No. 20-60241

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JUAN JOSE GONZALEZ-PENALOZA,
ALSO KNOWN AS JUAN TERRASCO-TORRES
Petitioner,

v.

WILLIAM P. BARR,
Attorney General of the United States, Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS
A205 665 068

UNOPPOSED MOTION FOR LEAVE TO FILE OUT-OF-TIME BRIEF FOR AMICUS CURIAE FOR PETITIONER
(Non-detained)

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CERTIFICATE OF INTERESTED PERSONS

(1) Case number 20-60241, *Gonzalez-Penaloza v. Barr*;

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of the Court may evaluate possible disqualification or recusal.

The membership-based, immigration legal service organization American Immigration Lawyers Association (AILA) has an interest in the outcome of the case as *amicus curiae*.

Attorneys and law firms / institutions representing the *amicus* are:

- Elissa Steglich
- Immigration Clinic, University of Texas School of Law
- Sabrina Damast
- Andrea Saenz
- Brooklyn Defender Services

Amicus AILA is a nonprofit organization and does not have a parent corporation or is owned in whole or in part by any publicly held corporation.

The following parties have an interest in the outcome of the case:

- Juan Jose Gonzalez-Penaloza, aka Juan Terrasco-Torres;
- William Barr, Attorney General;

Attorneys and law firms representing the parties are:

- Brenda Villalpando
- Nicole Thomas-Dorris
- Remi da Rocha-Afodu
- Office of Immigration Litigation, U.S. Department of Justice

/s/ Elissa Steglich
Attorney of Record for Amicus Curiae

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STATEMENT OF INTEREST

The American Immigration Lawyers Association (AILA), founded in 1946, is a non-partisan, nonprofit national association of more than 15,000 attorneys and law professors who practice and teach immigration law. AILA members represent U.S. families, businesses, foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis, as well as providing continuing legal education, professional services, and information to a wide variety of audiences. AILA has participated as amicus curiae in numerous cases before the U.S. Courts of Appeal and the U.S. Supreme Court. As amicus curiae in this case, AILA hopes to provide a broader context for the history, uses, and importance of administrative closure as a tool in immigration courts. Pursuant to Fed. R. App. P. 29(a)(4), AILA states that it is not a corporation, no party counsel authored any part of the brief, and no person or entity other than AILA contributed money to prepare or file it.

SUMMARY OF ARGUMENT

The Attorney General's decision in *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) erroneously stripped Immigration Judges ("IJs") and the Board of Immigration Appeals ("BIA") of their authority to administratively close removal proceedings, in violation of clear and unambiguous regulations acknowledging broad docket management authority and that administrative closure is appropriate or required in certain situations. Administrative closure, which simply removes a

case from a judge's active docket to await an event outside the court or the parties' control, is a long-standing, common, and critical tool of docket control for the immigration courts and the BIA, and other administrative and federal courts, making the Attorney General's abrupt declaration that this authority no longer existed particularly unworthy of deference.

Administrative closure is necessary in immigration court because Congress created many immigrant visas and forms of temporary and permanent protection and status that agencies other than the immigration courts have sole jurisdiction over, most commonly United States Citizenship and Immigration Services ("USCIS"). Without the ability to pause proceedings to await the results of dispositive applications for status or acknowledge that another agency has granted protection from removal, immigration courts undermine Congress's intent in enacting an immigration statute that is administered by more than one agency. Continuances are no substitute for administrative closure; they are too brief to ensure a case can actually be resolved and create enormous inefficiencies and backlogs in the immigration courts.

ARGUMENT

As a preliminary matter, AILA agrees with Petitioner's arguments regarding the authority of IJs to administratively close removal proceedings. AILA agrees that the Immigration and Nationality Act (INA)'s implementing regulations are

clear and unambiguous in vesting IJs and the BIA with this authority, including 8 C.F.R. §§ 1003.10(b) (IJ authority), 1240.1(a) (IJ authority), 1003.1(d)(1)(ii) (BIA authority), and 212.7(e)(4)(iii) (Department of Homeland Security ("DHS")) regulations requiring that a removal case be administratively closed to adjudicate a provisional waiver). This Court should adopt the reasoning of *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019) and *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020) in finding that no deference is due to the Attorney General's interpretation because the regulations provide a "single right answer." *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019). However, even if the Court finds the regulations ambiguous, the agency is not due deference under *Auer v. Robbins*, 519 U.S. 452 (1997) or *Skidmore v. Swift & Co*, 323 U.S. 134 (1944), because the agency's interpretation is unreasonable and not persuasive. This brief provides additional legal, historical, and practical context that supports Petitioner's argument that the authority of IJs is clear from the regulations and has been appropriately and efficiently exercised for over three decades. The agency's rule in *Castro-Tum* is unreasonable and creates unjust, inefficient and unworkable results.

I. ADMINISTRATIVE CLOSURE IS A LONG-STANDING DOCKET CONTROL MEASURE COMMON TO IMMIGRATION AND OTHER COURTS

Administrative closure is a widely used and long-accepted docket control measure that developed naturally from the need for judges to efficiently handle

matters requiring input or decisions from actors not before the court. In the context of immigration court, administrative closure "temporarily remove[s] a case from an Immigration Judge's calendar or from the [Board of Immigration Appeals'] docket" without the entry of a final order of removal. *Matter of Gutierrez*, 21 I&N Dec. 479, 480 (BIA 1996); *see also Matter of Avetisyan*, 25 I&N Dec. 688, 694 (BIA 2012) ("Administrative closure is a tool used to regulate proceedings, that is, to manage an Immigration Judge's calendar."). Administrative closure does not afford any immigration status or relief. It simply pauses the proceedings "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." *Avetisyan*, 25 I&N Dec. at 692. One of the most common bases for administrative closure, as further discussed in Part II below, is to await the decision of USCIS on a pending visa petition or waiver application that would allow a noncitizen to gain lawful status that would obviate the need for removal proceedings, but over which the IJ does not have jurisdiction.

Administrative closure has also been used to address other collateral issues – serious mental competency concerns or pending criminal appeals – that have a significant bearing on proceedings, or to acknowledge that a noncitizen has been granted protection from removal through Temporary Protected Status ("TPS") or Deferred Action for Childhood Arrivals ("DACA"). *See Matter of M-A-M-*, 25

I&N Dec. 474, 483 (BIA 2011) (suggesting administrative closure as a possible safeguard until a noncitizen is restored to competency); *Matter of Montiel*, 26 I&N Dec. 555 (BIA 2015) (administratively closing case while predicate conviction was on direct appeal); *Matter of Sosa Ventura*, 25 I&N Dec. 391, 396 (BIA 2010) (finding administrative closure "consistent" with the nature of TPS to permit temporary residence and work authorization).

A. Administrative Closure Has Been Used by the Immigration Courts for Over Thirty Years to Successfully Manage Dockets

Administrative closure has been a commonly used tool of docket managements at the Executive Office for Immigration Review ("EOIR"), the Department of Justice ("DOJ") agency that runs the immigration courts and the BIA, since the agency's inception in the 1980s. The BIA has acknowledged this in precedent decisions both old and new; while some of the boundaries of this authority shifted with time, including clarifying the factors for adjudicators to consider, the understanding never changed that IJs and the BIA have general administrative closure power. *See Matter of Amico*, 19 I&N Dec. 652, 654 n.1 (BIA 1988); *Matter of Lopez-Barrios*, 20 I&N Dec. 203 (BIA 1990); *Matter of Gutierrez-Lopez*, 21 I&N Dec. 479 (BIA 1996); *Avetisyan*, 25 I&N Dec. 688; *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017). Similarly, EOIR has issued guidance to its immigration judges over a period of decades, all premised on the authority to administratively close cases as part of the critical need for judges to

manage their own dockets and calendars to focus on cases that can be completed on the merits. *See* Memorandum for All Immigration Judges, from William R. Robie, Chief Immigration Judge, EOIR, Re: Operating Policy and Procedure 84-2: Cases in Which Respondents/Applicants Fail to Appear for Hearing at 1–2 (Mar. 7, 1984), *available at* https://www.hsdl.org/?view&did=9904 (advising IJs to administratively close cases when appropriate); Memorandum for All Immigration Judges, et al. from Brian M. O'Leary, Chief Immigration Judge, EOIR, Re: Operating Policy and Procedure 13-01: Continuances and Administrative Closure at 4 (Mar. 7, 2013), *available at* https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/08/13- 01.pdf (advising the same, nearly thirty years later). Since 1986, EOIR has administratively closed almost 400,000 removal cases, and over 300,000 remain closed as of July 2020. *See* Transactional Records Access Clearinghouse ("TRAC"), *The Life and Death of Administrative Closure*, *available at* https://trac.syr.edu/immigration/reports/623/ (last visited Oct. 14, 2020).

Given this long history, the Attorney General's sudden issuance of *Castro-Tum* in 2018 represented a new interpretation of the regulations that created "unfair surprise" to litigants, putting thousands of noncitizens at risk of deportation after they had the settled expectation that their cases were subject to existing standards. This is one reason that even if this Court finds the INA's regulations ambiguous,

Auer deference is not appropriate. *See Romero*, 937 F.3d at 295 (rejecting *Castro-Tum* on this basis after also rejecting it as contrary to the plain meaning of the regulations.) For these reasons, AILA concurs with Petitioner's arguments at Part B of the opening brief. Pet'r Opening Brief at 35-37.

B. Tools Like Administrative Closure Are Used Throughout Federal and Administrative Court Systems

Administrative closure is not unique to the immigration court system. Federal courts throughout the country have long used this tool, whether termed "administrative closure" or not, for docket control when a case is likely to be affected by the decision of another court or agency. *See Mire v. Full Spectrum Lending Inc.*, 389 F.3d 163, 167 (5th Cir. 2004) ("District courts frequently make use of [administrative closure] to remove from their pending cases suits which are temporarily active elsewhere (such as before an arbitration panel) or stayed (such as where a bankruptcy is pending)"); *Avetisyan*, 25 I&N Dec. at 697 n.2 ("Administrative closure is not limited to the immigration context. It is utilized throughout the Federal court system, under a variety of names, as a tool for managing a court's docket," and citing cases in the Fifth Circuit and elsewhere discussing administrative closure). Other administrative bodies also recognize and use this docket management tool. *See, e.g., Thompson v. Potter*, EEOC DOC 05880378, 2001 WL 1594476, at *1 (EEOC Dec. 1, 2001) (administrative closure used in EEOC proceeding); *Sec. & Exch. Comm'n v. Durham*, No. 1:11-cv-00370-

JMS-TAB (S.D. Ind. Aug. 9, 2016) (administratively closing SEC matter to await exhaustion of appeal in another forum).

The general nature of procedural tools like administrative closure, common to so many courts outside the immigration field is another reason why this Court should not defer to the BIA's interpretation of the regulations at issue in this case. Deference under *Auer* presumes that the interpretation involves that agency's substantive expertise; however, "[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity," and federal courts are well-equipped to handle the matter, no court should defer to the agency's interpretation. *Kisor*, 139 S. Ct. at 2417. Procedural and docketing matters common to all courts have repeatedly been found not to involve the BIA's expertise. *See Attipoe v. Barr*, 945 F.3d 76, 80 (2d Cir. 2019) (finding that filing deadlines and equitable tolling are subjects the federal courts are well-equipped to handle and are not within the BIA's particular expertise); *Bamidele v. INS*, 99 F.3d 557, 561 (3d Cir. 1996) (same, regarding statutes of limitations). The need to sometimes "pause" or stay proceedings is clearly in this same category. As the Supreme Court has stated, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Because the Court is well-equipped to read the plain language of the

regulations and address this issue de novo, *Auer* deference would not be warranted even if the regulations at issue are ambiguous. In addition, *Castro-Tum* was not written by members of the BIA but by the Attorney General through his certification authority, and appears to have actually been drafted by the DOJ's Office of Legal Counsel, a part of DOJ which has no expertise in immigration law, and thus does not deserve *Auer* deference.[1] *See, e.g., United States v. Ochoa-Colchado*, 521 F.3d 1292, 1298 n.4 (10th Cir. 2008) (declining to give deference to an interpretation of a regulation promulgated by the Bureau of Alcohol, Firearms, and Tobacco "in part because immigration is not the ATF's area of expertise"); *United States v. Orellana*, 405 F.3d 360, 369 (5th Cir. 2005) ("[T]he level of deference due an agency's interpretation of a statute imposing criminal liability is uncertain, particularly when the promulgating agency lacks expertise in the subject matter being interpreted.").

[1] In 2016, former Attorney General Alberto Gonzalez co-published an article explaining that the Office of Legal Counsel has primary responsibility on advising on immigration cases certified to the Attorney General. Hon. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 917 (2016) (noting that in fact the Attorney General might be "better served" by advisors with immigration expertise). In addition, Freedom of Information Act results from May 2018 show EOIR senior staff acknowledging that OLC was preparing the headnotes for *Castro-Tum*. See pages 6 and 11 of the document posted at https://cdn.muckrock.com/foia_files/2018/11/01/1101201847132.pdf (last viewed Sept. 30, 2020).

II. ADMINISTRATIVE CLOSURE IS AN ESSENTIAL TOOL IN IMMIGRATION COURT

A. Administrative Closure Facilitates the Objectives of Efficiency, Fairness, and Justice in the Court System.

The decision in *Castro Tum* focuses heavily on the objective of litigating cases to conclusion, which the Attorney General frames as a matter of agency efficiency. However, the decision simultaneously advocates for the re-calendaring of more than 355,000 administratively closed cases, an overwhelming addition to an immigration system that already had more than 1.2 million cases pending at the end of Fiscal Year 2020. *See* 27 I&N Dec. at 293-94; TRAC, "Immigration Court Backlog Tool," *available at* www.trac.syr.edu/phptools/immigration/court_backlog/ (last visited on Oct. 12, 2020). This contradictory rationale is reason enough to doubt the reasonableness of the decision.

However, the decision also fails to acknowledge the immigration system's aim of providing each litigant with a fair opportunity to present her case in full before suffering the serious consequences of deportation away from family, employment, and property. *See e.g.*, *Matter of Y-S-L-C*, 26 I&N Dec. 688, 290 (BIA 2015) ("Courts have stressed that a respondent in immigration proceedings should expect dignity, respect, courtesy, and fairness in a hearing before an Immigration Judge.") (citing *Cham v. Att'y Gen. of U.S.*, 445 F.3d 683, 690-91 (3d

Cir. 2006) (stating that such terms are "not merely advisory or aspirational" and that a noncitizen is "entitled, as a matter of due process, to a full and fair hearing on his application")); *see also Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) (noting that the immigration law was designed to promote family unity and serve humane purposes). As discussed in detail below, a full and fair opportunity to present a case often involves proceedings before multiple agencies or government offices, and administrative closure facilitates this multi-agency adjudicatory process.

In addition, without the authority to administratively close cases, IJs are forced to adjudicate to conclusion proceedings involving litigants that DHS cannot remove from the United States because they have been granted temporary status or protection from removal. Forcing IJs to conduct full removal proceedings, only to issue unenforceable removal orders, is the antithesis of an efficient use of limited agency resources.

For instance, prior to *Castro-Tum*, IJs could administratively close cases against aliens who had been granted TPS under 8 U.S.C. § 1254a, which precludes the removal of noncitizens to countries that are in a state of upheaval due to a natural disaster, armed conflict, or similar event. *Matter of Sosa Ventura*, 25 I&N Dec. 391, 396 (BIA 2010). IJs are now required to adjudicate such cases even though DHS is prohibited from executing any order of removal they may issue. 8

U.S.C. § 1245(a)(1)(A).

Similarly, DHS does not remove beneficiaries of the DACA program. Prior to *Castro-Tum*, it was common for such cases to be administratively closed following the approval of a DACA application. See, e.g., *In re: Christian Gerardo Garcia-Velasquez*, 2014 Immig. Rptr. LEXIS 5115 (BIA Nov. 18, 2014); *In re: Maurilio Perez-Cante*, 2014 Immig. Rptr. LEXIS 7106 (BIA Aug. 11, 2014); *In re: Ivan Meza-Jurado*, 2013 WL 6529195 (BIA Nov. 21, 2013). Now, IJs and the BIA are forced to enter removal orders against DACA recipients, even though DHS has committed not to executing removal orders against them.

In addition, without the ability to seek administrative closure, many noncitizens who would otherwise qualify for immigrant visas (such as Petitioner) will inevitably apply for more complex forms of relief requiring full-fledged evidentiary hearings – *e.g.*, cancellation of removal, 8 U.S.C. § 1229b(b)(1), and asylum, 8 U.S.C. § 1158(a). Prohibiting IJs and the BIA from administratively closing cases will thus prolong the time needed to dispose of countless cases that would otherwise be speedily resolved through the use of administrative closure.

B. Administrative Closure Accommodates Congressional Design of Divided Immigration Functions

The immigration system is a delicate balance between a number of different offices and agencies, each of whom has an important role to play. *See, e.g.,* 8

U.S.C. § 103(a)(l) (describing the powers of the Secretary of Homeland Security under the Act in relation to those of the President, Attorney General, the Secretary of State, and others). Indeed, there are at least four agencies across two federal departments - DHS and DOJ - with separate responsibilities, which are intimately involved in day-to-day immigration issues. USCIS administers immigration benefits, including certain applications for asylum and certain applications for adjustment of status to lawful permanent residence, as well as applications for naturalization, U visas (for survivors of certain crimes), Violence Against Women Act (VAWA) self-petitions (for survivors of domestic violence), family-based and employment-based immigrant petitions (Forms I-130 and I-140), and Special Immigration Juvenile Status (SIJS) petitions (for children who have been abandoned, neglected, or abused by one or both parents). Immigration and Customs Enforcement ("ICE") is responsible for detention and removal of noncitizens as well as housing the Office of the Principal Legal Advisor, which represents DHS in removal proceedings before the immigration courts and BIA. Customs and Border Protection ("CBP"), oversees ports, borders and inspections of noncitizens entering the United States. Lastly, EOIR, part of DOJ, administers the immigration courts nationwide and the BIA. Additionally, the Department of State adjudicates and issues immigrant and nonimmigrant visas in the U.S. Consulates, and the Department of Labor makes initial determinations required for

certain employment-based visas. While some overlapping authority exists, most jurisdictional powers are exclusive to a particular agency. By statutory design, these agencies must coordinate and accommodate each other to ensure that immigration laws and protections are fairly implemented.

Given the multiple agencies involved in the immigration process, it is not unusual for more than one agency to be involved in an individual's immigration matter at the same time. For example, a noncitizen in removal proceedings (which fall under the purview of EOIR) may be waiting for USCIS to adjudicate a Form I-130 petition filed by the individual's U.S.-citizen spouse before the noncitizen can move forward with an adjustment of status application before the IJ, which will ultimately result in a grant of permanent residence. Similarly, a noncitizen in removal proceedings may be applying for U nonimmigrant status, as the victim of certain serious crimes. USCIS maintains exclusive jurisdiction over U visa applications. *See* 8 C.F.R. § 214.14(c)(l).

In cases in which multiple agencies need to work on the same case, administrative closure is a necessary tool to permit each agency to play its role. Through administrative closure, IJs and the BIA can give another agency – most often USCIS – the opportunity to complete the processing of an application that could have an outcome-determinative impact on the removal proceeding. For example, if the U visa application is approved, the noncitizen has obtained lawful

immigration status in the United States, and the removal proceeding will be terminated. *See* 8 C.F.R. § 214.14(c)(5)(i). But to reach that result, EOIR must wait for USCIS to adjudicate a U visa application, a process that currently takes between 56 and 56.5 months. *See* Processing time for Petition for U Nonimmigrant Status (I-918) at Vermont Service Center, *available at* https://egov.uscis.gov/processing-times/ (last visited on Oct. 15, 2020). Administrative closure provides an efficient mechanism for allowing that process to play out, without encumbering the Immigration Court with repeated continuances while the U visa application remains pending before USCIS.

Congress did not create immigration benefits only to have them lost due to bureaucratic delay. Absent administrative closure, that is precisely the result. For example, U visa applicants now face a USCIS backlog of over 150,000 cases. Human Rights Initiative of North Texas & SMU Judge Elmo B. Hunter Legal Center, *Flawed Design: How the U visa is Revictimizing the People it was Created to Help* (October 6, 2020) available at https://storymaps.arcgis.com/stories/629a772b95e14b3aa05941ae309909f0 (last visited October 13, 2020). Based on current estimates, the crush of applications translates to an over four year wait to receive a prima facie determination and another approximate six years to receive U visa status. *Id*. Earlier this year, the BIA ordered a U visa applicant removed despite a showing of U visa eligibility

because the wait for USCIS adjudication was indeterminate. *Matter of L-N-Y-*, 27 I. & N. Dec. 755 (BIA 2020).

Far from indefinitely prolonging a case, administrative closure may "in fact expedite and result in a final resolution." *Zuniga-Romero*, 937 F.3d at 294, n. 13. Moreover, as the Seventh Circuit recognized, some cases are simply more complex than others, requiring coordination between two separate government agencies in order to reach a fair resolution. *Meza-Morales*, 973 F.3d at 659. "And while *Castro-Tum* tries to draw reinforcement from the general policy of expeditiousness underlying immigration law, that policy doesn't justify departure from the plain text of the rule. Immigration laws and regulations, like all laws and regulations, are the product of compromise over competing policy goals." *Id*. at 666. Administrative closure is precisely the appropriate and necessary tool to accommodate all of Congress' adjudication goals across executive agencies and departments.

III. CONTINUANCES ARE NOT AN ADEQUATE SUBSTITUTE FOR ADMINISTRATIVE CLOSURE

While the Attorney General overruled *Avetisyan* and withdrew the authority of IJs to order administrative closure, he provided no meaningful guidance to IJs for handling similar situations going forward. The Attorney General only stated that "for cases that truly warrant a brief pause, the regulations expressly provide

for continuances." 27 I&N Dec. at 292; 8 C.F.R. § 1003.29. In the wake of *Castro-Tum*, the Attorney General made the work of obtaining continuances all the more difficult, requiring IJs to justify continuances for good cause over the "public interest in expeditious enforcement of the immigration laws…." *Matter of L-A-B-R-*, 27 I. & N. Dec. 405, 406 (2018). EOIR leadership also announced that IJs would be evaluated on case completion metrics, further incentivizing a denial of continuances and a rush to removal. *See* James R. McHenry III, *EOIR Memorandum on Case Priorities and Immigration Court Performance Measures* (Jan. 17, 2018), *available at* https://www.justice.gov/eoir/page/file/1026721/download (last visited Oct. 13, 2020).

Continuances, however, are an inadequate substitute for several reasons. First, continuances presume that the parties before the court can advance toward litigation goals, while administrative closure was used in circumstances where both parties were awaiting a separate agency decision outside the parties' control (such as a decision on an immigrant visa petition or an application for U nonimmigrant status). Second, continuances are inadequate in cases where administrative closure is required or where removal is prevented by law or policy (such as in the case of a recipient of TPS or DACA). Finally, continuances reduce court efficiency and increase case backlog numbers.

Despite the Attorney General's assertions to the contrary, *see Castro-Tum*, 27 I. & N. Dec. at 291, continuances cannot replace administrative closure; they operate differently and serve different purposes. *See Jaime v. Holder*, 570 F. App'x 78, 80 (2d Cir. 2014) (summary order) ("[A]dministrative closure would alleviate the IJ's concerns about granting an open-ended and lengthy continuance."). While administrative closure removes cases from an IJ's active docket until they are recalendared, a continuance is only a "brief pause"; *Castro-Tum*, 27 I. & N. Dec. at 292; keeps the case on the IJ's active calendar; *see Avetisyan*, 25 I. & N. Dec. at 691; and requires the parties to regularly report to the court after each short continued period, regardless of whether the collateral relief is resolved. *See id.* at 689–90, 697. Continuances are often more appropriate in cases where the reason for the delay will be resolved quickly, whereas administrative closure is more appropriate when the respondent is awaiting collateral relief that will not be completed for a significant period of time. *Id.* at 691–92.

A. Continuances do not Permit Advancement toward Litigation Goals

First, continuances are inadequate to allow the case to advance toward the goals of litigation and an ultimate resolution of the case. While the Immigration Courts have a statutory mandate to resolve cases expeditiously, the resolution is best understood in two stages. The first addresses the question of removability, or a

decision as to whether the noncitizen has violated federal immigration law in the way DHS alleges. The second stage looks at whether the noncitizen is eligible for any relief under the law, which would grant immigration status that resolves the underlying violation. Both of these litigation goals must be considered in assessing the comparative value of continuances to administrative closure.

Toward the second goal, administrative closure has been an important feature of immigration court practice to accommodate various agencies' competencies, expertise and jurisdictional authorities, as described above. Recent data analysis shows that overall, about six percent of matters were administratively closed at some point before the court, ranging from one to 30 percent in any given fiscal year. TRAC, *The Life and Death of Administrative Closure* (Sept. 10, 2020), *available at* https://trac.syr.edu/immigration/reports/623/ (last visited Oct. 10, 2020). And when litigants returned to court, cases were expeditiously resolved, generally within four months. *Id*. In over 60% of the administratively closed cases, noncitizens had obtained some form of immigration relief. *Id*.

Continuances alone cannot permit the parties to advance toward relief options outside the court's own jurisdiction. TRAC found that the average length of administrative closure was three years. *Id*. Such length is inconsistent with the "brief" continuances the Attorney General proposed as the alternative to administrative closure. 27 I&N Dec. at 292.

B. Continuances are Inadequate in Matters where Law or Policy Prevents Removal

In addition, continuances are inadequate in cases where law or policy prevents the removal of a noncitizen, yet they remain in removal proceedings. Lacking any adequate tool to accommodate the reality of lengthy adjudication times of other agencies, IJs are forced to prioritize and accomplish only the removal-focused phase of proceedings. In many cases, this focus runs counter to Congressional mandate and DHS's own policies. As explained in Part II.A. above, IJs could previously administratively close cases against noncitizens who had been granted TPS or DACA. Now, IJs are required to adjudicate such cases, including holding potentially lengthy hearings that take up valuable docket space from other cases, even though DHS is prohibited from executing any order of removal they may issue.

C. Continuances are Inadequate where Administrative Closure is Required

Under *Castro-Tum*, the Attorney General only allows for administrative closure where law, federal regulations or judicial settlement agreements specifically authorize closure. *Castro-Tum*, 27 I&N Dec. at 277-78. This narrow category leaves out circumstances where administrative closure is required,

although was not specifically authorized given the long-standing assumption of the immigration courts' inherent ability to grant administrative closure.[2]

One such circumstance is that of Petitioner's case in pursuing a provisional waiver of the unlawful presence bar under INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B). As permitted in federal regulations, noncitizens whose departure from the United States will trigger an unlawful presence bar can seek a waiver of the bar before their travel abroad. 8 C.F.R. §212.7(e). Absent a waiver, the unlawful presence bar means that a noncitizen like Petitioner must remain outside the United States for a period of either three or ten years before being able to return, even to join a U.S. citizen spouse. INA § 212(a)(9)(B), 8. U.S.C. § 1182(a)(9)(B). The ability to have the waiver decided before such potentially catastrophic family separation, while the noncitizen is still in the United States, has allowed thousands of families to remain intact. USCIS National Benefits Center and AILA Teleconference Minutes (Dec. 9, 2016), available at https://www.uscis.gov/sites/default/files/document/outreach-

[2] Moreover, the mere fact that these regulations and judicial settlements exist presupposes that EOIR has the general authority administratively close proceedings. After all, how could previous Attorney Generals have entered into judicially approved settlements requiring IJs and the BIA to administratively close certain cases if IJs and the BIA lacked such authority? The Fourth Circuit described *Castro-Tum* as "internally contradictory" for this very reason, and concluded that "the better reading is that judicial settlement is simply a circumstance in which administrative closure is an action deemed "necessary and appropriate" under 8 C.F.R. §§ 1003.10(b) and 8 C.F.R. 1003.1(d)(1)(ii). *Romero,* 937 F.3d at 294, n.13.

engagements/AILA_NBC_QA_12092016.pdf (last visited Oct. 10, 2020) (reporting 105,577 provisional waivers approved since 2013).

For individuals like Petitioner, who need to seek the waiver while in removal proceedings before the immigration court, federal regulations require that the case be administratively closed. 8 C.F.R. §212.7(e)(4)(iii). A continuance or other showing that removal proceedings have not concluded will not meet the regulatory requirements. *Id*. The decision in *Castro-Tum* effectively nullifies the availability of provisional waivers to almost any noncitizen in removal proceedings.

Administrative closure is also a necessary tool in the immigration courts' handling of respondents presenting competency issues, where continuances would fail. *See Matter of M-A-M*, 25 I&N Dec. 474 (BIA 2011). The Immigration Courts are obligated to explore procedural safeguards where a respondent lacks sufficient competency to understand the nature and purpose of the immigration proceedings or to assist counsel or present evidence, in order to ensure that removal proceedings comport with due process. *Id*. at 481-83. The BIA has held that where safeguards are not enough to address the concerns – such as in cases where the person may need time to seek treatment to be restored to competency - administrative closure should be used. *Id*. at 483. Here again, brief continuances are simply inappropriate and the IJs would be unable to resolve the matter without trampling on the rights of a respondent lacking competency.

D. Continuances Reduce Efficiency and Increase the Backlog

In *Avetisyan*, the granting of multiple continuances itself contributed to the delay in proceedings, because USCIS was forced to transfer the noncitizen's file to ICE prior to each hearing, thereby preventing it from adjudicating the underlying visa petition. 25 I&N Dec. at 690. Even assuming USCIS would have eventually adjudicated the visa petition, the Attorney General did not explain what purpose would be served by requiring the parties to periodically appear in court rather than filing a single motion to recalendar after the visa petition was adjudicated. Moreover, shortly after issuing *Castro-Tum*, the Attorney General issued a decision discouraging IJs from granting continuances because they "require[] the immigration judge to notice another hearing date, and that, in turn, adds yet another hearing to an already overtaxed system." *L-A-B-R- et al.*, 27 I&N Dec. at 415.

As importantly, federal regulations only authorize only IJs to grant continuances. 8 C.F.R. §1003.29; 8 C.F.R. §1240.6. There is no mechanism to seek a continuance while a case is pending at the BIA. Under *Castro-Tum*, noncitizens who could have previously sought administrative closure from the BIA must instead request a remand to seek a one or more continuances from the IJ. If the IJ declined to grant a continuance, the noncitizen could then appeal that decision back to the BIA. And if the BIA found that the IJ should have granted a

continuance, the case would be remanded once again. The Attorney General did not identify any reason why such a scenario would be preferable to the BIA administratively closing the case in the first place.

In addition, as noted in Part II.B. above, without the ability to seek administrative closure, many noncitizens who would otherwise qualify for status that can be granted through USCIS or other applications will be forced to go through full-fledged evidentiary hearings on alternate forms of relief from removal simply because the IJ is not permitted to stop the proceedings to await a simpler resolution from another agency. These hearings regularly require the parties and IJs to hold multiple scheduling conferences, file and review hundreds of pages of documentary evidence, and take hours of testimony and argument before an IJ issues a detailed oral or written decision. They regularly require the time and resources of lay and expert witnesses, interpreters, judicial law clerks, and other government employees and resources. Many noncitizens whose applications are denied will then appeal to the BIA, requiring the agency to create a transcript of the proceedings and allow the parties an opportunity to submit briefs. 8 C.F.R. §1003.1(e)(3). And many noncitizens whose appeals are denied by the BIA will file petitions for review, as Petitioner did. Prohibiting IJs and the BIA from administratively closing cases will thus prolong the time needed to dispose of countless cases that would otherwise be speedily resolved and displace

valuable docket time from removal cases that should actually be resolved before the immigration courts because they are *not* awaiting outside events.

CONCLUSION

For the above reasons, the BIA's decision in *Castro-Tum* is contrary to the regulatory and docket management authority of Immigration Judges, and creates results that undermine Congressional intent, prevents noncitizens from fairly pursuing visas and other benefits for which they are statutorily eligible, and creates inefficiencies in immigration courts that are not addressed by continuances and produce unjust results. AILA urges this Court to grant the petition for review.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that: (i) this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the parts exempted by Rule 32(f), it contains 5571 words; (ii) this brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word and is set in Times New Roman font in a size measuring 14 points or larger.

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CERTIFICATE OF SERVICE

I certify that on October 19, 2020, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered users and will be served electronically via that system.

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