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

In the Matter of:)
)
)
 [REDACTED])
)
 Respondent)
)
 In Removal Proceedings)

File No. [REDACTED]

**REQUEST TO APPEAR AS AMICUS CURIAE AND
LAW PROFESSORS' AND NONPROFIT ORGANIZATION'S AMICUS CURIAE BRIEF**

INTEREST OF AMICUS CURIAE AND REQUEST FOR APPEARANCE

Pursuant to the BIA Practice Manual, § 2.10 and 8 C.F.R. § 1292.1(d), the following law clinics and non-profit organizations request the Board's leave to appear as *Amicus Curiae*. This brief is filed with the collaboration of the foregoing law professors, and nonprofit organization in support of the Respondent.

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

Director of the Immigration Clinic and Clinical Associate Professor Geoffrey A. Hoffman who teaches at the University of Houston Law Center, has represented hundreds of immigrants over the span of his career and has appeared as counsel and co-counsel with students in immigration court, district court and appellate cases. The Immigration Clinic, as a whole, has represented thousands of immigrants since its inception in 1999. The Clinic was started by the late Joseph A. Vail, formerly an immigration judge and *pro bono* attorney, who had the vision and dedication to create the clinic for the purpose of teaching students and assisting the immigrant community in a wide variety of family-based and humanitarian cases. Since its

inception the Clinic has trained hundreds of students who have gone on to become leaders in their fields, having worked for example for the AAO, DHS, Immigration Court, in private practice and for NGOs.

Professor Sheila I. Velez Martinez directs the Immigration Clinic at the University of Pittsburgh School of Law. In that capacity, she regularly supervises students and works daily on immigrant issues. She has publications relating to experiential learning, immigration law, and family law. She also currently teaches courses to judges and professors as part of the Judicial Academy of the Supreme Court of Puerto Rico, related to issues of Immigration, International Family Law, Domestic Violence, cultural competence and teaching techniques.

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCR) is a non-profit legal services and social justice organization that works in partnership with the private bar to protect and advance the rights and status of people of color, low-income communities, and immigrants and refugees through direct legal services, impact litigation, and policy advocacy. A core program of the Lawyers' Committee is its nationally recognized Asylum Program, established in 1983. In partnership with the *pro bono* bar, the program has assisted thousands of individuals fleeing persecution and seeking protection in the United States, including families seeking asylum who have been separated from immediate relatives at the border. Through this work, LCCR has developed a strong interest in preventing the harmful effects of family separation on noncitizens and their ability to fairly defend themselves in removal proceedings.

The Florence Immigrant and Refugee Rights Project ("Florence Project" or "Project") is a Legal Orientation Program site of the Executive Office of Immigration Review. As such, the Florence Project provides orientation services to detained adult men and women as well as unaccompanied minors in removal proceedings. In 2016, over 17,000 detained children, men,

and women facing removal charges observed a Florence Project presentation on immigration law and procedure. That same year, we provided individualized *pro se* support services including bond workshops to approximately 2,000 detained adult immigrants. Every year, the Florence Project also directly represents individuals before the Immigration Judge and Board of Immigration Appeals in addition to the aforementioned support to *pro se* respondents. At the Florence Project, we have seen hundreds of individuals, both children and adults, who have been separated from their family members in the course of their immigration detention. We also see the deleterious effects such family separation regularly has on these clients; denying efficient consolidated processing of family members' cases, preventing individuals from having a fair opportunity to present evidence in support of their claims, denying access to counsel for detained family members, and in some cases causing some individuals to forfeit valid claims for relief in their desperation to locate lost family members. The Florence Project firmly believes that all immigrants in removal proceedings have a right to humane and fundamentally fair procedures in their immigration proceedings. This goal can only be attained if Immigration Judges are empowered to take appropriate measures necessary to ensure every immigrant receives his right to a full and fair hearing.

Immigration Equality is a national organization that seeks to end the discriminatory treatment of lesbian, gay, bisexual, transgender, queer ("LGBTQ"), and HIV-positive individuals under U.S. immigration law. Immigration Equality runs a pro bono asylum project, provides technical assistance to attorneys, maintains an informational website, fields questions from LGBTQ and HIV-positive immigrants from around the world, trains asylum officers to address claims by LGBTQ and HIV-positive applicants, and maintains the leading manual on preparing claims for immigration relief based on sexual orientation, gender identity, and HIV status.

Because of their significant expertise in this area, the undersigned law professors and organizations are qualified to speak to the issues presented.¹

Respectfully submitted,

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INTRODUCTION

Imagine the following heart-wrenching but all-too-typical scenario: a family fleeing persecution presents themselves at the U.S.-Mexico border, seeking asylum. They are immediately separated and detained, the mother, “Laura,”² and her children are released and move to California, the father is detained in Georgia. Although both are seeking asylum based on persecution of their family, and are presenting the same claim for relief, their cases are treated differently. The detained father does not find legal help, even to fill out the asylum application. Without assistance, he is never able to apply for asylum and is ordered removed. Meanwhile, the mother and children locate and retain *pro bono* counsel, file an asylum application, and are able to present substantial declarations and documentary evidence in support of the claim.

Separating family members also impacts the non-detained relatives’ ability to present their case. Take the example of a West African couple who presented themselves at the border to seek asylum. The couple was separated at the border and detained at opposite ends of the country. The wife, “Adanna”, was so mentally ill that she could not fairly represent herself, and the immigration court appointed an attorney for her. The wife was subsequently released, but her court-appointed attorney struggled to understand the facts underlying the claim for her case due to the wife’s mental illness. Communication with the husband, detained in Georgia, was near impossible and the husband was ordered deported before he could testify in support of his wife’s case.

Minor children are also prejudiced when they are separated from their parents and forced to proceed on their own claims. “Marisol,” a five-year old child who was separated from her

² All names used as case examples in this brief are pseudonyms to protect confidentiality. The case examples have been provided by Amici and partner organizations and can be found discussed in the following exhibits. *See* Exh. A (Declaration of Megan Sallomi); Exh. B (Declaration of Laura St. John); Exh. C (Declaration of Aaron Morris). Exh. D (Declaration of Amelia Marritz).

mother explained to her pro bono attorney that her father had abused her and her mother. Due to Marisol's age, she could not provide more details to her attorney to develop the claim and the pro bono attorney was unable to communicate with the detained mother. In another example, a father and daughter flee persecution from a gang in Central America. On arrival at the border, the father and daughter are separated. On the same facts, the father is found to have a reasonable fear of persecution, but the daughter does not.

These stories are not unique; they represent a vital due process issue that *amici*—non-profit legal organizations and law school clinics—regularly struggle with. The instant case presents a similar set of facts: Respondent, [REDACTED], fled his country with his wife and children because of persecution of their family. As Respondent affirmed to the Immigration Judge (“IJ”), he and his spouse had the same claim for relief and intended to testify in support of the other’s case. But Respondent’s case is different than the above examples because here, the IJ took steps to guard against the due process violation that would occur if Respondent were forced to present his claim without his immediate relatives. The IJ attempted to change venue to consolidate Respondent’s case with his family’s but, at a hearing where Respondent was *not* present and had no opportunity to be heard, the Department of Homeland Security (“DHS”) moved *ex parte* to change venue back to the detained court in Pennsylvania. Unable to change venue or consolidate Respondent’s detained case with a non-detained case in Utah, the IJ had no other option but to terminate proceedings.

DHS argued that the IJ lacks authority to terminate proceedings, but this is not correct. Per regulation, immigration courts have the authority to take “any action” consistent with applicable law and may terminate when there is a valid legal basis to do so. Avoiding a procedural due process violation and preserving the respondent’s right to seek asylum with this

family is a valid legal basis and the Board should so hold. Amici present numerous examples of when separating family members prevents them from communicating with counsel, sharing evidence or testifying for the other's case, or even seeking relief from removal, resulting in fundamentally unfair hearings and inconsistent case outcomes—not to mention a gross misuse of scarce judicial resources. Even if the Board were to find that termination to prevent a procedural due process violation is not the appropriate remedy, the Board should order the case administratively closed. Finally, inability to terminate or administratively close where necessary to preserve the right to seek asylum and to procedural due process is inconsistent with the U.S.'s obligations under international law.

Please note, a detailed description of the procedural posture and factual background of the Respondent's case is included with his appeal brief, and will not be repeated here.

SUMMARY OF ARGUMENT

By regulation, an IJ is authorized to take “any action,” consistent with applicable law, that is appropriate for the case. *See* 8 C.F.R. § 1003.10(b). For this reason, IJs have broad discretion to use docket management tools to protect the respondent's right to procedural due process and to maximize judicial efficiency. *See Matter of M-A-M-*, 25 I. & N. Dec. 474, 479 (BIA 2011); *Matter of Taerghodosi*, 16 I. & N. Dec. 260, 263 (BIA 1977). These tools include consolidating cases of immediate family members with overlapping claims, changing venue in accordance with the location of witnesses or counsel, or administrative closure pending the outcome of a proceeding in another court. *Id.*; *see also* Immigration Court Practice Manual, at § 1.5; *Matter of Rahman*, 20 I&N Dec. 480 (BIA 1992).

Failure to use these tools, however, can also violate the respondent's right to a fair hearing, especially when a respondent intends to present evidence or a joint claim for relief with

immediate family members. *See, e.g., Campos v. Nail*, 43 F.3d 1285 (9th Cir. 1994) (denying change of venue requests for asylum seekers violated due process); *Garcia-Guzman v. Reno*, 65 F.Supp.2d 1077, 1091-93 (N.D. Cal. 1999) (failure to change venue for detainee transferred 800 miles from counsel violated due process). In the instant case, Respondent's right to procedural due process and his right to seek asylum were violated because he was separated from his wife and children, with whom he intended to seek asylum. Before concluding that termination was necessary, the IJ tried to change venue and considered consolidation of the cases to remedy this procedural unfairness. The IJ changed venue to Utah, but DHS failed to make Respondent available for a hearing in Utah and moved *ex parte* for venue to be returned to the York Immigration Court. The IJ also noted that the Respondent's family's cases could not be consolidated before the York Immigration Court because the York court is only authorized to hear detained cases. In addition, requiring Respondent's family, who reside in Utah, to proceed before an immigration court across the country would have violated *their* procedural due process rights. *See Campos*, 43 F.3d 1285.

Because there was no other option to correct the procedural unfairness in Respondent's case, termination was appropriate. As a practical matter, termination as a tool to remedy procedural unfairness is necessary to enable the courts to administer justice as efficiently as possible. At a time when the immigration courts face an unprecedented, crushing caseload and respondents' cases linger for years in the courts, multiple judges should not be required to hear the same claim and the same evidence in cases of immediate family members. In the alternative, if the Board determines that termination is not an appropriate remedy, the Board should order Respondent's case administratively closed, pending the outcome of his wife's asylum application.

When families with overlapping claims are forced to proceed separately, their rights to present evidence, to be assisted by counsel, and to seek asylum are violated, as the case examples in this brief amply demonstrate. This practice not only violates U.S. law, but also violates U.S. obligations under international law, which require the government to protect asylum-seekers' right to seek asylum and to due process, and to avoid arbitrary detention.

ARGUMENT

I. THE IMMIGRATION JUDGE APPROPRIATELY TERMINATED RESPONDENT'S CASE BECAUSE PROCEEDING WITH THE CASE WOULD VIOLATE THE RESPONDENT'S RIGHT TO SEEK ASYLUM AND DUE PROCESS.

A. Requiring the Respondent to proceed, *pro se* and detained far from his primary witnesses and co-applicants, would have violated due process and the Respondent's right to seek asylum.

“Any alien” who is physically present in the United States has the right to apply for asylum. *See* INA § 208(a); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (“It is undisputed that all aliens possess such a right [to apply for asylum] under the [INA]”). This right includes the right to a hearing before an immigration judge, wherein asylum-seekers can be represented by counsel and present evidence in support of their claim. *See* INA §§ 235(b) (arriving aliens seeking asylum are not subject to expedited removal); 240(b)(4) (right to present evidence and to counsel at no expense to the government in a removal hearing). The Attorney General is further charged with establishing procedures to ensure proper consideration of asylum applications, which it has done via regulations and decisions from this Board. *See* INA § 208(d)(1); *see also, e.g.*, 8 C.F.R. § 1208.1 *et seq.*; *Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2014) (holding that an asylum applicant is entitled to a hearing on the merits of the application).

It is also well-established that respondents in removal proceedings have a right to procedural due process. *See United States ex rel. Mezei*, 345 U. S. 206, 212 (1953). The “essence” of procedural due process is that a person risking a serious loss be given notice and an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). In the context of removal proceedings, Congress created a set of procedural rights to ensure that removal hearings are consistent with due process, including a right to be represented by counsel at no expense to the government and a right to present evidence, examine witnesses, and examine evidence that DHS presents. *See* INA § 240(b)(4)(A)-(B). The federal courts, and this Board, have also elaborated on these basic due process principles in specific cases. *See, e.g., Campos v. Nail*, 43 F.3d 1285 (9th Cir. 1994) (denying change of venue requests for asylum seekers violated due process); *Garcia-Guzman v. Reno*, 65 F.Supp.2d 1077, 1091-93 (N.D. Cal. 1999) (transfer of detainee 800 miles from his counsel, when detainee could not communicate telephonically with counsel violated due process).

The right to apply for asylum is constitutionally protected under the Due Process Clause.³ In *Haitian Refugee Center v. Smith*, the Fifth Circuit held that the federal law and regulations demonstrate “a clear intent to grant aliens the right to submit and the opportunity to substantiate their claim for asylum.” 676 F.2d 1023, 1038 (5th Cir. 1982). As such, asylum-seekers had a “constitutionally protected right to petition our government for political asylum.” *Id.* *See also Azizova v. U.S. Atty. Gen.*, 442 F. App'x 531, 536 (11th Cir. 2011) (“aliens do have a [due process] protected interest in petitioning for asylum”). The right to seek asylum also

³ The U.S. Supreme Court has also repeatedly found a liberty interest in removal proceedings, which is also implicated in the context of asylum proceedings. *See, e.g., Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950).

encompasses the due process rights discussed above, to present evidence and be represented by counsel in support of that application. *See id.*

1. Courts have held that failure to change venue or detaining respondents in remote locations where they cannot access evidence or retain counsel may violate due process and the right to seek asylum.

Courts have repeatedly held that agency practices that effectively prevent noncitizens from applying or presenting their claims for asylum violate their statutory and constitutional right to seek asylum and to due process. In *Campos v. Nail*, the Ninth Circuit considered an immigration judge's blanket policy of denying change-of-venue requests for Guatemalan and Salvadoran asylum-seekers who were initially detained in Florence, Arizona, were released on bond, and moved to live in other parts of the country. 43 F.3d 1285 (9th Cir. 1994). Many asylum-seekers lacked the money to return to Arizona for removal hearings and could not find counsel to represent them there. *Id.* at 1289. The IJ's failure to consider asylum-seekers' ability to return and locate counsel for their deportation hearings created a substantial risk that asylum-seekers would be denied the opportunity to be heard and present evidence at their hearings, including evidence for their asylum applications. *Id.* The Ninth Circuit held that failure to change venue deprived plaintiffs of not only their right to a fair hearing but also their right to apply for asylum and to secure counsel at no expense to the government. *Id.*

The manner of detaining asylum-seekers also implicates their ability to present asylum applications. In *Orantes-Hernandez v. Thornburgh*, the Ninth Circuit affirmed a permanent injunction enjoining various INS practices that prevented noncitizens from exercising their right to apply for asylum. 919 F.2d 549 (9th Cir. 1990). These practices included detaining asylum-seekers in remote locations with limited visitation hours and no access to the telephones, as well as the transfer of asylum-seekers to other detention facilities without prior notice to their

attorneys. *Id.* at 565-566. These practices interfered with asylum-seekers ability to retain counsel to present their asylum applications and therefore violated due process. *See Orantes-Hernandez v. Meese*, 685 F.Supp. 1488, 1509-1510 (C.D. Cal. 1988) (finding that “INS practices and procedures at detention centers and other locations where class members are detained coerce and discourage class members from exercising and pursuing asylum”); *see also Haitian Refugee Center*, 672 F.2d at 1031-32 (holding that INS practices that effectively “made it impossible for Haitians and their attorneys to prepare and file asylum applications in a timely manner” violated due process).

Separating family members also impacts the detained and non-detained respondents’ ability to be represented by counsel in their removal hearings and procedural due process generally. Federal courts have repeatedly held that DHS’s choice of detention location may impinge on the right to counsel, particularly where communication with the detained person is limited or unavailable. *See Rios-Berrios v. I.N.S.*, 776 F.2d 859, 862-63 (9th Cir. 1985) (noting that more accommodations were necessary to protect the due process and statutory right to counsel for a respondent who was “in custody, spoke only Spanish, had limited education, was unfamiliar with this country and its legal procedures, and had been removed nearly 3,000 miles from his only friend in this country”); *Baires v. I.N.S.*, 856 F.2d 89, 93 (denial of continuances and motion to change venue when respondent was detained in another state than where his attorney and witnesses were located “deprived [the attorney] of a fair opportunity to prepare his case” and violated petitioner’s “statutory right to present evidence”).

In several cases, *amici* and partner organizations have represented minor children separated from their parents who have a fear of return but, unable to communicate with the parents, the attorneys cannot obtain relevant facts for the case. For example, one five-year-old

client, “Marisol,” explained that her mother came to the U.S. because her father was abusive to her and her mother. Due to her age, Marisol could not provide her attorney more details and her attorney could not communicate with Marisol’s mother. In another case, a mentally-ill West African woman who was appointed an attorney pursuant to *Franco-Gonzales v. Holder*, 767 F.Supp.2d 1034 (C.D. Cal. 2010), was unable to explain the relevant details of her claim to her attorney. Her husband was detained across the country and the woman’s attorney struggled to communicate with him. Similarly, *pro bono* attorneys representing non-detained family members are often willing to also represent the separated relative because the claims are overlapping and the relatives can support their client’s case. The situs of detention and inability to communicate with the detained relative, however, makes this unfeasible for many *pro bono* attorneys. See Exhibits A (Sallomi Decl.); B (St. John Decl.); C (Morris Decl.); D (Marritz Decl.).

2. *As in Respondent’s case, denying immediate family members with the same claim and the same evidence the ability to consolidate and change venue will violate their right to seek asylum and to due process.*

When a respondent intends to jointly pursue an application with immediate family members, the IJ must ensure that the location and conditions of detention do not interfere with the respondent’s statutory and constitutional right to seek asylum and to due process. See *Rios-Berrios*, 776 F.2d at 862-63; *Baires*, 856 F.2d at 93. As Respondent’s case and the other case examples discussed in this *Amicus* brief demonstrate, coordinating asylum claims between non-detained and detained immediate family members presents serious logistical and communication difficulties, and interferes with the family’s right to seek asylum and to due process. As in the cases of “Laura” and “Adanna,” discussed above, the detained relative may be ordered removed before the non-detained client’s attorney even has the opportunity to communicate with the relative or include him or her on the client’s application for asylum.

Family members may not even know where the other is located, much less the status of the other's immigration case. *See* Exh. E (“Betraying Family Values: How Immigration Policy at the United States Border is Separating Families,” Feb. 2017 report) (hereinafter, “Family Separation Report,” at 4) (DHS databases do not readily track family relationships, and “individuals have little meaningful recourse to locate, contact, or reunite with a loved one”). Even if they do know the location of a detained relative, communicating with them is extremely challenging. Some jails holding ICE detainees do not allow incoming phone calls and outgoing calls are severely restricted and often prohibitively expensive. *See, e.g., Lyon v. U.S. Immigration & Customs Enft*, 171 F. Supp. 3d 961, 982 (N.D. Cal. 2016) (restrictive phone policies created a substantial risk of affecting the outcome of removal hearings); *Orantes-Hernandez*, 685 F.Supp. at 1509-1510 (finding that detaining asylum-seekers in remote locations with limited telephone access interfered with their right to access counsel and to apply for asylum).

Although consolidating relatives with the same claim is a more efficient use of judicial and *pro bono* attorney resources, attorneys seeking to represent a family of asylum-seekers may spend weeks and scarce resources just to determine the location of a detained relative and the status of their immigration case. In many cases, *pro bono* attorneys are ultimately unable to represent the detained relative together with the non-detained family due to inability to communicate with the detained client and the inability to consolidate the two cases. *See* Exh. A (Sallomi Decl.) In one case, a wife with mental illness was released from detention, secured *pro bono* counsel and applied for asylum, but the father still detained was not able to be present in his wife's case and was then ordered removed. *See* Exh. D (Marritez Decl); *see also Orantes-*

Hernandez v. Thornburgh, 919 F.2d at 565-66 (transfer and detention of asylum-seekers in remote locations interfered with right to counsel).

Separating family members with the same asylum claim also impedes the respondent's ability to present evidence in support of his or her asylum application. Although corroborating evidence may be required in an asylum case, relatives may be unable to present the testimony of a detained family member (or testify in support of a detained relative's claim) due to the physical distance and communication barriers between the family. "Separated family members, particularly children, may not know all the details or have all the documentation of the intertwined case. For example, one separated family may have carried the identification documents and evidence relating to an asylum claim for the whole family, leaving other family members without documentation." Exh. E, Family Separation Report, at 14.

In the instant case, the IJ below correctly held that proceeding with Respondent's asylum claim in the absence of his wife and children would violate Respondent's statutory and constitutional right to seek asylum. *See* IJ Order Terminating Proceedings 2 (Feb. 8, 2017); Transcript at 29. Although the Attorney General has discretion to determine the place of detention, *see* INA § 241(g), "this discretion must be exercised in a manner consistent with the constitutional and statutory rights of detainees." *Orantes-Hernandez v. Meese*, 685 F. Supp. at 1509. Once the IJ was on notice that Respondent intended to seek asylum *jointly* with his wife and children, and to present their testimony in support of his claim, he was obligated to ensure that the location and conditions of his detention did not interfere with his right to seek asylum. As the IJ found, however, Respondent could not consolidate his case with that of his wife and children in Utah and it would be difficult, if not impossible, for Respondent and his wife to testify in support of each other's claims. *See* IJ Order Terminating Proceedings 2 (Feb. 8, 2017);

Transcript at 29. Proceeding with Respondent’s asylum application, in the absence of his wife and children, would have violated his constitutional and statutory right to seek asylum and to due process. *See, e.g., Campos*, 43 F.3d at 1289; *Orantes-Hernandez v. Meese*, 685 F. Supp. at 1509; *Haitian Refugee Center*, 672 F.2d at 1031-32.

B. The Immigration Judge has the authority to terminate removal proceedings when necessary to prevent a procedural due process violation.

In deciding individual cases, an immigration judge “shall exercise his or her independent judgment and discretion and may take any action consistent with their authorities under the [Immigration and Nationality] Act and regulations that is appropriate and necessary for the disposition of such cases.” 8 C.F.R. § 1003.10(b); *see also* Immigration Court Practice Manual at §1.5 (citing 8 C.F.R. §§ 1240.1(a); 1240.31; 1240.41). DHS argues that immigration judges lack the authority to terminate removal proceedings when necessary to protect a respondent’s right to a fair hearing, but the regulations clearly provide that the judge has discretion to “take any action” consistent with applicable law. 8 C.F.R. § 1240.1(a)(1)(iv) (emphasis added).

While the IJ may only terminate removal proceedings where there is a legal basis to do so, *see Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 45 (BIA 2012), immigration courts do have the authority, *and more importantly the duty*, to ensure that removal hearings comport with procedural due process. *See Matter of Beckford*, 22 I&N Dec. 1216, 1225 (BIA 2000) (“A removal hearing must be conducted in a manner that satisfies principles of fundamental fairness”). This Board has also established rules to protect procedural due process rights for respondents on numerous occasions. *See, e.g., Matter of Lozada*, 19 I&N Dec. 637, 638 (BIA 1988) (determining under what circumstances an attorney’s ineffectiveness violated a respondent’s procedural due process rights); *Matter of M-A-M-*, 25 I. & N. Dec. 474, 479 (BIA

2011) (describing procedural safeguards necessary before conducting a removal hearing of a mentally incompetent person). Where the IJ has determined that proceeding with the case will violate due process, and no other alternative is available, termination is an appropriate remedy to prevent a procedural due process violation.

Moreover, Immigration Judges are given wide latitude to conduct removal proceedings and manage their courtrooms and are empowered under the INA and regulations to terminate removal proceedings that cannot be made to comport with due process. *See* INA §§ 240(a); 8 C.F.R. §§ 1003.10(b), 1240.1(a)(1)(iv), 1240.1(c); *see also Guevara*, 20 I&N Dec. at 247 (emphasizing that the fair administration of the laws requires ensuring that “proceedings are fair [and] the legal rights of all parties are observed,” and finding that “[c]ertain deficiencies in this respect” led to the Board’s termination of proceedings). The regulations repeatedly give Immigration Judge’s broad, catch-all authority to take actions that are necessary or appropriate. *See* 8 C.F.R. § 1240.1(a)(1)(iv) (“the immigration judge shall have the authority to...take any other action consistent with applicable law and regulations as may be appropriate”); 8 C.F.R. § 1003.10(b) (“immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.”). The Due Process Clause of the United States Constitution is unquestionably “applicable law” in removal proceedings. Therefore, a finding that there are no safeguards that can ensure a fair hearing leads inexorably to the “appropriate and necessary” action of disposing of the case by dismissing it. This is made even clearer by 8 C.F.R. § 1240.12(c), stating that “[t]he order of the immigration judge shall direct the respondent’s removal from the United States, or the *termination of the proceedings*, or other such disposition of the case as may be appropriate.” (emphasis added). This regulation

places no explicit conditions on the Immigration Judge's use of termination except that it be "appropriate."

In *Matter of M-A-M-*, the Board considered a variety of procedural safeguards to avoid due process violations when the respondent is mentally incompetent. 25 I&N Dec. at 479-483. Similarly, the Board and the Immigration Court Practice Manual have identified various procedural safeguards to avoid the due process violation that could happen if respondents with joint claims for relief are forced to proceed separately. The Practice Manual provides that "when spouses or siblings have separate but overlapping circumstances or claims for relief," the IJ may grant consolidation. See Immigration Court Practice Manual at § 4.21; See also *In Re: Yancy Granados-Rodriguez Jossilin Funez-Granados*, 2015 WL 7074238 (BIA October 22, 2015) (nonprecedential).

An IJ also has discretion to change the venue of the case, if the judge determines that changing the venue will enable the respondent to more fully and fairly present his or her case. See *Matter of Rahman*, 20 I&N Dec. 480 (BIA 1992) (factors to be considered in change of venue motion include location of witnesses, and cost of transporting witnesses to a new location). As discussed, *supra*, failure to change venue can violate a respondent's due process rights. See *Rios-Berrios*, 776 F.2d at 862-63; *Baires*, 856 F.2d at 93. The IJ did attempt to change venue, and Respondent's case passed through multiple immigration courts before ultimately returning to the York court. As the IJ describes:

From the beginning, the effort to change venue was fraught with inherent logistical problems. Respondent's spouse and children are not detained. Transferring venue to Salt Lake City would not have altered the detained status of respondent. That court would have been confronted with the problem of trying to consolidate a detained case with a non-detained case.

IJ Decision at 1.

The inability to change venue was not mere logistics. When the York court did change venue to Utah, DHS did not even make Respondent available for a telephonic or video appearance, or, as it appears, make any effort to give Respondent notice of the Utah court hearing. *See* Tr. at 13 (“The respondent is not present for this morning’s detainee calendar”). Despite the Respondent’s inability to be present at the Utah court hearing, DHS moved to change venue back to York, without notifying Respondent or giving him an opportunity to respond. Tr. at 13 (DHS attorney: “It is the Government’s understanding that the detainee is actually still in York, Pennsylvania, and so we would ask the Court, due to the detention contract that is imminently ending in Salt Lake, COV or change the venue back to York so that respondent can choose to change venue to Vegas if he wishes or to stay in York or perhaps another Court that better suits his case and the location of his witnesses”). DHS asserts in its appeal brief that the IJ could have changed venue to Utah, *see* DHS Appeal Brief at 8, but ignores the fact that, when the case *was* transferred to Utah, DHS did not make the Respondent available for the hearing⁴ and, without giving Respondent an opportunity to respond, moved *ex parte* to change venue back to York.

The IJ also correctly noted that immigration court rules prevent it from consolidating detained cases with non-detained cases. *See* IJ Decision at 3, n.4. Similarly, consolidating the wife and children’s cases with Respondent’s case in the York detained court would present due process concerns for the Respondent’s family. The only friend and relative the family had to stay with lives in Utah and the family has no contacts or ties to York, Pennsylvania. *See* Tr. at 31-32. Thus, forcing the wife and children to travel to York for their hearings, especially when there is

⁴ This procedural unfairness and violation is reason enough for termination of proceedings, since the Respondent apparently was not even present for his own hearing through no fault of his own.

no indication they have the means to do so, would violate due process. *See Campos*, 43 F.3d at 1289 (requiring respondents to travel to Arizona for asylum hearings violated due process).

The procedural safeguards available to Respondent—a change of venue or consolidating his wife and children’s case with his—were not possible in this case, so the IJ could not continue to hear it. When such prejudice and unfairness is clear and obvious, IJs must be able to protect the respondent’s right to procedural due process and avoid conducting the proceeding in an unlawful manner. In this case, the IJ appropriately terminated proceedings so that DHS could ensure proper venue. *See I.J. Dec.* at 1-3.

C. As a practical matter, IJs must be able to terminate cases to promote judicial efficiency and conserve scarce court resources.

It is undeniable that ensuring a fair and efficient system for adjudicating immigration cases is in the best interest of both the government and those individuals within the system. Fairness and efficiency can only be achieved by a system that balances the interests and performs for all parties involved and it demands that the Board consider practical solutions. The inefficiencies present in many of the cases that come through Immigration Courts can be prevented and even cured if DHS cooperated with IJs who are attempting to move cases through their dockets. In the absence of cooperation from DHS with the Court’s attempts to consolidate cases of family members with overlapping claims, IJs must be able to exercise their discretionary powers to terminate removal proceedings. Without the power to terminate, DHS will have no incentive to cooperate and assist the courts in maximizing efficiency and reducing their backlog of cases.

Judicial economy and efficiency are of special importance to the administration of justice in the immigration context. Immigration court dockets have reached a record high, with a

backlog of more than half a million cases.⁵ Buckling under the extreme caseload, immigration courts are unable to deliver timely and fair decisions to respondents.⁶ *See also In Re: Ony Gallegos Villatoro* 2014 WL 3795479, at *1 (BIA June 10, 2014) (noting the “challenging caseloads and extended dockets facing Immigration Judges”). Without the ability to terminate in cases such as the Respondent’s, judges must hear these cases on a detained priority docket, even though the same claim, evidence, and witnesses will be presented before a different court, for the respondent’s family members. There is no logic to this practice; it only adds to the court backlogs and wastes scarce judicial resources. As one former IJ stated, the extensive immigration court delays “robs judges of their credibility” and “the court as a whole loses credibility.”⁷

Furthermore, it is important to note that immigration judges lack contempt powers against the government or other binding legal mechanisms by which to enforce judicial compliance with their orders. Despite legislation passed in 1996 authorizing civil contempt powers for Immigration Judges under 8 U.S.C. § 1229a(b)(1), immigration judges still lacked actual contempt authority because the Attorney General has failed, or refused, to develop the necessary implementing regulations. *See e.g.* American Bar Ass’n, Commission on Immigration,

⁵ *See* Exh. F, Transactional Records Access Clearinghouse, Immigration Court Backlog Tool, available at http://trac.syr.edu/phptools/immigration/court_backlog/ (data current as of February 2017).

⁶ *See* Exh. G, Human Rights First, Reducing the Immigration Court Backlog and Delays (July 2016), <https://www.humanrightsfirst.org/sites/default/files/HRF-Backgrounder-Immigration-Courts.pdf>.

⁷ *See* Exh. H, Julia Preston, Deluged Immigration Courts, Where Cases Stall For Years Begin To Buckle, THE NEW YORK TIMES (Dec. 1, 2016), available at <https://www.nytimes.com/2016/12/01/us/deluged-immigration-courts-where-cases-stall-for-years-begin-to-buckle.html>.

“*Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*,” at 5-16 (2010).⁸

II. IN THE ALTERNATIVE, THE BOARD SHOULD ORDER ADMINISTRATIVE CLOSURE PENDING THE OUTCOME OF RESPONDENT’S WIFE’S APPLICATION FOR ASYLUM BEFORE THE UTAH IMMIGRATION COURT.

In contrast to termination, where the IJ must have a legal basis to do so, IJs have broad discretion to administratively close proceedings:

No principle of administrative law is more firmly established than that of agency control over its own calendar ... Consolidation ... and similar questions are housekeeping details addressed to the discretion of the agency.

Matter of Taerghodsi, 16 I. & N. Dec. 260, 263 (BIA 1977) (quoting *Assoc. of Mass.*

Consumers, Inc. v. U.S. Securities and Exchange Comm’n, 516 F.2d 711, 714 (D.C.Cir. 1975)).

In *Matter of Avetisyan*, the Board provided a framework for the use of administrative closure as a docket management tool. 25 I&N Dec. 688 (BIA 2012). The IJ must consider six factors: (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the

⁸ This report is available at: http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf); see also, National Ass’n of Immigration Judges, “NAIJ Blueprint for Immigration Court Reform 2013” at 4 (April 13, 2013)(available at: <http://journalism.berkeley.edu/conf/2014/immigration/wp-content/uploads/2014/04/NAIJ-BLUEPRINT-Revised-4-13-13-.pdf>)(“Despite legislation passed over 15 years ago, Immigration Judges have no contempt authority because the DOJ lacks the political will to overrule the DHS’s objections.”); see also 8 U.S.C. §1229a(b)(1) (“The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.”)(emphasis added).

anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings when the case is recalendared before the Immigration Judge or the appeal is reinstated before the Board. *Id.* at 696. Additionally, the Board held, "...the Immigration Judges and the Board may, in the exercise of independent judgment and discretion, administratively close proceedings under the appropriate circumstances, even if a party opposes." *Id.*

In the event the Board rules that the IJ may not terminate a case to protect a Respondent's due process rights, the Board should order the proceedings administratively closed because the circumstances plainly meet the *Avetisyan* factors. Under factor one, administrative closure is necessary to avoid the procedural due process violation that would occur if Respondent must proceed separate from his wife and children. *See* I.J. Dec. 1-3. In addition, administrative closure is an effective docketing tool in this instance to prevent the gross misuse of judicial resources and risk of inconsistent decisions, were Respondent's family's claim presented two separate times, before two courts. The potential for inconsistent rulings could bring forth a slew of issues which would be avoided if administratively closed until the family could pursue asylum in the same forum. For example, if respondent's case were denied, but his wife's claim was granted, the respondent would likely appeal or move to reopen his case, based on the wife's grant of asylum on the same facts. In the alternative, his wife may file a Form I-730 petition for him as a derivative asylee and a waiver of his deportation order, which will need to be separately adjudicated by USCIS. In addition, as discussed below, deporting an asylum-seeker when his wife has a valid claim for protection would violate the U.S.'s obligations under international law.

The second factor, whether any party opposes administrative closure, is not applicable because DHS has not yet stated any opposition to administrative closure. *See generally,*

Transcript of Immigration Court proceedings, DHS Appeal Brief. Factor three concerns the likelihood of success on Respondent's asylum application. Respondent has filed an application for asylum and indicated he has evidence and testimony in support of his claim. The anticipated duration of closure under factor four would be entirely dependent on DHS. As soon as they provide a fair hearing for Respondent, by allowing him to proceed with his family, the case would be reopened and ready to adjudicate. Alternatively, if Respondent's wife is granted asylum and includes Respondent in her application, there will be no need for the court to adjudicate Respondent's asylum claim, maximizing the use of court resources. Factor five has crucial importance in this case. As is clear from the IJ decision and the above discussion, the sole responsibility for the delay falls on DHS. The IJ stated, "As the government refuses to assist this court in assuring that respondent receives a fundamentally fair hearing, this case will be terminated without prejudice to the government." I.J. Dec. at 3. Finally, the ultimate outcome will be an adjudication of the Respondent's asylum application once a full and fair hearing is ensured.

A remand for administrative closure would be in line with the judge's written decision and adequately protect Respondent. Indeed, this termination was meant to be temporary. Administrative closure is used to temporarily remove a case from an Immigration Judge's active calendar. *Matter of Avetisyan*, 25 I&N Dec. at 692. After a case has been administratively closed, DHS may move to recalendar it before the Immigration Judge. *Id.* at 695. Administrative closure would meet the Immigration Judge's responsibility to oversee a full and fair hearing by closing the case until DHS can ensure that a proper forum will be used and that Respondent will be proceeding forward in his asylum application with his family.

The recent decision from this Board in *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017) does not change this analysis. In that case, the Board held that the primary consideration for an Immigration Judge in evaluating whether to administratively close or recalendar proceedings is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits, clarifying *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012). In *W-Y-U-*, the respondent wanted his case to proceed. The IJ was found not to be able to review whether an alien falls within the enforcement priorities of DHS, which has exclusive jurisdiction over matters of prosecutorial discretion. Here, the due process violations which would be associated upon proceeding with Respondent's asylum case without his family members or witnesses are distinguishable from *W-Y-U-*. In fact, in the prior case there was no due process concern working against the respondent's interests involved with allowing the case to go forward in contrast to the serious issues presented in the instant case.

III. TERMINATION OR ADMINISTRATIVE CLOSURE IS ALSO NECESSARY TO COMPLY WITH THE U.S. OBLIGATIONS UNDER INTERNATIONAL LAW.

The United States is bound by two sources of international law: treaties to which the United States is a party, and norms and practices that are so widespread as to become customary international law. Restatement (Third) of the Foreign Relations Law of the United States § 102. Over the past several decades, the U.S. has become a party to multiple treaties and international instruments that outline the rights of asylum seekers and refugees and govern the United States' immigrant detention practices. Pursuant to these instruments, the U.S. is obligated to ensure that the rights, security, and welfare of all asylum seekers are safeguarded in accordance with international standards. Specifically, the U.S. must protect individuals' due process rights and

right to liberty. The U.S. may not detain an individual arbitrarily and without demonstrating that the particular individual's detention is reasonable and necessary in the circumstance of his case. The detention must also be subject to court review for its propriety. Failure to do so can lead to violation of well-established international standards pertaining to protection of asylum seekers.

When, as here, the Government places asylum seekers in prolonged detention⁹ without adequately demonstrating both the reasonableness and necessity of that detention, it has wrongfully denied those individuals the safeguards that the United States is obligated to observe pursuant to international law. Additionally, when the Government conducts itself in a manner such that it intentionally contradicts lawful court orders and deliberately refuses to release detainees seeking asylum who meet the criteria for bail or bond, the Government is doing more than preventing individuals from reuniting with their families-- the Government is impermissibly jeopardizing guaranteed due process rights under international law.

A. U.S. Treaty Obligations Call for Protection of Due Process Rights of Asylum Seekers

The U.S., by ratifying and becoming a party to several binding international treaties governing its immigration practices, has specifically guaranteed to protect, to the greatest extent possible, vulnerable groups of immigrants such as asylum seekers and refugees. Under such treaties, one of the Government's most important guarantees is that, at the very minimum, individuals seeking asylum in the United States enjoy the full range of established due process rights.

A few of the main sources of international law that govern U.S immigration detention practices include the 1951 United Nations Convention relating to the Status of Refugees

⁹ Upon information and belief, Respondent is still detained even after the IJ's termination order and pending this appeal by DHS.

(“Refugee Convention”), the 1967 United Nations Protocol relating to the Status of Refugees (“Refugee Protocol”), and the American Declaration on the Rights of Man (“American Declaration”).

Because of the U.S. accession to the Refugee Protocol—which the U.S. is a party to—Articles 2 through 34 of the Refugee Convention became binding on the US. *See* United Nations Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 606 U.N.T.S. 267. Under both instruments, the U.S. has agreed to uphold international refugee protections standards and to cooperate with the Office of the United Nations High Commissioner for Refugees (“UNHCR”). *Id.*

Similar to the Refugee Convention and Protocol, the American Declaration of the Rights and Duties of Man (“American Declaration”) also provides that non citizens’ must be guaranteed basic fundamental rights and protections. Although the American Declaration is not a binding treaty, it is a source of legal obligation for every member of the Organization of American States (“OAS”), including the United States. *See* Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 *Fordham Int’l L.J.* 243, 282 (2013). Article XXVI of the American Declaration provides for the OAS member states’ particular obligation to safeguard the right to due process. American Declaration of Human Rights and Duties of Man, Art. XXVI, May 2, 1948, available at: <http://www.oas.org/en/iachr/mandate/Basics/declaration.asp>. The Inter-American Commission on Human Rights (“IACHR”), created by the OAS Charter to promote the defense of human rights and to serve as the Charter’s primary human rights monitoring board, has affirmed that Article XXVI applies to immigration proceedings. The IACHR maintained that denying an alleged victim the protections afforded by Article XXVI due to the nature of the immigration

proceedings “contradicts the very object of this provision and its purpose to scrutinize the proceedings under which the rights, freedoms and well-being of the persons under the State’s jurisdiction are established.” *Mortlock v. United States*, Case 12.534, Inter-Am. Comm’n H.R., Report No. 63/98, ¶ 83 (1997), available at:

<http://www.cidh.oas.org/annualrep/2008eng/USA12534eng.htm>.

Additionally, Article 8 of the American Convention on Human Rights (“American Convention”) also recognizes that every person must have the right to a hearing, with due guarantees and within a reasonable time. American Convention on Human rights, Art. 8, (Nov. 22, 1969).¹⁰ Although the Convention does not specifically state that the due process rights recognized in Article 8 are applicable to immigration proceedings, the IACHR has observed that the due process rights set forth in Article 8 of the American Convention “establish a baseline of due process to which all immigrants, whatever their situation, have a right.” IACHR, *Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, Annual Report 2000*, para. 90 (April 16, 2001);¹¹ see also, *Wayne Smith v. United States*, Case No. 12.562, Inter-Am. Comm’n H.R., Report No. 56/06, ¶ 51 (Jul. 20, 2006), available at: <http://www.cidh.oas.org/annualrep/2006eng/USA8.03eng.htm>; *Loren Laroye Riebe Star, Jorge Alberto Barón Guttlein and Randolpho Izal Elorz v. Mexico*, Case No. 11.610, Inter-Am. Comm’n H.R., Report No. 49/99, ¶ 46 (April 13, 1999), available at: <http://www.cidh.oas.org/annualrep/98eng/Merits/Mexico%2011610.htm>.

¹⁰ See report available at: <http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>.

¹¹ See report available at: <http://www.cidh.oas.org/annualrep/2000eng/chap.6.htm>.

Moreover, in its advisory opinion on the Juridical Condition and Rights of the Undocumented Migrants, the IACHR declared that States must recognize the right to due process, as one of the minimum guarantees that should be offered to any migrant, irrespective of his migratory status. Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R., (ser. A), (Sept. 17, 2003), *available at*: http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf.

Where a Government's actions prevent an asylum seeker from consolidating his asylum case with that of his family, the asylum seeker's due process rights are jeopardized. This is especially the case when, as in the present one, the Government provides no reasonable justification for refusing to cooperate with an Immigration Judge's transfer of venue order in order to facilitate consolidation a detainee's asylum cases with that of his family members. In such cases, an asylum seeker is left with no other choice but to apply for asylum separate from his family, which may lead to unnecessary doubling of his legal costs and potential inconsistencies in the outcomes of each family member's case. Because of this, an asylum seeker is prejudiced as his family unity is compromised. As such, there is no question that such Government practices violate asylum seekers' duly guaranteed due process rights under international law.

B. The Government Must Resort to Detention Only When Necessary, Reasonable, and Proportionate.

The United States' obligations under international law prohibit it from subjecting any person to arbitrary detention. International human rights law and standards make clear that immigration detention should be used only as a last resort in exceptional cases and after all other options have been exhausted in the individual case. Specifically, a State should only detain a person if it can establish that detention is necessary, reasonable and proportionate under the

person's circumstances. The Government's failure to establish the necessity, reasonableness, and proportionality of its constant detentions of asylum seekers constitutes arbitrary detention and runs contrary to the U.S. commitments under international human rights law as outlined in various international conventions, instruments, and guidelines.

Perhaps the most notable instrument concerning the requirements for detention is the UNHCR Detention Guidelines ("Detention Guidelines"). The United Nations High Commissioner ("UNHCR") adopted the Detention Guidelines in order to provide guidance regarding the permissible scope of measures that restrict the liberty of asylum seekers. Although the Detention Guidelines are not binding, they are considered authoritative on issues regarding the detention of asylum seekers. The UNHCR Guidelines emphasize that states may resort to detention only "when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose." (*Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, UNHCR, at Guideline 4.2 (2012), <http://www.unhcr.org/505b10ee9.html>). The Detention Guidelines particularly provide that detention of asylum seekers may exceptionally be resorted to for a legitimate purpose, and only in cases involving threats to national security, public health, or public order. *Id.* at Guideline 4.1. Accordingly, states must treat noncitizens with a presumption of liberty, and must justify the restriction of liberty as necessary means. Furthermore, the Guidelines stipulate that the "detention of asylum-seekers should normally be avoided and be a measure of last resort." UNHCR Detention Guidelines, at Guideline 2. Additionally, the Refugee Convention also prohibits the use of detention as a penalty or sanction for illegal entry or presence in a country. *See* UNHCR Detention Guidelines, 11, 32.

A policy of mandatory administrative detention, which entails placing asylum seekers in detention without meaningful individualized determinations of the necessity of detention, also violates Article 31 of the Refugee Convention. The Inter-American Commission has maintained that, based on the presumption of liberty, “[m]easures aimed at the automatic detention of asylum seekers are therefore impermissible under international refugee protections. They may also be considered arbitrary and, depending upon the characteristics of persons affected by any such restriction, potentially discriminatory under international human rights law.” Inter-Am. Comm’n H.R., *Report on Terrorism and Human Rights*, Org. Am. States ¶ 380 (Oct. 22, 2012), OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., <http://www.cidh.org/terrorism/eng/toc.htm>.

The Human Rights Committee has specified that “[a]sylum seekers who unlawfully enter a State party’s territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt.” UN Human Rights Committee (HRC), *General comment no. 35, Article 9 (Liberty and security of person)*, ¶ 18, 16 December 2014, CCPR/C/GC/35, (citing Human Rights Comm., *A. v. Australia*, Communication No. 560/1993, at ¶¶ 9.3-9.4, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997), available at: <http://www.refworld.org/docid/553e0f984.html>.

Importantly, the proportionality principle requires states to balance the potential need for detention against the effect that detention will have on each particular detainee. UNHCR Detention Guidelines, at 34; *See also* HRC General Comment No. 35, at 18.

The Government cannot be permitted to continually detain individuals without assessing the reasonableness, necessity, and proportionality of that detention. That is not to say that the Government cannot briefly detain asylum seekers who unlawfully enter the country in order to document their entry, their claims, and their identity, But the detention must be just that—brief.

If the Government can easily ascertain a detainee's identity and it raises no concern, then there is one less basis, to detain that individual. Additionally, where an asylum seeker neither poses a threat to public safety nor national security, the Government's basis for detention appears more and more arbitrary.

If the Government continues to automatically detain asylum seekers at the border and separate them from their families, it would have a measurably disproportionate effect on the asylum seeker in comparison to the Government's potential need for detention. Allowing the Government to continue its arbitrary detention practices unfettered would be an affront to nearly all international laws and treaties on this matter.

C. States Must Use Alternatives to Detention, Where Possible.

When the Government refuses to release a detainee on bail or bond when that option is available to it, it acts in direct contravention to U.S. obligations under international law to implement less invasive alternatives to detention whenever possible.

The Special Rapporteur on the Human Rights of Migrants has emphasized that States should "generally permit detention only as a last resort" and should implement alternatives to detention. U.N. Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants*, ¶ 50, 65, U.N. Doc. A/HRC/7/12 (Feb. 25, 2008). To justify a decision to detain, states are required to demonstrate that "there were less invasive means of achieving the same ends." Human Rights Comm., *C. v. Australia*, Communication No. 900/1999, at ¶8.3, U.N. Doc. CCPR/C/76/D/900/1999 (Nov. 13, 2000). Alternatives to detention are not permitted to become "alternative forms of detention." UNHCR Detention Guidelines, at Guideline 4.3. The UNHCR Detention Guidelines provide a range of alternatives to detention, including release on bail/bond. UNHCR Detention Guidelines, at Annex A. Furthermore, a determination that detention is

necessary to protect the public or prevent flight requires “case by case” consideration of “less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions.” HRC General Comment No. 35, 18.

It is, by far, less invasive to release a detainee that meets the criteria for parole or bail rather than keeping him detained absent required necessity. And where a less invasive option exists, *that* is the option that the Government must choose. Any other course of action by the Government runs contrary to established international law. The only purpose detention would serve in scenarios similar to this, would be to separate families and create unnecessary barriers to asylum when detention serves no imperative interest to the Government.

D. Prompt and Independent Court Review is Necessary to Prevent Arbitrary Detention.

The Government’s failure to provide a detainee with court review of the propriety of his detention violates the U.S. obligations under international law. The fundamental right to court review of a decision to detain is well-established in human rights law. (American Convention on Human Rights, art. 7(6), Nov. 22, 1969, 1144 U.N.T.S. 123). This important guarantee applies to all persons deprived of liberty, including those in immigration detention. HRC General Comment No. 35, at 4, 40. The right of detainees to court review of their detention is binding on the United States through the International Covenant of Civil and Political Rights and also under recognized norms of customary international law. *See* U.N. Working Grp. On Arbitrary Det., Rep. of the Working Group on Arbitrary Detention, U.N. Doc. WGAD/CRP.1/2015, at 19 (May 4, 2015).

The Human Rights Committee and the UNHCR confirm that under the Refugee Convention, states must promptly bring immigrants and asylum seekers who are in custody before a judicial or other independent review authority for a determination on whether continued

detention is necessary in that individual's circumstances. The UNHCR Detention Guidelines provide, "This review should ideally be automatic, and take place in the first instance within 24-48 hours of the initial decision to hold the asylum-seeker." UNHCR Detention Guidelines, at Guideline 7. Immigration detention is considered arbitrary when the government fails to conduct "periodic re-evaluation of the justification for continuing the detention." UN HRC, *General comment no. 35, Article 9 (Liberty and security of person, ¶ 12*, 126 December 2014, CCPR/C/GC/35. Under Article XXV of the American Declaration, "every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court." American Declaration art. XXV.

When the Government detains an asylum seeker for a prolonged period of time without providing the opportunity for review of the propriety of that detention by the Immigration Court, the Government is again at odds with the requirements outlined by the Detention Guidelines and the Refugee Convention. When a detainee is made to languish in detention although meeting the criteria for parole and release, the arbitrary nature of the arrest and confinement deprives one of the due process rights that the U.S. has committed to safeguard.

CONCLUSION

Where a respondent is detained, *pro se*, and separated from immediate family members with whom he intends to pursue a joint application for relief, Due Process requires that the respondent's case be consolidated (and, if necessary, venue changed) with his immediate family members' cases. Where a change of venue and consolidation is not possible or frustrated due to no fault of his own, as in Respondent's case, termination is the appropriate remedy to avoid violating Due Process. The Board should therefore dismiss DHS's appeal and affirm the IJ's decision below.

WHEREFORE, for all the reasons stated in this *Amicus Curiae* brief, the undersigned law professors and organizations hereby respectfully request that the appeal by DHS be DISMISSED.

Respectfully submitted, this 26th day of APRIL, 2017.

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CERTIFICATE OF SERVICE

I, Geoffrey A. Hoffman, hereby certify that I have sent a true and correct copy of the foregoing REQUEST TO APPEAR AS *AMICUS CURIAE* AND LAW PROFESSORS' AND NONPROFIT ORGANIZATION'S *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT with attached exhibits via first-class U. S. mail, postage-prepaid to:

Kent J. Frederick,
Chief Counsel
Mary Ellen Withrow,
Assistant Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
3400 Concord Road
York, PA 17402

on this 26th day of APRIL, 2017.

Geoffrey A. Hoffman
Counsel for *Amici Curiae*
UHLC Immigration Clinic-Director

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