Matthew L. Hoppock
Hoppock Law Firm LLC
10985 Cody Street, Suite 130
Overland Park, KS 66210

Bradley Jenkins
Michelle Mendez
Charles Wheeler
Catholic Legal Immigration Network, Inc.
8757 Georgia Ave., Suite 850
Silver Spring, MD 20910

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

IN THE MATTER OF: Reynaldo CASTRO-TUM, Respondent, In Removal Proceedings	File No. A206-842-910

BRIEF OF AMICUS CURIAE CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

1. VARIOUS SOURCES OF AUTHORITY REQUIRE THE MAINTENANCE OF ADMINISTRATIVE CLOSURE AS A TOOL FOR IJS AND THE BIA TO MANAGE THEIR DOCKETS. 2

   A. The Authority to Administratively Closure Cases is Guaranteed by a Series of Federal Regulations. 4

   B. Several Judicial Settlement Agreements Continue to Bind the Department of Justice to Administratively Close Cases. 12

   C. Both the BIA and the Federal Courts Have Consistently Recognized the Power to Administratively Close Cases. 14

2. THE ATTORNEY GENERAL IS UNABLE TO "WITHDRAW" ADMINISTRATIVE CLOSURE AUTHORITY FROM IJS AND THE BIA. 16

   A. The Department of Justice must engage in "Notice and Comment" to Amend its Own Regulations. 16

   B. If the Respondent was not Served With Notice of These Proceedings, the Attorney General Lacks Authority to Proceed in This Case. 18

CONCLUSION 19

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Cases

Aguirre v. Holder, 728 F.3d 48 (1st Cir. 2013) 15

Alcaraz v. I.N.S., 384 F.3d 1150 (9th Cir. 2004) 10

Ali v. Quarterman, 607 F.3d 1046 (5th Cir. 2010) 3

American Baptist Churches v. Thornburgh 760 F. Supp. 796 (N.D. Cal. 1991) 5, 6, 12, 13

Arca-Pineda v. Attorney Gen. of U.S., 527 F.3d 101 (3d Cir. 2008) 15

Barahona-Gomez v. Ashcroft, 243 F.Supp.2d 1029 (N.D. Cal 2002) 13

Chrysler Corp. v. Brown, 441 U.S. 281, 299, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979) 16

Duruji v. Lynch, 630 Fed.Appx. 589 (6th Cir. 2015) 15

Fla. Ass'n for Retarded Citizens, Inc. v. Bush, 246 F.3d 1296 (11th Cir. 2001) 3

Gonzalez-Caraveo v. Sessions, __ F.3d __, No. 14-72472, 2018 WL 846230 (9th Cir. Feb. 14, 2018) 3, 14, 15

Gonzalez-Vega v. Lynch, 839 F.3d 738 (8th Cir. 2016) 15

Hernandez v. Lynch, 625 F. App'x 336 (9th Cir. 2015) 13

Hernandez-Castillo v. Sessions, 875 F.3d 199 (5th Cir. 2017) 15

In re Blanco-Acuna, 2016 WL 6519957 (BIA 2016) 5

Kadriovski v. Gonzales, 246 F. App'x 736 (2d Cir. 2007) 11

Lehman v. Revolution Portfolio, LLC, 166 F.3d 389 (1st Cir. 1999) 3

Llanos v. Holder, 565 F. App'x 675 (10th Cir. 2014) 15

Matter of Amico, 19 I&N Dec. 652 (BIA 1988) 14

Matter of Avetisyan, 25 I&N Dec. 688 (BIA 2012) 3, 14, 15

Matter of C-, 20 I&N Dec. 529 (BIA 1992) 4

Matter of Cubor-Cruz, 25 I&N Dec. 470 (BIA 2011) 18

Matter of Fede, 20 I&N Dec. 35 (BIA 1989) 4

Matter of Gutierrez-Lopez, 21 I&N Dec. 479 (BIA 1996) 12, 13, 14

Matter of H-M-V-, 22 I&N Dec. 256 (BIA 1998) 4

Matter of Mejia-Andino, 23 I&N Dec. 533 (BIA 2002) 18

Matter of Morales, 21 I&N Dec. 130 (BIA 1995) (*en banc*) 13

Matter of M-R-A-, 24 I&N Dec. 665 (BIA 2008) 18

Matter of Ponce De Leon-Ruiz, 21 I&N Dec. 154 (BIA 1996) 16

Matter of W-A-F-C-, 26 I&N Dec. 880 (BIA 2016) 18

Matter of W-Y-U-, 27 I&N Dec. 17 (BIA 2017) 14

Mi Young Lee v. Lynch, 623 F. App'x 33 (2d Cir. 2015) 15

N. Mariana Islands v. United States, 686 F. Supp. 2d 7 (D.D.C. 2009) 17

Navarro v. Mukasey, 518 F.3d 729 (9th Cir. 2008) 13

Otis v. City of Chicago, 29 F.3d 1159 (7th Cir. 1994) 4

Penn W. Assocs. Inc. v. Cohen, 371 F.3d 118 (3d Cir. 2004) 3

Penn-America Ins. Co. v. Mapp, 521 F.3d 290 (4th Cir. 2008) 3

Sajan v. Mukasey, 257 F. App'x 736 (5th Cir. 2007) 7

Santos-Amaya v. Holder, 544 Fed.Appx. 209 (4th Cir. 2013) 15

Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87 (1995) 16

St. Marks Place Housing Co. v. U.S. Dept. of Housing & Urban Dev., 610 F.3d 75 (D.C. Cir. 2010) 3, 4

Vahora v. Holder, 626 F.3d 907 (7th Cir. 2010) 15

Statutes

5 U.S.C. § 553 ..... 16, 17

5 U.S.C. § 553(b)(B) 17

5 U.S.C. § 553(c) 17

8 U.S.C. § 1103(a)(1) 18

8 USC § 1229(a)(1)(F) 18

8 USC § 1229a 3

8 USC § 1252(a)(5) 19

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ..... 6, 9, 10, 11

Regulations

8 C.F.R. § 1003.10(b) 3

8 CFR § 1003.1(d)(1)(ii) 14

8 CFR § 1003.10(b) 14

8 CFR § 103.8(c)(2)(ii) 18

8 CFR § 1214.2(a) 9

8 CFR § 1214.3 9

8 CFR § 1239.2 15

8 CFR § 1240.62(b)(1) 6

8 CFR § 1240.70(f) 6

8 CFR § 1240.70(g) 6

8 CFR § 1245.13(d)(3) 8

8 CFR § 1245.13(m)(1)(ii) 8

8 CFR § 212.7(e)(4)(iii) 5

8 CFR § 214.15(l) 9

8 CFR § 245.15(g)(2) 7

8 CFR § 245.15(p)(4) 7

8 CFR § 245.15(r)(2)(ii) 7

8 CFR § 245a.12(b) 7

8 CFR § 245a.20(a) 7

Other Authorities

Delegation of Authority to the Immigration and Naturalization Service to Terminate Deportation Proceedings and Initiate Removal Proceedings," 65 Fed. Reg. 71,273 (proposed Nov. 30, 2000) 11

Expansion of Provisional Unlawful Presence Waivers of Inadmissibility, 81 Fed. Reg. 50243, 50255 (Jul. 29, 2016) 5

March 20, 2000 EOIR/AILA Liaison Meeting Minutes 11

Memorandum of Bo Cooper, General Counsel for the INS, Dec. 7, 1999, 77 *Interpreter Releases* 39, App. 1 (Jan. 10, 2000) 10

Memorandum of Lori L. Scialabba, Vice Chair of the BIA, dated March 14, 2000. 10

Memorandum of Paul Schmidt, Chairman of the Executive Office of Immigration Review, Aug. 20, 2000 11

COMES NOW AMICUS CURIAE, The Catholic Legal Immigration Network, Inc., (CLINIC), which writes in support of Respondent Reynaldo Castro-Tum ("Respondent") and in response to the Attorney General's certification of this matter to himself. In response to the request for amicus briefing, we write to explain that both Immigration Judges (IJs) and the Board of Immigration Appeals (BIA) are empowered to order administrative closure and that the Attorney General lacks authority to unilaterally "withdraw that authority." *Matter of Castro-Tum*, 27 I&N Dec. 187, 187 (A.G. 2018).

STATEMENT OF INTEREST OF AMICUS CURIAE

The Catholic Legal Immigration Network, Inc. (CLINIC) is the largest nationwide network of nonprofit immigration programs, with over 300 affiliates in 47 states and the District of Columbia. Programs include training and supporting immigration legal agencies, advocating for humane immigration policies, and building the capacity of local programs. CLINIC also is a partner in providing pro bono representation to detained families and offers public education materials on immigrants' rights and Catholic teaching on migration. CLINIC's work draws from Catholic social teaching to promote the dignity and protect the rights of immigrants in partnership with its network. CLINIC staff are the authors of immigration law treatises, including *Provisional Waivers: A Practitioner's Guide* and *Representing Clients in Immigration Court* and *Representing Clients in Immigration Court*. Attorneys and accredited representatives at CLINIC and its affiliate agencies have represented thousands of immigrants for whom administrative closure was an essential feature of the efficient resolution of their immigration case.

SUMMARY OF THE ARGUMENT

There is no meaningful dispute that IJs and the BIA may administratively close cases. They find that authority in a series of binding regulations of the Department of Homeland Security and the Department of Justice, in Settlement Agreements that continue to bind both agencies, and in various administrative and judicial decisions going back decades. Further, the Attorney General lacks authority to "withdraw" such power through a certified decision because: (1) the Department of Justice must engage in "Notice and Comment" to amend its regulations; (2) withdrawing authority to administratively close cases would violate several binding Settlement Agreements; and (3) if the respondent was not served with notice of these proceedings, the Attorney General lacks authority to order him removed and thus must terminate this proceeding.

ARGUMENT

The regulations implementing the immigration statute, various still-binding settlement agreements, and a litany of published federal court decisions acknowledge and mandate that IJs and the BIA have the power to administratively close and re-calendar the cases on their dockets. The Attorney General lacks authority to "withdraw" such authority unilaterally and likely cannot do so in this case, in any event, because the respondent was apparently not served with notice of his hearing.

1. Various Sources of Authority Require the Maintenance of Administrative Closure as a Tool for IJs and the BIA to Manage Their Dockets.

Although administrative closure, a docket-controlling measure used by courts and administrative agencies, previously without much controversy, is not explicitly mentioned in the immigration statute, it is a well-authorized tool for the administration of justice. Most fundamentally, this authority springs from an Immigration Judge's duty to "exercise their

independent judgment and discretion" to "take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of [proceedings under 8 USC § 1229a]." 8 C.F.R. § 1003.10(b); *accord Matter of Avetisyan*, 25 I&N Dec. 688, 691 (BIA 2012); *Gonzalez-Caraveo v. Sessions*, __ F.3d __, No. 14-72472, 2018 WL 846230, at *6 (9th Cir. Feb. 14, 2018). Indeed, docket management tools such as administrative closure are so essential to the proper functioning of any court system that federal appellate courts uniformly recognize that district courts "obviously" have "inherent authority" to employ such tools, even if the practice of administrative closure does not appear in the Federal Rules of Civil Procedure. *See St. Marks Place Housing Co. v. U.S. Dept. of Housing & Urban Dev.*, 610 F.3d 75, 80 (D.C. Cir. 2010) ("First, and most obviously, district courts can choose when to decide their cases."); *Ali v. Quarterman*, 607 F.3d 1046, 1049 (5th Cir. 2010) (acknowledging a district court's administrative closure practice as stemming from its inherent authority to control its docket); *Penn-America Ins. Co. v. Mapp*, 521 F.3d 290, 295 (4th Cir. 2008) (acknowledging that a district court's administrative closure practice is not formalized in the Federal Rules of Civil Procedure or the court's local rules and otherwise speaking approvingly of the practice); *Penn W. Assocs. Inc. v. Cohen*, 371 F.3d 118, 128 (3d Cir. 2004) (acknowledging a district court's administrative closure practice); *Lehman v. Revolution Portfolio, LLC*, 166 F.3d 389, 392 (1st Cir. 1999) (same); *Fla. Ass'n for Retarded Citizens, Inc. v. Bush*, 246 F.3d 1296, 1298 (11th Cir. 2001) (same).

On this basis alone, the Attorney General should respect the independent discretion and judgment of Immigration Judges and the Board of Immigration Appeals and abandon any effort to make sweeping changes in the use of administrative closure. As several federal appellate judges have stated regarding their trial court counterparts, "it is incumbent upon us, as a

responsible and responsive reviewing court, to provide our colleagues with all reasonable means of efficiently and intelligently managing their caseloads." *Otis v. City of Chicago*, 29 F.3d 1159, 1173 (7th Cir. 1994) (Rovner, concurring); *St. Mark's Place Housing Co.*, 610 F.3d at 82 (favorably discussing the Otis concurrence).

A. The Authority to Administratively Closure Cases is Guaranteed by a Series of Federal Regulations.

In addition to an Immigration Judge's inherent authority to engage in docket control, the practice of administrative closure has been expressly incorporated in a series of regulatory provisions that guide the Department of Justice and the Department of Homeland Security on how to adjudicate applications for certain kinds of benefits.

These regulations require that IJs and the BIA be empowered to control their own dockets with such measures, in most cases explicitly identifying administrative closure as the tool an IJ should use to remove a case from the court's docket.[1] In many cases this tool is a fundamental part of the process, and applying for benefits under various sections of the regulations is impossible without the ability to administratively close and later re-calendar proceedings.

Provisional Waiver Regulations

The most recently promulgated regulations discussing administrative closure are those implementing the provisional unlawful presence waiver, which enables immigrants to have their

[1] The agency is required to follow administrative regulations properly issued by the Attorney General, as they "have the force and effect of law" as to the BIA and the IJs. *Matter of H-M-V-*, 22 I&N Dec. 256, 261 (BIA 1998); *see also, e.g. Matter of Fede*, 20 I&N Dec. 35 (BIA 1989) (concluding the BIA lacks authority to entertain motions for attorneys' fees under the Equal Access to Justice Act because "[t]he Attorney General has determined that immigration proceedings do not come within the scope of the EAJA"); *Matter of* C-, 20 I&N Dec. 529, 532 (BIA 1992) ("[I]t is settled that the Immigration Judge and this Board lack jurisdiction to rule upon the constitutionality of the Act and the regulations.").

inadmissibility waived prior to consular processing, decreasing the cost and administrative involvement in the waiver process. In particular, the regulations describe immigrants as ineligible for the waiver if they are in removal proceedings "unless the removal proceedings are administratively closed and have not been re-calendared at the time of filing the application for a provisional unlawful presence waiver." 8 CFR § 212.7(e)(4)(iii). Thus, a necessary step for immigrants in removal proceedings who intend to seek the waiver is to request administrative closure from an Immigration Judge or the BIA. *See e.g. In re Blanco-Acuna*, 2016 WL 6519957, at *1 (BIA 2016) (describing the process of administrative closure before the filing of a Form I-601A).

With this regulation, the Secretary of Homeland Security incorporated administrative closure as a fundamental tool, necessary to the provisional waiver process. Indeed, DHS considered, and rejected, several proposals to permit people in removal proceedings to apply for a provisional waiver, relying on the desirability of the administrative closure regime. *See* Expansion of Provisional Unlawful Presence Waivers of Inadmissibility, 81 Fed. Reg. 50243, 50255 (Jul. 29, 2016).

For immigrants in removal proceedings, this regulation requires that an IJ first administratively close their proceedings. The regulation would make no sense if the Attorney General concludes that IJs in fact lack any authority to administratively close such cases. This reference to administrative closure in the regulation confirms what is already well known: IJs and the BIA have authority to administratively close cases.

ABC Regulations

To comply with the settlement agreement in *American Baptist Churches v. Thornburgh* 760 F. Supp. 796 (N.D. Cal. 1991), the Attorney General promulgated regulations describing the

use of administrative closure by IJs. Specific provisions describe how IJs are to treat the cases of certain *American Baptist Churches* ("ABC") class members whose cases were "administratively closed or continued." 8 CFR § 1240.70(f). The regulations also discuss how IJs are to treat cases for dependents "whose proceedings before EOIR were administratively closed or continued." 8 CFR § 1240.70(g).

Elsewhere, whether an ABC class member's case has previously been administratively closed determines whether an IJ will have jurisdiction to hear that person's application for "suspension of deportation or special rule cancellation of removal filed pursuant to section 309(f)(1)(A) or (B) of IIRIRA, as amended by NACARA." 8 CFR § 1240.62(b)(1).

As outlined below, administrative closure was a tool enshrined in the ABC settlement agreement, and it has since been incorporated into the agency's regulations implementing that agreement. Determining now that IJs and the BIA lack any statutory or regulatory authority to administratively close such cases will throw these regulatory schemes into complete chaos, making it nearly impossible to determine which agency has authority to decide which application for relief.

HRIFA Regulations

In implementing the Haitian Refugee Immigrant Fairness Act of 1998 ("HRIFA") the agency promulgated regulations that similarly outline how an IJ or the Board are to use administrative closure to comply with the statute. In particular, to allow immigrants to apply for HRIFA benefits the regulations command that

> "An alien who is in exclusion, deportation, or removal proceedings, or who has a pending motion to reopen or a motion to reconsider such proceedings filed on or before May 12, 1999, may request that the proceedings be administratively closed, or that the motion be indefinitely continued, in order to allow the alien to file such application with the Service as prescribed in paragraph (g) of this section. If the alien appears to be eligible to file an application for adjustment of status under this section, the Immigration Court or the

> Board (whichever has jurisdiction) **shall**, with the concurrence of the Service, **administratively close** the proceedings or continue indefinitely the motion."

8 CFR § 245.15(p)(4) (emphasis added). Further, when immigrants' removal proceedings have "been administratively closed" they must apply for HRIFA benefits with USCIS, rather than before the Immigration Court. 8 CFR § 245.15(g)(2). When the proceedings have been administratively closed, the agency must "make a request for re-calendaring or reinstatement to the Immigration Court that had administratively closed the proceeding, or the Board, as appropriate, when the application has been denied." 8 CFR § 245.15(r)(2)(ii).

LIFE Act Regulations

In implementing the LIFE Act the agency has also described administrative closure as a tool Immigration Judges can use. For example, a person in immigration court "who is prima facie eligible for adjustment of status under LIFE Legalization" is authorized "to request that the proceedings be administratively closed or that the motion filed be indefinitely continued, in order to allow the alien to pursue a LIFE Legalization application with the Service." 8 CFR § 245a.12(b). Similarly, if the Service grants the application and the person's court proceedings "were administratively closed, such proceedings shall be deemed terminated as of the date of approval of the application for adjustment of status by the district director." 8 CFR § 245a.20(a).

The Fifth Circuit has interpreted this regulation to permit individuals to seek administrative closure. *Sajan v. Mukasey*, 257 F. App'x 736, 739 (5th Cir. 2007) (unpublished). And it has held that an IJ's refusal to consider a request for administrative closure in compliance with the LIFE Act is reversible error. *Id.*

NACARA Regulations

Just like the HRIFA and LIFE Act regulations, the agency chose to empower IJs to administratively close eligible cases so immigrants could apply for benefits under the Nicaraguan

Adjustment and Central American Relief Act or NACARA (Title II of Pub.L. 105–100) ("NACARA"). 8 CFR § 1245.13(d)(3) (an IJ "shall ... administratively close the proceedings ..."). Then, if the application is denied by the Service, the Immigration Courts or the BIA must "re-calendar or reinstate the prior exclusion, deportation or removal proceedings." 8 CFR § 1245.13(m)(1)(ii).

These regulations provide guidance to IJs and to the USCIS on who has initial jurisdiction to hear NACARA applications. Without having their court cases administratively closed as contemplated by the regulations, individuals eligible for NACARA benefits would be unable to pursue their applications for relief before the USCIS and IJs would likely lack authority to consider them (because the USCIS had not first ruled on them). Implementing such a rule now would create substantial disorder and confusion for adjudicators.

Regulations Implementing the T, V Nonimmigrant Visas

Several nonimmigrant visa categories permit an immigrant in removal proceedings to seek administrative closure while awaiting a decision on their visa applications. For example, in implementing the "V visa" the DHS discusses in its regulations the process for administrative closure. It notes an immigrant in removal proceedings who believes she is eligible for a "V nonimmigrant visa" should

> "request before the immigration judge or the Board of Immigration Appeals, as appropriate, that the proceedings be administratively closed (or before the Board that a previously-filed motion for reopening or reconsideration be indefinitely continued) in order to allow the alien to pursue an application for V nonimmigrant status with the Service."

8 CFR § 1214.3; *see also* 8 CFR § 214.15(l) ("An alien who is already in immigration proceedings and believes that he or she may have become eligible to apply for V nonimmigrant status should request before the immigration judge or the Board, as appropriate, that the

proceedings be administratively closed (or before the Board that a previously-filed motion for reopening or reconsideration be indefinitely continued) in order to allow the alien to pursue an application for V nonimmigrant status with the Service."). Upon such a motion, if the immigrant appears to be eligible for the visa, the IJ or the BIA "shall administratively close the proceeding or continue the motion indefinitely" to allow the immigrant to pursue the visa. If the person is later found ineligible "the Service shall recommence proceedings by filing a motion to re-calendar." 8 CFR § 1214.3.

Similarly, a person eligible for a T visa who is in removal proceedings may move the Immigration Judge or the BIA to administratively closure the case, and the agency "may grant such a request to administratively close the proceeding or continue a motion to reopen or motion to reconsider indefinitely." 8 CFR § 1214.2(a). If the T visa application is later denied, "the Service may recommence proceedings that have been administratively closed by filing a motion to re-calendar with the immigration court or a motion to reinstate with the Board." *Id.*

Re-Papering Regulations and Memoranda

When Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Section 309 of that Act retroactively made certain immigrants ineligible for suspension of deportation. In particular, IIRIRA § 309(c)(5) retroactively changed the date that the clock stopped for calculating when a person had accrued seven years residence for suspension of deportation eligibility. However, Congress included a safety-net provision for people rendered ineligible for suspension of deportation because of the retroactive stop-time rule: in IIRIRA § 309(c)(3) Congress authorized the Attorney General to provide these individuals a chance to apply for cancellation of removal.

The Attorney General began implementing IIRIRA § 309(c)(3) by drafting a regulation that solved the retroactive application of the suspension of deportation timing rules. However, in the interim the Executive Office of Immigration Review issued a series of directives to the BIA to "administratively close removal proceedings of eligible aliens through a process called 'repapering.'" *Alcaraz v. I.N.S.*, 384 F.3d 1150, 1153 (9th Cir. 2004). For example, a December 7, 1999 Memorandum from INS General Counsel Bo Cooper entitled "Administrative Closure of Executive Office for Immigration Review Proceedings for Non–Lawful Permanent Resident Aliens Eligible for Repapering," outlined the procedure for seeking such "re-papering." Memorandum of Bo Cooper, General Counsel for the INS, dated Dec. 7, 1999 ("Cooper Memorandum"), reproduced in 77 *Interpreter Releases* 39, App. 1 (Jan. 10, 2000). That memorandum is still available online at http://www.usdoj.gov/eoir/chip4.pdf.

The Cooper Memorandum directed the BIA to administratively close cases where individuals were eligible for repapering. *Id.* at 2 ("The Board will *sua sponte* administratively close cases meeting the above criteria on a case-by-case basis.") (emphasis added).

On March 14, 2000, the BIA's vice-chair issued a separate memorandum describing how the agency would implement this statute, which included administrative closure. Memorandum of Lori L. Scialabba, Vice Chair of the BIA, dated March 14, 2000 ("Scialabba Memorandum"), available at http://www.usdoj.gov/eoir/chip6.pdf. The BIA also gave reassurances in a meeting with the American Immigration Lawyers Association liaison ("AILA") on March 20, 2000 that

> "[t]he Board will administratively close the proceedings of any alien who appears eligible for repapering in accordance with the criteria agreed to between INS and EOIR. The Board began closing the cases of non-LPRs who appear eligible for repapering on March 16, 2000."

March 20, 2000 EOIR/AILA Liaison Meeting Minutes. These minutes remain available on the DOJ's website at http://www.usdoj.gov/eoir/statspub/qaeoiraila.htm

Following the reassurances about the availability of administrative closure at this meeting, BIA Chairman Paul Schmidt issued another memorandum to BIA members again describing the use of administrative closure for repapering. Memorandum of Paul Schmidt, Chairman of the Executive Office of Immigration Review, dated Aug. 20, 2000 ("Schmidt Memorandum"). This memorandum remains available online at https://www.justice.gov/sites/default/files/eoir/legacy/2014/01/23/streamimplem.pdf. The Schmidt Memorandum describes the BIA's procedures for administratively closing cases and authorizes a single BIA judge to exercise the authority of the BIA for "Non–Lawful Resident Repapering cases [any cases in which the Attorney General is authorized to terminate deportation proceedings and reinitiate removal proceedings under section 309(c)(3) of IIRIRA]." *Id.* at 6.

The Department of Justice then proposed a final rule to allow for repapering. "Delegation of Authority to the Immigration and Naturalization Service to Terminate Deportation Proceedings and Initiate Removal Proceedings," 65 Fed. Reg. 71,273 (proposed Nov. 30, 2000). This proposed regulation has never been finalized. However, while the statute did not require the Attorney General to permit repapering in any specific cases, courts have interpreted the memoranda issued describing the practice of repapering to be "not contrary to clear congressional intent." *Kadriovski v. Gonzales*, 246 F. App'x 736, 740 (2d Cir. 2007). And while there still is no final rule implementing the repapering statute, courts have deferred to the agency's memoranda interpreting the statute. *Id.*

These examples demonstrate that administrative closure isn't just a tool the BIA and IJs are empowered to use. It is in fact incorporated into the adjudicative process for various forms of immigration relief, and whether a case has been or will be administratively closed is at times a

condition for determining whether the IJ or the USCIS have jurisdiction to hear certain applications for relief. Thus, there is no question the Attorney General should conclude that IJs and the BIA have authority to administratively close and re-calendar cases. Any other conclusion would conflict with 30 years of binding regulations and would cause serious chaos for IJs and the BIA tasked with complying with these regulations.

B. Several Judicial Settlement Agreements Continue to Bind the Department of Justice to Administratively Close Cases.

In addition to the binding regulations that govern how the Department of Justice and the Department of Homeland Security are to implement the immigration statute, at least two settlement agreements continue to require the agency to keep "administrative closure" as an option available to immigration judges.

First, in settling the *ABC* case, the Department of Justice entered into a settlement agreement specifically authorizing class members to have their cases administratively closed. It states:

> "Unless an individual class member objects and waives the right to apply hereunder, upon signing of this agreement by the parties, Defendants agree to stay the deportation and, on or before January 31, 1991, ... to stay or administratively close the EOIR proceedings of any class member (unless they have been convicted of an aggravated felony), whose cases were pending on November 30, 1990, until the class member has had the opportunity to effectuate his or her rights under this agreement."

Matter of Gutierrez-Lopez, 21 I&N Dec. 479, 480 (BIA 1996). The BIA has described the *ABC* settlement as "designed to ameliorate systemic defects in the prior processing of Salvadoran and Guatemalan asylum claims by providing a fresh opportunity for most class members to present their applications." *Matter of Morales*, 21 I&N Dec. 130, 139 (BIA 1995) (*en banc*) (Lory Rosenburg Concurring).

The BIA has construed the requirements outlined in the *ABC* settlement agreement to mandate that the agency permit class members to seek administrative closure. *Gutierrez-Lopez*, 21 I&N Dec. at 480; *Morales*, 21 I&N Dec. at 137. Similarly, the Ninth Circuit has held that this agreement remains binding and that the agency must continue to comply with it, including permitting administrative closure. *Hernandez v. Lynch*, 625 F. App'x 336, 337 (9th Cir. 2015) (unpublished)

Second, the *Barahona* settlement agreement similarly requires Immigration Judges and the BIA to administratively close cases in certain instances. *See Barahona-Gomez v. Ashcroft*, 243 F.Supp.2d 1029, 1035-1036 (N.D. Cal 2002) *holding modified by Navarro v. Mukasey*, 518 F.3d 729 (9th Cir. 2008).[2] For example, when a case has been scheduled for hearing and there is no evidence the immigrant received notice, the *Barahona* agreement requires the IJ to administratively close the case. *Id.* p. 1035.

In both instances the United States has entered into binding settlement agreements with large classes of immigrants that require the Department of Justice to consider administratively closing their removal cases. The United States has not sought to vacate or modify either of these settlement agreements claiming the agency now believes it lacks authority to administratively close cases. Acting unilaterally to decree that administrative closure it outside the scope of an IJ's authority would violate both settlement agreements and up-end the adjudicative process agreed to by the parties there. Not only do IJs and the BIA have authority to administratively

[2] The Ninth Circuit's later modification of the class in *Barahona* had no effect on the administrative closure requirement. *Navarro v. Mukasey*, 518 F.3d 729 (9th Cir. 2008). Rather, the Ninth Circuit merely expanded the scope of the class identified in the *Barahona* settlement. *Id.* p. 736.

close cases, but both settlement agreements make clear the Attorney General lacks the power to unilaterally withdraw such authority.

C. Both the BIA and the Federal Courts Have Consistently Recognized the Power to Administratively Close Cases.

Consistent with the guarantees found in both the federal regulations and the settlement agreements referenced *supra*, federal courts have consistently acknowledged the authority of IJs and the BIA to administratively close cases.

In one of its earliest decisions on the subject, the BIA acknowledged administrative closure as an "administrative convenience which allows the removal of cases from the calendar in appropriate situations." *Matter of Amico*, 19 I&N Dec. 652, 654 n.1 (BIA 1988); *Matter of Gutierrez-Lopez*, 21 I&N Dec. 479, 480 (BIA 1996) (same), *overruled on other grounds by Avetisyan*, 25 I&N Dec. 688. The BIA has also outlined the legal standard for whether and when to grant administrative closure. *Avetisyan*, 25 I&N Dec. at 693. And it has similarly provided a workable standard for IJs on when to re-calendar a previously-closed case. *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017).

The circuits have broadly agreed that the agency has authority to administratively close and re-calendar cases and that the federal courts can review such decisions for abuse of discretion. Most recently the Ninth Circuit held that not only does an IJ have authority to grant administrative closure, but that it is legal error to refuse to consider such a request. *Gonzalez-Caraveo,* 2018 WL 846230, at *6. The Ninth Circuit cited as authority the regulatory sections authorizing IJs and the BIA to manage their dockets. *Id.* At *5 n.5 *citing* 8 CFR §§ 1003.1(d)(1)(ii), 1003.10(b). The Ninth Circuit also offered a helpful distinction between administrative closure and prosecutorial discretion, noting that IJs sometimes use these terms interchangeably. *Id.* At *6 n.5. While the DHS has discretion to decline to prosecute cases, the

decision to administratively close is solely within the purview of the Department of Justice and can be done over the prosecution's objection. *Id.* at *6 n.5 *citing Avetisyan*, 25 I&N Dec. at 693.[3]

Gonzalez-Caraveo is only the latest in a line of recent federal court cases acknowledging that the standard for administrative closure is now well-settled enough that federal courts may review these decisions for abuse of discretion. The Second, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits had previously reached this same conclusion since the BIA published its decision in *Avetisyan*. *See Gonzalez-Vega v. Lynch*, 839 F.3d 738, 741 (8th Cir. 2016); *Duruji v. Lynch*, 630 Fed.Appx. 589, 592 (6th Cir. 2015) (unpublished); *Hernandez-Castillo v. Sessions*, 875 F.3d 199, 209 (5th Cir. 2017); *Llanos v. Holder*, 565 F. App'x 675, 675 (10th Cir. 2014) (unpublished); *Mi Young Lee v. Lynch*, 623 F. App'x 33, 34 (2d Cir. 2015) (unpublished) (reviewing "denial of administrative closure for abuse of discretion"); *Santos-Amaya v. Holder*, 544 Fed.Appx. 209, 209 (4th Cir. 2013) (unpublished *per curiam*); *Vahora v. Holder*, 626 F.3d 907, 918 (7th Cir. 2010). Notably, since the BIA published its decision in *Avetisyan*, no federal court has concluded that it lacks authority to review administrative closure determinations.

In the Eighth Circuit's decision in *Gonzalez-Vega*, the court confirmed that not only must an IJ consider administrative closure when a party requests it but that the BIA has a separate duty to consider requests to administratively close cases before it. *Gonzalez-Vega*, 839 F.3d at 741. Read together, both decisions make abundantly clear the view held by most circuits: IJs and the

[3] Administrative closure of immigration court proceedings is quite distinct from termination. While the regulations limit an IJ's authority to terminate proceedings, 8 CFR § 1239.2, administrative closure merely controls which cases on an IJ's docket should be heard first. *Arca-Pineda v. Attorney Gen. of U.S.*, 527 F.3d 101, 104 (3d Cir. 2008) (distinguishing between termination and administrative closure); *Aguirre v. Holder*, 728 F.3d 48, 53 (1st Cir. 2013) ("Administrative closure does not terminate the proceedings or result in a final order of removal").

BIA have authority to administratively close cases, but the refusal by either to consider such a request will be reversed by the circuit courts.

2. The Attorney General is Unable to "Withdraw" Administrative Closure Authority from IJs and the BIA.

A. The Department of Justice must engage in "Notice and Comment" to Amend its Own Regulations.

The Attorney General is not permitted to create a new federal rule without first complying with the advance notice and public comment requirements of the Administrative Procedure Act ("APA") *See* 5 U.S.C. § 553; *Matter of Ponce De Leon-Ruiz*, 21 I&N Dec. 154, 180 (BIA 1996) (Lory Rosenburg dissenting) (confirming that legislative rules created by the agency which affect substantive rights must first be subjected to public notice and comment). This is so whether the agency creates its new rule by promulgation of regulations or, as suggested here, merely by declaring the agency is abandoning a previously "settled understanding" of the scope of its authority. *Chrysler Corp. v. Brown*, 441 U.S. 281, 299, 99 S. Ct. 1705, 1716, 60 L. Ed. 2d 208 (1979); *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (concluding rulemaking is required if agency adopts a new position inconsistent with its own existing regulations).

The APA explicitly requires that notice of proposed rule-making be "published in the Federal Register" and must include:

> **(1)** a statement of the time, place, and nature of public rule making proceedings;
>
> **(2)** reference to the legal authority under which the rule is proposed; and
>
> **(3)** either the terms or substance of the proposed rule or a description of the subjects and issues involved.

5 U.S.C. § 553(b). The agency then must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without

opportunity for oral presentation." 5 U.S.C. § 553(c). The agency can dispense with notice-and-comment when it "for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). However, courts construe this exception narrowly, lest it outstrip the rule itself. *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 14 (D.D.C. 2009) (finding no exceptions to the notice-and-comment requirement applied where new immigration regulation created a substantive rule that affected participants' rights and enjoining the Department of Homeland Security from enforcing the regulation).

None of the narrow exceptions to the notice-and-comment requirement apply here. There is no reason engaging in a public process would burden the agency or be contrary to public interest. Rather, the new proposed rules would have vast implications for the administration of justice in Immigration Court and would substantially abrogate the rights of many participants in those proceedings. At a minimum the statute requires that such rules be crafted in the light of day through a fair and open process that permits full participation.

Each of the Attorney General's proposed courses of action (which would be accomplished by agency adjudication) manifestly interferes with the orderly implementation of DHS's current regulations (and the Department of State's ability to adjudicate immigrant visas). Such a move is undesirable as a matter of public policy[4] and entirely unlawful if accomplished without formal notice-and-comment rulemaking.

---

[4] The action suggested in the certification order, "withdrawing" authority to administratively close cases will do more than merely create chaos for those tasked with enforcing the regulations. As a policy matter, the suggestion is untenable. DHS is not just an enforcement agency; it is statutorily an adjudicator. 8 U.S.C. § 1103(a)(1). Most of the regulatory references outlined above permit administrative closure so a benefit application may be adjudicated by the DHS. By usurping a separate agency's authority and putting all power in the hands of the Department of Justice, the Attorney General would trample on the orderly

B. If the Respondent was not Served With Notice of These Proceedings, the Attorney General Lacks Authority to Proceed in This Case.

Even if the Attorney General had the authority to do what has been proposed, in a vacuum, it appears he lacks authority to do so in this case, because the respondent has likely not been served with process. Accordingly, the agency lacks jurisdiction to adjudicate questions about Mr. Castro-Tum's removability and should terminate removal proceedings.

When a person is placed into removal proceedings, they must be served with a Notice to Appear ("NTA"), which is necessary to inform him of certain affirmative duties he has under 8 USC § 1229(a)(1)(F). If the respondent is under 14 years old, such service must be on their parent. 8 CFR § 103.8(c)(2)(ii); *Matter of Cubor-Cruz*, 25 I&N Dec. 470, 471 (BIA 2011).

Without being notified of the obligations listed in the NTA, an immigrant is unable to comply with the law, including the requirement that he update his address with the DHS in writing and to notify the Immigration Court immediately by filing a Change of Address Form/Immigration Court (Form EOIR-33). *See Matter of M-R-A-*, 24 I&N Dec. 665, 674-75 (BIA 2008).

When a child has not been served with the Notice to Appear, the appropriate outcome is termination of proceedings, *Matter of Mejia-Andino*, 23 I&N Dec. 533, 536 (BIA 2002) (*en banc*), unless the DHS plans to re-serve the child with the Notice to Appear. *Matter of W-A-F-C-*, 26 I&N Dec. 880 (BIA 2016).

Here, the IJ had sufficient concerns about the propriety of service that he administratively closed the proceedings. As amici we do not have the benefit of examining the administrative record. However, to the extent the IJ believed as a matter of fact that service had not been proper,

---

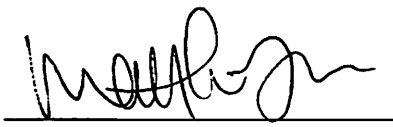
functioning of the asylum offices, USCIS Field Offices, the provisional waiver program, and the State Department's function.

the appropriate outcome here should have been to terminate proceedings. And, as the Attorney General now considers what to do with this case, there are significant concerns with a major policy change being announced with this young man's case as the vehicle.

Aside from the jurisdictional problems that may exist here if the respondent was not properly served, the Attorney General certifying *this* case to himself almost necessarily shields his decision from appellate review. Ordinarily when the BIA or the Attorney General decide a removal case, the federal courts can review the final order of removal to determine if the Department of Homeland Security met its burden, among other things. 8 USC § 1252(a)(5). But here the respondent, if he is unaware of these proceedings, has no ability to appeal an adverse determination. What is more, given that the Attorney General seeks to make a policy pronouncement about not just this case but all cases under the jurisdiction under the Executive Office for Immigration Review, it is highly inappropriate to do so in a case that is entirely insulated from appellate review.

CONCLUSION

For these reasons, the Attorney General should conclude that IJs and the BIA have authority to control their own dockets and may do so through "administrative closure" orders. Any other conclusion would invalidate currently-binding regulations while skipping the mandatory process for doing so, would violate at least two settlement agreements that continue to bind the Department of Justice, and would throw the adjudicative process for numerous forms of relief into disarray. And it would do so in the context of a young man's case where the sole factfinder in these proceedings raised concerns about him even having been served with notice of these proceedings.



Matthew L. Hoppock
Hoppock Law Firm LLC
10985 Cody Street, Suite 130,
Overland Park, KS 66210

Bradley Jenkins
Michelle Mendez
Charles Wheeler
Catholic Legal Immigration Network, Inc.
8757 Georgia Ave., Suite 850
Silver Spring, MD 20910
Counsel for Amicus Curiae Catholic Legal Immigration Network, Inc.

CERTIFICATE OF SERVICE

On February 16, 2018 I filed this brief and any attachments with the Department of Justice by submitting a copy via e-mail to AGCertification@usdoj.gov and mailed three copies via First Class Mail to United States Department of Justice Office of the Attorney General, Room 5114 950 Pennsylvania Avenue, NW Washington, DC 20530.

On February 16, 2018 I sent a copy of this brief and any attachments to the parties at the following addresses:

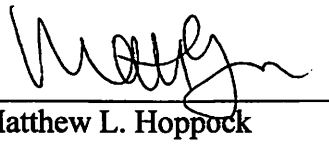
Philadelphia Office of Chief Counsel
900 Market Street Suite 346
Philadelphia, PA, 19107

Washington Office of Chief Counsel
500 12th Street SW, Mail Stop 5902
Washington, DC 20536-5902

and

Reynaldo Castro-Tum
637 Holly Drive
Washington, PA 15301

Via FedEx Overnight mail.



Matthew L. Hoppock