreover, the court file must be pulled and reviewed by the Immigration Judge prior to each hearing, as must the Immigration and Customs Enforcement ("ICE") file be pulled and reviewed by the government attorney assigned to the case. These resources are all necessary in order to support the (often brief) in-court hearing time it takes merely to confirm that the case is still not ready to proceed due to factors outside the control of the court and the parties.

To operate efficiently, the Immigration Judge needs the ability to triage cases, and to prioritize those that are ripe for resolution. This concern is not new, nor is it specific to the facts of the case. *See* Memorandum from Brian M. O'Leary, Chief Immigration Judge, Operating Policies and Procedures Memorandum 13-01: Continuances and Administrative Closure 4 (March 7, 2013) [hereinafter O'Leary Memo]. While a continuance will temporarily postpone a hearing, scheduling the new date involves the same resources to coordinate with the parties' counsel and to notify them. A "domino effect" occurs when rescheduling one case bumps others.

Administrative closure, as opposed to a continuance, allows the judge and parties to avoid this cumbersome rescheduling when a case is not ripe to adjudicate. The *Hashmi* court, when deciding the respondent's request for a continuance when his I-130 petition was pending before USCIS, noted that "[a]dministrative closure is an attractive option in these situations, as it will assist in ensuring that only those cases that are likely to be resolved are before the Immigration Judge. *This will avoid the repeated rescheduling of a case that is clearly not ready to be concluded.*" *Hashmi*, 24 I&N at 791 n.4 (emphasis added).

B. Due process considerations also weigh in favor of retaining administrative closure.

In many instances, administrative closure is the optimal docket management tool. *See infra*, Section VI (answering the third certified question). A recent survey noted that immigration courts face a backlog of nearly 600,000 cases⁸—split among only 350 judges.⁹ Given this heavy load, judges need every tool at their disposal to effectively and fairly adjudicate cases. Withdrawing administrative closure—which gives judges the flexibility to turn their attention away from cases likely to be resolved through other means—will significantly undermine the efficiency of the immigration court and delay the resolution of the more important cases.

While administrative expediency is a real concern for courts, efficiency must respect procedural fairness, not abridge it. “To reach a decision about whether to grant or deny a motion for a continuance based solely on case completion goals, with no regard for the circumstances of the case itself, is impermissibly arbitrary.” *Hashmi v. Attorney General of the United States*, 531 F.3d 256, 261 (3d Cir. 2008). Despite the availability of a motion to reopen, ordering an alien removed when some other relief is available infringes upon rights. *Vahora*, 626 F.3d at 918; *cf. Potdar v. Mukasey*, 550 F.3d 594, 596 (7th Cir. 2008) (“Congress did not intend to entitle illegal aliens to seek an adjustment of status upon the receipt of certificates from . . . labor departments and at the same time also intend[] section 1252(a)(2)(B)(ii) to place beyond judicial review decisions by the immigration authorities that nullif[y] the statute.”). In cases such as these, the

⁸ Dana Marks, *Immigration Courts Need Independence to Work Fairly and Efficiently*, *Newsday*, (July 16, 2017, 4:15 pm), <https://www.newsday.com/opinion/commentary/want-to-boost-immigration-courts-1.13801499> (last visited Feb. 16, 2018).

⁹ U.S. Department of Justice, *Office of the Chief Immigration Judge*, <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios> (last visited Feb. 16, 2018).

most efficient way to preserve procedural fairness—and thus to protect substantive rights—is through administrative closure. “[I]t is a reality in any court system that fundamental fairness and due process require that legal proceedings be postponed in appropriate circumstances.” O’Leary Memo, 4.

IV. Options such as continuances, dismissal without prejudice, and termination without prejudice, are suboptimal as compared to administrative closure.

As reflected in the certified question, the principle purpose of the removal regulations is to ensure the “expeditious, fair, and proper resolution” of removal proceedings. *See* 8 C.F.R. § 1003.12. Moreover, in light of its large backlog of pending immigration cases, DOJ has prioritized case completion and performance metrics with the aim of ensuring “that EOIR’s mission of fairly, expeditiously, and uniformly administering the immigration laws is fulfilled.” *See* Office of the Attorney General, Memorandum for the EOIR: Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest (Dec. 5, 2017). *Amici’s* experience as Immigration Judges firmly persuades us that administrative closure is an essential tool in the successful advancement of EOIR’s mission. More to the point, several key features of administrative closure that are absent from its procedural counterparts make it uniquely qualified to achieve judicial economy.

Continuance. Unlike administrative closure, continuances frequently lead to—indeed *require*—repeated but unnecessary appearances on an immigration court’s Master Calendar. To be sure, there are cases in which continued appearances are necessary for expeditious adjudication. One such example is where the USCIS has asked the respondent for more information or evidence in the course of adjudicating a petition or application outside of the removal proceedings, such as a Request for Evidence (“RFE”). In that context, the respondent

must do or produce some concrete act or information in order to move his or her immigration case along, and a continuance permits the court to ensure the respondent's progress. By contrast, in cases where the outcome of an application or other pending case is entirely dependent on another agency's action, administrative closure allows the court simply to remove the case temporarily from its Master Calendar schedule until the manifestation of the action upon which completion is dependent and, crucially, avoid unnecessary and time-consuming interactions with the parties in the meantime. *See, e.g., Avetisyan*, 25 I&N Dec. at 689–90; *cf. Matter of M-A-J-XXXX-XXX*, 274 (BIA 2015) (illustrating that parallel proceedings may be pending before state courts, USCIS, or both).

Amici are keenly aware of how much effort is expended by both courts and the DHS Office of Chief Counsel each time a case is recalendared before it is ready for adjudication. *See generally Hashmi*, 24 I&N Dec. at 786–87 (illustrating an example of wasteful recalendaring that could have been avoided by administrative closure while the respondent's I-130 petition was adjudicated). Each time the case is heard, staff and judges must set, reset, notify, and coordinate with all parties' counsel. On the agency's side, each appearance on the court's calendar similarly involves staff time in pulling the file and getting it to the assistant chief counsel; the ACC must then also spend time requesting any relevant files or petition information from the Service, and finally the ACC must review the file. Exacerbating these demands is the (in our experience, high) likelihood that the ACC who reviews the file is newly assigned to the case. Even more problematic, such unnecessary hearings negatively impact other cases whose merits are more ready for adjudication. These inefficiencies can be easily avoided through the judicious use of administrative closure, which permits the court and the parties to keep cases with no current business before the court off of its Master Calendar.

Termination without prejudice. Termination without prejudice under 8 C.F.R. § 1239.2(f) is also often a suboptimal mechanism relative to administrative closure. Most importantly, where an administratively closed case can be reinitiated by a mere motion to recalendar, a terminated case requires significantly more prosecutorial resources to return it to the court's docket. *See* 8 C.F.R. § 1003.23(b)(1)(i)-(ii) and (b)(3) (2017) (outlining the procedural and substantive elements of a motion to reopen). Also, per regulation, termination where a legally sufficient NTA has been issued and served is only available in instances where the respondent has a pending petition for naturalization. *See* 8 C.F.R. § 1239.2(f) (2017). Absent such circumstances, there is accordingly no other mechanism (besides dismissal or administrative closure) to fully halt removal proceedings while other valid forms of relief such as a visa application remain pending before USCIS.

Separately, it is our experience that DHS often prefers administrative closure in situations where the NTA is not facially defective but the agency simply cannot identify the recipient's current location in order to serve the NTA. Without the option of administrative closure, judges will undoubtedly be more likely to terminate proceedings based on insufficient notice, or in the alternative, issue unfounded *in absentia* orders. In the former context, ICE will be obligated to file motions to reopen proceedings—a more resource intensive process than simply filing a motion to recalendar an administratively closed case. *See* discussion, *supra*. In the latter context, the chances for remand—the most resource intensive procedural option in the immigration court context—increase exponentially. By contrast to these undesirable alternatives, administrative closure permits DHS to continue attempting to locate the alien and serve its valid NTA, and all parties can avoid the costly requirements associated with reopening, refiling, and/or remand.

Dismissal without prejudice. The final alternative to an administrative closure, a dismissal without prejudice under 8 C.F.R. § 1239.2(c), is also problematic for many of the same reasons as termination—in short, it precipitates a more significant resource expense once the government seeks to reinitiate proceedings. Moreover, a dismissal may wrongly imply a defect with the NTA, as dismissal would require DHS to issue, serve, and file it anew. Separately (and perhaps even more critical with respect to judicial economy), a dismissal without prejudice must be brought by the government’s attorney. The mechanism of dismissal therefore fails to provide an adequate alternative to administrative closure in cases where the Immigration Judge should, in the interests of efficiency—and in some cases due process—pause the proceedings while ICE pursues service of the NTA.

V. There is no reason to attach legal consequences to administrative closure.

Administrative closure is not an immigration benefit—rather, it is an administrative tool. Under U.S. immigration law, eligibility for immigration benefits derives from some form of immigration status—for example, that granted by possessing a visa. When some intervening event alters that status, e.g. expiration, a criminal offense, etc., the benefits that derived from it recede, and removal proceedings may commence. Once an individual is in removal proceedings, however, the application of a case management mechanism such as a continuance or administrative closure does not—and in any event should not—implicate the individual’s substantive eligibility for an immigration status (or other benefit) otherwise available under the law. Of course, assuming a properly grounded and validly served NTA, it would be improper to use administrative closure to thwart an otherwise authorized removal ready for adjudication. That is why the standards set forth in *Avetisyan* and *W-Y-U-* limit the purposes for which an administrative closure is appropriate and allow for review of such decisions. However, to suggest

that administrative closure in and of itself confers some benefit on the respondent such that their eligibility for other benefits should be negatively (or, for that matter, positively) impacted misunderstands the fundamentally procedural nature of administrative closure.

As described above, Immigration Judges have the power under binding regulations to grant administrative closure, and the Attorney General accordingly lacks the authority to alter this power without proper notice-and-comment rulemaking. Therefore, in response to the last certified question, even if DOJ chooses to promulgate new regulations restricting the use of administrative closure, the Attorney General cannot take action on cases that are already administratively closed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 16, 2018, a true and correct copy of this *Amicus Curiae* Brief was served upon the following counsel of record electronically at AGCertification@usdoj.gov and by first class mail at the address below:

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