20-3324-ag

United States Court of Appeals

for the

Second Circuit

[redacted],

Petitioner,

– v. –

MERRICK B. GARLAND, United States Attorney General,

Respondent.

ON PETITION FOR REVIEW OF A DECISION OF THE BOARD OF IMMIGRATION APPEALS A NO. A 039-751-184

BRIEF FOR *AMICI CURIAE* CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, DISABILITY RIGHTS ADVOCATES, IMMIGRANT DEFENDERS LAW CENTER, AND PANGEA LEGAL SERVICES IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), Amici Curiae Civil Rights Education and Enforcement Center ("CREEC"), Disability Rights Advocates ("DRA"), Immigrant Defenders Law Center ("ImmDef"), and Pangea Legal Services ("Pangea") state that they each are private non-profit corporations organized under Section 501(c)(3) of the Internal Revenue Code, that they are not publicly held corporations or other publicly held entities, that they have no parent corporations, and that no publicly held corporation or other publicly held entity owns ten percent (10%) or more of any of these organizations.

Dated: April 5, 2021

Respectfully submitted,

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I. INTEREST OF AMICI CURIAE[1]

Amici Curiae are civil rights, disability rights, and immigrant rights organizations who share a commitment to the full participation and effective representation of individuals with disabilities in U.S. immigration courts and proceedings. Amici were founded by, are staffed by, represent, and/or provide services to individuals with intellectual and mental health disabilities, including noncitizens in the American immigration system. Amici also have expertise in the interpretation and application of not only the Immigration and Naturalization Act of 1965 (the "INA"), but also the Rehabilitation Act of 1973 (the "Rehabilitation Act") and the Americans with Disabilities Act of 1990 (the "ADA"), including their respective amendments and regulations promulgated under such legislation. Among other things, these federal laws guarantee full and fair process in immigration proceedings and prohibit federal agencies from engaging in conduct that unjustly discriminates or causes adverse discriminatory impact against persons with disabilities.

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no person or entity other than Amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). [redacted]'s Petition for Review (ECF No. 43-1) is cited as "Pet'r Br"; the Certified Administrative Record (ECF Nos. 33-2, 33-3) is cited as "AR."

Amici submit this brief in support of [redacted]s Petition for Review of the Board of Immigration Appeals' September 25, 2020 Order. *See* ECF No. 43-1. In its September 25, 2020 Order the Board of Immigration Appeals (BIA) among other things, acknowledged and affirmed the Immigration Judge's (IJ's) decision "*not [to] make* a complete competency determination," despite unrefuted evidence and clear indicia of [redacted]'s incompetence and mental illness throughout his extensive procedural history. AR.3–4. And even though the IJ found that [redacted] "could not assist his counsel," the BIA nonetheless held that the safeguards that the IJ implemented were "sufficient to ensure the respondent received a full and fair hearing." AR.3–AR.5. *Id.*

The BIA was wrong. As [redacted] argues, the record clearly establishes that he was incompetent under the BIA's competency standard, and that he could not meaningfully participate in his removal proceedings (specifically, consult and aid his counsel in securing waiver of removability under former INA § 212 (c)). *See* Pet'r Br. 37–39. The IJ's failure to determine [redacted]'s competency, and provide adequate accommodations or safeguards tailored to his specific level of incompetence, violates constitutional and statutory requirements that immigration proceedings be fundamentally fair. These requirements include Section 504 of the Rehabilitation Act's mandate that executive agencies (including immigration courts) provide "meaningful access" to the programs they administer, including removal

proceedings. Although the requirements of Section 504 in immigration proceedings have been recognized in other jurisdictions, this Court has not had an opportunity to develop Section 504's application and requirements in the context of immigration proceedings. Therefore, Amici offer this supplemental brief as additional background for what Section 504 requires of the immigration courts to prevent discrimination in immigration proceedings against individuals, like [redacted], who live with mental health disabilities.

Descriptions of individual Amici are set forth below.

* * *

CREEC is a national non-profit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC's efforts to defend human and civil rights extend to all walks of life, including ensuring that people with disabilities have access to all programs, services, and benefits of public entities, especially programs related to the exercise of such individuals' fundamental rights under the law, and the accommodations necessary to sustain them. CREEC lawyers have extensive experience in the enforcement of Section 504 of the Rehabilitation Act and believe the arguments in this brief are relevant and essential to realize the full promise of that statute.

DRA is a non-profit, public interest law firm that specializes in high impact litigation and other advocacy to advance equal rights and opportunity for people with all types of disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, and housing. DRA's clients, staff and board of directors include people with various types of disabilities. DRA lawyers have extensive experience in interpreting Section 504 and believe the arguments in this brief are critical to protect the rights of persons with disabilities as promised under law.

ImmDef is a non-profit social justice law firm defending immigrant communities against injustices in the immigration court system. ImmDef believes the right to counsel in deportation proceedings is a necessary step towards ensuring due process for all. The right to counsel includes—at the very least—the ability to consult and effectively communicate with one's attorney or representative, and assist the attorney in preparing one's defense or claim for relief. ImmDef provides various immigrants and their families meaningful access to counsel in deportation proceedings to ensure fairness under the law. To that end, ImmDef is a part of the National Qualified Representatives Program (NQRP) established by the Executive Office for Immigration Review (EOIR) through which ImmDef is appointed to be

the Qualified Representative for individuals deemed mentally incompetent to represent themselves in their immigration removal proceedings.

Pangea Legal Services is a non-profit organization that represents immigrant communities and provides services through direct legal representation, especially in the area of deportation defense. Pangea is also committed to advocating on behalf of the immigrant community through policy advocacy, education, and legal empowerment efforts. Pangea attorneys have extensive experience in representing various noncitizens in immigration proceedings and protecting their due process rights.

II. INTRODUCTION

There is no dispute that [redacted] has experienced symptoms of mental illness for years from his untreated schizophrenia, including recurring auditory command hallucinations. *See* Pet'r Br. 5–7. As a result of [redacted]'s disability, the IJ and BIA had an affirmative obligation under Section 504 of the Rehabilitation Act to: (1) assess [redacted] to determine whether there were accommodations that would allow him to meaningfully participate in immigration proceedings; and (2) provide any reasonable accommodations. Because the government failed to meet its obligations to [redacted] under Section 504, this case should be remanded with instructions to address whether any accommodation is possible to allow [redacted] to

meaningfully participate in immigration proceedings, and, if not, to terminate those proceedings.

III. SUMMARY OF ARGUMENT

Noncitizens with mental health disabilities, like [redacted] may be limited in their ability to participate fully—or at all—in the removal proceedings against them. *See, e.g.*, *Matter of J-R-R-A*, 26 I&N Dec. 609, 611–12 (BIA 2015). The BIA has directed IJs to make competency determinations and provide "safeguards" in removal proceedings involving competency questions. *See Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011). But these competency inquiries and safeguards are not always adequate to meet the agency's obligations under Section 504. *See e.g.*, *Franco-Gonzalez v. Holder*, 2013 WL 3674492, at *8 (C.D. Cal. Apr. 23, 2013).

Immigration courts are subject to the requirements of Section 504 of the Rehabilitation Act because they are part of federally funded agencies; accordingly, they must provide reasonable accommodations to ensure individuals with disabilities have meaningful access to their programs. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified at 29 U.S.C. §§ 701–796l). Section 504 accommodations must be robust, and can range from appointment of counsel to adjustment of court procedures (like arranging for a noncitizen to testify live rather than by video). There are also cases, like [redacted]s, where a noncitizen has a mental health disability so severe that no modification to the removal proceeding

can make it fair. In those cases, an IJ should terminate the proceedings in a straightforward exercise of both their authority to provide safeguards in proceedings against incompetent noncitizens, and their duty to provide reasonable accommodations under Section 504.

IV. ARGUMENT

A. The United States' Immigration System Has Long Discriminated Against Individuals with Disabilities.

The United States' long history of denigrating the dignity of people with disabilities is deeply intertwined with the history of its immigration system. As the U.S. Commissioner General of Immigration stated in a 1907 report, "The exclusion from this country of the morally, mentally, and physically deficient is the principal object to be accomplished by the immigration laws."[2] Since that time, Congress has taken action, including through the passage of Section 504 of the Rehabilitation Act ("Section 504") in 1973, to address this "lengthy and tragic history of segregation and discrimination" that people with disabilities have faced in the United States. But immigrants with disabilities continue to face discrimination at the hands of the U.S. government to this day. *See generally City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 461 (1985) (Marshall, J. concurring in part and dissenting in

[2] Dr. Douglas Baynton, *Disability and the Justification of Inequality in American History* (2001), https://www.disabilitymuseum.org/dhm/edu/essay.html?id=70 (citing U.S. Bureau of Immigration, Annual Report of the Commissioner of Immigration (Washington: Government Printing Office, 1907)).

part); *Fraihat v. ICE*, 445 F. Supp. 3d 709, 747 (C.D. Cal. 2020), *order clarified*, 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020) (describing risks of immigration detention to individuals with disabilities). Indeed, the unfair and inadequate proceedings against [redacted] illustrate the ways in which the immigration court system discriminates against, and punishes, individuals with disabilities.

B. Noncitizens with Disabilities Are Entitled to Full and Fair Participation in Immigration Proceedings.

1. Section 504 of the Rehabilitation Act Prohibits Federally Funded Agencies from Discriminating Against Individuals with Disabilities.

Section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability in programs or activities conducted by executive agencies of the United States. 29 U.S.C. § 794. This provision not only incorporates key language from the Civil Rights Act of 1964, but goes further—it imposes an *affirmative obligation* on public entities to reasonably modify their rules, policies and practices, in order to make benefits, services and programs accessible to people with disabilities. *See Disabled in Action v. Bd. of Elections in City of New York*, 752 F.3d 189, 196–97 (2d Cir. 2014). Individuals are entitled to accommodation under Section 504 if they have a disability—a "physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1). This includes individuals living with severe mental illness, like [redacted] *See id.*

Under Section 504, a federally funded agency illegally discriminates against individuals with disabilities when it fails to provide "meaningful access" to its benefits, programs, or services. *Alexander v. Choate*, 469 U.S. 287, 301 (1985); *Disabled in Action*, 752 F.3d at 197; *see also Tennessee v. Lane*, 541 U.S. 509, 531 (2004). An agency can fail to provide meaningful access not only through intentional exclusion, but also by "failure to modify existing facilities and practices." *Disabled in Action*, 752 F.3d at 197; *see also Choate,* 469 U.S. at 297.

Section 504 requires federally funded programs to remedy a lack of meaningful access by providing "reasonable accommodation." *Disabled in Action*, 752 F.3d at 197; *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272–73 (2d Cir. 2003). A proposed accommodation is reasonable if it does not fundamentally alter the nature of the federal program or impose an undue hardship. *See id.* at 281. And it is not enough for an agency to *remove* prejudicial policies or practices; an agency must *affirmatively modify* its practices to accommodate individuals with disabilities. *See id.* at 274–75 (noting this Court has "specifically embraced" Section 504's affirmative accommodation mandate, and explaining, "[i]t is not enough to open the door for the handicapped ...; a ramp must be built so the door can be reached.") (citation omitted); *see also Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 266–67 (D.D.C. 2015) (affirmative obligation under Section 504 at its "apex" for detained individuals).

Section 504 applies to immigration courts and removal proceedings because they are conducted and administered by a federally funded agency, the Executive Office for Immigration Review (EOIR)—a sub-agency within the Department of Justice. *See* 29 U.S.C. § 794; *see also* 28 C.F.R. § 39.130 (applying the Rehabilitation Act to the DOJ). Section 504 requires that all individuals with disabilities are entitled to meaningful access to (as relevant here) the "programmatic 'benefit'" of "participation in the removal process." *See Fraihat v. ICE*, 445 F. Supp. at 748; *see also Franco-Gonzalez v. Holder*, 2013 WL 3674492, at *4 (C.D. Cal. Apr. 23, 2013). Put differently, because the INA offers "rights and privileges" to noncitizens, *see, e.g.*, 8 U.S.C. §§ 1229a(b)(3), 1229a(b)(4)(B), and executive agencies, like EOIR, facilitate the exercise of those privileges, individuals may not be excluded from meaningful participation in immigration court processes because of a disability.

2. Section 504 Complements Noncitizens' Rights Under the Fifth Amendment, the Immigration & Nationality Act, and Implementing Regulations.

Section 504 complements other sources of fundamental constitutional and statutory rights, including the Fifth Amendment's guarantee of due process, the Immigration and Nationality Act ("INA"), and its related regulations. As a first principle, noncitizens have constitutional due process rights to full and fair immigration hearings. It is "well established that the Fifth Amendment entitles

aliens to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993); *see also United States v. Fernandez-Antonia*, 278 F.3d 150, 156 (2d Cir. 2002). That due process guarantee includes the right to a full and fair hearing. *Landon v. Plasencia*, 459 U.S. 21, 32–33 (1982).

In addition to this requirement, Congress structured its statutory scheme governing removal proceedings to provide for fundamental fairness in those proceedings. This includes providing a right to a full and fair hearing, including the opportunity to present evidence. *See generally* 8 U.S.C. § 1229a(b)(4)(B); *Augustin v. Sava*, 735 F.2d 32, 36–37 (2d Cir. 1984). Additionally, for individuals with intellectual and mental health disabilities, Congress specifically required that immigration courts provide procedural "safeguards" to "protect the rights and privileges" of noncitizens with "mental incompetency." 8 U.S.C. § 1229a(b)(3); *see also Calderon-Rodriguez v. Sessions*, 878 F.3d 1179, 1182 (9th Cir. 2018) (describing regulations including 8 C.F.R. §§ 103.8(c)(2)(ii) (governing service requirements), 1240.4 (governing notice to appear), 1240.10(c) (prohibiting the acceptance of an admission of removability from an unrepresented incompetent person)).

C. To Comply with Section 504, Immigration Judges Must Conduct Independent and Comprehensive Investigations into Respondents' Disabilities and Accommodation Needs.

Under Section 504, an IJ must identify noncitizens with disabilities and then investigate their disabilities, in order to determine whether an individual requires a Section 504 reasonable accommodation. *See, e.g.*, *Fraihat*, 445 F. Supp. 3d at 748 (discussing affirmative duty by ICE to identify and track detained noncitizens with disabilities); *see also Updike v. Multnomah County*, 870 F.3d 939, 958 (9th Cir. 2017) (failure to "conduct an informed assessment" may violate Section 504); *Blatch ex rel. Clay v. Hernandez*, 360 F. Supp. 2d 595, 632–33 (S.D.N.Y. 2005) (Agency may be required to conduct affirmative outreach to individuals who may need accommodation, because, *inter alia*, "some mentally disabled persons may not be able to self-identify").

Because assessing a noncitizen's disability is a threshold step in providing that person "meaningful access" to their immigration proceedings, the IJ must provide sufficient explanation of its disability determination to advise the parties and any reviewing court of the basis for the competency and accommodation determinations. *See Mejia v. Sessions*, 868 F.3d 1118, 1121–22 (9th Cir. 2017) (BIA erred in failing to remand case where the immigration court failed to articulate his assessment of Petitioner's competence and why these procedural safeguards were adequate); *Franco-Gonzalez v. Holder*, 2014 WL 5475097, at *7–8 (C.D. Cal. Oct. 29, 2014)

(discussing procedure for determining competence). On a practical level, without sufficient explanation by the IJ, the parties are unable to request appropriate corrections from the IJ, and the BIA and any Circuit Court may be unable to exercise meaningful review. *See, e.g.*, *Calderon-Rodriguez*, 878 F.3d at 1182–83 (holding that the BIA abused its discretion by affirming unsupported determination that a petitioner was competent).

Additionally, under Section 504, an IJ must make an individualized and affirmative investigation into the accommodations that are necessary in light of a competency determination. Compliance with Section 504 includes a "duty to gather sufficient information from the disabled individual and qualified experts as needed to determine what accommodations are necessary." *See, e.g.*, *Duvall v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001). That duty includes a duty to investigate the feasibility of proposed accommodations—"mere speculation that a suggested accommodation is not feasible falls short of the reasonable accommodation requirement." *Id.* at 1136 (quotation omitted).

[redacted]'s case exemplifies the problem with insufficiently explained IJ competency and accommodation determinations. In [redacted]'s case, the IJ *agreed* [redacted] presented with indicia of incompetency, but refused to make specific findings about the degree of his competency and did not make an explicit finding of incompetency. *See* AR.385-86 (Tr. at 116:2-117:6). The BIA then affirmed the IJ's

determination because the IJ imposed safeguards, which purportedly fixed any problem with the IJ's insufficient competency determinations. *See* AR.3. But this circular reasoning falls flat, because there is no way to evaluate the *adequacy* of safeguards—or, for the purposes of Section 504, accommodations—without knowing whether they were *necessary* or *feasible*.

D. To Comply with Section 504, Immigration Courts Must Affirmatively Consider and Provide a Range of Reasonable Accommodations, Including Termination of Proceedings.

Section 504 requires IJs to consider and provide a range of reasonable accommodations, including accommodations beyond those specifically enumerated by BIA in its *Matter of M-A-M-* decision. *See* 25 I&N Dec. 474 (BIA 2011). These accommodations include termination of proceedings for a small minority of noncitizens, like [redacted] for whom there is no other way to meaningfully access those proceedings.

1. Immigration Courts' Obligations Under Section 504 Extend Far Beyond the Requirements Listed in *Matter of M-A-M-*.

Immigration courts' obligations under Section 504 extend far beyond the requirements explicitly described in *Matter of M-A-M-*. Even for disabilities that manifest primarily as challenges to an individual's competency (the specific topic of *M-A-M-*), the specific determinations and safeguards discussed in *Matter of M-A-M-* may not fully address every need for accommodation. As such, immigration courts

should construe their obligations under *Matter of M-A-M-* broadly, consistent with their Section 504 duties.[3]

Under *Matter of M-A-M-* , a noncitizen is competent if he "has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses." 25 I&N Dec. at 484. Where the noncitizen "lacks sufficient competency to proceed with the hearing," the IJ has the "discretion to determine which safeguards are appropriate, given the particular circumstances in a case." *Id.* at 481-82.

Matter of M-A-M- summarizes the safeguards a judge should consider: "refusal to accept an admission of removability from an unrepresented respondent; identification and appearance of a family member or close friend who can assist the respondent and provide the court with information; docketing or managing the case

[3] This Court should not defer to any agency construction of *Matter of M-A-M-* as imposing a lesser duty to evaluate and accommodate than Section 504. To the extent the BIA attempts to construe *Section 504* as permitting such a variance, that determination would receive no deference because Congress has not delegated interpretation of Section 504 to the BIA. *See, e.g.*, *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986). To the extent BIA attempts to construe the *INA* or related regulations and rules as authorizing a lesser duty than required by Section 504, such interpretation would be unreasonable, even under *Chevron* or other standards of review that may apply when an agency has some authority to construe a statute or its regulations. *See, e.g., Nat. Res. Def. Council, Inc. v. EPA*, 961 F.3d 160, 169–70 (2d Cir. 2020) (describing Chevron steps 1 and 2); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–15 (2019).

to facilitate the respondent's ability to obtain legal representation and/or medical treatment in an effort to restore competency; participation of a guardian in the proceedings; continuance of the case for good cause shown; closing the hearing to the public; waiving the respondent's appearance; actively aiding in the development of the record, including the examination and cross-examination of witnesses; and reserving appeal rights for the respondent." 25 I&N Dec. at 483. But there are circumstances in which none of the safeguards put forward by *M-A-M-* are adequate to ensure an immigration meaningful access of immigration services: as *M-A-M-* itself acknowledges, "even where the court and the parties undertake their best efforts to ensure appropriate safeguards, concerns may remain." *Id.* Accordingly, this Court should construe the safeguards discussed in *M-A-M-* as a *floor*, and not a *ceiling*, for the types of accommodations that may be required in immigration proceedings.

The landmark class action *Franco-Gonzales v. Holder* is an example of this principle. In that case, the district court repeatedly held that Section 504 requires significant affirmative action by the government—*beyond* the safeguards listed in *Matter of M-A-M*—to reasonably accommodate noncitizens with mental health disabilities during immigration proceedings. *See, e.g.*, 767 F. Supp. 2d 1034, 1056 (C.D. Cal. 2010); 828 F. Supp. 2d 1133, 1145–47 (C.D. Cal. 2011); 2013 WL 3674492, at *8–9 (C.D. Cal. Apr. 23, 2013). The court noted that the majority of

the safeguards explicitly provided under *Matter of M-A-M-* are discretionary, and found that none explicitly guarantee that the incompetent individual can participate in their own proceeding as fully as an individual without a disability. *See* 2013 WL 3674492, at *8–9. The court concluded that Section 504 required the appointment of a Qualified Representative as a reasonable accommodation for individuals who are not competent to represent themselves by virtue of their mental disability. *See id.* at *8. Section 504 may also require other reasonable accommodations, such as alteration of court procedures (like the removal of judicial garb referenced in [redacted]'s case (*see* Pet'r Br. 41)), requiring the government to produce a respondent live rather than by video, and similar accommodations. This is not an exhaustive list, and IJs should construe their obligation to affirmatively identify and provide accommodations broadly. *See Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 722 (2d Cir. 1994) ("Because the [Rehabilitation] Act is a remedial statute, it and the regulations promulgated under it are to be construed broadly."); *see also, e.g.*, *Matter of M-J-K-*, 26 I&N Dec. 773, 775 (BIA 2016) (various "safeguards" may be necessary under *Matter of M-A-M-*); *Matter of J-S-S-*, 26 I&N Dec. 679, 682 (BIA 2015) (similar). Here, too, the Court should reject any argument that *M-A-M-* limits the accommodations that IJs may be required to provide to satisfy Section 504. Instead, *M-A-M-* and Section 504 should be construed to jointly require affirmative

and fulsome competency determinations, and reasonable accommodations, for individuals living with mental health disabilities.

2. Termination is the Only Adequate Safeguard or Accommodation in Some Cases.

In a limited set of cases, there is no safeguard or accommodation that permits a noncitizen to competently participate in the proceedings against them. This includes cases where noncitizens cannot understand or participate in the proceedings at all, and where—as in [redacted]'s case—a noncitizen cannot communicate or work with his counsel. *Cf. Drope v. Missouri*, 420 U.S. 162, 171 (1975) ("[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."). Where an individual with a disability cannot participate in proceedings against him or her despite any other efforts to accommodate their disability, proceedings should be terminated because they cannot be made fair. "To order the removal of someone unable to participate meaningfully in his or her removal proceedings would make the whole process a charade." *Diop v. Lynch*, 807 F.3d 70, 76 (4th Cir. 2015).

For some noncitizens with severe mental health disabilities, restoration to competency is not a realistic prospect. This is especially true for detained noncitizens who cannot expect to receive adequate—let alone meaningful—

treatment to restore competency while in immigration detention.[4] Termination is thus the only option for this small subset of noncitizens who are not competent and cannot be rendered competent for lack of other realistically available measures. Any alternative to termination simply leaves the incompetent noncitizen in limbo, or, in cases involving noncitizens detained pending deportation, subject to the kind of prolonged detention which is separately problematic under the Fifth and Eighth Amendments. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Jackson v. Indiana*, 406 U.S. 715, 731 (1972). Temporarily suspending proceedings through administrative closure is thus not a viable alternative for detained noncitizens; it may just leave them indefinitely detained. For example, the named plaintiff in *Franco-Gonzales v. Holder* was detained for over four years after administrative closure with no active proceedings against him prior to the class litigation. *See* 2010 WL 11643590, at *5 (C.D. Cal. Oct. 18, 2010); *see also Velasco Lopez v. Decker*, 978 F.3d 842, 851–52 (2d Cir. 2020) (noncitizen's prolonged detention violated due

[4] *See, e.g.*, United States House of Representatives, Committee on Homeland Security, Majority Staff Report *ICE Detention Facilities, Failing to Meet Basic Standards of Care*, at 17 (Sept. 21, 2020), https://homeland.house.gov/imo/media/doc/Homeland%20ICE%20facility%20staff%20report.pdf; ACLU, Human Rights Watch, and National Immigrant Justice Center, *Research Report, Justice-Free Zones, U.S. Immigration Detention Under the Trump Administration* (2020), https://www.aclu.org/sites/default/files/field_document/justice-free_zones_immigrant_detention_report_aclu_hrw_nijc_0.pdf.

process). As one court has noted, "there is something fundamentally unfair in keeping a case open where the defendant, as a result of his incompetency, will never be in a position to challenge it on the merits." *Massachusetts v. Guinta*, No. 2004-00088, 2011 WL 3480959, at *2 (Mass. Super. Ct. Mar. 31, 2011). Accordingly, this Court should hold that termination must be available to IJs, so that they may to uphold their obligations under Section 504.

3. Immigration Courts Have the Authority to Terminate Proceedings.

Termination of immigration proceedings is consistent with Section 504's mandate that IJs affirmatively provide meaningful access to removal proceedings, and with IJs' responsibility to conduct fair and sufficient proceedings. For example, by law and regulation, when an IJ determines that a respondent lacks sufficient competency to proceed with the hearing, the IJ "shall prescribe safeguards to protect the rights and privileges of the alien." 8 U.S.C. § 1229a(b)(3); *see also* 8 C.F.R. § 1003.10(b) (authorizing immigration judges to take "any action" consistent with their authority that is "appropriate and necessary" to resolve the cases before them); 8 U.S.C. § 1229a(a)(l) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."); *see also Matter of M-J-K-*, 26 I.&N. Dec. 773, 775 (BIA 2016) (confirming IJ discretion to implement

appropriate safeguards in competency cases).[5] But where no other accommodation will ensure meaningful access, the only reasonable accommodation is to terminate the proceedings. *See* EOIR, Immigration Judge Benchbook, § II.B.1 (2016) (suggesting that immigration judges consider "terminating cases where respondents are unable to proceed in light of mental health issues and a corresponding inability to secure adequate safeguards").

Similarly, it is well-established that under Section 504, exemption from a program requirement can be a reasonable accommodation. *See, e.g.*, *People First of Alabama v. Merrill*, 467 F. Supp. 3d 1179, 1221 (N.D. Ala. 2020), *appeal dismissed*, No. 20-12184-GG, 2020 WL 5543717 (11th Cir. July 17, 2020) (determining at preliminary injunction stage that plaintiff voters' requested accommodation was facially reasonable, where plaintiffs requested exemption from requirement to show photo ID in order to vote); *see also, e.g.*, *Fraihat*, 445 F. Supp. 3d at 748, 751 (ordering ICE to reevaluate custody determinations for medically vulnerable detained noncitizens who raised Section 504 and other claims).

[5] Permitting or requiring immigration judges to terminate cases based on mental incompetence may appear to be in tension with 8 C.F.R. § 1239.2 , which appears to authorize immigration judges to terminate only in order to allow the respondent to pursue naturalization. The doctrine of constitutional avoidance, however, requires the court to construe the regulation as permitting immigration judges to terminate where the respondent is mentally incompetent. In the alternative, to the extent the regulation conflicts with a constitutional due process right to competence, it is invalid.

Accordingly, termination in cases where there is no possible way to create meaningful access to proceedings is an *obligation* arising from multiple legal bases, not an exercise in unexplained discretion. It is therefore distinct from *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (AG 2018), which held that Immigration Judges do not have inherent authority to terminate cases on discretionary grounds; in *F-D-B-*, for example, neither the IJ nor the BIA provided a legal basis for the termination at issue. *See id.* at 467-68.

4. Reasonable Accommodations Do Not Fundamentally Alter or Impose an Undue Hardship on Immigration Court Proceedings.

Finally, termination and other reasonable accommodations—like the appointment of Qualified Representatives in *Franco-Gonzalez*—are "reasonable" under Section 504 for the additional reason that they neither "fundamentally alter" nor imposes an "undue hardship" on immigration courts. *See Disabled in Action*, 752 F.3d at 197; *Henrietta D. v. Bloomberg*, 331 F.3d at 281. There is no fundamental alteration because immigration proceedings are already complex events; logistical accommodations (like requiring the government to produce a detained respondent in-person for evaluation), or procedural accommodations (like administratively closing the case), are similar to existing case management activities, and thus do not "fundamentally alter the nature" of the proceedings. *See Disabled in Action*, 752 F.3d at 197; *see Franco-Gonzalez v. Holder*, 2013 WL 3674492, at

*5 (C.D. Cal. Apr. 23, 2013) (explaining that appointment of qualified representative is not a fundamental alteration). Nor does termination constitute a fundamental alteration, because it occurs only in selected cases, at the end of a full exercise of the "program" (immigration proceedings). Perhaps most importantly, in special circumstances IJs already terminate proceedings.[6] When an accommodation is already available and in practice, it cannot be a "fundamental alteration."

Nor do reasonable accommodations, including termination, create any "undue hardship" to the agency. *See Henrietta D. v. Bloomberg*, 331 F.3d at 281. The cost and burden of providing accommodations or terminating proceedings may well be less than the cost and burden of administering protracted and inefficient proceedings for immigrants with disabilities who are acutely incompetent. Indeed, providing

[6] *See, e.g.*, Order on Motion to Terminate (Jan. 2020) (Addendum 1) at 4–5 (determining that termination was "constitutionally required because of the circumstances present in this respondent's case" and distinguishing *Matter of S-O-G- & F-D-B-*); Order on Motion to Terminate (Sept. 2018) (Addendum 2) at 21 (terminating proceedings because IJ could not "adequately safeguard Respondent's Due Process right to a fundamentally fair proceeding" in case where respondent's "significant psychological and cognitive impairments" meant that he could not, among other things, meaningfully consult with counsel or "provide anyone with consistent, accurate information[.]"); *see also* Sarah Sherman-Stokes, *Sufficiently Safeguarded?: Competency Evaluations of Mentally Ill Respondents in Removal Proceedings*, 67 Hastings L.J. 1023, 1057 & n.191 (May 2016) (noting that, based on interviews with immigration judges and attorneys, "immigration judges in [some] jurisdictions are routinely ordering termination for incompetent respondents that appear before them.").

reasonable accommodations will allow some proceedings to expedite,[7] thus releasing resources for use in other proceedings.

And "undue" burden does not mean *no* cost or burden—by its very nature, Section 504 "requires some degree of positive effort to expand the availability of federally funded programs to handicapped persons otherwise qualified to benefit from them." *Henrietta D.*, 331 F.3d at 275. Indeed, Section 504, which applies to federally *funded* programs, would be dead letter if it were prohibited from expanding those programs in some manner that could incur cost. To that end, some cost in affirmatively accommodating noncitizens with mental health disabilities in removal proceedings would be consistent with, not contrary to, Section 504.

V. CONCLUSION

For the above reasons, Amici respectfully request the Court consider the position set forth herein and grant [redacted]s Petition for Review.

[7] The government's legal orientation program (LOP) derives from the similar rationale that noncitizens advised of their rights can pursue or abandon claims for relief from removal or detention more efficiently. *See, e.g.*, Fact Sheet, "EOIR's Office of Legal Access Programs," *available at*: https://www.justice.gov/eoir/file/882786/download.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 5,421 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically on April 5, 2021. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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