UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

MATTER OF REYNALDO CASTRO-TUM,
Respondent

Referred from:
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
A206 842 910

BRIEF OF AMICI CURIAE THE AMERICAN IMMIGRATION COUNCIL, ASISTA IMMIGRATION ASSISTANCE, HER JUSTICE, IMMIGRANT DEFENSE PROJECT, NORTHWEST IMMIGRANT RIGHTS PROJECT, AND SOUTHERN POVERTY LAW CENTER URGING VACATUR OF REFERRAL ORDER OR RECUSAL

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the Attorney General's invocation of a Department of Justice regulation, 8 C.F.R. § 1003.1(h)(1)(i), directing the Board of Immigration Appeals ("Board") to refer the instant case to him. Although the Attorney General does not act as an adjudicator in the first instance, under § 1003.1(h)(1), the Board must refer to the Attorney General all cases that: (1) "[t]he Attorney General directs the Board to refer to him"; (2) "[t]he Chairman or a majority of the Board believes should be referred to the Attorney General for review"; or (3) "[t]he Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, refers to the Attorney General for review." Here, the Attorney General has referred the case to himself under the first subsection of the regulation.

At issue in this case is the longstanding practice of administrative closure, a docketing tool regularly employed "to temporarily remove a case from an Immigration Judge's active calendar or the Board's docket . . . to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time." *Matter of Avetisyan*, 25 I&N Dec. 668, 692 (BIA 2012) (citation omitted). A decision issued by the Attorney General pursuant to 8 C.F.R. § 1003.1(h)(1)(i) becomes binding precedent in immigration proceedings nationwide, and it remains

controlling unless and until each federal court of appeals or the Supreme Court vacates the decision.[1] According to the government, the outcome in this case potentially will affect over 350,000 cases.[2]

Remarkably, the Attorney General has chosen to invoke the referral regulation in this matter: the case of a young man whom the Department of Homeland Security ("DHS") placed in removal proceedings when he was a minor, who was not represented by counsel below, and who, to amici's knowledge, remains unrepresented today. The referral order sets out seven broad questions for the Attorney General's review, including whether "Immigration Judges and the Board have the authority . . . to order administrative closure" and, if they do, whether the Attorney General should withdraw that authority. *Matter of Castro-*

[1] A respondent in removal proceedings may file a petition for review in a federal court of appeals only once a final administrative order of removal has issued. 8 U.S.C. §§ 1252(a) & 1101(a)(47)(B). Here, the Board initially vacated and remanded the order of the immigration judge ("IJ") administratively closing Castro-Tum's case. *See Matter of Castro-Tum*, A206 842 910, at *1 (BIA Nov. 27, 2017) ("BIA Decision"). If the Attorney General upholds the Board's order, ending administrative closure, Castro-Tum's case will require remand to the immigration court for entry of a removal order in the first instance, followed by any appeal to the Board, before a final order of removal could issue. At that point, Castro-Tum would be entitled to file a petition for review with the U.S. Court of Appeals for the Third Circuit challenging the Attorney General's decision on any applicable grounds. If the Attorney General vacates the Board's order, Castro-Tum's case will remain administratively closed and judicial review will not be available unless and until the case is re-calendared, the IJ orders removal, and the Board affirms the removal order. Similarly, in all other cases affected by the Attorney General's decision, respondents cannot challenge the decision in the court of appeals via petition for review in their respective circuits until their removal orders are administratively final (i.e., issued by an immigration judge and affirmed by the Board). *See* 8 U.S.C. §§ 1101(a)(47)(B), 1252(a), 1252(b)(9). Given this process, it likely would take years for each circuit court to resolve the legality of the Attorney General's decision, or for the Supreme Court to do so.

[2] Elliot Spagat, *Sessions takes aim at judges' handling of immigration cases*, Associated Press (Jan. 6, 2018), https://www.apnews.com/9ce3e704a0c6457a958d410f001f0f22.

Tum, 27 I&N Dec. 187, 187 (A.G. 2018) ("AG Decision"). These far-reaching questions are of vital importance to Castro-Tum and other participants in removal proceedings, including adjudicators, respondents, and DHS. They cannot be decided here, however, because due process requires a neutral decisionmaker in immigration proceedings, and the Attorney General's documented lack of neutrality disqualifies him from participation in this case.

The test for disqualification of an agency adjudicator is "whether 'a disinterested observer may conclude that [the adjudicator] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959), *cert. denied*, 361 U.S. 896 (1959)). In *Cinderella*, the D.C. Circuit held that disqualification is warranted where an agency head responsible for adjudicating a case has "ma[d]e speeches which give the appearance that the case has been prejudged." *Id.* at 590. Here, as set forth below, the Attorney General has made numerous public statements that, individually and collectively, demonstrate prejudgment of this particular case.

At least three categories of statements raise serious due process concerns. First, the Attorney General's recent public remarks—including an official speech and memorandum from less than a month before he referred this case to himself—

strongly suggest that he decided to end the practice of administrative closure before invoking the referral regulation in this case. Second, the Attorney General has expressed sustained bias toward unaccompanied children, a designation that applies to Castro-Tum. *See* BIA Decision at *1. Finally, the Attorney General's long history of public commentary on immigration, both as a United States senator and as Attorney General, reflects a predisposition to disfavor certain categories of noncitizens—particularly those who do not meet his standards for income, education, professional skills, and language ability, or whose family ties might provide a basis for immigration relief. He therefore lacks the requisite impartiality to decide at least one of the sweeping questions set out in the referral order: "what actions should be taken regarding cases that are already administratively closed?" *See* AG Decision at 187.

For all of these reasons, the Attorney General's public statements, considered under an objective standard, establish a "probability of actual bias" that "is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)); *see also Cham v. Att'y Gen. of the U.S.*, 445 F.3d 683, 694 (3d Cir. 2006) (stating that violation of due process occurs where "the violation of a procedural protection . . . had the *potential* for affecting the outcome of [the] deportation proceedings"). The appearance of prejudgment is heightened by the fact that the

Attorney General has targeted this case on his own referral, rather than at the request of the Board or a designated DHS official. 8 C.F.R. §§ 1003.1(h)(1)(ii) & (iii). In short, the Attorney General has referred to himself a matter that he may not adjudicate without offending constitutional safeguards. Due process requires that the Attorney General vacate the referral order or recuse himself from the case.

INTEREST OF AMICI CURIAE[3]

The American Immigration Council (the "Council") is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council previously has appeared as an amicus curiae before the Attorney General, and regularly litigates issues relating to due process, removal defense, and government accountability before the Board and the federal courts. The Council has a direct interest in ensuring that decisions in removal proceedings are made by fair, impartial, and open-minded adjudicators who are shielded from political influences.

ASISTA Immigration Assistance ("ASISTA") worked with Congress to create and expand routes to secure immigration status for survivors of domestic

[3] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person (other than amici curiae, their counsel, or their members) contributed money that was intended to fund the preparation or submission of this brief.

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 DHS personnel charged with implementing these laws. 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.

Since 1993, Her Justice has been dedicated to making quality legal representation accessible to low-income women in New York City in family, matrimonial, and immigration matters. Her Justice recruits and mentors volunteer attorneys from the City's law firms to stand side-by-side with women who cannot afford to pay for a lawyer, giving them a real chance to obtain legal protections that transform their lives. Her Justice's immigration practice focuses on representing immigrant survivors of gender-based violence pursuing relief under the Violence Against Women Act (VAWA), many of whom are in removal proceedings. Her Justice has appeared before Courts of Appeals and the United States Supreme Court in numerous cases as amicus.

Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center that supports, trains, and advises criminal defense and immigration lawyers, immigrants themselves, as well as judges and policymakers on the

intersection between immigration law and criminal law. IDP is dedicated to promoting fundamental fairness for immigrants at risk of detention and deportation based on past criminal charges and therefore has a keen interest in ensuring the integrity and fairness of agency removal proceedings.

The Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal organization dedicated to the defense and advancement of the legal rights of noncitizens in the United States with respect to their immigrant status. NWIRP provides direct representation to low-income immigrants placed in removal proceedings.

The Southern Poverty Law Center ("SPLC") has provided pro bono civil-rights representation to low-income persons in the Southeast since 1971. SPLC has litigated numerous cases to enforce the civil rights of immigrants and refugees to ensure that they are treated with dignity and fairness. SPLC also monitors and exposes extremists who attack or malign groups of people based on their immutable characteristics. SPLC is dedicated to reducing prejudice and improving intergroup relations. SPLC has a strong interest in opposing discriminatory governmental action that undermines the promise of civil rights for all.

ARGUMENT

I. Due Process Guarantees an Impartial Decisionmaker at Every Stage of Removal Proceedings, Including Review by the Attorney General

"[T]he Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). It is well-settled that "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities," including in the immigration context. *Abdulrahman v. Ashcroft*, 330 F.3d 587, 596 (3d Cir. 2003) (quoting *Schweiker v. McClure*, 456 U.S. 188, 195 (1982)). "[N]o person [may] be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Wang v. Att'y Gen. of the U.S.*, 423 F.3d 260, 269 (3d Cir. 2005) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)). In line with these principles, a respondent in removal proceedings is entitled to independent and impartial review "throughout all phases of [the] proceedings"—in hearings before the IJ, on appeal to the Board, and, on the rare occasion it occurs, on referral to the Attorney General. *Serrano-Alberto v. Att'y Gen.*, 859 F.3d 208, 213 (3d Cir. 2017).

The federal courts—including the U.S. Court of Appeals for the Third Circuit, where Castro-Tum would be required to file any petition for review in this case—have not hesitated to reject final orders of removal where the proceedings

before the IJ failed to satisfy constitutional requirements. These requirements include "a full and fair hearing" by a "neutral and impartial arbiter of the merits of [the] claim." *Abulashvili v. Att'y Gen.*, 663 F.3d 197, 207 (3d Cir. 2011) (quoting *Cham v. Att'y Gen.*, 445 F.3d 683, 691 (3d Cir. 2006)); *see also Marincas v. Lewis*, 92 F.3d 195, 203-04 (3d Cir. 1996) (describing review by impartial immigration judges as one of the most basic due process protections); *Serrano-Alberto*, 859 F.3d at 224 (concluding that "pervasive[ ]" and "egregious[ ]" conduct by the IJ constituted a violation of due process).

The Board has recognized that "the constitutional due process requirement that the hearing be before a fair and impartial arbiter" requires the recusal of IJs under certain circumstances. *Matter of Exame*, 18 I&N Dec. 303, 306 (BIA 1982). In *Matter of Exame*, the Board set out two situations in which recusal is required. First, an IJ must recuse where "it [is] demonstrated that [he] had a personal, rather than judicial, bias stemming from an 'extrajudicial' source which resulted in an opinion on the merits on some basis other than what the immigration judge learned from his participation in the case." *Id.* Second, even when the conduct at issue is internal to the proceedings, an IJ must recuse where "such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party." *Id.* (quoting *Davis v. Board of School Comm'rs*, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976)). An IJ's "conduct [is] improper . . .

whenever a judge appears biased, even if she actually is not biased." *Abulashvili*, 663 F.3d at 207.

The same constitutional requirements apply to the adjudication of removal proceedings by the Board, although the appellate context gives rise to different obligations and potential violations. A neutral Board ensures a layer of impartial review that is independent of both the IJ and the Attorney General. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 264-68 (1954) (holding Board must exercise its own discretion as provided in regulations and may not defer to the Attorney General in deciding the outcome of a case). In *Accardi*, the Attorney General had "announced at a press conference that he planned to deport certain 'unsavory characters'" and subsequently prepared a list of individuals he wished to have deported, including Accardi, which was circulated to employees of the Immigration Service and Board. *Id.* at 264. After the Board denied Accardi's application for suspension of deportation, Accardi challenged the decision on a petition for writ of habeas corpus, "charg[ing] the Attorney General with precisely what the regulations forbid him to do: dictating the Board's decision." *Id.* at 267. The Court held that it violates due process for the Board to "fail[ ] to exercise its own discretion, contrary to existing valid regulations." *Id.* at 268. The Court emphasized that this requirement "applies with equal force to the Board and the Attorney General," and that Accardi was entitled to a "fair hearing" and a decision

based solely on the record after the Board "exercised its own independent discretion." *Id.* at 267-68.

The due process principles discussed above "ha[ve] long been established by the Supreme Court," and courts have applied them in many contexts other than immigration proceedings. *Wang v. Att'y Gen.*, 423 F.3d 260, 269 (3d Cir. 2005). It is axiomatic that the right to an impartial decisionmaker is inherent in due process. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). This well-established principle "preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). "Fairness of course requires an absence of actual bias . . . [b]ut our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). Thus, in determining whether a decisionmaker possesses the requisite impartiality to adjudicate a matter, "[t]he inquiry is an objective one" that asks "not whether the [decisionmaker] is actually, subjectively biased, but whether the average [decisionmaker] in his position is 'likely' to be neutral." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009).

As a practical matter, the due process right to an impartial decisionmaker is secured by multiple overlapping safeguards, with the restraint of conscientious

decisionmakers playing a key role. For example, adjudicators routinely identify their personal and financial interests so they can be appropriately screened from matters that implicate those interests. *Cf. In re Murchison*, 349 U.S. at 136 ("[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."). Recusal, removal by agency superiors, and disqualification are all important tools. Although the appropriate protections vary by situation, their combined effect is "to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Marshall*, 446 U.S. at 242.

Where the Attorney General acts as an adjudicator in his own right, he is subject to the same constitutional requirements as any other agency decisionmaker—taking into account, of course, the specific requirements of the immigration context. *See Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (agency adjudicator may not prejudge or appear to prejudge a case); *Serrano-Alberto v. Att'y Gen.*, 859 F.3d 208, 213 (3d Cir. 2017). There is no exception to the impartiality requirement for immigration matters the Attorney General refers to himself. Yet, for the reasons discussed below, an exception would be required for the Attorney General to decide this case.

II. The Attorney General Cannot Impartially Adjudicate This Case

A. Due Process Bars Participation by an Adjudicator Whose Public Statements Show He Has Prejudged or Appeared to Prejudge a Case

In determining whether an adjudicator possesses the requisite impartiality, the ultimate question is whether he is "capable of judging a particular controversy fairly on the basis of its own circumstances." *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)). The adjudicator "enjoys a presumption of honesty and integrity," but that presumption may be rebutted on various grounds. *Harline v. Drug Enforcement Admin.*, 148 F.3d 1199, 1204 (10th Cir. 1998) (citing *Withrow*, 421 U.S. at 47).

The D.C. Circuit's decision in *Cinderella* sets out the standard that applies when public statements made by an agency head call into question the fairness of an adjudication in which the official is involved. In that case, the court considered whether then-Chairman of the Federal Trade Commission Paul Rand Dixon should have recused himself from an adjudication involving charges of false, misleading, and deceptive advertising "due to public statements he had previously made which allegedly indicated pre-judgment of the case on his part." *Cinderella*, 425 F.2d at 584-85. While the case was pending, Chairman Dixon had delivered a speech setting forth several examples of advertisements newspapers should reject as a

matter of ethics, including one that appeared to correspond to the facts of the pending case. *Id.* at 589-90. In analyzing whether the Chairman should have recused himself, the D.C. Circuit explained that "[t]he test for disqua[l]ification . . . [is] whether a disinterested observer may conclude that [the adjudicator] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Id.* at 591 (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959), *cert. denied*, 361 U.S. 896 (1959)). The court concluded that disqualification was required. *Id.* at 590-91. Separately, the court noted that public statements by an adjudicator risk "entrenching [him] in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." *Id.* at 590.

The test for disqualification set out in *Cinderella* is consistent with the standard for recusal adopted by the Board for "personal, rather than judicial, bias." *Matter of Exame*, 18 I&N Dec. 303, 306 (BIA 1982) (explaining that recusal is required where "it [is] demonstrated that the immigration judge had a personal, rather than judicial, bias stemming from an 'extrajudicial' source which resulted in an opinion on the merits on some basis other than what the immigration judge learned from his participation in the case"). However, the facts of *Cinderella* are instructive regarding the special concerns that arise when an agency head serves as

an adjudicator while simultaneously performing other official duties. These concerns are especially pronounced in relation to the Attorney General, who serves as an immigration adjudicator only rarely and spends the vast majority of his time in roles that do not just involve but depend on partiality, such as maintaining a political affiliation with the president.

Although courts have concluded in other contexts that "'the combination of investigative and adjudicative functions does not, without more, constitute a due process violation,'" they also have recognized that "[courts] are not precluded in a particular case from finding 'that the risk of unfairness is intolerably high.'" *Khouzam v. Att'y Gen.*, 549 F.3d 235, 258 (3d Cir. 2008) (quoting *Withrow*, 421 U.S. at 58). The nature of the Attorney General's competing roles is relevant to this inquiry.

B. The Attorney General's Public Statements Raise an Unconstitutional Appearance of Bias in This Case

This case represents this Attorney General's first use of the referral authority under 8 C.F.R. § 1003.1(h)(1)(i), and one of the rare uses of such authority among recent holders of the office.[4]

[4] During the eight years of the Obama Administration, the Attorney General issued a decision in a referred case, on average, only once every two years. *See, e.g.*, *Matter of Chairez-Castrejon*, 26 I&N Dec. 796 (A.G. 2016); *Matter of Silva-Trevino*, 26 I&N Dec. 550 (A.G. 2015); *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011); *Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009).

Here, the Attorney General has chosen the case of Reynaldo Castro-Tum as the vehicle for a sweeping review of "issues relating to the authority to administratively close immigration proceedings." AG Decision at 187. At the time of his scheduled hearing before the IJ, Castro-Tum, whom DHS alleged to be a native and citizen of Guatemala, was 19 years old and previously had been designated as an unaccompanied child. BIA Decision at *1. After Castro-Tum failed to appear at the hearing, the IJ questioned the reliability of the address to which DHS had sent the Notice to Appear and declined to enter an in absentia removal order, instead administratively closing the case. *Id.* at *1-2. On appeal, the Board vacated the IJ's decision and remanded for further proceedings, reasoning that, in the absence of evidence that the address was unreliable, the "presumption of regularity" should apply. *Id.* at *2. To amici's knowledge, Castro-Tum was unrepresented in these proceedings, including at the time the Attorney General referred the case to himself.

The Attorney General has identified a number of far-reaching questions as "relevant to the disposition of [Castro-Tum's] case," including whether "Immigration Judges and the Board have the authority, under any statute, regulation, or delegation of authority from the Attorney General, to order administrative closure in a case." AG Decision at 187. Although no previous Attorney General has addressed these questions on referral, the Board has

considered the function of and authority for administrative closure on multiple occasions, including in its precedential decisions *Matter of W-Y-U-* and *Matter of Avetisyan*. In *Matter of W-Y-U-*, decided in April 2017, the Board explained:

> Administrative closure . . . is used to temporarily remove a case from an Immigration Judge's active calendar or from the Board's docket. It is a docket management tool that is used to temporarily pause removal proceedings. Administrative closure is not a form of relief from removal and does not provide an alien with any immigration status. After a case has been administratively closed, either party may move to recalendar it before the Immigration Court, as the respondent did here, or to reinstate the appeal before the Board.

27 I&N Dec. 17, 17-18 (BIA 2017) (citations omitted).

In *Matter of Avetisyan*, the Board explained that an IJ's authority to grant administrative closure stems from the authority "to regulate the course of the hearing and to take any action consistent with applicable law and regulations as may be appropriate." 25 I&N Dec. 688, 691, 694 (BIA 2012) (citing to the authority granted to immigration judges in 8 C.F.R. §§ 1240.1(a)(1)(iv), (c)). The Board also clarified that administrative closure may occur over the objection of either party, rejecting the previous contrary rule—which it viewed as giving DHS a unilateral veto over the IJ's ability to administratively close the case—as "troubling" and in conflict with the delegated authority of IJs and the Board. *Id.* at 690-694.

Against this backdrop, the Attorney General's referral of this case to himself raises serious due process concerns. The Attorney General has made public

statements over a period of many years, including in his official capacities as United States senator and Attorney General, that compromise his impartiality in this case. Three categories of statements, in particular, give rise to an unconstitutional potential for bias: (1) the Attorney General's statements expressing prejudgment as to the continued use of administrative closure by IJs and the Board; (2) the Attorney General's statements expressing bias toward unaccompanied children like Castro-Tum; and (3) the Attorney General's statements expressing a predisposition to disfavor certain categories of noncitizens whose interests are implicated in this case.

1. The Attorney General's public statements evidence prejudgment regarding whether to restrict or end administrative closure

The Attorney General's public statements strongly suggest prejudgment as to the continued availability of administrative closure, both in particular and as part of a larger set of practices that extend removal proceedings or allow noncitizens to remain in the United States. Because the Attorney General referred Castro-Tum's proceedings to himself "for review of issues relating to the authority to administratively close immigration proceedings," AG Decision at 187, these statements go to the heart of the case.

In remarks prepared for delivery on December 12, 2017, the Attorney General directly criticized the practice of administrative closure, stating: "As the

backlog of immigration cases grew out of control, the previous administration simply closed nearly 200,000 pending immigration court cases without a final decision in just five years—more than were closed in the previous 22 years combined."[5] By contrast, under the Trump Administration, "[w]e are completing, not closing, immigration cases."[6] The Attorney General noted that this change in priorities has corresponded with a change in "complet[ion]" rates: "[u]nder President Trump, our immigration judges completed 20,000 more cases this last fiscal year than in the previous one."[7] In the same speech, the Attorney General announced that he had issued a memorandum the previous week to the Executive Office for Immigration Review ("EOIR"), the agency that employs both IJs and members of the Board, "mak[ing] clear" that "cases are to be resolved either with a removal order or a grant of relief."[8] This memorandum, titled "Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest," instructs EOIR employees as follows: "The ultimate disposition for each case in which an alien's removability has been established must be either a removal order or a grant of relief or protection from removal

[5] Jefferson B. Sessions III, Att'y Gen., *Attorney General Sessions Delivers Remarks on the Administration's Efforts to Combat MS-13 and Carry Out its Immigration Priorities* (Dec. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-administrations-efforts-combat-ms-13-and-carry.

[6] *Id.*

[7] *Id.*

[8] *Id.*

provided for under our immigration laws, as appropriate and consistent with applicable law."[9]

These statements strongly suggest that the Attorney General had decided to end the practice of administrative closure as of December 2017—and, indeed, had taken steps to end it by issuing the memorandum to EOIR. Yet, less than a month after publicly stating that position, the Attorney General referred a case to himself purporting to consider, among other issues, whether "Immigration Judges and the Board have the authority . . . to order administrative closure" and whether, if they do, the Attorney General should withdraw that authority. AG Decision at 187. Proximity in time is significant in determining whether an official's public statements give rise to an appearance of prejudgment. *See Cinderella*, 425 F.2d at 590 n.10 ("In light of the timing of the speech in relation to the proceedings herein, we think the reasonable inference a disinterested observer would give these remarks would connect them inextricably with this case.").

These recent statements are consistent with the Attorney General's long history of opposition to any practice that extends removal proceedings, particularly where that extension authorizes or has the effect of allowing the respondent to remain in the United States. For example, in the following remarks as a senator,

[9] Office of the Attorney General, *Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest* (Dec. 5, 2017).

the Attorney General expressed the view that removal should occur immediately after adjudication by the agency, notwithstanding pending appeals:

> We have to simply understand that there is no right to be here after a final adjudication has occurred while your case is on appeal in the court of appeals. But we allow them to. We give them a right. . . . The court of appeals can override the adjudicating authority of the Immigration Service and allow the person to stay if they choose. We have had an abuse of that. We have had 10,000 such cases. With this amendment, we are going to see even more such cases.
>
> I suggest that we must get serious about immigration. The more we create appellate possibilities, the more we can confuse the law. The more we create exception after exception after exception, the more unable we are to operate a system effectively and fairly.
>
> The fair principle is, if you are adjudicated not to be here, you have no right to be here. But we give you a generous right to appeal to a court one step below the U.S. Supreme Court, but you have to go home until that court decision. If they override it, he can come back.
>
> I think that is preciously generous. I think that is fair and right, and it also provides that court, in narrow areas, to extend and allow a person to stay if they feel it is necessary to do so.

152 Cong. Rec. 9542 (2006) (statement of Sen. Sessions).

Here, the Attorney General's statements give rise to the appearance that he already has decided to restrict or end administrative closure. The questions set out in the referral order include whether the practice of administrative closure is authorized by law or delegated authority and, if it is discretionary, whether it should be continued. AG Decision at 187. But the Attorney General stated in remarks prepared for delivery on December 12, 2017 that the Trump

Administration is "completing, not closing, immigration cases," and he has directed his agency, which includes IJs and the Board, to resolve cases in ways that do not include administrative closure.[10]

The Attorney General's public statements also implicate the additional concern raised by the D.C. Circuit in *Cinderella*: public statements can "entrench [ ]" a decisionmaker in the "position which he has publicly stated" and "mak[e] it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." *Cinderella*, 425 F.2d at 590. That principle applies with particular force to an Attorney General who has an established record of remarks that make him an interested party, and who is associated with carrying out the anti-immigrant political agenda of rapid removals espoused by the current Administration.[11] Indeed, the December 12

[10] *Attorney General Sessions Delivers Remarks on the Administration's Efforts to Combat MS-13 and Carry Out its Immigration Priorities* (Dec. 12, 2017).

[11] *See, e.g., Transcript of Donald Trump's Immigration Speech* (Sept. 1, 2016), https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html ("According to federal data, there are at least two million, two million, think of it, criminal aliens now inside of our country, two million people criminal aliens. We will begin moving them out day one. As soon as I take office. Day one . . . Day one, my first hour in office, those people are gone."); Donald Trump (@realDonaldTrump), Twitter (Feb. 12, 2017, 3:34AM), https://twitter.com/realdonaldtrump/status/830741932099960834 ("The crackdown on illegal criminals is merely the keeping of my campaign promise. Gang members, drug dealers & others are being removed!"); Donald Trump (@realDonaldTrump), Twitter (April 18, 2017, 2:39AM), https://twitter.com/realdonaldtrump/status/854268119774367745 ("The weak illegal immigration policies of the Obama Admin. allowed bad MS 13 gangs to form in cities across U.S. We are removing them fast!); *President Trump Meeting with Cabinet* (June 12, 2017), https://www.c-span.org/video/?429863-1/president-touts-accomplishments-cabinet-meeting ("Great success, including MS-13. They're being thrown out in record numbers and rapidly. And, uh, they're being depleted. They'll all be gone pretty soon. So, you're right, Jeff. Thank you very much."); *Remarks by President Trump During Meeting with Immigration Crime Victims* (June 28, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-

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speech endorsing the practice of "completing, not closing, immigration cases" repeatedly references President Trump and informs the Department of Justice audience that the Attorney General is "looking forward to working with you to protect the American people and implement the President's ambitious agenda."[12] In light of the repeated public statements of the Attorney General and President Trump "entrenching" their position that immigrants should be deported as rapidly as possible, *see Cinderella*, 425 F.2d at 590, the "average [decisionmaker]" in the Attorney General's position is not "'likely' to be neutral" in an adjudication that requires him to either confirm or reject the positions taken in these previous official statements, *see Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009).

2. The Attorney General's public statements evidence bias toward unaccompanied children like Castro-Tum, whom he associates with MS-13 gang activity and has long sought to remove from the United States

A disinterested observer would conclude on at least two grounds that the Attorney General has prejudged Castro-Tum's case based on his previous

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immigration-crime-victims/ ("MS-13 is a prime target . . . We're getting them out as fast as we can get them out."); Donald Trump (@realDonaldTrump), Twitter (Feb. 6, 2018, 5:32AM), https://twitter.com/realdonaldtrump/status/960868920428253184 ("We must get the Dems to get tough on the Border, and with illegal immigration, FAST!"); *see also* Elizabeth Landers, *White House: Trump's tweets are 'official statements,'* CNN (June 6, 2017), https://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html.

[12] *Attorney General Sessions Delivers Remarks on the Administration's Efforts to Combat MS-13 and Carry Out its Immigration Priorities* (Dec. 12, 2017).

designation as an unaccompanied child. First, the Attorney General repeatedly has made public remarks associating unaccompanied children with the violent transnational gang MS-13, including in multiple official speeches over the past year. Some of these speeches were reported in the press,[13] and the references to unaccompanied children and MS-13 remain online in the prepared remarks posted on the Department of Justice website. Second, as both a senator and Attorney General, the Attorney General has expressed the strong view that unaccompanied children should not be allowed to remain in the United States. Both grounds give rise to a potential for bias that precludes his participation in this case.

Over the past year, the Attorney General has stated on multiple occasions that the unaccompanied child program is a tool of the violent transnational gang MS-13. In prepared remarks to law enforcement officials in Boston in September 2017, the Attorney General explained that "the gang is running rampant [in Central Islip, New York]: killing victims, traumatizing communities, and replenishing its ranks by taking advantage of the Unaccompanied Alien Child program."[14] In the

[13] *See, e.g.*, Lauren Dezenski, *Sessions: Many unaccompanied minors are 'wolves in sheep's clothing,'* Politico (Sept. 21, 2017), https://www.politico.com/story/2017/09/21/jeff-sessions-border-unaccompanied-minors-wolves-242991; Joseph Tanfani, *Atty. Gen. Sessions says lax immigration enforcement is enabling gangs like MS-13*, L.A. Times (Apr. 18, 2017), http://www.latimes.com/politics/washington/la-na-essential-washington-updates-sessions-says-lax-immigration-1492527375-htmlstory.html; John Binder, *'Lax Immigration Enforcement' Led to MS-13 Growth, Sessions Says*, Breitbart (Apr. 18, 2017), http://www.breitbart.com/texas/2017/04/18/lax-immigration-enforcement-led-ms-13-growth-sessions-says/.

[14] Jefferson B. Sessions III, Att'y Gen., *Attorney General Sessions Gives Remarks to Federal Law Enforcement in Boston About Transnational Criminal Organizations* (Sept. 21, 2017),

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same speech, the Attorney General referred to these gang members as "wolves in sheep clothing" and stated that "[w]e are now working with the Department of Homeland Security and HHS to examine the unaccompanied minors issue and the exploitation of that program by gang members."[15] The Attorney General further asserted that the unaccompanied child program "continues to place juveniles from Central America into . . . gang controlled territory" and "is clearly being abused."[16] In April 2017, the Attorney General made similar claims in prepared remarks to the Organized Crime Council, explaining that, "[b]ecause of an open border and years of lax immigration enforcement, MS-13 has been sending both recruiters and members to regenerate gangs that previously had been decimated, and smuggling members across the border as unaccompanied minors."[17] These remarks evidence clear bias toward unaccompanied children and suggest that the Attorney General would apply a presumption of gang affiliation to Castro-Tum, despite the absence of any evidence in the record to that effect.

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https://www.justice.gov/opa/speech/attorney-general-sessions-gives-remarks-federal-law-enforcement-boston-about.

[15] *Id.*

[16] *Id.*

[17] Jefferson B. Sessions III, Att'y Gen., *Remarks by Attorney General Jeff Sessions at Meeting of the Attorney General's Organized Crime Council and OCDETF Executive Committee* (Apr. 18, 2017), https://www.justice.gov/opa/speech/remarks-attorney-general-jeff-sessions-meeting-attorney-general-s-organized-crime-council.

In determining whether an adjudicator's involvement in a case gives rise to a "probability of unfairness," the overall "relationships" and "[c]ircumstances . . . must be considered." *In re Murchison*, 349 U.S. 133, 136 (1955). Here, the Attorney General's statements about unaccompanied children correspond directly to the facts of Castro-Tum's case. The Attorney General has expressed the belief that a transnational gang that poses a grave threat to American security has appropriated the unaccompanied child program to smuggle members from Central America into the United States. Castro-Tum is alleged to be a native and citizen of Guatemala, a country where MS-13 operates, and was designated as an unaccompanied child. BIA Decision at *1. Although there is no evidence or allegation that Castro-Tum is a member of MS-13, the Attorney General's public statements would lead a disinterested observer to conclude that he has already decided whether Castro-Tum should be allowed to remain in the United States, given his previous designation as an unaccompanied child.

Further, the Attorney General has staked out a hardline position on the dismantling of MS-13, declaring it to be an enforcement priority in multiple official speeches over the past year. In his remarks in September 2017, the Attorney General stated: "We have issued mandates to the field that prosecutors renew their focus on immigration offenses—specifically where those criminals have a gang nexus, targeting violent crime offenses, and charging the most serious,

readily provable offense—all of which will ensnare criminal gangs."[18] He explained that the department had plans to "surge[ ] an additional 300 [Assistant U.S. Attorneys] to the field to specifically focus on violent crime and immigration, both of which will involve anti-MS-13 efforts."[19] In April 2017, the Attorney General pledged to take steps to "secure our border, expand immigration enforcement and choke-off supply lines."[20] These comments, combined with the Attorney General's repeated statements associating unaccompanied children with MS-13, "entrench[ ]" the Attorney General in a "tough on unaccompanied children" position that precludes fair judgment in this case. *See Cinderella*, 425 F.2d at 590.

In any case, the Attorney General's long history of advocating against unaccompanied children—from supporting bills to limit their protections as a senator to sharing public anecdotes of DACA recipients alleged to have committed crimes—creates a potential for bias that would mar any decision in the case he has referred to himself. For example, in February 2016, Senator Sessions and Senator Ron Johnson (R-Wis.) co-sponsored a bill titled "The Protection of Children Act" (S. 2541), which would have expedited removal proceedings for unaccompanied

[18] *Attorney General Sessions Gives Remarks to Federal Law Enforcement in Boston About Transnational Criminal Organizations* (Sept. 21, 2017).

[19] *Id.*

[20] *Remarks by Attorney General Jeff Sessions at Meeting of the Attorney General's Organized Crime Council and OCDETF Executive Committee* (Apr. 18, 2017).

children and forbidden the use of taxpayer funds for attorneys in their cases, among other things.[21] In a statement in support of the bill, Senator Sessions explained: "[I]n recent months the number of purported unaccompanied alien children crossing our southern border has more than doubled. As a result, our nation's schools, hospitals, and social services are facing massive, unsustainable strain."[22] In the same press release, Senator Johnson specifically referenced the influx of unaccompanied children from Guatemala and the low repatriation rates to date.[23] The year prior to introducing that bill, Senator Sessions prepared an "Immigration Handbook" for Republican members that advocated "mandatory repatriation for unaccompanied alien minors" as a "common sense enforcement-only measure[ ]."[24]

In his current position, the Attorney General has continued to use his official role as a platform to oppose the interests of unaccompanied children. In remarks prepared for delivery only months before he referred Castro-Tum's case to himself, the Attorney General expressed the view that the DACA program has incentivized

[21] Press Release, Sen. Ron Johnson, *Johnson, Sessions Introduce Bill Prompting Return of Unaccompanied Illegal Immigrant Children* (Feb. 24, 2016), https://www.ronjohnson.senate.gov/public/index.cfm/2016/2/johnson-sessions-introduce-bill-prompting-return-of-unaccompanied-illegal-immigrant-children.

[22] *Id.*

[23] *Id.*

[24] Sen. Jeff Sessions, *Immigration Handbook for the New Republican Majority* (Jan. 2015).

unaccompanied children to come to the United States and told two anecdotes that associated DACA recipients with criminality.[25]

Although these statements would raise impartiality concerns for any adjudicator tasked with deciding an unaccompanied child case, they are especially troubling here, given that the Attorney General has chosen Castro-Tum's case to undertake a generalized review of administrative closure that is not specific to either Castro-Tum or unaccompanied children. The Attorney General, unlike immigration judges and Board members, is not an ordinary adjudicator for whom an unaccompanied child case (or any other case) might arise in the normal course. Rather, the Attorney General reviews only those cases he or another designated official determines he should adjudicate. 8 C.F.R. § 1003.1(h)(1)(i). Although there is little case law addressing the referral authority itself—including its validity, scope, and the process required—the Third Circuit has suggested, in the context of rejecting the methodology used by Attorney General Mukasey in *Silva-Trevino*, that it "bear[s] mention" when the Attorney General takes an "unusual"

[25] Jefferson B. Sessions III, Att'y Gen., *Attorney General Jeff Sessions Delivers Remarks About Carrying Out the President's Immigration Priorities* (Oct. 20, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-about-carrying-out-presidents-immigration.

approach in matters of referral and adjudication. *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 470 n.11 (3d Cir. 2009).[26]

The circumstances here are "unusual" in the context of administrative closure. In the typical case, the IJ or Board employs administrative closure to temporarily remove a case from the docket to await the occurrence of an external event. *Matter of Avetisyan*, 25 I&N Dec. at 692 (citation omitted). For example, administrative closure can be "appropriate . . . where [a noncitizen] demonstrates that he or she is the beneficiary of an approved visa petition filed by a lawful permanent resident spouse who is actively pursuing, but has not yet completed, an application for naturalization." *Id.* at 696. Here, the Attorney General has invoked the self-referral authority—itself a relatively rare practice, *see* n.4, *supra*—to review a case that presents the following combination of unusual circumstances: (1) the respondent was designated as an unaccompanied child; (2) no record was developed because the IJ administratively closed the removal proceedings in absentia; (3) the Board ruled against the respondent, vacating the administrative closure order and remanding the case to the immigration court to send him a new Notice of Hearing ; and (4) the respondent was unrepresented by counsel throughout proceedings and, to amici's knowledge, is still unrepresented. *See* BIA

[26] With respect to impartiality itself, it is not necessary to look to the conduct of other Attorneys General to determine the usual practice, as bias is always a deviation from the norm. *Cf. Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

Decision at *1-3; AG Decision at 187. In short, the Attorney General has chosen a matter that is far from representative of administrative closure cases as the vehicle for his administrative closure review. The potential for bias is heightened by the unusual circumstances of the case.

3. The Attorney General's public statements evidence a predisposition to disfavor certain categories of noncitizens whose interests are implicated in the referral order

Over a period of many years, as both a senator and Attorney General, the Attorney General has expressed the view that certain categories of noncitizens—particularly those who do not meet his standards for income, education, professional skills, and language ability—should be excluded or removed from the United States. Here, the questions the Attorney General has identified for his review go far beyond the facts of Castro-Tum's case, implicating the interests of all noncitizens in removal proceedings that are administratively closed, as well as those who may be eligible for federal or state benefits and certain forms of immigration relief. AG Decision at 187. Yet the Attorney General has designated these issues as "relevant to the disposition of [Castro-Tum's] case." *Id.* Thus, to the extent the Attorney General's public statements address these matters, they directly bear on whether he possesses the requisite impartiality.

Moreover, one of the primary uses of administrative closure is to provide sufficient time for a noncitizen in removal proceedings to acquire eligibility to

adjust status through a family relationship. *See, e.g.*, *Matter of Avetisyan*, 25 I&N Dec. at 696. Because administrative closure often provides a path by which noncitizens in removal proceedings can acquire lawful status through family ties, the Attorney General's antipathy toward family-based immigration—which he typically refers to by the derogatory term "chain migration"—is relevant to any decision in this case.

The following statements, among others, reflect the Attorney General's deeply held views toward family-based immigration, immigrants, and the immigration system as a whole, all of which implicate the questions the Attorney General has identified for review in this case:

- "We should give priority to those who are likely to thrive here—such as those who speak English or are highly skilled—not someone chosen at random or who happens to be somebody's relative."[27]

- "Chain migration is going to increase until 2015. The portion of family-based migration versus merit-based migration will be worse than it is today, perhaps much worse. Think about that." 153 Cong. Rec. 13259 (2007) (statement of Sen. Sessions).

- "Well, if they are illiterate in their home country they're not likely to be a police officer the next week in the United States, are they?"[28]

- "We think under the bill that 70, 80 percent of the people entered will be low-skill immigrants. We know about two-thirds, over 60 percent at

[27] *Attorney General Sessions Delivers Remarks on the Administration's Efforts to Combat MS-13 and Carry Out its Immigration Priorities* (Dec. 12, 2017).

[28] Adam Serwer, *Jeff Sessions's Fear of Muslim Immigrants*, Atlantic (Feb. 8, 2017), https://www.theatlantic.com/politics/archive/2017/02/jeff-sessions-has-long-feared-muslim-immigrants/516069/.

least, of those who are here illegally today and are proposed for amnesty are high school dropouts. They do not have high school degrees. They are not going to be able to be highly successful in our workplace."[29]

- "The American people have known for more than 30 years that our immigration system is broken. It's intentionally designed to be blind to merit. It doesn't favor education or skills. It just favors anybody who has a relative in America—and not necessarily a close relative. That defies common sense. Employers don't roll dice when deciding who they want to hire. Our incredible military doesn't draw straws when deciding whom to accept. But for some reason, when we're picking new Americans—the future of this country—our government uses a randomized lottery system and chain migration."[30]

- "[A] central idea of the President's immigration reform proposal is switching to a merit-based system of immigration. That means welcoming the best and the brightest but banning and deporting gang members, identity fraudsters, drunk drivers, and child abusers—making them inadmissible in this country. This merit-based system would better serve our national interest because it would benefit the American people, which is what the Trump agenda is all about."[31]

- "The President is exactly correct about the changes we need to our immigration system. We have now seen two terrorist attacks in New York City in less than two months that were carried out by people who came here as the result of our failed immigration policies that do not serve the national interest—the diversity lottery and chain migration. The 20-year-old son of the sister of a U.S. citizen should not get priority to come to this country ahead of someone who is high-skilled, well

[29] Center for Immigration Studies, *Implications of the Hagel-Martinez Amnesty Bill* (June 15, 2006), https://cis.org/Implications-HagelMartinez-Amnesty-Bill.

[30] Jefferson B. Sessions III, Att'y Gen., *Attorney General Sessions Delivers Remarks on National Security and Immigration Priorities of the Administration* (Jan. 26, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-national-security-and-immigration-priorities.

[31] *Id.*

educated, has learned English, and is likely to assimilate and flourish here."[32]

- "I think we are too far down the road of an entitlement mentality. This whole bill contemplates people having an entitlement to come to America, to bring in their parents and children, and they are entitled to have them ultimately be on Medicare and go to hospitals and be treated, even though they are not properly here." 152 Cong. Rec. 8553 (2006) (statement of Sen. Sessions).

- "In seven years we'll have the highest percentage of Americans, non-native born, since the founding of the Republic. Some people think we've always had these numbers, and it's not so, it's very unusual, it's a radical change. When the numbers reached about this high in 1924, the president and congress changed the policy, and it slowed down immigration significantly, we then assimilated through the 1965 and created really the solid middle class of America, with assimilated immigrants, and it was good for America. We passed a law that went far beyond what anybody realized in 1965, and we're on a path to surge far past what the situation was in 1924."[33]

- "Fundamentally, almost no one coming from the Dominican Republic to the United States is coming here because they have a provable skill that would benefit us and that would indicate their likely success in our society."[34]

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[32] Jefferson B. Sessions III, Att'y Gen., *Attorney General Sessions Issues Statement on the Attempted Terrorist Attack in New York City* (Dec. 11, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-issues-statement-attempted-terrorist-attack-new-york-city.

[33] Adam Serwer, *Jeff Sessions's Unqualified Praise for a 1924 Immigration Law*, Atlantic (Jan. 10, 2017), https://www.theatlantic.com/politics/archive/2017/01/jeff-sessions-1924-immigration/512591/ (describing interview between Sen. Sessions and Stephen Bannon of Breitbart).

[34] Sam Stein & Amanda Terkel, *Donald Trump's Attorney General Nominee Wrote Off Nearly All Immigrants From An Entire Country*, Huffington Post (Nov. 19, 2016), https://www.huffingtonpost.com/entry/jeff-sessions-dominican-immigrants_us_582f9d14e4b030997bbf8ded.

The Attorney General's long history of public statements, as both senator and Attorney General, conveys a deep-seated animus toward noncitizens that has persisted over many years. In particular, the Attorney General has displayed sustained hostility toward noncitizens who do not meet his standards for income, education, professional skills, and language ability, or whose family ties might provide a basis for immigration relief. A disinterested observer would have no trouble concluding that the statements above render him unable to fairly decide Castro-Tum's case. Were an IJ or member of the Board to express similar views, the federal courts would vacate the ensuing removal order, holding that the adjudicator's lack of impartiality violated basic principles of due process. *See* Section I, *supra*. At a minimum, an Attorney General who expresses such views must be held to the same standards as the Department of Justice employees he oversees; the Attorney General is not above the law.

CONCLUSION

For the foregoing reasons, principles of due process bar the Attorney General from participating in the matter he has referred to himself. The Attorney General must vacate the referral order or recuse himself from this case.

Dated: February 16, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the instructions in the Attorney General's referral order dated January 4, 2018 because the brief contains 8,737 words, excluding the cover page, Table of Contents, Table of Authorities, signature block, Certificate of Compliance, and Certificate of Service.

Dated: February 16, 2018

/s/ R. Stanton Jones
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CERTIFICATE OF SERVICE

I hereby certify that, on February 16, 2018, the foregoing brief was submitted electronically to AGCertification@usdoj.gov and in triplicate via FedEx to:

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