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**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS**

In the Matter of:

Respondent

In Removal Proceedings

File No.

**REQUEST TO APPEAR AS *AMICUS CURIAE* AND
LAW PROFESSORS' *AMICUS CURIAE* BRIEF IN SUPPORT OF
RESPONDENT(S)' INTERLOCUTORY APPEAL(S)**

INTEREST OF AMICUS CURIAE AND REQUEST FOR APPEARANCE

Pursuant to the BIA Practice Manual, § 2.10 and 8 C.F.R. § 1292.1(d), the University of Houston Law Center Immigration Clinic, Geoffrey A. Hoffman, Director, and University of Pittsburgh School of Law Immigration Clinic, Sheila I. Velez Martinez, Director, hereby respectfully request the Board's leave to appear as *Amicus Curiae*, as well as the number of immigration law professors who have signed-on to the instant brief. (Exhibit E contains list of signatories). Three cases have been filed as interlocutory appeals by the Erie County Bar Association Volunteer Lawyers Project (ECBVLP) on behalf of the Cornell Law School Clinical Programs. This brief shall address all three appeals and shall be submitted in each case.

The Immigration Clinic at the University of Houston Law Center advocates on behalf of immigrants in a broad range of complex legal proceedings before the immigration and federal courts and the Department of Homeland Security (hereinafter referred to as "DHS" or "Department") and collaborates with other immigrant and human rights groups on projects that advance the cause of social justice for immigrants. Under the direction of law school professors who practice and teach in the field of immigration and nationality law, the Clinic provides legal training to law students and representation in asylum cases on behalf of victims of torture and persecution, victims of domestic violence, human trafficking and crime, children and those fleeing civil war, genocide and political repression including representation of detained and non-detained individuals in removal proceedings.

Director of the Immigration Clinic and Clinical Associate Professor Geoffrey A. Hoffman who teaches at the University of Houston Law Center, has represented hundreds of immigrants over the span of his career and has appeared as counsel and co-counsel with students in immigration court, district court and appellate cases. The Immigration Clinic, as a whole, has

represented thousands of immigrants since its inception in 1999. The Clinic was started by the late Joseph A. Vail, formerly an immigration judge and *pro bono* attorney, who had the vision and dedication to create the clinic for the purpose of teaching students and assisting the immigrant community in a wide variety of family-based and humanitarian cases. Since its inception the Clinic has trained hundreds of students who have gone on to become leaders in their fields, having worked for example for the AAO, DHS, Immigration Court, in private practice and for NGOs.

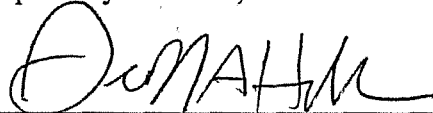
Professor Hoffman regularly supervises students in a wide variety of cases. *Amici* therefore has a deep interest in the appropriate application of the statutes, regulations, practices and policies at issue in this Interlocutory Appeal. The denial of law student representation is especially disturbing and goes to the heart of what we do at the Immigration Clinic. It threatens the very foundations of *pro bono* legal practice including the right to representation of their choice available to noncitizens who are in especially vulnerable positions. The clients who we have represented may have mental competency issues, are children, families, detained and non-detained, asylum-seekers fleeing violence and persecution, among others. Representing those individuals and ensuring that they are afforded due process protections would be impossible without the *pro bono* program of law student representatives who regularly work under the direct supervision of licensed attorneys and professors in law school clinics.

Professor Sheila I. Velez Martinez directs the Immigration Clinic at the University of Pittsburgh School of Law. In that capacity, she regularly supervises students and works daily on immigrant issues. She has publications relating to experiential learning, immigration law, and family law. She also currently teaches courses to judges and professors as part of the Judicial

Academy of the Supreme Court of Puerto Rico, related to issues of Immigration, International Family Law, Domestic Violence, cultural competence and teaching techniques.

Because of their significant expertise in this area, the undersigned professors and law school clinical directors are qualified to speak to the issues presented in these three interlocutory appeals concerning denials of law student appearances impacting Cornell Law School's Clinical Programs.¹

Respectfully submitted,



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¹ The following law students have contributed to this *Amicus* Brief: Nahla Kamaluddin and Elle Evans. The authors express their sincere thanks for their assistance on this brief.

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**PROCEDURAL HISTORY AND FACTUAL BACKGROUND RELEVANT TO
INTERLOCUTORY APPEALS**

The following procedural history and facts serve as an overview of the circumstances which led up to the present interlocutory appeals.

Three (3) separate interlocutory appeals have been filed in support of three separate denials of motions for law student appearance made by the Cornell University Law School clinics. The clinics include the Cornell Farmworker Legal Assistance Clinic ("Farmworker Clinic") and the Lesbian, Gay, Bisexual and Transgender Advocacy Clinic ("LGBT Clinic"). The Immigration Judge (IJ) presiding in all three cases is the same: IJ Philip J. Montante, Jr. The first appeal involved a respondent, [REDACTED] whose case is being handled by the LGBT Clinic. On November 24, 2015, the IJ denied the motion for a student practice order in a "checklist" style decision that provided no rationale at all for the Court's denial. *See* Exhibit A, attached hereto for decision of IJ in [REDACTED]

In the other two cases the students had filed motions for law student appearance under the aegis of Cornell's Farmworker Clinic. Those cases are: [REDACTED] and [REDACTED]. On December 10, 2015, IJ Montante denied the students' motions in both these cases, *see* attached Exhibits B and C, respectively, this time providing written decisions. *Id.* The written decisions do not contain any rationale for the Court's denials beyond the bald statement that "the Court is not a law student clinic." *Id.* at page 1 of both orders. The Court apparently then is concerned about the "backlogged docket," and also problems associated with the new "language interpreter service." *Id.* However, the IJ's orders do not contain any discussion regarding how these two apparent

issues – the backlog and difficulties with the new interpreter service – could be connected to law students' representation of clients or Cornell's law clinics. *Id.*

ARGUMENT

I. THE IMMIGRATION JUDGE DID NOT PROVIDE A REASONED DECISION TO DENY THE CORNELL LAW SCHOOL'S MOTIONS FOR LAW STUDENT APPEARANCE, AS THERE WAS NO CONNECTION BETWEEN THE ASSERTED REASONS--THE BACKLOGGED DOCKET AND NEW TRANSLATION SERVICE--AND THE CLINICAL LEGAL PROGRAMS' STUDENTS

A. *De novo* review is required and no deference should be given to the decisions below

With respect to the decision in [REDACTED] the Immigration Judge did not provide any reasoning whatsoever to support the court's denial of law student appearance, instead entering a form order with no written decision with an explanation. *See* attached Exhibit A. The Board is not required to give deference to a denial where there does not exist any record of the reasons provided for court's decision below. With respect to the other two decisions, in [REDACTED] [REDACTED], there were written decisions issued, but in those decisions the reasons which were asserted by the court were not connected in any way to the issue at hand: i.e., whether or not law students should appear to represent respondents as part of the Cornell Law School's clinical programs. *See* attached Exhibits B and C, containing the denial decisions in the two other cases, respectively.

The difficulties faced by the backlog and the new translation service are not occasioned by the existence of the clinical programs or their students. In addition, no such connection can be gleaned from the IJ's written order(s). *De novo* review on appeal is required pursuant to the

applicable regulatory provisions where the Board is reviewing pure questions of law and/or discretionary decisions made below. *See* 8 C.F.R. 1003.1(d)(3)(ii). This was not a decision below premised on any finding of fact nor credibility such that the “clear error” standard should be applied. *See* 8 C.F.R. 1003.1(d)(3)(i). Even assuming *arguendo* the issue of whether a student appearance should be granted was a “mixed question” of law and fact, the standard still is *de novo* for such questions. *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008) (stating that the Board determines *de novo* whether established facts are sufficient to meet a legal standard), overruled in part, on other grounds, by *Matter of Z-Z-O*, 26 I&N Dec. 586 (BIA 2015).

II. THE IMMIGRATION JUDGE’S ORDER(S) VIOLATED THE FUNDAMENTAL FAIRNESS GUARANTEES OF THE FIFTH AMENDMENT WHICH HAS LONG BEEN HELD TO APPLY TO RESPONDENTS IN REMOVAL PROCEEDINGS WHO HAVE THE RIGHT TO COUNSEL OF THEIR CHOICE AT NO GOVERNMENT EXPENSE

The Fifth Amendment’s guarantee of fundamental fairness applies in immigration court removal proceedings. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) *aff’d*, 857 F.2d 10 (1st Cir. 1988) (“Any right a respondent in deportation proceedings may have to counsel is grounded in the fifth amendment guarantee of due process”); *Matter of Toro*, 17 I. & N. Dec. 340 (BIA 1980) (discussing fundamental fairness under the Fifth Amendment in the context of manner of acquisition of evidence); *Montilla v. INS*, 926 F.2d 162, 164 (2d Cir. 1991) (holding that the notion of fair play animating the Fifth Amendment precludes agency from promulgating regulation affecting individual liberty or interest and then with impunity ignoring or disregarding regulation as it sees fit).² The consequences of a deportation (now, removal) proceeding has

² In 2014, the Congressional Research Service (CRS) published a monograph concerning the right to counsel in immigration proceedings. *See* Kate M. Manuel, Legislative Attorney,

long been recognized by the Supreme Court as leading potentially to a very severe penalty. *See Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *see also Padilla v. Kentucky*, 130 S.Ct. 1473, 1481 (2010) (“We have long recognized that deportation is a particularly severe ‘penalty’”) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

Although courts have yet to embrace a Sixth Amendment right to counsel, many courts have found there exists a Fifth Amendment right to counsel in the immigration context. *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) (“The right to counsel in immigration proceedings is rooted in the Due Process Clause.”); *Dakane v. U.S. Attorney General*, 399 F.3d 1269, 1273 (11th Cir. 2005) (“It is well established in this Circuit that an alien in civil deportation proceedings ... has the constitutional right under the Fifth Amendment Due Process Clause ... to a fundamentally fair hearing.”); *Borges v. Gonzales*, 402 F.3d 398, 408 (3d Cir. 2005) (“The Fifth Amendment entitles aliens to due process of law in deportation proceedings.”); *Rosales v. Bureau of Immigration & Customs Enforcement*, 426 F.3d 733, 736 (5th Cir. 2005) (“[D]ue process requires that deportation hearings be fundamentally fair”); *Brown v. Ashcroft*, 360 F.3d 346, 350 (2d Cir. 2004) (“The right ... under the Fifth Amendment to due process of law in deportation proceedings is well established.”); *Castro-O’Ryan v. INS*, 847 F.2d 1307 (9th Cir. 1987) (*en banc*) (legislative history confirms right to counsel); cases cited in Congressional Research Service (CRS) monograph, *supra fn. 1*; *see generally* IRA J. KURZBAN, Immigration Law Sourcebook 472 (14th ed. 2014).

The guarantee of fundamental fairness is especially relevant to access to counsel claims and the importance of counsel for vulnerable immigrants has been widely and well-documented. *See* Deborah M. Weissman, Reef C. Ivey II, Distinguished Professor of Law, University of North

“Aliens’ Right to Counsel in Removal Proceedings: In Brief” (2014), *available at* <https://www.fas.org/sgp/crs/homesec/R43613.pdf>

Carolina School of Law, "A Basic Human Right: Meaningful Access to Legal Representation" (2015), available at <http://www.law.unc.edu/documents/academics/humanrights/malr.pdf>; ABA Commission on Immigration, "Representing Detained Immigration Respondents of Diminished Capacity: Ethical Challenges and Best Practices," (2015), available at the following website: <http://www.americanbar.org/content/dam/aba/administrative/immigration/MentalHealthPaper.authcheckdam.pdf>; as well as the TRAC Report, "Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court 'Women with Children' Cases," (2015), available at <http://trac.syr.edu/immigration/reports/396/>.

Although currently there is no recognized federal right to appointed counsel in the context of civil removal proceedings, with a limited exception,³ analogies can be drawn from cases where appointment has been mandated by the courts. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963) (establishing the general right to assigned counsel for all indigent persons in criminal proceedings facing deprivation of physical liberty); *In Re Gault*, 387 U.S. 1 (1967) (per se rule that juveniles in delinquency proceedings who were at risk of confinement were entitled to court-appointed counsel under the due process clause); *see also* Matt Adams "Advancing the 'Right' to Counsel in Removal Proceedings," 9 Seattle J. for Soc. Just. 169 (2010). That there currently is no right to appointed counsel only underscores the need for law school clinics to provide *pro bono* counsel who are ready, willing and able to "fill the gap" and help immigrants in need of representation.

³ A federal district court in California has ruled that there is at least a right to appointed counsel in the limited circumstance where the immigrant is detained and may be incompetent. *See Franco-Gonzalez v. Holder*, (No.10-02211), 2013 WL 3674492, at *16 (C.D. Cal. Apr. 23, 2013).

III. THE IMMIGRATION JUDGE'S ORDER(S) VIOLATED THE RELEVANT STATUTE, REGULATION, AS WELL AS THIS BOARD'S OWN PRECEDENT DECISIONS AND FEDERAL COURT PRECEDENT

Section 240 of the Immigration and Nationality Act provides in clear, mandatory language that aliens in removal proceedings “shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings. . . .” INA §240(b)(4)(A) (emphasis added). The relevant regulatory provisions spell out in further detail that the privilege encompasses several other types of qualified representatives and not just licensed attorneys, such as law students, law graduates, reputable individuals, and accredited representatives who must meet further well-defined requirements. *See* 8 C.F.R. § 1292.1(a).

With respect specifically to law students, the regulation provides certain requirements which must be fulfilled before the student can represent anyone in court: “In the case of a law student, he or she has filed a statement that he or she is participating, under the direct supervision of a faculty member, licensed attorney, or accredited representative, in a legal aid program or clinic conducted by a law school or non-profit organization, and that he or she is appearing without direct or indirect remuneration from the alien he or she represents. . . .” *Id.*, § 1292.1(a)(2)(iii). Further requirements include that the student must be appearing “at the request of the [respondent],” with the permission of the official, and the official before whom the student seeks to appear “may require that “a law student be accompanied by the supervising faculty member, attorney, or accredited representative.” *Id.*, § 1292.1 (a)(2)(i) and (iv).

The Supreme Court of the United States has held that in the related and analogous criminal context, “a defendant should be afforded a fair opportunity to secure counsel of his own choice.” *Powell v. Alabama*, 287 U.S. 45, 53 (1932). In another analogous case, more recently, the high

court held in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) that the erroneous deprivation of counsel chosen by the defendant entitled the defendant to have his conviction overturned and without any requirement that he show prejudice resulting from the ineffectiveness of the substituted counsel. *Id.* at 145-146. In the civil context, while the Supreme Court has yet to rule that there is a Constitutional right to counsel under the Sixth Amendment the Court has nevertheless reversed a conviction for unlawful reentry under 8 U.S.C. § 1326, where respondents were deprived of their right to appeal and the IJ inadequately informed them of their right to counsel at a prior deportation hearing and accepted their unknowing waivers of their right to apply for suspension of deportation. *U.S. v. Mendoza-Lopez*, 481 U.S. 828, 842 (1987).

This Board has recognized the importance of the enforcing the rule allowing that the respondent be provided an opportunity to have counsel of his choice. In the leading case, *Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012), this Board held that in order to “meaningfully effectuate the statutory and regulatory privilege of legal representation where it has not been expressly waived, the Immigration Judge must grant a reasonable and realistic period of time to provide a fair opportunity for a respondent to seek, speak with, and retain counsel.” *Id.* at 889. Even where the court is faced with a detained docket and the attendant pressures which fact judges in such cases, the Board expressly found that immigration judges should have “expressly rule[] on the request for a continuance and explain[] the reasons for not continuing the proceeding.” *Id.* at 890. Similarly, and applying the logic in *C-B-*, it cannot be said that Judge Montanto acted reasonably in denying one case with no explanation and issuing two denials of counsel without a well-reasoned or cogent decision.

By comparison, respondents herein have not presented a situation which was found for example in *Matter of Rahman*, 20 I. & N. Dec. 480 (BIA 1992). In that case, this Board considered an interlocutory appeal by the legacy INS (not by respondents) in a distinguishable context, where

the issue was whether a respondent could permissibly change venue for purposes of hiring a distant attorney. *Id.* at 482-83. Interestingly, the Board sustained the former INS's appeal and held that the Immigration Judge's decision to grant change of venue based on a distant attorney will be closely scrutinized by the Board and subjected to a number of factors, such as "administrative convenience, expeditious treatment of the case, location of witnesses, cost of transporting witnesses or evidence to a new location, and factors commonly associated with the alien's place of residence." *Id.* at 483. Considering that the respondents have now filed the interlocutory appeal challenging the decision to deny counsel, shouldn't the IJ's decision be subjected to at least the same level of scrutiny as was provided in *Matter of Rahman*?

Respondents in the instant three appeals do not need to show prejudice to prevail on their due process and statutory claims. In the Second Circuit, there is no requirement that the respondents show prejudice where there is a *per se* violation of their right to counsel of their choice at no government expense. *See Montilla v. INS*, 926 F.2d 162 (2d Cir. 1991), holding contrary to *Matter of Santos*, 19 I. & N. Dec. 105 (BIA), which predated *Montilla* and outside Second Circuit. The Second Circuit stated clearly in *Montilla* that "the notion of fair play . . . precludes an agency from promulgating a regulation affecting individual liberty or interest, which the rule-maker may then with impunity ignore or disregard as it sees fit. The INS may not fairly administer the immigration laws on the notion that on some occasions its rules are made to be broken." *Id.* at 164. In *Montilla*, the right to counsel of choice was directly implicated where the immigrant at his deportation hearing communicated to the IJ that he did not know what to do. *Id.* The IJ then continued the hearing but later no further mention was made of obtaining counsel. In such a situation, the Second Circuit held that where there is a failure to adhere to the government's own regulations concerning the right to counsel in a deportation hearing, the

immigrant “is not required to make a showing of prejudice before he is entitled to relief. All that need be shown is that the subject regulations were for the alien's benefit and that the INS failed to adhere to them.” *Id.* at 169.

The present interlocutory appeals should be analyzed under the Second Circuit’s holding in *Montilla* since the IJ below failed to adhere to the EOIR’s own regulations in denying the motion for law student appearance where he failed to give any explanation whatsoever for his denial in [REDACTED] and failed to provide any cogent reasons for the denial in the other two cases.

Another instructive case from the Third Circuit is *Leslie v. U.S. Attorney Gen’l*, 611 F.3d 171 (3d Cir. 2010). In that case, the court of appeals considered an issue which arose from the IJ’s failure to provide respondent notice of the availability of free legal services. *Id.* at 176. There, the Third Circuit recognized the right to counsel and recognized that 8 U.S.C. § 1229a(b)(4)(A), “commands the Attorney General to adopt regulations ensuring that an alien ‘shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.’” *Id.* at 180. The court relied on the *Accardi* doctrine⁴ in finding that there had been a violation of the agency’s own regulations. Similarly, the IJ below failed to follow the EOIR’s own regulations and gave no valid reason for denying law student appearances which violated the right to counsel at no expense to the government and of respondent’s choice. Therefore, no prejudice need be shown and the IJ’s decision should be overturned.

And even assuming *arguendo* that prejudice were required to be shown below, which it is not, respondents nevertheless certainly were prejudiced by the denials of law student

⁴ *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954).

appearances in the cases below. The IJ apparently seemed to believe that his Court was being viewed as a “law school clinic” and the assumption was that students were somehow able to be replaced readily by other counsel. The facts from the record below appears that the respondents were represented by the students already, had established an attorney-client relationship with the respective respondents already, and were in the best position to represent their clients in immigration court. The assumption by an IJ that someone else could stand-in for the students is wholly unfounded. *See* Declarations of clinical law professors attached as Composite Exhibit D, discussing the way law student clinics work, discussed immediately below.

A. Declarations from Law Professors and Directors Supporting the Conclusion that the Denials By the IJ of Law Student Appearances Prejudiced the Respondents

Attached are declarations from law school professors and/or directors of legal service agencies with extensive experience teaching in and working with law school clinics, discussing their experiences with law student appearances. *See* the following attached as part of composite Exhibit D, including Declaration of Victoria Nielson, Legal Director of the Immigration Legal Justice Corps, Declaration of Professor Stacy Caplow, Brooklyn Law School, Declaration of Keith Fogg, Professor of Law at Villanova Law School, Declaration of Professor Irene Scharf, University of Massachusetts School of Law, Declaration of Janet B. Beck, Clinical Assistant Professor and Clinical Supervising Attorney at the University of Houston Law Center, Declaration of Caitlin Barry, Visiting Assistant Professor and Director of the Farmworker Legal Aid Clinic at Villanova Law School, and Declaration of Jennifer Lee Koh, professor and director of the Immigration Clinic at Western State College of Law. In particular, these declarations underscore and highlight the great importance of these clinical programs for the clients whom they serve, for the students who work under the direct supervision of professors, as well as to future employers who rely on the experience gained from their service in the clinics. The other

important benefit of law school clinics - it should not be forgotten or understated - is to the administration of justice and the immigration court system itself, which is benefited greatly by the *pro bono* services of these students and professors, leading to greater efficiency and serving to lessen the backlog not increase it. *See, infra*, discussion Part IV.

In the Declaration of Victoria Nelson, the current legal director of the Immigrant Justice Corps (IJC), in New York, discusses the importance of clinical programs in the context of selection of new legal fellows for the IJC. Furthermore, according to Ms. Nelson, allowing students to represent clients under the supervision of their professors serves multiple public interest goals: the client receives excellent legal services, students gain invaluable once-in-a-career benefit of making court appearances under close and intensive supervision, and finally employers and clients of law graduates are benefited.

Professor Stacy Caplow, a professor of law and director of a clinical program at Brooklyn Law School, in her declaration discusses the Safe Harbor Project as well as BLS Legal Services Corp. In her declaration, Professor Caplow states: "Over all the years that I have appeared in Immigration Court with my students, no judge has ever questioned their ability or right to appear on behalf of a client." Moreover, Professor Caplow discusses the procedures of law student appearances including the fact that she and her students at the outset inform the judge that the students will be conducting the hearing, and she reports that they actually never have filed "any formal motions requesting permission." *Id.* According to Professor Caplow, the experience of the students would be diminished significantly were they not allowed to do the actual lawyering in immigration court. *Id.* For Professor Caplow, "it is beyond comprehension why any judge would consider barring a student from appearing when it is universally recognized that their preparation and performance far exceeds the norm." *Id.*

Professor Irene Scharff, professor of law and clinic director at the University of Massachusetts School of Law states in her declaration that “Denying these students permission to practice before the Immigration Court would effectively shut down the Immigration Law Clinic’s operation. Students would be denied the experience of learning how to practice all of the skills detailed above [in her declaration] . . . they would undoubtedly be far less prepared to act as lawyers when they became members of the bar.” *Id.* Professor Scharff also discusses her experience with judges in the Boston Immigration Court as follows: the judges “have interpreted the regulations concerning law student representation in a way that maximizes their participation in the legal process. In my experience, only one of the judges has questioned whether the students have had permission to appear before the courts of the commonwealth [of Massachusetts], which they generally do, unless they are in their second year of law school and have not yet taken the court prerequisites to gain that permission.” *Id.*

Professor Keith Fogg, at Villanova Law School, and formerly of the Office of Chief Counsel at the Internal Revenue Service (IRS) for over 30 years, discusses in his declaration discusses an analogous situation in the context of the federal tax courts. In his former capacity with the IRS he worked closely with the Tax Court on representation issues by clinics and assisted the Tax Court in achieving clinic representation in each of the 74 locations in which the Tax Court sits to hear cases. *Id.* The declaration carefully details the procedures with student representation in Tax Court, which is very similar to the representation by students in the Immigration Court, with direct supervision by a licensed attorney. In Professor Fogg’s declaration he further states: “During my tenure as a clinic director, I have never had a Tax Court judge refuse to allow a student to handle a case and have never had a judge call on me to intervene because of concern about the representation. . . .” *Id.*

Professor Laila Hlass directs the Immigrants' Rights Clinic at Boston University School of Law and in her declaration discusses her experiences with student appearances and immigration court practice. Professor Hlass states that in "Boston, New Orleans, New York and Oakdale immigration courts, I usually only submitted Notices of Appearance for myself and the students, without even including a motion, because the student appearances are so routine. In Baltimore and Arlington immigration courts, I regularly submitted motions, less than one page in length. . . ." *Id.* Professor Hlass continues, "Immigration Judges have regularly thanked me and my students for our representation of low-income students, as these individuals would otherwise go before the court unrepresented." *Id.* Citing the TRAC report, Professor Hlass notes that representation makes a fourteen-fold difference in positive outcome in immigration court in "women and children" cases." *Id.* Similarly, 73% of children with attorneys were allowed to stay in the United States whereas only 15% of children appearing alone were allowed to remain." *Id.*

Professor Janet Beck, a clinical assistant professor and supervising attorney at the University of Houston Law Center (UHLC) Immigration Clinic has submitted her declaration where she discusses the procedures and practices of law student appearance and pro bono representation in and around Houston.⁵ In her declaration, she states that "a great many indigent individuals seeking relief in removal proceedings would be without legal representation" without the UHLC immigration clinic. *Id.* According to Professor Beck, although there are at least three other non-profit agencies in Houston handling cases, they are limited as to the numbers of individuals in removal proceedings and on appeal from removal orders that they can represent.

⁵ Professor Beck works closely with one of the authors of this brief, Geoffrey A. Hoffman who directs the UHLC Immigration Clinic. Professor Beck has authored her declaration at his request for purposes of this submission.

Id. After citations to the relevant authorities, Professor Beck's maintains that the "respondent's right to be represented by counsel at his or her own expense includes representation by law students." *Id.* She concludes that "[f]or an immigration judge to go against a respondent's desire to be represented by a law student is a violation of due process in that it is an abridgement of the respondent's right to counsel." *Id.*

Professor Caitlin Barry is a visiting assistant professor and director of the Farmworker Legal Aid Clinic at Villanova Law School. Previously she supervised the Immigration Law Clinic at Temple Law School. She teaches an intensive six-credit course that involves 196 hours of supervised direct representation. According to Professor Barry, "I have never witnessed a Judge question or deny a student's ability to advocate for her clients. My students E-28s have never been rejected. . . ." *Id.* In addition, Professor Barry reports that she regularly attends meeting with her local EOIR Pro Bono Committee which meets with several local Immigration Judges. In her experience, at these meetings judges "frequently ask" if law school students can accept more cases." *Id.* Professor Barry concludes that given the "desperate need for pro bono representation" in the immigration courts it seems "without question that law student appearances in Immigration Court benefit all parties and should not only be permitted, but encouraged." *Id.*

Professor Jennifer Lee Koh is a professor and director of the Immigration Clinic at Western State College of Law in California. Professor Koh in her declaration recounts how the clinic operates as a model of student ownership. *Id.* Students who practice in her clinic are certified to practice under the Practical Training of Law Students rules of the State Bar of California. *Id.* Under the clinic's model, students meet directly with clients, prepare for all aspects of litigation, and are "extremely familiar" with the underlying facts and law of a client's

case. Professor Koh reports that in order for her clinic to function she expects that immigration judges will grant the clinic's motions for law student appearances. *Id.* To deny those motions, in her opinion, would "amount to a denial of access to justice for the clinic's clients." *Id.* Requiring supervising attorneys to make court appearances when students are prepared would "undermine the teaching mission" of the clinic and furthermore discourage the clinic from taking cases in which clients are in removal proceedings." *Id.*

IV. ACCESS TO JUSTICE AND *PRO BONO* LEGAL REPRESENTATION ARE NEEDED ESPECIALLY TO PROTECT VULNERABLE RESPONDENTS AND THE IJ'S DENIAL(S) BELOW FURTHER VIOLATED EOIR POLICY MEMORANDA CONCERNING *PRO BONO* LEGAL CLINICS, CHILDREN, AND OTHER VULNERABLE INDIVIDUALS

From the perspective of the immigration bench, the unmet legal needs of the immigrant poor are perpetually apparent, as is the importance of instituting concrete ways to begin to take on the herculean task of improving and increasing the availability of legal services for oft-forgotten immigrants.

Noel Brennan, *A View From the Immigration Bench*, 78 Fordham L. Rev. 623, 623 (2009)

(italics added).

EOIR's stated primary mission is to adjudicate immigration cases in a careful and timely manner, while ensuring the standards of due process and fair treatment for all parties involved. See EOIR Website, at <http://www.justice.gov/eoir/about-office>. Yet among the most serious flaws in the U.S. immigration system is its failure to ensure that every respondent appearing in immigration court proceedings is guaranteed legal counsel of his or her choice. American Immigration Lawyers Association, *Statement Submitted to the Committee on the Judiciary of the Senate Hearing on "Improving Efficiency and Ensuring Justice in the Immigration Court System," May 18, 2011*, <http://www.aila.org/File/DownloadEmbeddedFile/44700>. The lack of

access to adequate legal counsel is even more dramatic in rural areas, remote regions and courts outside mayor metropolitan areas. In the Statement Submitted to the Committee on the Judiciary of the Senate Hearing on “Improving Efficiency and Ensuring Justice in the Immigration Court System,” AILA highlighted that:

The common use by Immigration Customs and Enforcement (ICE) of detention facilities that are located in remote regions presents serious challenges to the goal of providing access to counsel. Small towns and rural areas have far fewer practicing immigration lawyers or non-profit legal service organizations.

Id.

In general, aliens have difficulty locating and accessing legal counsel, many of whom may only be able to obtain legal counsel through low cost or free legal services providers. *Leslie v. U. S. Attorney General*, 611 F.3d 171 (3d Cir. 2010). The right to counsel is a particularly important procedural safeguard because of the grave consequences of removal. *Id.* at 181.⁶ Compounding the grave consequences of removal, many aliens subject to removal proceedings are unfamiliar with the complex adjudicatory process by which immigration laws are enforced. Many courts have recognized that “our immigration statutory framework is notoriously complex.” *N-A-M v. Holder*, 587 F.3d 1052, 1058 (10th Cir. 2009); *see also INS v. Nat’l Ctr.*

⁶ The Immigration and Nationality Act codified the right of aliens in removal proceedings before an immigration judge to be represented by a counsel of his choosing at no expense to the government. 8 USC 1362. The Attorney General in turn is tasked with adopting regulations that facilitate the execution of this right. It is plan that 8 C.F.R. § 1292.1 together with 8 C.F.R. § 1240.10(a)(2)-(3) protect an alien’s right of counsel in removal hearings. This statutory and regulatory right to counsel is also derivative of the due process right to a fundamentally fair hearing. *See Borges v. Gonzales*, 402 F.3d 398, 408 (3d Cir. 2005); *Iavorski v. INS*, 232 F.3d 124, 128 (2d Cir. 2000) (noting that the “statutory right [of aliens] to be represented by counsel at their own expense” is “an integral part of the procedural due process to which the alien is entitled” (quotation and citation omitted).

for Immigrants' Rights, Inc., 502 U.S. 183, 19 (1991) (referencing our “complex regime of immigration law”). The complexity of removal proceedings renders the alien’s “right to counsel” particularly vital to his or her ability to “reasonably present[] his case.” *Bernal-Vallejo*, 195 F.3d at 63.

One of the greatest challenges to ensuring justice in immigration courts involves the number of individuals who are unaware of their options regarding representation or who represent themselves. Close to half of the immigrants in removal proceedings do not have representation and 84% of detained immigrants do not have representation, many immigrants are often unaware of whether they have legitimate claims or not. See Esha Bhandari, Staff Attorney, ACLU, “Historic Decision Recognizing Right to Counsel for Group of Immigration Detainees,” (2013), available at <https://www.aclu.org/blog/historic-decision-recognizing-right-counsel-group-immigration-detainees>. Experts have cautioned that “the system should not rely on the ability of opposing counsel or overworked judges to identify valid claims”. Statement of Julie Myers Wood President, ICS Consulting, LLC Former Assistant Secretary, Immigration and Customs Enforcement, Department of Homeland Security Before the Committee on the Judiciary United States Senate April 18, 2011 <https://www.hsdl.org/?view&did=4963>

Immigration Clinics have played an important role in securing **accessible, competent and compassionate** legal representation for the most vulnerable immigrant populations. See Declaration of Law School Professors, attached hereto as Composite Exhibit D (discussing the ways in which clinical programs utilize students under the direct supervision of licensed attorneys and the benefits of such programs); *see also* discussion, *supra*, Part III (a) regarding the

potential prejudice flowing to a respondent in the event of a denial of a motion for law student appearance.

There are many instances where students from immigration clinics have zealously represented their clients in proceedings. These examples range from trial court documents to Board of Immigration Appeals (BIA) to Appellate Briefs. In *Aguilar v. Imperial Nurseries*, students from the Human Trafficking Litigation Project Workers and the Immigrants Rights Advocacy Clinic at Yale Law School filed a complaint to recover damages against Imperial Nurseries for work trafficking claims. 2007 WL 1183549 (D. Conn. 2007).⁷ In *Sicar v. Chertoff*, students from the Florida International University (FIU) College of Law, Carlos A. Costa Immigration & Human Rights Clinic filed a Plaintiffs' Memorandum of law in Opposition to Defendants' Motion to Dismiss, arguing that the court has subject matter jurisdiction. 2006 WL 4034316 (S.D. Fla. 2006). In *Francis v. Silva*, students from the University of Miami School of Law Immigration Clinic filed a complaint seeking damages against defendants, U.S. Immigration and Customs Enforcement employees and Krome detention center officers involved in a string of

⁷ Professor Michael Wishnie, at Yale Law School, reports that students also worked on a series of cases involving 236(c) and habeas issues as follows, in addition to a variety of other cases at the appellate and district court levels: *Reid v. Donelan*, 991 F.Supp.2d 275 (D.Mass. 2014) (granting habeas petition of named plaintiff held per INA 236(c)), *notice of appeal pending*; *Reid v. Donelan*, 297 F.R.D. 185 (D.Mass. 2014) (certifying class of immigration detainees and appointing clinic as class counsel); *Reid v. Donelan*, 22 F.Supp.3d 84 (D.Mass. 2014) (granting class-wide relief and ordering bond hearings for long-term immigration detainees in Massachusetts), *notice of appeal pending*; *Reid v. Donelan*, 64 F.Supp.3d 271 (D.Mass. 2014) (rejecting government narrow construction of class certification order and holding those with final orders may still be class members); *see also Reid v. Donelan*, 2 F.Supp.3d 38 (D.Mass. 2014) (holding ICE nationwide policy of shackling detainees in immigration court violates Fifth Amendment but approving use of shackles in individual case).

illegal aggressive encounters with plaintiff that resulted in Plaintiff receiving several serious injuries. 2011 WL 9232793 (S.D. Fla. 2011).

In *Matter of Villanueva*, students from the Immigration Clinic at George Washington University and the Houston Center for Immigrants appealed to the BIA that the District Director failed to “consider the petitioner’s United States passport as conclusive proof of his United States citizenship, as required by 22 U.S.C. 2705.” 19 I. & N. Dec. 101, 102 (1984). The BIA held in petitioner’s favor and remanded to the District Director. *Id.* at 103.

Additionally, law students have also advocated for their clients in appealing to circuit courts regarding removal proceeding matters. In *Mariscal Luna v. Gonzales*, students from the University of Arizona College of Law Legal Clinic appealed a BIA decision that Petitioner Mariscal Luna was not eligible for cancellation of removal under 8 U.S.C. § 112b. *See* 236 Fed.Appx. 279, 280 (9th Cir. 2007). The Ninth Circuit held that the BIA failed to follow binding precedent regarding the 10-year period examination of good moral character and how that “10-year period runs backwards from the date of the final administrative decision.” *Id.* The Ninth Circuit remanded the case to the BIA to consider the precedential decision of *In re Ortega-Cabera*. *Id.* Additionally, in *Oliva-Ramos v. Attorney General of the United States*, students from Washington Square Legal Services, advocated for Petitioner to reopen removal proceedings. 694 F.3d 259, 261 (3d Cir. 2012). The court remanded to the BIA with instructions to reopen proceedings. *Id.* at 287. Also, in *Centurino v. Immigration and Naturalization Service*, students from Community Legal Clinics at The National Law Center filed an Appellate Brief with the Fourth Circuit arguing that “the board abused its discretion when it denied Section 212(C) relief from deportation to Jack Centurino” and that “Petitioner’s claim that he is a United States citizen

raises a genuine issue of fact and therefore should be remanded for consideration.” 1992 WL 12126557 (4th Cir. 1992).

Further, there are several examples of students and interns under the supervision of licensed attorneys who filed appellate briefs with the Ninth Circuit. In *Shamilmar v. Gonzales*, an intern from the University of Idaho College of Law Legal Aid Clinic filed an appeal with the Ninth Circuit, arguing that the BIA abused its discretion in finding that Petitioner did not qualify for reopening and withholding of removal on changed circumstances, by “failing to fully and independently address Petitioners’ claims for relief under the Convention Against Torture,” and for “failing to fully and independently address Petitioners’ claims that their case merits a favorable exercise of discretion with regards to their Motion to Reopen.” 2006 WL 6324170 (9th Cir. 2006). Similarly, in *Wahjudi v. Gonzalez*, other interns from the University of Idaho College of Law Legal Aid Clinic filed an appeal with the Ninth Circuit for Caesar Whajudi, the son of Irma Whajudi Shalimar from the previous example. 2006 WL 3023349 (9th Cir. 2006).

Immigration Law is complicated and labyrinthine. See Noel Brennan, *A View From the Immigration Bench*, 78 Fordham L. Rev. 623 (2009). One of the benefits immigration clinics offer is “in aiding the thoughtful resolution of a difficult legal question in a highly specialized area of the law” Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudications: A Study of the Immigration Process*, 71 Iowa L. Rev. 1297, 1389 (1986). (footnote omitted); *Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. Sch. L. Rev. 38, 42 n.10 (2006-07). Moreover, there is ample evidence showing that legal representation is often considered the most important factor affecting the outcome of immigration proceedings, both for children and for adults, as a number of studies demonstrate a connection between legal representation and outcome of the case. Jaya

Ramji-Nogales, Andrew I. Schoenholtz and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 340 (2007) (noting that in asylum cases before the EOIR, representation is the single most important factor affecting outcomes, with represented asylum seekers winning asylum in 45 percent of cases, versus 16.3 percent for unrepresented asylum seekers). Experts agree that asylum seekers, detained aliens and unaccompanied minors are the most likely to be fully disadvantaged without counsel. *Statement of Julie Myers Wood* President, ICS Consulting, LLC Former Assistant Secretary, Immigration and Customs Enforcement, Department of Homeland Security Before the Committee on the Judiciary United States Senate April 18, 2011, available at: <https://www.hsdl.org/?view&did=4963>.

A. Unaccompanied Children

The lack of counsel for immigrant children has become an especially serious problem in the last year as a surge of unaccompanied young migrants have been crossing the southwest border fleeing violence in their home countries, primarily Honduras, Guatemala, and El Salvador. Since 2013, more than 125,000 children have been taken into custody by the Department of Homeland Security. *US Customs and Border Protection Alien Children Statistics FY 2016* available at <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> . Without legal representation, these children face what experts have called a “Dickensian absurdity” in which they are required to appear before judges and trained government lawyers with no idea of what happens around them. *Equal Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases, Including Immigration Proceedings: Response to the Seventh to Ninth Periodic Reports of the United States to the Committee on the Elimination of All Forms of Racial Discrimination* available at:

http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/equal_access_to_justice_-_cerd_shadow_report.pdf

Because of their age and lack of maturity, children are generally unable to adequately exercise their right to a full and fair hearing without the aid of an attorney. As the Supreme Court has stated in addressing the right to appointed counsel in juvenile delinquency proceedings, a child “needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’” *In re Gault*, 387 U.S. 1, 37 (1967) (quoting *Powell v. State of Alabama*, 287 U.S. 45, 69 (1932)). The need for legal counsel is just as great, if not greater, in the immigration context, where the laws are particularly complex.

Although the government has taken some steps toward ensuring legal representation for children in immigration proceedings, children are regularly forced to appear in court without counsel and defend themselves against trained government prosecutors. Furthermore, immigration proceedings present an exceptional predicament for unaccompanied minors in that no party actually prioritizes the child, nor does any other party advocate for the best interest of the child. An Administrative judge has practically no domestic legal basis to consider the best interest of the child in ruling on the merits of the case; the child’s best interest is expressly not an issue that can dictate the outcome of a federal immigration proceeding. Wendy Youn & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 Harv. C.R.-C.L. Law Review 247, 249 n.14 (2010); See Susan M. Akram, *Are They Human or Just Border Rats?*, 15 B.U. Pub. Int. L.J. 187, 189 (2006) (noting that there is no required consideration of the best interests of children in immigration

proceedings). Because of this strange situation, unaccompanied minors often find themselves alone when their matter comes before the court. Furthermore, evidence shows that when unaccompanied minors are forced to face their immigration proceedings alone, their chance of success decreases dramatically, and they may suffer dire consequences if deported.

Without legal representation, unaccompanied minors lack the knowledge to understand the nature and consequences of immigration proceedings, and are forced to go up against an unfamiliar and complicated legal process. It has previously been declared that immigration proceedings take second place in complexity after federal tax cases. *Baltazar-Alcazar v. I.N.S.*, 386 F.3d 940, 948 (9th Cir. 2004); see also *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010). The immigration system that affects unaccompanied minors involves multiple agencies, including the Customs and Border Patrol (“CBP”), Immigration and Customs Enforcement (“ICE”), and United States Citizenship and Immigration Services (“USCIS”), all within the United States Department of Homeland Security (“DHS”), the Department of Justice’s Executive Office of Immigration Review (“EOIR”); the United States Department of Health and Human Services’s Office of Refugee Resettlement Division of Unaccompanied Children’s Services (“ORR/DUCS”); and the United States Department of State. Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 Harv. J. on Legis. 331 (2013). When unaccompanied minors fall into ORR/DUCS custody, they are put in removal proceedings before the EOIR. *Id.* at 335. Removal proceedings are adversarial administrative hearings in which children must face attorneys from DHS whose main task is to prove that the child should be removed to his or her home country. *Id.* at 338. The proceedings allow for examination of evidence against the child, presentation of evidence by the child, and for the child to cross-examine government witnesses. *Id.* The matters are further complicated by

the fact that the proceedings are governed by the intersection of an elaborate substantive legal framework and several challenging areas of law such as international law, federal statutes and regulations, and case law that varies by jurisdiction. *Id.* As such, it is highly unlikely, if not impossible, for a child to be able to navigate the immigration process without some legal assistance.

Between 2005 and 2014, approximately 47 percent of children who were represented in their immigration proceedings were permitted to remain in the United States. In contrast, only 10 percent of unrepresented children were permitted to remain in the United States. TRAC Immigration, *New Data on Unaccompanied Children in Immigration Court*, Table 4, <http://trac.syr.edu/immigration/reports/359/>. Notably in 2013, as much as 78 percent of children who were represented in immigration proceedings were permitted to stay, while only 25 percent of unrepresented children obtained this result. *Id.* This shows that, while the percentage of unrepresented children obtaining such result has increased, the disparity in outcome between represented and unrepresented children remains manifest.

These statistics raise serious questions and concerns regarding unaccompanied minors who are forced to represent themselves in immigration proceedings. See, e.g., *Jacinto v. I.N.S.*, 208 F.3d 725, 727-28 (9th Cir. 2000). Forcing minors, most of whom do not speak English, to represent themselves in inherently complex immigration proceedings where their lives may be at risk inevitably deprives unaccompanied minors of a full and fair hearing and does not give them a sufficient opportunity to be heard. As such, unaccompanied minors do not enjoy the full protection of the rule of law, and are particularly vulnerable to facing unfair results.

Finally, deprivation of a full and fair hearing as a result of lack of access to counsel may

put unaccompanied minors at risk of facing dangerous circumstances if they are forced to return to their home countries. As an example, in 2004, an unrepresented fifteen-year-old boy named Edgar Chocoy insisted that gangs would kill him if he were to return to Guatemala. Young and McKenna, "The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States," 45 Harv. C.R.-C.L. Law Review at 247, 254-55 (2010); *see also* Jaqueline Bhabha, "Not a Sack of Potatoes": Moving and Re-Moving Children Across Borders, 15 B.U. Pub. Int. L.J. 197, 203 (2006) (indicating Chocoy was unrepresented). Chocoy's asylum was denied and he was subsequently deported back to Guatemala. Young & McKenna, *supra*, at 254. In less than a month, Chocoy was murdered. *Id.*

B. Detained Aliens

In 2013, an alarming mere fifty-nine percent of immigrants in removal proceedings had representation. U.S. Department of Justice, Exec. Office For Immigration Review, *FY 2013 Statistics Yearbook* F1 (2014) [hereinafter DOJ, *FY 2013 Yearbook* available at <http://www.justice.gov/eoir/statspub/fy13syb.pdf>]. However, the figures for detained immigrants remain abysmally low: a staggering eighty-four percent lack counsel. ABA Commission in Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases* 5-8 (2010), available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf; AMNESTY INT'L, *Jailed Without Justice: Immigration Detention in the U.S.A.* 30 (2008), available at <http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf>.

It is particularly difficult for detained immigrants to find legal representation because of

the remote location of many immigration detention facilities. *Equal Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases, Including Immigration Proceedings: Response to the Seventh to Ninth Periodic Reports of the United States to the Committee on the Elimination of All Forms of Racial Discrimination* available at http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/equal_access_to_justice_-_cerd_shadow_report.pdf. Forty percent of Immigration and Customs Enforcement bed space is located more than sixty miles from an urban center. Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two-Year Review* 31 (2011), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf>. See also Report on Immigration in the United States: Detention and Due Process, Inter-Am. Comm'n H.R., ¶¶ 336-84, OEA/Ser.L/V/II, doc. 78/10 (2010) (expressing concern regarding the lack of available representation for immigrants and, in particular, the unique challenges faced by detainees).

In removal proceedings, representation can have a substantial impact on whether a person is able to remain in the country. Donald Kerwin, *Revisiting the Need for Appointed Counsel*, INSIGHT, Apr. 2005, at 5, available at http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf (finding success rates of 34 percent for represented, non-detained immigrants versus 23 percent of unrepresented, non-detained immigrants; 24 percent for represented detained immigrants compared to 15 percent for unrepresented detained immigrants; 39 percent for represented, non-detained asylum seekers versus 14 percent of unrepresented, non-detained asylum seekers; and 18 percent for represented, detained asylum seekers compared to 3 percent of unrepresented, detained asylum seekers). Other immigration studies demonstrate similar results. *Asylum Denial Rate Reaches All Time*

Low: FY 2010 Results, a Twenty-Five Year Perspective, TRAC Immigration (2010), available at <http://trac.syr.edu/immigration/reports/240/> (in 2010, 11 percent of asylum applicants without legal representation were granted asylum, compared to 54 percent of those with representation); *Immigration Judges*, TRAC Immigration (2006), available at <http://trac.syr.edu/immigration/reports/160/> (between 1994 and 2005, 46 percent of represented asylum seekers received relief compared to 7 percent of unrepresented asylum seekers). See also Donald Kerwin, *Charitable Legal Programs for Immigrants: What They Do, Why They Matter, and How They Can Be Expanded*, 04-06 Immigr. Briefings 1 (2004).

The New York Immigrant Representation Study published in 2011 found that seventy-four percent of non-detained immigrants with counsel prevailed in their cases, compared to only thirteen percent of non-detained immigrants without counsel. See N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 Cardozo Law R. 357, 363-64 (2011).

C. EOIR Policy and Memoranda

The EOIR has indeed recognized the “critical and ongoing shortage of qualified legal representation for underserved populations in immigration” and has also recognized that law students enrolled in clinical programs have an important role to play in addressing the critical and ongoing shortage of counsel in removal proceedings.⁸ The EOIR has adopted internal

⁸ The persons entitled to represent respondents in removal proceedings are set forth at 8 C.F.R. Section 1292.1 and include attorneys admitted in the U.S. who have duly registered with EOIR, as well as law students and law graduates. In order for the latter group to be eligible to represent a respondent, s/he must meet specific requirements listed in Section 1292.1(a)(2) and s/he must attest in writing that those requirements have been met. 8 C.F.R. Section 1292.1(a)(2)(ii). The regulations also require the permission of the IJ. 8 C.F.R. Section

policies and memoranda to facilitate legal representation of aliens in removal proceedings. In April 2000, EOIR created the Legal Orientation and Pro Bono programs, now known as the Office of Legal Access Programs to “increase the level of representation for immigrants appearing before the Immigration Courts and the Board.” *See*, <http://www.justice.gov/eoir/office-of-legal-access-programs>. On May 22, 2007, EOIR adopted OPPM 07-01, Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (Replaces OPPM 04-07), May 22, 2007. The Guidelines encourage immigration judges to use “pro bono resources whenever a child respondent is not represented.”

In a Memorandum entitled OPPM 08-01 and dated March 10, 2008 from Chief Immigration Judge David L. Neal, EOIR set forth guidance to all immigration judges, in this Memorandum recognized the importance of Pro Bono representation for the administration of justice and the participation of law schools clinics in this effort for “the public good”.

Pro bono representation benefits both the respondent and the court, providing respondents with welcome legal assistance and the judge with efficiencies that can only be realized when the respondent is represented. A capable pro bono representative can help the respondent navigate court rules and immigration laws and thereby assist the court in understanding the respondent's circumstances and interests in relief, if any is available. Pro bono representation in immigration court thus promotes the effective and efficient administration of justice.

(OPPM 08-01, p. 2). The memo further recognizes that law students participating in clinical programs are among the *pro bono* representatives who appear before the immigration courts and suggests that, “judges should be cognizant of the unique scheduling needs of law schools operating on an academic calendar and pro bono programs which require sufficient time to recruit and train representatives.” *Id.* at p. 4 EOIR’s interest in encouraging Pro Bono

1292.1(a)(2)(iii). The Immigration Court Practice Manual, at Section 2.5(a), elaborates that a request must be made to the IJ in writing and the IJ must approve of the students’ appearances

representation is also evident in the OPPM 08-04 Guidelines for Telephonic Appearances by Attorneys and Representatives at Master Calendar and Bond Redetermination Hearings. The Memorandum also encourages Immigration Judges to be flexible in allowing pro-bono counsels to appear by telephone.

Access to legal counsel for Unaccompanied Children and Adults with Children was also a central concern reflected on the March 24, 2015 Memorandum by Brian M O'Leary, Chief Immigration Judge on *Docketing Practices Relating to Unaccompanied Children Cases and Adults with Children Released on Alternatives to Detention Cases on Light of New Priorities*. The Memorandum encourages Immigration Judges to be flexible in granting continuances in UAC and AWC/ATD cases in order to facilitate securing legal counsel. The Memorandum directs Immigration Judges to reschedule non priority cases if necessary to grant a continuance for purposes of obtaining legal representation. Interestingly this Memorandum arises from a meeting on August 6, 2004 where the Vice President of the United States urged lawyers to assist with the backlog of cases for tens of thousands of children from Honduras, El Salvador and Guatemala, after exploring the concerns of the interested groups EOIR issued this Memorandum to facilitate legal representation. Available at <http://www.justice.gov/eoir/pages/attachments/2015/03/26/docketing-practices-related-to-uacs-and-awcatd-march2015.pdf>

As well, EOIR published a new regulation on October 1, 2015 regarding the accreditation of non-attorneys to practice before this Board and the immigration courts. In its executive summary of the proposed rule, EOIR stated that the Recognition and Accreditation program "addresses the critical and ongoing shortage of qualified legal representation for underserved

populations in immigration cases before Federal administrative agencies.” 80 Fed. Reg. 59514 (Oct. 1, 2015).

Very recently, EOIR has amended the regulation at 8 CFR Section 1003.64 regarding free legal services available in immigration courts in order “to improve legal fairness by increasing rates of representation” in removal proceedings according to statements made in a nationwide “Stakeholder Meeting” on this new rule, which was held on October 8, 2015 and hosted by EOIR’s Outreach Director, Nathan Berkeley, and the OLAP Director, Steven Lang.

It is a long settled principle that rules and policies promulgated by a federal agency that regulate the rights and interests of others are controlling upon the agency. *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 422 (1942). This doctrine was first applied in an immigration case in *Accardi*, where the Supreme Court vacated a removal order of the Board because the procedures leading to the order did not conform to the applicable regulations. *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). The decision of the Immigration Judge to arbitrarily deny the participation of law students as counsel of record can create a pernicious precedent that runs in opposition to EOIRs stated commitment to facilitate pro bono representation in removal proceedings.

Immigration clinics usually represent indigent immigrants with urgent legal needs. The cases taken by the Clinics are frequently complex cases requiring hundreds of hours of research and preparation. Unable to find low fee or pro bono attorneys locally, some clients travel long distances and spend many hours each week to meet with students and attorneys at the clinics. Kevin Johnson and Amagda Perez, *Clinical Legal Education and The U.C. Davis Clinic: Into Practice And Practice Into Theory* 51 SMU L. Rev. 1423, 1429 (1998). See Law School Professors’ Declarations attached hereto as Composite Exhibit D. Because of the

competent and comprehensive work that clinic students perform has been praised by immigration judges. *New York Immigrant Representation Study, Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, 33 CARD. L. REV. 357, 364, 388-94 (2011).

By preventing law students enrolled in immigration clinics from representing aliens in removal proceedings the Immigration Judge is effectively ignoring EOIR policy to facilitate pro bono representation and deprives vulnerable immigrant respondents of access to their counsel of choice.

V. IF ALLOWED TO STAND THE IMMIGRATION JUDGE'S DENIAL(S) OF ACCESS TO THE COURT WOULD FRUSTRATE PUBLIC POLICY AND UNDERMINE THE PRO BONO LEGAL PROGRAMS THAT EOIR AND DHS HAVE PLEDGED TO SUPPORT

As has been discussed, *supra*, the lack of access to counsel for respondents in removal proceedings has reached a critical stage. In response to this reality, EOIR has an obligation and has already taken steps to support *pro bono* legal programs that would help address these needs. The Immigration Clinics and students enrolled in those clinics are natural partners to help EOIR address this crucial need and run successful programs.

A. The TVPRA requires that in certain cases *pro bono* representation be encouraged and supported.

The Homeland Security Act of 2002, an Act that created the Department of Homeland Security, first charged ORR with the responsibility of guaranteeing that qualified and independent legal counsel is timely appointed to represent the interests of unaccompanied minors who are in federal custody by reason of their immigration status. 6 U.S.C. § 279(b)(1)(A).

A subsequent federal law, the Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), then mandated that the "Secretary of Health and Human

Services shall ensure, to “the greatest extent practicable” and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362) “that all unaccompanied minors in its care “have counsel to represent them in legal proceedings or matters.” 8 U.S.C. §§ 1232(a)(5)(D)(iii) and (c)(5).

The TVPRA further requires that the Secretary of Health and Human Services “shall *make every effort to utilize the services of pro bono counsel* who agree to provide representation to such children without charge.” 8 U.S.C. § 1232(c)(5) (emphasis added). While this provision appears subject to financial appropriations and other resource constraints, the Secretary of Health and Human Services still has a clear duty to ensure that unaccompanied minors are able to access legal counsel to assist or represent them in their immigration proceedings.

In addition to the aforementioned TVPRA mandate, a longstanding court injunction in *Perez-Funez v. District Director*, 619 F. Supp. 656 (C.D. Cal. 1985),⁹ now implemented in federal regulations that apply to both DHS and EOIR, requires that unaccompanied children be both advised of their legal rights and guaranteed access to outside advice before voluntarily choosing to return to their countries of origin. *See* 8 C.F.R. §§ 236.3(g)-(h), 1236.3(g)-(h). Thus, before the government can order an unaccompanied minor to voluntarily depart the United States or withdraw his or her application for admission, the government must provide the child with (1) a written notice of rights; (2) a list of free legal service providers; and (3) access to telephones and notice that they may call a parent, close relative, friend, or attorney. *Id.*

⁹ In the *Perez-Funez* litigation, it was alleged that then INS was involved in a widespread practice of coercing children into accepting voluntary departure from the United States, resulting in waiving their rights to a hearing and opportunity to seek relief. The court subsequently held that the government’s existing voluntary departure procedures violated the children’s due process rights and imposed necessary safeguards to help minimize the risk of coercion. *See Children at the Border* at 2, 6-9 (2011); Ian Gordon, *4 Reasons Why Border Agents Shouldn’t Get to Decide Whether Child Migrants Can Stay in the US*, Mother Jones (July 1, 2014).

As a response to the direct mandate from Congress in the TVPRA, and to help address legal representation needs of unaccompanied minors, the ORR is funding a Pro Bono Representation project. See Rosemary Sheehan, Helen Rhoades and Nicky Stanley, *Vulnerable Children and The Law; International Evidence for Improving Child Welfare, Child Protection and Children's Rights* (2012). The Pro Bono Representation project provides funding to non-government organizations in order to recruit, train, and connect pro bono attorneys to children in need of legal representation. *Id.*

In June of 2014, the Corporation for National and Community Service, a federal agency that engages more than five million Americans in service through its AmeriCorps, Senior Corps, Social Innovation Fund, and other programs, has announced its partnership with the EOIR to fund a very limited number of lawyers and legal support staff for unaccompanied children. See <http://www.nationalservice.gov/newsroom/press-releases/2014/justice-department-and-cnscs-announce-new-partnership-enhance>.

The partnership, known as “Justice AmeriCorps,” responds to Congress’ direction to Department of Justice’s Executive Office for Immigration Review “to better serve vulnerable populations such as children and improve court efficiency through pilot efforts aimed at improving legal representation.” *Id.* In the partnership announcement, the CEO of the Corporation for National Community Service has declared that Justice AmeriCorps “will provide critical support” for unaccompanied minors, many of whom are escaping abuse, persecution, or violence, and that the partnership “responds to a direct call from Congress.” *Id.*

While such *pro bono* providers represent children nationwide, *they still are far from being able to meet the need*, especially as the number of unaccompanied minors continues to grow. As of April 2015, children in over 38,000 pending cases remained unrepresented. These

children are forced to appear before an immigration judge, navigate the proceedings, and put on a legal defense without legal representation. The result is that children are not able to adequately present their claims and fight their case before the immigration courts. *See* Declarations of Law Professors, attached as Composite Exhibit D. Many of the law professors' statements support this conclusion and in fact due to the lack of adequate representation in their communities many immigrants would go unrepresented without law school clinics. *See, especially*, Decl. of Janet Beck, University of Houston Law Center, within Exhibit D.

If an immigration judge denies a clinical student's motion to appear without any valid basis it makes it more challenging for vulnerable groups such as unaccompanied minors to access qualified legal representation. There is no denying that there are simply not enough lawyers to handle the massive immigration caseloads that the courts face each year. Not only does permitting the Immigration Judge's decision to stand hurt those who need protection the most, it also becomes an unnecessary stumbling block for those who are already straining to continue to provide *pro bono* services. This would undeniably frustrate Congress' clear intent as embodied in the TVPRA where it calls to ensure that unaccompanied minors are, to the greatest extent practicable, be afforded access to *pro bono* legal representation.

B. EOIR has recently instituted a pilot project relating to appointed counsel for mentally incompetent respondents who are detained.

On April 22, 2013, the Department of Justice (DOJ) and the Department of Homeland Security (DHS) issued a nationwide policy for unrepresented immigration detainees with serious mental disorders or conditions that may render them mentally incompetent to represent themselves in immigration proceedings. The directive is available online at the following location: <http://nwirp.org/Documents/ImpactLitigation/EOIRDirective04-22-2013.pdf>. In a very

encouraging move and responsive to the federal court litigation, the policy specifically states that if the unrepresented alien was found to be not mentally competent to represent him or herself, and the alien at that point does not have legal representation, "EOIR will make available a qualified legal representative to represent the alien in all future detained removal and/or bond proceedings." *Id.*

By December 31, 2013, EOIR released guidance to immigration judges nationwide entitled "Phase I of Plan to Provide Enhanced Procedural Protection to Unrepresented Detained Respondents with Mental Disorders." See guidance available at: <https://dl.dropboxusercontent.com/u/27924754/EOIR%20Protections.pdf>. This new guidance represents EOIR's ongoing efforts to reform how the agency handles cases of persons with mental disorders who are placed in removal proceedings. *Id.* In general, the guidance clarifies the legal standard for competence and provides a detailed course of action for immigration judges hearing cases of detained, unrepresented immigrants showing signs of a mental disorder. *Id.* The guidance states that, where the respondent is unrepresented, he or she must be "competent to represent him- or herself in a removal or custody redetermination proceeding," meaning he or she must "be able to meaningfully participate in the proceedings and perform the functions necessary for self-representation." *Id.* According to the guidelines, an Immigration Judge is required to detect facts suggesting mental incompetency, conduct a judicial inquiry, and follow up with a competency review. *Id.* If the Immigration Judge determines that a respondent is not competent to represent him or herself, the EOIR may provide a qualified representative for the respondent. *Id.*

EOIR and DHS have been striving to put in place this pilot program that would afford those who suffer from mental disabilities the opportunity to fully participate in their legal

proceedings. This program was formed in the face of the reality that many mentally incompetent individuals encounter in the court: there is a serious need for qualified advocates to represent them. Student advocates can fill that need. By permitting a judge to deny students access to the court, it would deny the most vulnerable among aliens access to pro bono services, which, in many immigration proceedings, is often a matter of life and death. To deny mentally incompetent individuals representation, which could easily be provided by students, is an affront to public policy and a direct contravention of the aims of Department of Justice.

C. The IJ's asserted reasons for denial actually support the grant of law student appearances, since this would tend to mitigate the backlog not increase it.

Clinics, like *pro bono* counsel from the private bar, improve the administration of justice and help EOIR meet its "primary mission to adjudicate immigration cases in a careful and timely manner. Representation has the potential to increase the efficiency of at least some adversarial immigration proceedings. This was recognized by EOIR in the Introduction to the OPPM 08-01: *Guidelines for Facilitating Pro Bono Legal Services*:

Pro bono representation benefits both the respondent and the court, providing respondents with welcome legal assistance and the judge with efficiencies that can only be realized when the respondent is represented. A capable pro bono representative can help the respondent navigate court rules and immigration laws and thereby assist the court in understanding the respondent's circumstances and interests in relief, if any is available. Pro bono representation in immigration court thus promotes the effective and efficient administration of justice.

David L. Neal, Chief Immigration Judge, EOIR Memorandum, "Guidelines for Facilitating Pro Bono Legal Services," OPPM 08-01 at 2 (March 10, 2008).

Pro se litigants can and do cause severe delays in the adjudication of their cases due to lack of knowledge and understanding and, as a result, impose a substantial financial cost on the government. As a number of immigration judges, practitioners, and government officials have

observed, the presence of competent counsel on behalf of both parties helps to clarify the legal issues, allows courts to make better informed decisions, and can speed the process of adjudication. The increasing amount of evidence being proffered presents a huge challenge for respondents who are unrepresented and requires a significant amount of additional judicial time to conduct hearings and evaluate such cases. *Statement of National Association of Immigration Judges Before the Senate Committee on the Judiciary* on “Improving Efficiency and Ensuring Justice in the Immigration Court System” May 18, 2011 http://naij-usa.org/wp-content/uploads/2014/06/NAIJ-Written_Testimony-Senate-Judiciary_5-18-11--1.pdf

Increased representation for noncitizens thus would facilitate the more efficient processing of claims, lessen the burden on the immigration courts, and decrease appeal rates. This is particularly true in detained cases. *See Statement of Karen T. Grisez on behalf of the American Bar Association to the Committee On The Judiciary United States Senate* for the hearing on “Improving Efficiency and Ensuring Justice in the Immigration Court System” May 18, 2011, available at <https://www.hsdl.org/?view&did=4963>. According to research by the Vera Institute of Justice undertaken for and with the Katzmman Study Group it was the general opinion of immigration judges interviewed that pro bono attorneys and those from nonprofit organizations and law school clinics performed better than private lawyers. Kirk Semple, *In a Study, Lawyers Present a Bleak View of Lawyers Representing Immigrants*, N.Y. TIMES, Dec. 19, 2011, at A24; *New York Immigrant Representation Study, Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, 33 CARD. L. REV. 357, 364, 388-94 (2011).

In addition to the argument that increasing representation makes the system more effective, there is strong evidence that representation also affects the *outcome* of immigration proceedings. In fact, a study has shown that whether a noncitizen is represented is the “single

most important factor affecting the outcome of [an asylum] case.” Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340-41 (2007). More importantly, law school clinics support the administration of justice not only in the present but also in the long-term. *See* Composite Exhibit D, Declarations of Law Professors, discussing the impact of clinical experience on the administration of justice and especially the benefits to the students themselves and future employers.

Clinics not only offer direct representation to clients but also serve to train a new generation of competent attorneys sensitized to the needs of immigrant communities increasing the pool of qualified immigration practitioners. Irene Scharf, *Nourishing Justice and the Continuum: Implementing a Blended Model in an Immigration Law Clinic*, 12 CLINICAL LAW REVIEW 243, 245-246 (2005). Many immigration clinic graduates continue to represent immigrants and continue to provide consultations or *pro bono* representation to clients referred by the Clinic. Kevin Johnson and Amagda Perez, *Clinical Legal Education and the U.C. Davis Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423, 1452 (1998). Moreover, clinic practice affects future immigrants and other underprivileged people by invigorating and training students to represent the poor. *Id.*

CONCLUSION


There is no more pressing concern for our immigration courts at this time than access to justice. As our immigration judges are aware and as confirmed by the extensive experiences of the professors and clinical directors reported in their attached declarations, these appearances by law students under the direct supervision of their professors greatly benefit the court system on multiple levels and in myriad ways. To deny access to a law school clinical program without a valid reason (or no reason) and under mistaken assumptions is a real concern. Far from impeding

the goals of the immigration courts, law students serving under well-respected and proven clinical programs such as Cornell's strengthen the commitment to justice and fairness which is at the very heart of EOIR's mission. Under the Fifth Amendment, we must protect the due process rights of all and especially, as in these three cases, the most vulnerable respondents.

WHEREFORE, for all the reasons stated in this *Amicus Curiae* brief, the undersigned law professors hereby respectfully request that the interlocutory appeal(s) be SUSTAINED and the record returned to the Immigration Judge to allow for law student representation to proceed.

Respectfully submitted, this 6th day of January, 2016.

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*THE LAW PROFESSORS WHO HAVE SIGNED-ON TO THIS AMICUS BRIEF IN SUPPORT
ARE LISTED IN THE ATTACHED EXHIBIT E*

CERTIFICATE OF SERVICE

I, Geoffrey A. Hoffman, hereby certify that I have sent a true and correct copy of the LAW
PROFESSORS' *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT(S)'
INTERLOCUTORY APPEAL(S), with exhibits, via first-class U. S. mail, postage-prepaid to:

Brandi Lohr, Esq.
Office of the Chief Counsel
U.S. Department of Homeland Security/Immigration and Customs
Enforcement
130 Delaware Avenue, 2nd floor
Buffalo, New York 14202

on this 6th day of January 2016.



Geoffrey A. Hoffman
Amicus Curiae

TABLE OF EXHIBITS

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