18-3460

IN THE

United States Court of Appeals for the Second Circuit

JOSE MARIO BENITEZ MARQUEZ, AKA JOSE BENITEZ,
Petitioner

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL
Respondent

On Petition for Review of a Decision and Order by the
Board of Immigration Appeals

BRIEF IN SUPPORT OF PETITIONER BY AMICI CURIAE ASISTA IMMIGRATION ASSISTANCE, THE BRONX DEFENDERS, BROOKLYN DEFENDER SERVICES, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., CENTRAL AMERICAN LEGAL ASSISTANCE, THE DOOR, LEGAL SERVICES NYC, LUTHERAN SOCIAL SERVICES OF NEW YORK, SANCTUARY FOR FAMILIES, AND UNLOCAL, INC.

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amici curiae ASISTA Immigration Assistance, The Bronx Defenders, Brooklyn Defender Services, Catholic Legal Immigration Network, Inc., Central American Legal Assistance, The Door, Legal Services NYC, Lutheran Social Services of New York, Sanctuary for Families, and UnLocal, Inc. each certifies that it is a not-for-profit organization that does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTERESTS OF THE AMICI CURIAE

Amici curiae are legal services organizations that represent vulnerable noncitizen clients in immigration and removal proceedings. The *amici* are submitting this brief to draw to the Court's attention the broad practical impacts for thousands of their clients that have resulted from the elimination of administrative closure in removal proceedings under *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (AG 2018).[1]

ASISTA Immigration Assistance ("ASISTA") worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes, which were incorporated in the 1994 Violence Against Women Act and its progeny. ASISTA serves as liaison for the field with personnel from United States Department of Homeland Security ("DHS") charged with implementing these laws, most notably U.S. Citizenship and

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[1] All parties have consented to the filing of this brief, which therefore is being filed without a motion for leave of the Court under Federal Rule of Appellate Procedure 29(a)(2).

In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), the *amici curiae* state that no party's counsel authored this brief, in whole or in part, and no party or person other than the amici curiae, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

Immigration Services ("USCIS"), Immigration and Customs Enforcement ("ICE"), and the DHS Office for Civil Rights and Civil Liberties. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, and legal services, non-profit, pro bono, and private attorneys working with immigrant crime survivors.

The Bronx Defenders is a non-profit provider of innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support, and other civil legal services and advocacy to indigent Bronx residents. It represents individuals in over 20,000 cases each year and reaches hundreds more through outreach programs and community legal education. The Immigration Practice of the Bronx Defenders provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project at the Varick Street Immigration Court and also represents non-detained immigrants in removal proceedings. The Bronx Defenders also files applications on behalf of its clients in removal proceedings before the United States Citizenship and Immigration Services.

Brooklyn Defender Services ("BDS") is a public defender organization that represents nearly 30,000 low-income residents of Brooklyn and elsewhere each year in criminal, family, civil, and immigration proceedings, providing interdisciplinary legal and social services since 1996. Since 2009, BDS has counseled or represented more than 15,000 clients in immigration matters including deportation defense, affirmative applications, and advice, as well as immigration consequence consultations in Brooklyn's criminal court system. BDS's immigration practice represents people in applications for immigration relief before USCIS, including for special immigrant juvenile status ("SIJS"), U and T visas, and family-based petitions and waivers, as well as in removal proceedings in New York's immigration courts and before the Board of Immigration Appeals.

The Catholic Legal Immigration Network, Inc. ("CLINIC") is the nation's largest network of non-profit immigration legal services providers, with more than 370 programs in 49 states and the District of Columbia. Agencies in CLINIC's network employ approximately 1,400 attorneys and accredited representatives who, in turn, serve hundreds of thousands of low-income immigrants each year. CLINIC's promotion

of the dignity and rights of immigrants is informed by Catholic Social Teaching and rooted in the Gospel value of welcoming the stranger. CLINIC's work includes in-person training, webinars, practice advisories on immigration court procedures, and immigration law treatises, including *Provisional Waivers: A Practitioner's Guide* and *Representing Clients in Immigration Court*.

Central American Legal Assistance ("CALA") is a Brooklyn based non-profit organization that has been representing immigrants in removal proceedings since 1986. CALA's client population is comprised primarily of trauma survivors from Central and South America who are applying for asylum and other humanitarian relief. Through the course of representation, our clients often become eligible for USCIS based relief, such as SIJS, U visas, and adjustment through marriage to a U.S. Citizen.

The Door, founded in 1972, is an organization that provides comprehensive youth development services in the New York City area. Among other services, The Door represents young people in immigration matters, including direct representation of clients applying for SIJS, asylum, U and T visas, and other forms of humanitarian relief.

One of The Door's core missions is to obtain lawful immigration status and a pathway to permanent residency and citizenship for young immigrants in New York City and the surrounding areas. Many of The Door's clients are in removal proceedings before New York's immigration courts while simultaneously waiting for USCIS to adjudicate their applications for humanitarian relief.

Legal Services NYC ("LSNYC") is one of the largest civil legal service providers in the country, with over 500 staff that help over 100,000 low-income New Yorkers annually in a wide range of services, including immigration, housing, and education law. LSNYC represents young people eligible for SIJS, trafficking victims, crime victims who are eligible for U visas, and immigrants seeking an I-601A provisional waiver both in immigration court proceedings and in applications to USCIS.

Lutheran Social Services of New York provides 7,000 New Yorkers each day with a wide range of social services. Lutheran Social Services of New York's Immigration Legal Program ("LSSNY-ILP") provides community based direct immigration legal services to under-served populations in the New York City metropolitan area. Since 1995, the

program has represented thousands of clients seeking asylum, family-based immigration status, citizenship, and other forms of immigration relief. In addition to its broader practice, LSSNY-ILP has developed particular expertise in working with young clients pursuing SIJS and asylum. Attorneys from the program regularly appear on behalf of young clients before USCIS, in state family courts, and in removal proceedings.

Sanctuary for Families ("Sanctuary") is the largest dedicated service provider and advocate in New York State for survivors of domestic violence, human trafficking, and related forms of gender violence. Sanctuary's Immigration Intervention Project provides free legal assistance and direct representation to thousands of immigrant survivors every year in a broad range of humanitarian immigration matters, including asylum, special rule cancellation of removal, SIJS, Violence Against Women Act self-petitions, and petitions for U and T nonimmigrant status. In addition, Sanctuary provides training on domestic violence and trafficking to community advocates, pro bono attorneys, law students, service providers, and the judiciary, and plays a leading role in advocating for legislative and public policy changes

that further the rights and protections afforded to survivors and their children.

UnLocal, Inc. ("UnLocal") provides free representation to undocumented immigrants who might be eligible to obtain lawful status, most of whom are in removal proceedings. UnLocal clients include undocumented youth eligible for SIJS, family members of United States citizens in removal proceedings, and individuals who have been victims of crime and have cooperated with U.S. law enforcement, among many others.

INTRODUCTION

Every year, thousands of vulnerable noncitizens apply for visas created by Congress for their protection. Whether to protect trafficking victims or children who have been abused, abandoned or neglected by their parents, or to encourage victims of violent crime to assist police without fear of retribution, these visas are vital to providing a full defense to removal and protection for the vulnerable. To receive status, however, vulnerable noncitizens need to administratively close their removal proceedings in order to have their applications adjudicated by USCIS.

Administrative closure has been part of immigration court practice for decades. It predates the statutory creation of the modern removal proceeding in 1990. The power to administratively close cases in immigration court has been recognized by the federal courts and enshrined in multiple regulatory authorities.

The *amici* respectfully submit this brief to describe how administrative closure has enabled their clients to pursue finality and permanent status efficiently while presenting a full defense to removal.

These experiences illustrate why closure is an "appropriate and necessary" action for management of dockets in the immigration courts.

SUMMARY OF ARGUMENT

1. Legislating after administrative closure already was in wide use, Congress established special visas for particularly vulnerable groups of noncitizens. In addition to the U visa process at issue in this petition, Congress has created visas for survivors of domestic violence and trafficking and for children who have been abused, abandoned or neglected. For noncitizens who might qualify for these special visas, administrative closure provided a crucial tool that allowed immigration courts to balance adjudication by two coequal agencies and protected applicants from the entry of a removal order by the immigration court while they pursued a visa application with USCIS.

2. Administrative closure also protected the rights of U.S. citizens with spouses or children in removal proceedings. In allowing a noncitizen spouse or child to pursue inadmissibility waivers with USCIS, immigration courts relied on administrative closure to protect against the risk of ten years of enforced separation under the immigration laws and the resulting hardship that can impose.

3. *Castro-Tum*'s revocation of administrative closure is a radical break from prior agency practice. It has undermined statutory protections for vulnerable groups of noncitizens, decreased efficiency in immigration court proceedings, and attempted to fast-track noncitizens toward removal despite having viable pathways to remaining in the United States.

ARGUMENT

Administrative closure has a long history as a procedure used by immigration courts in appropriate cases to effectively manage their dockets. Nowhere is that clearer than when immigrants have pathways to lawful status that require action from other federal agencies, such as visa processes overseen by USCIS. Administrative closure has allowed courts to conserve their resources while awaiting USCIS adjudication, which can resolve the parallel removal case and prevent deportation.

Administrative closure is "appropriate and necessary," within the plain meaning of 8 C.F.R. § 1003.10(b), to allow thousands of the most vulnerable non-citizens to pursue relief under the immigration laws. By substantially eliminating administrative closure, *Castro-Tum*

threatens *amici*'s current and future clients, forcing them towards removal even though Congress has provided for relief.

Amici urge this Court to join the United States Court of Appeals for the Fourth Circuit, *see Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019), in holding that *Castro-Tum* is not a proper exercise of agency authority and that immigration courts are vested with the authority to administratively close cases where appropriate.

I. Access to Administrative Closure is Necessary to Effectuate Congress's Intent to Protect Vulnerable Groups of Noncitizens.

A defining feature of immigration law is its division of the adjudication of status between two coequal administrative agencies: USCIS and the Executive Office of Immigration Review ("EOIR") in the U.S. Department of Justice.

Immigration court proceedings, including removal proceedings, are overseen by EOIR. The modern removal proceeding is adversarial with a trial attorney from DHS representing the government. Immigration court is the only forum in which a noncitizen can obtain some forms of relief from removal, such as cancellation of removal. 8 U.S.C. § 1229b. In other respects, such as in asylum claims, immigration courts share jurisdiction with USCIS. 8 C.F.R. § 1208.2.

The adjudication of other pathways to status, including naturalization and family or employment-based visas, is assigned by statute to USCIS, a sub-agency of DHS. Many of the applications USCIS adjudicates are decided on the papers or in non-adversarial settings. Its responsibilities include adjudicating petitions and applications from some of the most vulnerable groups of noncitizens: children who have been abused, abandoned, or neglected; trafficking victims; and survivors of domestic violence and other witnesses to violent crimes.

But the dual-agency structure in immigration law creates certain timing pressures. Both USCIS and the immigration courts have backlogs for certain types of adjudication. Immigration courts often are focused on their completion rates and might choose to force a case towards removal without waiting for USCIS to complete adjudication. Conversely, in some situations, USCIS will not adjudicate an application if an individual is in removal proceedings. *See, e.g.*, 8 C.F.R. § 212.7(e)(4)(iii) (stating that an individual is ineligible for a provisional unlawful presence waiver if subject to pending removal proceedings). Without a way to mitigate the tension between these two

regimes, and to harmonize their timelines, the government risks pushing towards removal the very individuals that Congress has identified for protection and legal pathways to status.

Administrative closure mitigated these timing issues. It is "an attractive option in [such] 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." *Matter of Hashmi*, 24 I. & N. Dec. 785, 791 n.4 (BIA 2009); *see also Matter of Rajah,* 25 I. & N. Dec. 127, 135 n.10 (BIA 2009) (noting closure is useful where respondent has "a pending prima facie approvable visa petition"). With administrative closure, immigration courts can await USCIS's adjudication without wasting resources in adjudicating removability.

Three forms of relief highlight how administrative closure has been a necessary tool for vulnerable groups: special immigration juvenile status ("SIJS"), T visas for survivors of human trafficking, and U visas for survivors of crime. Without general access to administrative closure in immigration court, applicants risk removal while they wait

for USCIS to determine their eligibility for relief expressly created by Congress.

A. Children Who Have Been Abused, Abandoned, or Neglected Must Have Their Cases Closed So That They Can Receive Special Immigrant Juvenile Status.

Administrative closure has been vital in managing removal proceedings for children eligible for SIJS. In its absence, some immigration courts have sought to fast-track removals of SIJS-eligible youth, therefore effectively abrogating protections that Congress enacted for these vulnerable children.

First enacted in 1990, and expanded by Congress since then, SIJS embodies "a congressional intent to assist a limited group of abused children to remain safely in the country with a means to apply for [lawful permanent resident] status." *Osorio-Martinez v. Attorney General*, 893 F.3d 153, 168 (3d Cir. 2018) (internal quotation marks and citations omitted); *Perez v. Cuccinelli*, 949 F.3d 865, 878 (4th Cir. 2020) (noting "Congress's efforts to expand eligibility for SIJ status and increase protections for vulnerable immigrant children"). SIJS protects children who cannot reunite with "one or both of the immigrant's parents . . . due to abuse, neglect, abandonment, or a similar basis

found under State law" and have been either declared dependent in a juvenile court or placed in custody of a state agency or an individual appointed by a state family court. 8 U.S.C. § 1101(a)(27)(J).

To pursue SIJS, an eligible child generally must navigate state court and USCIS in three separate stages. First, the child must seek a state court order that determines whether he or she meets the SIJS definition under state law. Second, having obtained such a state court order, a child can submit a Petition for Amerasian, Widow(er) or Special Immigrant, or "I-360," seeking USCIS's approval of their SIJS status. Finally, once the I-360 is approved, the child must wait until a visa becomes available, at which point the child can adjust his or her status to lawful permanent resident.

Administrative closure is necessary at each stage of the SIJS process. The first step requires a family court to determine the factual predicates for SIJS eligibility.[2] For example, in 2016 the Queens

[2] Immigration courts sometimes grant continuances to allow time to seek the requisite family court order, but before *Castro-Tum* they were encouraged to consider administrative closure to accommodate state courts' busy schedules. *See* Memorandum from Brian M. O'Leary, Chief Immigration Judge, to Immigration Judges, Docketing Practices Relating to Unaccompanied Children

County family court determined that C., a client of LSSNY-ILP, met the SIJS criteria.[3] C. was forced to seek refuge in the U.S. after a member of his country's national police kidnapped and sexually abused him. But C. also had been abused and neglected by his parents. As the family court later determined, C.'s father had physically abused him almost daily, spent the family's money on alcohol, and forced C. to start working when he was only eight years old. His mother disappeared for days at a time, leaving him alone with his abusive father. The family court determined that reunification with either parent was not possible given this history, that he was under the custody of the family court, and that return to his country of origin would not be in his best interest.

The second step requires USCIS to approve the SIJS petition on the basis of the state court's special findings order, which is submitted with the applicant's I-360. SIJS is often preferable to asylum because of

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Cases and Adults with Children Released on Alternatives to Detention Cases in Light of New Priorities (Mar. 24, 2015), available at www.justice.gov/eoir/pages/attachments/2015/03/26/docketing-practices-related-to-uacs-and-awcatd-march2015.pdf.

[3] Given the sensitivity of the issues discussed, pseudonyms are used in discussing individual cases.

this administrative ease: it decreases the risk of re-traumatizing the applicant and the process is much less resource-intensive.[4]

Once USCIS approves a petition, the petitioner must only wait for a visa. Eligibility at this point is strictly ministerial; no further action is necessary from the applicant. The U.S. Department of State issues a monthly visa bulletin describing which priority dates have become eligible for visas. SIJS-eligible children only have to wait until the applicable visa preference category – the employment-based fourth preference in the visa bulletin – is after the date USCIS received their completed I-360.[5] Prior to *Castro-Tum*, removal proceedings would have been administratively closed to await the arrival of a priority date;

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[4] On average, adjudication by a USCIS visa officer takes sixty percent less time than it would take the same officer to evaluate an affirmative asylum application. *See* U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefits Request Requirements, 84 Fed. Reg. 62,280, 62,292 (proposed Nov. 14, 2019) (noting rate of 1.65 hours per completion for I-360 and 4.10 hours for I-589, the asylum application). Adjudication is on the papers.

[5] For some countries, this wait may be minimal. But for others it can take much longer. For applicants from El Salvador, Guatemala, and Honduras, USCIS currently is processing petitions approved in August 2016. *See* Visa Bulletin for May 2020, U.S. Dep't of State (Apr. 6, 2020), available at travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-may-2020.html.

a removal case would not go forward, nor would a removal order be entered, while an individual approved for SIJS protection waited his or her turn to seek permanent residence. *See In re: Juan Alfonso Avelar-Galdamez*, No.: AXXX XX2 844-BOS, 2017 WL 1330125 (BIA Mar. 8, 2017).

Since the decision in *Castro-Tum*, however, immigration judges can only continue such cases and cannot administratively close them. *See, e.g., In re: Silvia Daniela Argueta-Solis Kensy Isabella Argueta-Solis*, No.: AXXX-XX7-818-CHA, 2019 WL 4054091 (BIA July 25, 2019) (rejecting closure for two four-year-old children with approved I-360s). Moreover, the Attorney General also has curtailed immigration judges' authority to grant continuances, *see Matter of L-A-B-R-*, 27 I. & N. Dec. 405 (AG 2018), and has established strict case completion metrics.[6] Immigration judges' compensation and performance reviews therefore are tied to how many cases they complete – and how quickly.

[6] *See, e.g.*, Memorandum from James R. McHenry III, Director of EOIR to The Office of the Chief Immigration Judge et. al, Case Priorities and Immigration Court Performance Measures (Jan. 17, 2018), available at justice.gov/eoir/page/file/1026721/download.

These changes raise pressure on judges to "complete" the case and order removal even though a state court already has determined it is not in the best interests of that child to be removed from the United States *and* the federal government has consented to that determination. *Amici*'s clients now are threatened regularly with removal while they await their priority dates, and immigration judges might refuse to even continue cases and instead schedule a final individual hearing that could result in a removal order. *See Joshua M. v. Barr*, No. 3:19-CV-770, 2020 WL 836606, (E.D. Va. Feb. 20, 2020) (staying removal for SIJS applicant ordered removed despite approved I-360).

Many children qualifying for SIJS also have viable claims to asylum or under the United Nations Convention Against Torture. Asylum claims are resource-intensive, often requiring multiple witnesses, extensive research into country conditions, and hours-long court proceedings. For many asylum seekers, the required fact-finding is traumatizing and comes at great cost to their mental health. C., for instance, was forced to relive his kidnapping and sexual assault. The preparation of his asylum application, or "I-589," was difficult, emotionally draining, and, ultimately, unnecessary. He was eligible for

SIJS, and if his proceedings had been administratively closed, he could have seen that process through to completion and only would have returned to the asylum claim if he were not able to adjust his status before USCIS.[7]

Finally, once a SIJS-eligible applicant has an approved I-360 and a current priority date, he or she can apply to adjust his or her status. The most common way to do so is through an Application to Register Permanent Residence or Adjust Status, or "I-485," with USCIS. The form is straightforward, but USCIS claims it does not have the jurisdiction to accept I-485s from individuals in removal hearings.[8] C.,

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[7] C.'s I-360 originally was denied as part of an unannounced policy shift at USCIS in which the agency denied SIJS for New York-based petitioners aged 18 to 21. That policy was rejected in *R.F.M. v. Nielson*, 365 F. Supp. 3d 350 (S.D.N.Y. 2019). C.'s petition was granted as part of the class settlement.

[8] The adjustment procedure further highlights the inefficiency of the immigration courts compared to USCIS. USCIS calculates it takes a visa officer only an average of *one hour and thirty-eight minutes* to adjudicate an I-485. 84 Fed. Reg. at 62,292. But instead of this simple administrative process at USCIS, individuals in immigration court will have to litigate the issue, filing additional materials, briefing, and argument, to which the DHS trial attorney will likely respond and the court will hold a hearing. That hearing alone is likely to take as long or longer than the time it takes USCIS to adjudicate the entire application. *See* Policy Manual – Immigrants, U.S. Citizenship & Immigration Services at Vol. 6, Part J, Chapt. 4 n. 2

for instance, is now eligible to adjust as he has an approved I-360, and his priority date is current. Because he remains in removal proceedings, he likely will have to wait until his individual hearing in 2021 and seek adjustment there.

C. has been lucky – most of the time he spent waiting for his priority date occurred before recent political pressure on immigration proceedings, and a visa became available before his individual hearing. In the wake of *Castro-Tum*, however, SIJS-eligible children will be removed because, without closure and despite clear congressional intent, immigration judges will continue to consider the possibility of such visas as too remote. By removing administrative closure, *Castro-Tum* will deny SIJS relief for many eligible children each year.

B. Administrative Closure Allows Survivors of Human Trafficking to Seek Safety and Help Prosecute Traffickers.

The administrative closure of removal cases during the pendency of applications for T nonimmigrant status ("T visas") has helped trafficking victims avoid unnecessary court processes, expenses, and re-traumatization. Created by Congress in 2000 as part of the Victims of

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(Apr. 24, 2020), available at uscis.gov/policy-manual/volume-6-part-j-chapter-4#footnote-2.

Trafficking and Violence Protection Act, T visas protect trafficking victims who assist in the investigation and/or prosecution of their traffickers. Congress's purpose in enacting the legislation was "to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1466.

An individual is eligible for T visa status if he or she "is or has been a victim of a severe form of trafficking in persons"; is physically present in the United States "on account of such trafficking"; and has complied with reasonable requests to assist in investigating and/or prosecuting her trafficker. *Id.* at 1477. A "severe form of trafficking" refers to either sex trafficking or labor trafficking. *Id.* at 1470.

To pursue a T visa, an eligible victim must file with USCIS an Application for T Nonimmigrant Status, or "I-914," with evidence she complied with reasonable requests from law enforcement to assist in the investigation and/or prosecution at issue. USCIS issues up to 5,000 T

visas annually, but that cap has never been reached.[9] T visa recipients may adjust their status to lawful permanent residence after three years.

T visa applicants often are subject to concurrent removal proceedings. While regulations permit applicants to request administrative closure of their removal proceedings in order to pursue a T visa, immigration courts cannot administratively close those cases without the concurrence of DHS.[10] Absent consent, victims who do not have defenses to removal can be ordered deported in removal proceedings before receiving their T visa. Others who do assert

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[9] U and T Visa Law Enforcement Resource Guide, U.S. Dep't of Homeland Sec., available at dhs.gov/sites/default/files/publications/PM_15-4344%20U%20and%20T%20Visa%20Law%20Enforcement%20Resource%20Guide%2011.pdf.

[10] In *Castro-Tum*, the Attorney General cited to T visa regulations among others to claim closure is only available in a limited set of circumstances. *See Castro-Tum*, 27 I. & N. at 277-78, 288 (citing 8 C.F.R. § 1214.2(a)). The Attorney General's reasoning misreads the plain text of the regulations. The regulations do not create or define administrative closure but instead (along with some settlement agreements) *presume* the general availability of administrative closure and explain how immigration judges should apply that authority in particular situations. There is no logical reading of these authorities except as being premised on the understanding that immigration courts already have the general authority to administratively close cases. *See Romero*, 937 F.3d at 294 & n13.

defenses to removal, such as asylum, must pursue two forms of relief, requiring victims to expend twice the amount of resources and time when one avenue should have been sufficient. The immigration court process takes an incredible toll on a victim's emotional and mental health, and petitioners would have no choice but to repeatedly relive the trauma.

W.'s path to recovery after years of severe trauma, for instance, has been impeded by the inability to administratively close her removal proceedings because DHS did not concur with her request. W., a client of *amicus* Sanctuary, is a survivor of gender-based violence in China and the United States. In China, she was subjected to domestic violence for years by her husband, resulting in serious injuries such as a paralyzed finger and burns on her head. When W. fled to the United States, she was a victim of sex-trafficking in a massage parlor. W. is eligible for at least two avenues for immigration relief: asylum and T

visa status.[11] But each process has vastly differing impacts on her mental and physical health.

W. is permanently scarred, physically and emotionally, from her husband's abuse and has extreme difficulty speaking about her past. A licensed psychologist found that W. is severely traumatized and diagnosed her with post-traumatic stress disorder and chronic depression. She also suffers from dissociation, insomnia, and severe anxiety due to her trauma. Although W. has established some psychological coping mechanisms for her trauma, requiring her to testify in immigration court for her asylum claim would overwhelm them.

Despite W.'s currently pending application for a T visa, she has not been able to close her removal case because DHS has not concurred with her request. The continuing court dates subject W. to agonizing uncertainty. As she and her legal team prepare for her asylum case, she must relive the violence repeatedly, which will only exacerbate her mental health conditions and symptoms.

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[11] The Attorney General has attempted to curtail certain asylum claims, *see Matter of A-B-*, 27 I. & N. Dec. 315 (AG 2018), making access to the T visa even more critical.

C. Administrative Closure Allows Victims of Crimes to Aid Law Enforcement Without Fear of Deportation or Intimidation By Perpetrators.

Administrative closure has allowed victims of severe crimes to pursue nonimmigrant status while assisting law enforcement in investigating and prosecuting those crimes. The U nonimmigrant status ("U visa") provides relief "for victims of certain crimes who have suffered mental or physical abuse and provide assistance to investigations or prosecution of criminal activity." *Argueta Anariba v. Shanahan*, 190 F. Supp. 3d 344, 346 (S.D.N.Y. 2016). When it enacted the statute, Congress stated its intention was to "facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. . . . [in keeping with] the humanitarian interests of the United States." Pub. L. No. 106-386, § 1513, 114 Stat. at 1534.

To pursue a U visa, an eligible victim must file two forms with USCIS: a law enforcement certification, signed by the investigator or prosecutor of the crime showing the victim was helpful in investigating or prosecuting the crime, and a Petition for U Nonimmigrant Status, or "I-918." 8 C.F.R. §§ 214.14(a)(12), (c)(2)(i); *Matter of Sanchez-Sosa*,

25 I. & N. Dec. 807, 811 (BIA 2012). Once filed, the applicant must wait for a decision.

USCIS issues up to 10,000 U visas every year. When that quota has been exhausted, approved applicants are placed on a waiting list until a visa becomes available. 8 C.F.R. § 214.14(d)(1), (2). U visa recipients can remain in the United States for up to four years and then adjust their status. *See New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53,014, 53,015 (Sept. 17, 2007).

Individuals applying for U visas often are simultaneously subject to removal proceedings. Historically, many immigration courts have administratively closed such cases. For example, J., a client of *amicus* CALA, applied for a U visa after he saved his roommate from her domestic abuser and in the process sustained multiple stab wounds and near-fatal blood loss. J. was in removal proceedings at the same time, but the immigration judge administratively closed his case on January 22, 2016 to allow USCIS to adjudicate his U visa.

After *Castro-Tum*, many cases previously closed by immigration judges were reopened, or "recalendared," arbitrarily with no intervening

factors to support recalendaring except the Attorney General's decision. As in many cases since *Castro-Tum*, J.'s case was recalendared in response to a motion by DHS, and a hearing was scheduled for March 22, 2019 where he would have faced the possibility of entry of a removal order. J. avoided removal only because he received a U visa before his scheduled hearing as a result of the original decision of the immigration judge to administratively close his case for much of the three-year period following his visa application.

While J. benefitted from the time that had elapsed between the administrative closure of his case and its recalendaring, others have not been as fortunate. E., a client of *amicus* Sanctuary, was a victim on multiple fronts. For many years, E. suffered violent abuse from her husband. In an effort to regain her independence, she sought the assistance of an immigration attorney who defrauded her through the promise of a "10-year visa." She was placed in removal proceedings by the time she discovered her attorney's deception.

E. disclosed her domestic violence history to the immigration judge and demonstrated that she qualified for a U visa. The judge administratively closed her case in October 2016. E. then worked with

attorneys at Sanctuary to cooperate with an investigation against her abuser. She eventually applied for a U visa in 2018. As she waited for USCIS to approve her application, however, the Attorney General issued *Castro-Tum*, and the same immigration judge who administratively closed her case was compelled to recalendar it in response to a DHS motion.

The recalendaring of her case has plunged E. back into panic and despair, as years yet remain before her U visa application is decided. E. has no avenue for relief through asylum in the immigration courts because her previous attorney filed an untruthful asylum application without her knowledge or consent (an action for which he since has been disbarred). Her only likely form of relief is a U visa. In light of *Castro-Tum*, however, E.'s immigration court case will proceed. She now must return to court, litigate her prima facie eligibility for a U visa, and risk removal.

J. and E. are only two among many examples of recalendared cases under *Castro-Tum* in which victims of severe crimes who willingly assisted law enforcement are sped toward deportation instead of being protected under existing federal laws. This causes additional trauma to

victims of crimes and undermines the federal government's intent to protect such individuals.

II. Administrative Closure is Necessary to Protect United States Citizens or Lawful Permanent Residents from Facing Extreme Hardship.

The federal government itself relied on the general availability of administrative closure when it promulgated the Provisional Unlawful Presence Waiver, or "I-601A." The government specifically chose administrative closure to protect U.S. citizens from the extreme hardship caused by family separation. *See* 8 C.F.R. § 212.7(e).

Hundreds of thousands of immigrants become eligible to adjust their immigration status every year when they marry a U.S. citizen or permanent resident, or when a qualifying relative naturalizes.[12] However, those who were "unlawfully present in the United States for one year or more," will be barred from reentering the United States for up to ten years. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(II).

[12] *See* Office of Immigration Statistics, 2018 Yearbook of Immigration Statistics, U.S. Dep't of Homeland Sec. at 18 (Oct. 2019), available at dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/yearbook_immigration_statistics_2018.pdf.

One of the primary purposes of immigration law is to minimize family separation and its attendant hardship. *See Nwozuzu v. Holder*, 726 F.3d 323, 332 (2d Cir. 2013) (court must be "mindful of the 'underlying intention of our immigration laws regarding the preservation of the family unit'") (quoting H.R. Rep. No. 82–1365, at 24 (1952)). To limit separation, Congress authorized a waiver for spouses or children of U.S. citizens and permanent residents where "refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien." 8 U.S.C. § 1182(a)(9)(B)(v). Before 2013, however, a waiver applicant would have to travel abroad to consular process first, risking whatever applicable bar to re-entry, and then seek a waiver from the embassy.

In 2013, DHS promulgated new regulations allowing prospective lawful permanent residents to apply for a provisional waiver and await its approval in the United States with their families. *See* Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule, 78 Fed. Reg. 536 (Jan. 3, 2013); *see also* Expansion of Provisional Unlawful Presence Waivers of Inadmissibility; Final Rule, 81 Fed. Reg. 50244 (July 29, 2016).

In implementing the rule, DHS relied on the general availability of administrative closure in immigration courts to manage applications from individuals in removal proceedings.[13] First, DHS concluded that all applications would be adjudicated by USCIS, as allowing immigration courts to adjudicate waiver applications would be less "efficient and appropriate." 78 Fed. Reg. at 537. Second, the government decided that individuals in removal proceedings were ineligible. The family member could file a Petition for Alien Relative, or "I-130," but once it was approved prospective residents would have to administratively close their removal proceedings in immigration court and *only then* apply for the waiver before USCIS. *See* 8 C.F.R. § 212.7(e)(3)(iii); *see also* 78 Fed. Reg. at 543-44; 81 Fed. Reg. at 50255-57. Individuals could then recalendar their removal proceedings, move

[13] In *Castro-Tum*, the Attorney General did not substantively address these regulations but instead concluded only that they do not provide authority for administrative closure. *Castro-Tum*, 27 I. & N. at 277 n.3. But the regulations illustrate that administrative closure was sufficiently "necessary and appropriate" that one of two federal agencies tasked with immigration adjudication relied on the practice in devising procedures for a specific form of relief. No commenter suggested that immigration courts did not have authority to administratively close cases. *See* 78 Fed. Reg. at 543-44; 81 Fed. Reg. at 50255-57.

to terminate, and consular process in significantly less time. *See Romero*, 937 F.3d at 286-87.

Castro-Tum, in effect, rescinded these regulations. Consider, for instance, D., a client of *amicus* CALA. D. fled extortion and death threats from corrupt police officers in El Salvador in 2012. Several years later, he married a U.S. citizen, and together they now have two children under the age of five. D's wife petitioned for him, and in May 2018, USCIS approved the petition.

D. moved to administratively close his removal proceedings to allow him to pursue a provisional waiver before USCIS. He can demonstrate extreme hardship to U.S. citizens – he is the breadwinner for his family, and both of his U.S. citizen children are very young, meaning that without a waiver he would have to spend the majority of their childhood separated from them. Additionally, each day he spends in El Salvador would increase the risk that his persecutors would find and kill him.

The immigration court denied closure based on *Castro-Tum* and scheduled a removal hearing for June 2020. D. is now blocked from pursuing the provisional waiver. *See* 8 C.F.R. § 212.7(e)(4)(iii). Instead

of a quick adjudication before USCIS, he must now pursue a lengthy trial for relief under the Convention Against Torture.[14] And if he is ordered removed, he will be barred from applying for a provisional waiver. *See* 8 C.F.R. § 212.7(e)(4)(iv).

As with others profiled in this brief, D. has access to a pathway to lawful status through USCIS that would finally resolve his status in a straightforward manner and reduce the resources D., his counsel, and the federal government would have to expend. After *Castro-Tum*, however, D. cannot access that relief and must remain in removal proceedings. His wife and two small children will suffer as a result.

III. Administrative Closure Facilitates the Efficient Resolution of Removal Proceedings and Status Adjudication.

In deciding *Castro-Tum*, the Attorney General disregarded decades of precedent demonstrating that administrative closure was "appropriate and necessary for the disposition" of removal proceedings. *See Romero*, 937 F.3d at 292. The Attorney General's assertion that

[14] It only takes one visa officer approximately two hours and thirty-eight minutes to grant a provisional waiver using I-601A. *See* 84 Fed. Reg. at 62,292. Like other forms of relief, seeking a waiver is much more efficient and less resource-intensive than litigating in immigration court.

administrative closure thwarts the efficient final resolution of cases, *see Castro-Tum*, 27 I. & N. Dec. at 289, is mistaken.

First, administrative closure only is warranted when a case is not ready for resolution. *See Hashmi*, 24 I. & N. Dec. at 791. Second, efficiency must be balanced against other values underlying immigration law, including fairness, due process, and minimizing family separation. Third, finality does not *only equate with removal*. Finality also encompasses the various paths to status under federal immigration law, many of which can be achieved more quickly than a lengthy removal case.

Administrative closure facilitates the efficient final resolution of an individual case. For each noncitizen, a full defense to removal requires that he or she be able to apply for the visas and channels that Congress has created. Applying for relief before USCIS is more straightforward and less traumatizing than continuing in immigration court. And it is more efficient than seeking relief in open court for asylum or under the Convention Against Torture.

Without administrative closure, immigration courts, at best, will be forced to continue proceedings repeatedly and, in the process, take

up space on the court's docket that could be used for other cases. *See, e.g.*, *Matter of Avetisyan*, 25 I. & N. Dec. 688 (BIA 2012) (considering closure more efficient than multiple continuances). Clients also will need to disrupt their lives to appear repeatedly for proceedings. At worst, the immigration courts will attempt to speed individuals who have valid claims to permanent status toward removal, abrogating their rights to pursue statutory paths to relief, regardless of their eligibility for status and the extreme hardship removal will cause to them, their families, and their communities.[15]

Eliminating administrative closure also places unwarranted additional demands on the immigration system. *Castro-Tum* itself noted the closure of 355,835 cases and empowered DHS trial attorneys to return those cases to the calendar. *Castro-Tum*, 27 I. & N. Dec. at 293-94; *see also* ABA Report at UD1-32. Thousands more become eligible for relief each year.

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[15] *See* Am. Bar Ass'n, 2019 Update Report: Reforming the Immigration System (Mar. 2019), available at americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf (cautioning *Castro-Tum* "may increase the chance that immigrants, especially children, face deportation" because visa backlogs "may cause delays beyond those an immigration judge can allow") ("ABA Report").

Administrative closure is a necessary tool for immigration judges to manage their own dockets, prioritize cases ready for resolution, and conserve the immigration courts' resources.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully request the Court to join the United States for the Fourth Circuit and recognize the authority of immigration judges to administratively close removal proceedings in appropriate circumstances.

Dated: May 6, 2020

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Local Rule 29.1(c) and Local Rule 32.1(a)(4)(A) because it contains 6,816 words excluding the cover page, tables, and certificates.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May, 2020, a true and correct copy of the foregoing document was filed with the Clerk of Court using the CM/ECF system, which will send notice of electronic filing to all CM/ECF participants, resulting in service upon all counsel of record.

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