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

REQUEST TO APPEAR AS AMICUS CURIAE AND AMICUS CURIAE BRIEF OF ACACIA CENTER FOR JUSTICE

AMICUS INVITATION No. 24-28-06

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I. REQUEST TO APPEAR AS AMICUS CURIAE

On June 28, 2024, the BIA welcomed interested members of the public to file amicus curiae briefs discussing the scope of the Immigration Judge's (IJ) duty to develop the record for pro se respondents and whether this duty is affected by the individual characteristics of the respondent, such as education or language ability. *See* Amicus Invitation No. 24-28-06. The Acacia Center for Justice (Acacia) submits this brief in response.

II. INTERESTS OF AMICUS CURIAE

Acacia is a nonprofit, non-governmental organization that supports and partners with a national network of legal services organizations that provide legal representation and legal orientation services to immigrants facing deportation. We currently operate eight federally funded programs, including the Legal Orientation Program for Detained Adults (LOP), the Immigration Court Helpdesk (ICH), the Family Group Legal Orientation Program (FGLOP), the National Qualified Representative Program (NQRP), and the Unaccompanied Children's Program (UCP). Acacia has managed these programs since September 2022, working closely with the Vera Institute of Justice ("Vera") to take over management of the work that Vera had managed since 2005.

The orientation programs provide basic information to pro se respondents about their rights through legal orientations and workshops. While the orientation programs ensure that some people facing deportation have access to rudimentary information about immigration proceedings, they are not a substitute for legal representation. The LOP educates people in ICE detention on their rights, including how to request release from custody and advocate for themselves in court. The program provides a basic orientation to immigration proceedings and forms of immigration relief but does not have the capacity to fully advise and assist a respondent in pursuing relief as an attorney would. In 2023, LOP provided orientation services to people in 70 detention facilities. ICH is a court-based legal education program for individuals in

immigration proceedings who are not in detention. ICH provides LOP services to adults, children, and families who are in removal proceedings in immigration court, or in certain U.S. Citizenship and Immigration Services (USCIS) administrative proceedings. The FGLOP provides LOP services to families on expedited dockets before the immigration court.

The NQRP began based on a 2013 settlement following the class action lawsuit *Franco-Gonzalez v. Holder* No. CV 10–02211, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013). In *Franco*, the district court held that the 1973 Rehabilitation Act requires appointment of counsel for individuals who are detained, unrepresented, and incompetent to represent themselves. Since 2013, the NQRP has grown into a nationwide appointed counsel program, providing zealous representation to an especially vulnerable population through a network of over 40 legal service providers.

Acacia manages three programs specifically focused on providing legal services to children, including UCP. UCP provides know your rights presentations, legal screenings, court preparation, and representation to unaccompanied children who are in or have been in Office of Refugee Resettlement (ORR) custody through a network of more than 78 legal service providers across the U.S.

Given our extensive experience managing these orientation and representation programs, Acacia has a unique ability to observe the impacts of policies that affect pro se individuals appearing before the immigration court. Moreover, many of the staff at Acacia have worked for legal services organizations where they worked on and/or managed programs such as LOP, UCP, and NQRP and therefore have firsthand knowledge of the challenges pro se individuals face when appearing in immigration court.

III. ISSUES PRESENTED

a. What is the scope of the Immigration Judge's duty to develop the record for a pro se respondent?
b. Is this duty affected by individual characteristics of the respondent, such as education level or language ability?

IV. INTRODUCTION

The IJ has a duty to develop the record for all respondents, but this duty is especially heightened when the respondent is pro se. Given the sheer difficulty of "navigating an unfamiliar legal system [without counsel] while facing the daunting prospect of deportation," pro se individuals are deprived of adequate hearings when they are thrown into removal proceedings and left to sink or swim without adequate assistance from the IJ. *Quintero v. Garland,* 998 F.3d 612, 628 (4th Cir. 2021) (quoting *Diop v. Lynch,* 807 F.3d 70, 76 (4th Cir. 2015)). Given the complexities and constantly changing nature of immigration law, the BIA should determine that the IJ's duty to develop the record be interpreted broadly to ensure that due process protections are afforded to everyone who appears before the immigration court, including individuals who lack the financial resources to retain counsel. "[I]n light of the significant challenges *pro se* individuals in removal proceedings face, such individuals have a particularly strong need for procedural protections, without which they would not be able to "receive[ ] a meaningful hearing." *Quintero* 998 F.3d at 627 (quoting *Ruso v I.N.S.,* 296 F.3d 316, 321 n. 7 (4th Cir. 2002)). Thus, the IJ's duty to fully develop the record "becomes especially crucial in cases involving unrepresented noncitizens." *Quintero,* 998 F.3d at 627.

Moreover, the duty to develop the record is heightened when a pro se respondent possesses individual characteristics that make it even more difficult to understand the proceedings, identify forms of relief for which they are eligible, and present evidence in support of their claim. Given the "labyrinthine character of modern immigration law," *Drax v. Reno,* 338 F.3d 98, 99 (2d. Cir. 2002), the BIA should establish a rule that requires the IJ to consider whether individual characteristics prevent a pro se respondent from having a full and fair

hearing. If a respondent possesses such a characteristic, the IJ must take steps to provide appropriate advisals, ask pertinent questions, and explore all relevant facts. *See Castro-O'Ryan v. I.N.S.,* 847 F.2d 1307, 1312 (9th Cir. 1988) (observing that, "[w]ith only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity'"). "[I]t is critical that the [immigration judge] 'scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.'" *Agyeman v. I.N.S.,* 296 F.3d 871, 877 (9th Cir. 2002) (quoting *Jacinto v. I.N.S.,* 208 F.3d 725, 733 (9th Cir. 2001)). "Otherwise, such [noncitizens] would have no way of knowing what information was relevant to their cases and would be practically foreclosed from making a case against removal." *United States v. Copeland,* 376 F.3d 61, 71 (2d Cir. 2004).

In this brief we argue that (1) the IJ should thoroughly develop the record in all cases involving pro se respondents; (2) the IJ's duty is especially heightened in cases involving individuals detained by ICE; (3) the IJ has special duties under the NQRP; (4) the IJ has a heightened duty to develop the record for individuals with physical, neurological, developmental, and cognitive disabilities, as well as chronic illness; (5) the IJ owes a particular duty to pro se children.

V. DISCUSSION

a. The IJ must thoroughly develop the record in all cases involving pro se respondents

The integrity of our immigration system requires IJs to thoroughly develop the record in all cases involving pro se respondents. IJs must ensure a full and fair hearing by providing appropriate direction so that the respondent may meaningfully present their claim for relief. *Okpala v. Whitaker,* 908 F.3d 965, 971 (5th Cir. 2018) (Generally, due process requires that [a noncitizen] be provided notice of the charges against [them], a hearing before the executive or administrative tribunal, and a fair opportunity to be heard). IJs are authorized to

"take any action consistent with their authorities under the Act and regulations that is necessary for the appropriate disposition or alternate resolution" of the case before them. 8 CFR §1003.10(b) (2024). Furthermore, the IJ "shall administer oaths, receive evidence, and interrogate, examine, and cross-examine noncitizens and any witnesses." *Id.* Thus, "the statute specifically recognizes that the presentation of evidence is a proper function of an Immigration Judge." *Matter of S-M-J-*, 21 I&N Dec. 722, 727-29 (BIA 1997), *disapproved of on other grounds by Ladha v. I.N.S.,* 215 F.3d 889 (9th Cir. 2000).

There is no right to appointed counsel or a federal public defender system in immigration court. For the second quarter of 2024, only 36 percent of respondents in removal proceedings had counsel.[1] That is because most respondents in removal proceedings cannot afford to retain counsel and are unable to obtain the services of the limited number of pro bono attorneys available to handle removal cases. While some courts entertain the legal fiction that there are respondents who choose "to receive LOP assistance" rather than retaining counsel, this view is disingenuous and disassociated from reality. *Hussain v. Rosen*, 985 F.3d 634, 643 (9th Cir. 2021). Representation matters. Studies show that immigrants who are represented by attorneys are up to 10 times more likely to win their cases.[2] Pro se individuals who appear before the immigration court do so because they have no other option, not because it is their choice.

Given that there is no federal public defender system in immigration court and recognizing the complicated nature of immigration law, in cases involving pro se respondents, the BIA should interpret the duty to provide a full and fair hearing broadly. The BIA's goal should be to ensure fairness and due process, and guarantee that pro se respondents have a

[1] Executive Office for Immigration Review Adjudication Statistics, Current Representation Rates, available at: https://www.justice.gov/eoir/media/1344931/dl?inline (last visited August 13, 2024).
[2] Vera Institute of Justice Policy Brief, *A Federal Defender Service for Immigrants: Why we Need a Universal, Zealous, and Person-Centered Model,* (February 2021), available at: https://www.vera.org/downloads/publications/a-federal-defender-service-for-immigrants.pdf (last visited August 15, 2024).

meaningful opportunity to present their case against deportation. Courts have suggested that it is enough for the IJ to meet their duty to develop the record by explaining "statutory rights, detail[ing] the court procedures, and ensur[ing] [respondents] ha[ve] the opportunity to procure a lawyer if they want one. *Hussain,* 985 F.3d at 642. However, the IJ must do more than inform pro se respondents of their statutory rights, court procedures, and right to retain an attorney when the respondent indicates that they "lack the funds for an attorney" and are "relying on the judge to answer [their] legal questions (without misleading [them])." *United States v. Ordonez*, 328 F. Supp. 3d 479, 503 (D. Md. 2018).

There are several basic steps the IJ should be required to take to develop the record for pro se respondents. As a preliminary matter, using plain language rather than legal jargon, the IJ should simply and clearly explain legal terms and procedures, and ensure that the respondent fully understands the process, the implications of their case, and the steps they must take to apply for relief. The IJ should provide examples as to what types of evidence the respondent can submit, including evidence in the form of their own testimony. *Ordonez,* 328 F. Supp. 3d at 503 "Our removal system relies on IJs to explain the law *accurately* to *pro se* [noncitizen]s". *Id.* (emphasis in original).

The IJ should also clearly advise pro se respondents as to the forms of relief available. "One of the components of a full and fair hearing is that the IJ must adequately explain the hearing procedures to the [noncitizen], including what he must prove to establish his basis for relief." *Agyeman*, 296 F.3d at 877 (quoting *Jacinto*, 208 F.3d at 733). This includes relief both before the Immigration Court and collateral relief only available at USCIS, such as a U Visa or Special Immigrant Juvenile Status (SIJS). As part of this duty, the IJ should offer detailed guidance on how to complete and file the necessary applications with both EOIR and USCIS. The IJ has a duty to indicate which forms are required, how to obtain the forms, and what the full

process looks like (e.g., file at the court window or mail the application with the fee to this address on the form), as well as the method for requesting a fee waiver.

In addition, the IJ should affirmatively ask probing and clarifying questions about the applications for relief. *Quintero,* 998 F.3d at 629; *see also Mendoza-Garcia v. Barr*, 918 F.3d 498, 504–05, 507 (6th Cir. 2019). The IJ should also review the evidence submitted and provide feedback on any deficiencies or additional information needed and give the respondent more time to provide supplemental evidence. This does not mean that IJs should instruct pro se respondents on how to answer the questions, but rather that they have a duty to sufficiently inquire and ask follow-up questions to determine the full answer to the questions posed.

Although orientation services are not available in every jurisdiction, IJs should also collaborate with the legal service providers that provide orientation services, where available, to screen for potential forms of relief. Orientation service providers can access or gather evidence on behalf of pro se respondents for submission to the court. Orientation providers may also appear as a "friend of the court" ("FOTC") to help pro se respondents submit filings or make requests in court. When IJs and orientation providers work together, a fuller picture of a respondent's case will emerge.

Another important aspect of developing the record is for the IJ to identify the elements of the law and the evidence required to establish a particular element. For example, in an application for cancellation of removal for non-permanent residents, the IJ should emphasize the importance of the ten years of continuous physical presence requirement and what evidence should be submitted to support this element. When certain conduct or the respondent's criminal record are at issue, the IJ should define legal terms such as "habitual drunkard," "crime involving moral turpitude," or "aggravated felony."

The IJ should also explain the evidentiary burdens on the parties, and the legal analysis regarding inadmissibility and deportability, including the immigration consequences of criminal

convictions. Moreover, given that the burden of proof is on the Department of Homeland Security (DHS) to prove deportability as part of the duty to develop the record, the IJ should explain the burden shifting framework to the pro se respondent and hold the government to its burden of proof by requiring the government to establish the facts alleged in the Notice to Appear (NTA) through clear, unequivocal, and convincing evidence. *Matter of Guevara* 20 I&N Dec. 238, 242 (BIA 1991) ("the burden of proof in deportation proceedings is upon the Service to establish the [non-citizenship] of the respondent, and ultimately his deportability, by evidence that is clear, unequivocal, and convincing." citing *Woodby v. INS*, 385 U.S. 276 (1966); 8 C.F.R. § 242.14(a) (1990)).

Immigration law is complicated, complex, and convoluted. *Quintero,* 998 F.3d at 628. "It is a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike." *Drax,* 338 F.3d at 99. Without assistance from the IJ, pro se respondents are simply unable to identify forms of relief for which they are eligible, much less apply for and be granted relief. Ironically, the consequences of deportation may be more severe than the consequences of criminal proceedings in which defendants have robust due process and constitutional rights, including the right to counsel. *See Gideon v. Wainwright*, 372 U.S. 335 (1963). Deportation results in permanent exile from a country in which the respondent may have grown up or considered home for years, if not decades. It often results in permanent separation from family, friends, and loved ones and even return to conditions of persecution, violence, torture, or death in a person's country of origin. Deportation impacts not just the respondent but their broader community, including spouses, children, parents, siblings, neighbors, co-workers, and employers.

Acacia has received many examples from our network of legal services providers of situations in which the IJ failed to screen for and identify forms of relief that should have been obvious from review of the NTA or Form I-213. In these examples, the IJ failed to ask clarifying

and probing questions. For example, one provider identified a detained participant who was eligible for INA § 212(c) relief, which was obvious based on the allegations in the NTA. However, after a short hearing with no questions regarding potential 212(c) relief, the IJ ordered the participant deported based on a decades-old prior conviction.

Unfortunate outcomes like this could be avoided if EOIR created a checklist of questions that the IJ should ask to screen for most forms of relief. This checklist could be a tool for IJs to use while reviewing the NTA and taking pleadings. Use of a checklist would assist IJs to manage their dockets better and reduce the number of erroneous deportation orders and subsequent appeals that consume resources for the immigration and circuit courts.

Because immigration law does not guarantee counsel to noncitizens facing deportation, respondents are left to learn to swim on their own in the cold ocean without a life vest unless they are able to retain an attorney or have the good fortune of encountering a pro bono attorney willing to represent them. The BIA should thus find that the IJ has a robust duty to develop the record for pro se respondents, which includes a duty to take affirmative steps to identify forms of relief, explain such relief to the respondent, and provide the respondent with a meaningful opportunity to apply for relief by asking probing and clarifying questions and ensuring that all relevant evidence is presented to the court.

b. The IJ's duty is especially heightened when the pro se respondent is detained

The IJ's duty to develop the record is particularly heightened in cases involving individuals detained by ICE because, in addition to "inflicting grievous harm" on a person's mental health and wellbeing, detention "decreases the likelihood that a detained person will be able to secure critical evidence, witnesses, and information needed to mount a meaningful

defense against removal."[3] Detained pro se respondents must rely on family, friends, or benevolent members of the community to assist with the onerous task of obtaining the necessary documents, including birth, marriage and death certificates; school records; police reports; local news articles; medical records; and other evidence in support of their claim. *Id* at n.2. "Without internet access and with telephone access that is both expensive and highly restricted, it can be challenging—often impossible—for detained immigrants to obtain documents from other countries." *Id.* If a detained respondent does not speak English, they will need assistance translating any English documents into their native language. While these tasks are difficult for a non-detained individual who is unfamiliar with the legal system, they become next to impossible for a detained individual to accomplish without an attorney. *Id.*

IJs must ensure that detained pro se respondents can communicate with potential witnesses. Unfortunately, ICE recently announced that the agency will end the 520 minutes of free phone call access for people in immigration detention.[4] This means respondents will now be left without a means to contact potential witnesses and prepare declarations supporting their claims unless they have the money to pay for calls. The IJ should liberally grant continuances to allow detained individuals sufficient time to gather the necessary evidence and documentation for their case. The IJ should also be mindful as to whether the conditions of detention unduly hinder the detained pro se respondent's ability to prepare their case. This includes ensuring that the respondent has access to legal materials and online resources such as Westlaw or LexisNexis as well as resources such as the Center for Gender and Refugee Studies Technical Assistance Library.[5]

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[3] Amelia Wilson, *Franco I Loved: Reconciling the Two Halves of the Nation's Only Government-Funded Public Defender Program for Immigrants*, 97 WASH. L. REV. ONLINE 21, 22 (2022), available at: https://digitalcommons.law.uw.edu/wlro/vol97/iss1/2.

[4] *See* U.S. Immigration and Customs Enforcement, *Statement of Free Cell Phone Minutes Provided During the COVID-19 public health emergency,* (Aug. 6, 2024), https://www.ice.gov/news/releases/statement-free-cell-phone-minutes-provided-during-covid-19-public-health-emergency (last visited August 15, 2024).

[5] *See* Access the TAL Center for Gender and Refugee Studies (uclawsf.edu), available at: https://cgrs.uclawsf.edu/access-tal (last visited August 15, 2024).

c. *The IJ has special duties under the NQRP Program*

i. The IJ has a particular duty to develop the record when considering whether appointment of a Qualified Representative (QR) is appropriate under *Franco*

The NQRP provides government-paid counsel to noncitizens in immigration court who are: (i) detained by DHS; (ii) unrepresented by counsel; and (iii) have been found by an immigration judge or the Board of Immigration Appeals to be incompetent to represent themselves.

The NQRP appoints counsel to eligible immigrants pursuant to the 2013 federal district court order in *Franco-Gonzalez v. Holder*, which applies to immigrants who are initially detained in California, Arizona, or Washington. 10-CV-02211 DMG (DTBx) (C. D. Cal. 2013). After the court order in *Franco,* EOIR agreed to provide counsel to mentally incompetent respondents in states outside of the *Franco* jurisdiction through its Nationwide Policy NQRP program.[6] However, EOIR terminates funding for Nationwide Policy respondents 90 days after their release from custody unless the QR makes a motion to withdraw due to lack of funding and the IJ denies that motion. [7] If the IJ grants the motion, the Respondent will no longer be provided counsel under the program and must proceed pro se unless, in the highly unlikely event, they are financially able to retain counsel or are able to retain pro bono counsel.

EOIR announced its Nationwide Policy to provide enhanced procedural protections to unrepresented, detained respondents on April 22, 2013.[8] According to EOIR, "Immigration

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[6] *See* EOIR, "Department Of Justice And The Department Of Homeland Security Announce Safeguards For Unrepresented Immigration [Detained Person]s With Serious Mental Disorders Or Conditions," available at https://www.justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-unrepresented (last visited August 15, 2024).

[7]Amelia Wilson, *Franco I Loved: Reconciling the Two Halves of the Nation's Only Government-Funded Public Defender Program for Immigrants*, 97 WASH. L. REV. ONLINE 21, 34 (2022), available at https://digitalcommons.law.uw.edu/wlro/vol97/iss1/2.

[8] EOIR, *Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders*, April 22, 2013, available at https://immigrationreports.wordpress.com/wp-content/uploads/2014/01/eoir-phase-i-guidance.pdf (last visited August 15, 2024). *See also* EOIR, *Department Of Justice And The Department Of Homeland Security Announce Safeguards For Unrepresented Immigration*

Judges must be vigilant at all times for indicia of a mental disorder that significantly impairs the respondent's ability to perform the functions listed in the definition of competence." *Id.* at 3. Indicia of incompetency may come from any reliable source including family members, friends, legal service providers, health care providers, social service providers, caseworkers, clergy, detention personnel, or third parties knowledgeable about the respondent. *Id.* In addition, "the Immigration Judge or the parties may observe certain behaviors by the respondent, such as the inability to understand and respond to questions, the inability to stay on topic, or a high level of distraction." *Matter of M-A-M,* 25 I.&N. Dec 474, 479 (BIA 2011). DHS must provide the court with relevant materials in its possession regarding the respondent's mental competency. 8 C.F.R. § 1240.2(a) (2022).

Where the evidence results in a "bona fide doubt" about the respondent's competency to represent him or herself, the IJ should conduct a judicial inquiry to make an informed decision regarding whether to appoint a QR.[9] The IJ must explain to the respondent the reason for the judicial inquiry and the steps the judge will take to conduct the judicial inquiry. *Id.* at 6, 18. As part of such an inquiry, the judge must ask questions that will clarify the respondent's cognitive, emotional, and behavioral functioning and their ability to represent themself. *Id.* at 6. If the IJ is unable to make a finding as to competency, the judge must refer the respondent for a mental health evaluation with a professional trained in psychiatry, clinical psychology, or counseling psychology. *Id.* at 8. When the IJ finds that the respondent is incompetent, the judge must prescribe appropriate safeguards, including the appointment of a QR. *Id.* at 6, 15.

ii. The IJ has a heightened duty to develop the record when considering whether to appoint a QR

Detainees With Serious Mental Disorders Or Conditions, April 22, 2013, available at https://www.justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-unrepresented

[9] EOIR Phase I Guidance at 3.

Because a mentally incompetent respondent who eventually receives counsel through the NQRP will be unrepresented while the IJ determines whether appointment of a QR is appropriate, the BIA should require that the IJ robustly develop the record in those proceedings. The EOIR has created a non-exhaustive list of questions designed to shed light on the respondent's: 1) cognitive, emotional, and behavioral functioning; and 2) ability to represent themself. The judge may ask other questions relevant to the respondent's ability to communicate, subjective reality, and memory. *Id.* At 18-20. Moreover, it is important for a judge to observe a respondent's non-verbal and verbal responses to questions posed.

The IJ must take special care to consider all relevant information before deciding whether the appointment of a QR is an appropriate safeguard. This includes reviewing relevant medical records, school records, and criminal records. The IJ should engage with the respondent's family members and support networks, medical providers, and former attorneys if the respondent has had contact with the criminal legal system. The IJ should take testimony or consider declarations from family members, friends, or other individuals familiar with the respondent's mental health history. After consideration of all relevant evidence, if the IJ makes a finding that the respondent is competent to proceed without the appointment of a QR, the judge must "articulate that determination and his or her reasoning." *Matter of M-A-M,* 25 I.&N. Dec 474, 481.

Acacia has received concerning reports from our network regarding IJs who have denied the appointment of a QR based on a conclusion that the Respondent is "malingering."[10] In cases where the IJ denies the appointment of a QR, the IJ should be required to thoroughly articulate the evidence they relied upon and the reason for the denial. *Matter of M-A-M-Z,* 28 I.&N. Dec. 173 (BIA 2020). This includes taking testimony from the medical professional who expresses

[10] The *DSM-5* describes malingering as the intentional production of false or grossly exaggerated physical or psychological problems. Motivation for malingering is usually external (e.g., avoiding military duty or work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs). American Psychiatric Association. Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5). Washington DC: American Psychiatric Press Ince, 2013, 2017.

any opinions as to the respondent's mental state, questioning the medical professional on the record as to how and why they came to that conclusion, what evidence they reviewed, and whether they considered any other diagnosis. In addition, the IJ should probe the medical expert for bias. *Matter of J-G-T-* 28 I&N Dec. 97, 100-103 (BIA 2020) (including voir dire).

When deciding against the appointment of a QR, the IJ should take special care to consider any countervailing evidence, such as testimony from family members, friends or others who have interacted with the respondent. The IJ should also accept additional evaluations in assessing competency. As articulated in *Matter of J-G-T-*, "a judge should explain why inferences made by the expert are reasonable and more persuasive than the other evidence presented. Without such findings, we are unable to determine whether an Immigration Judge's reliance on an expert's testimony was reasonable." *Id.* at 106.

iii. The IJ has a heightened duty to develop the record for Nationwide Policy cases in which representation is terminated due to the 90-day funding restriction

As described above, there is an important funding distinction between *Franco* cases, which apply to the class members in California, Washington and Arizona, and cases that EOIR funds through its Nationwide Policy. Nationwide Policy funding terminates 90 days after an individual has been released from custody, unless the Qualified Representative moves to withdraw and the IJ denies that motion. Given that these individuals have been found to be incompetent to represent themselves, the IJ has a heightened duty to develop the record when hearing their cases.

If an IJ determines that the respondent is incompetent, the Judge "shall prescribe safeguards to protect the rights and privileges of the [noncitizen]." 8 U.S.C. § 1229a(b)(3) (2000). The BIA has found that "Immigration Judges have discretion to determine which safeguards are appropriate, given the particular circumstances in a case before them." *Matter of M-A-M,* 25 I&N Dec 474, 482. Thus, in cases where the QR is terminated after the respondent is

released from custody, the IJ must take special care to develop the record and ensure that an incompetent pro se respondent's due process rights are respected. In cases where the respondent is found incompetent, the Attorney General has stated that "[i]t is appropriate for Immigration Judges to aid in the development of the record, and directly question witnesses..." *Matter of J-F-F-,* 23 I&N Dec. 912, 922 (A.G. 2006).

If an incompetent respondent appears pro se, the judge should remain impartial but take on a more protective role to ensure that the proceedings do not unfairly disadvantage the respondent due to their incompetency. This includes taking steps articulated above in the section regarding the decision to appoint a QR, such as reviewing all relevant records. The IJ should also engage with family members, support networks, and medical providers. In addition, if the respondent is unable to present their own evidence, the judge should take a more active role in gathering relevant information, including medical records, witness testimonies, and other documents that could impact the case. The judge should also break down the hearing into smaller, more manageable parts, giving the respondent time to understand and respond. Moreover, the judge should not accept an admission of removability from an unrepresented respondent who is incompetent and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend. 8 C.F.R. § 1240.10(c) (2010). The judge should also try to connect an incompetent respondent with any orientation services available, such as FOTC and ICH. Finally, the judge should liberally grant continuances to give an incompetent respondent time to find an attorney to represent them.

d. The IJ has a heightened duty to develop the record for pro se individuals with physical, neurological, developmental, and cognitive disabilities, as well as chronic illness

Many pro se individuals who appear before the court are found to be competent to represent themselves but still suffer from a physical, neurological, developmental, or cognitive disability or chronic illness that hampers their ability to understand the proceedings and

meaningfully present their application for relief. If a pro se respondent possesses an individual characteristic that would prevent him or her from having a full and fair hearing, the IJ must explore, probe, elicit, and clarify specific facts to develop the record. Specific characteristics or factors that should heighten the IJ's duty to develop the record include but are not limited to:

- Youth
- Lack of English language fluency
- Lack of education
- Physical disabilities
- Cognitive disabilities
- Neurological disabilities
- Chronic illness
- Individuals in immigration detention

Matter of M-A-M- requires that IJs apply safeguards even when someone is found competent. One such safeguard may be that the IJ actively aid "in the development of the record, including the examination and cross-examination of witnesses" and reserve appeal rights for the respondent:

> Even if [a respondent] has been deemed to be medically competent, there may be cases in which an Immigration Judge has good cause for concern about the ability to proceed, such as where the respondent has a long history of mental illness, has an acute illness, or was restored to competency, but there is reason to believe that the condition has changed. In such cases, Immigration Judges should apply appropriate safeguards. *Matter of M-A-M-* 25 I&N Dec 474, 480.

The IJ should inquire early in the proceedings whether the respondent has a physical condition or any physical, neurological, or cognitive disabilities that may affect their ability to participate in the hearing. The judge should review all relevant medical records or evaluations that may affect the respondent's ability to participate in the hearing. The judge should also provide additional time for respondents with the conditions referenced above to answer questions or process information. Frequent breaks may be necessary. In addition, the judge should take a more non-adversarial approach and carefully explain the proceedings and legal concepts, reducing the complexity of the proceedings as much as possible. The judge should ask simple,

direct questions to confirm that the respondent understands the proceedings and any questions being asked.

A case example from one of Acacia's network legal service providers (LSP) involving a pro se mother and her child who was diagnosed with severe autism illustrates the need for increased vigilance in such cases. The child had severe deficits in verbal and nonverbal social communication skills causing severe impairments in functioning, very limited initiation of social interactions, and minimal response to social overtures from others.

The LSP filed a third-party notice ("TPN") containing medical documents, including a letter from the doctor with the child's diagnosis. These documents included facts that could have impacted both the mother's and the child's cases, but the filing was initially rejected due to a clerical error.[11] The LSP refiled the corrected TPN and it was nevertheless still rejected despite procedural compliance. The child and mother were ordered deported without the judge having considered the child's cognitive disability.

As part of their duty to develop the record, IJs should accept TPNs, and any other relevant evidence, despite minor clerical errors because they will likely shed light on mental health or cognitive disabilities of the respondent. In fact many letters and medical documents filed by family or friends are unlikely to comply with cover-page and Immigration Practice Manual instructions. The IJ must accept and consider all information bearing on a respondent's mental and cognitive abilities. *Id.* at 483. In the above case, the IJ should have permitted the filing to "actively aid in the development of the record." *Id.*

e. The IJ has a heightened duty to develop the record for pro se children

Courts have long recognized that special considerations apply to children. The Supreme Court has observed that children "generally are less mature and responsible than adults," and that

[11] The rejection was in part due to labelling ("detained") and compounded by a misunderstanding by the court that TPNs are limited to detained dockets.

"youth is a time and condition in life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma,* 455 U.S. 104, 115-116 (1982). This is because children "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti v. Baird,* 43 U.S. 622, 635 (1979) (plurality opinion); and they "are more vulnerable or susceptible to ... outside pressures" than adults, *Roper,* 543 U.S., at 569. *See Grahan v. Florida,* 560 U.S. 48, 68 (2010) (finding no reason to "reconsider" these observations about the common "nature of juveniles"). In the specific context of police interrogation, the Supreme Court has observed that events that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." *Haley v. Ohio,* 332 U.S. 596, 599 (1948) (plurality opinion); see also *Gallegos v. Colorado,* 370 U.S. 49, (1962) ("[N]o matter how sophisticated," a juvenile subject of police interrogation "cannot be compared" to an adult subject).

In recent years, the United States Sentencing Commission has urged federal courts to consider a growing body of neuroscientific research which strongly suggests that teenagers and young adults do not have fully developed brains.[12] The prefrontal cortex, the part of the brain utilized for impulse control, emotional reactions, executive functioning, and decision making, is the last part of the brain to develop, and continues to develop well into a person's twenties. *Id.* at 6-7. As neuropsychologist Francis Jensen concluded, and anyone who has spent time with a teenager can relate to, "adolescents suffer from the cerebral equivalent of defective spark plugs."[13] Jensen further explains, "When we think of ourselves as civilized, intelligent adults, we really have the frontal and prefrontal parts of the cortex to thank…teens are not quite firing on all

[12] United States Sentencing Commission, *Youthful Offenders in the Federal System*, 5 (May 2017), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525_youthful-offenders.pdf (last visited August 15, 2024).
[13] Elizabeth Kolbert, *The Terrible Teens: What's Wrong with Them?* The New Yorker, (August 31, 2015), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525 (last visited August 15, 2024).

cylinders when it comes to the frontal lobes." *Id.* This research supports a heightened burden on the IJ when hearing cases of pro se children.

Given children's cognitive limitations, in a December 2023 memorandum, EOIR director David L. Neal issued a Director's Memorandum recognizing that children's cases require special consideration.[14] According to EOIR, "all immigration judges must be prepared to adjudicate children's cases: they should familiarize themselves with the law and EOIR guidance on children's cases, as well as with child-friendly courtroom procedures." *Id.* at 1. Moreover, given the particular vulnerabilities of children, EOIR recognizes that "legal representation is particularly important. Therefore, immigration judges should facilitate pro bono representation in cases involving unrepresented children." *Id.* at 2. The agency also encourages the use of Friend of the Court programs where they exist and recognizes that appointment of child advocates is appropriate in some cases. *Id.* at 3. Child advocates can submit Best Interests Determinations or "BIDs" that assess the best interests of the child and are based on a holistic review of the child's circumstances, taking into consideration a child's safety and well-being. *Id.*

The EOIR memorandum also instructs IJs to inform children that some forms of immigration relief available to them require the filing of applications with agencies or entities outside EOIR, such as USCIS. *Id.* at 4. For example, "where a respondent is an unaccompanied child and appears potentially eligible for asylum, the immigration judge should inform the respondent that their asylum application must be filed with USCIS and not with the immigration court." *Id.* Moreover, EOIR instructs IJs to anticipate receiving a motion to dismiss in cases in which an unaccompanied child files an asylum application with USCIS. "Assuming there is no dispute between the parties, efficiency and fairness are served by such a dismissal." *Id.*

[14] David L. Neal, *Children's Cases in Immigration Court*, (Dec. 21, 2023), available at: https://www.justice.gov/d9/2023-12/dm-24-01_1.pdf (last visited August 15, 2024).

i. IJs must develop the record to refer children to the appropriate self-help workshops and legal assistance provided by government-funded and/or other existing programs

The federal government currently funds a number of programs to provide "self-help" workshops for children in immigration proceedings. The Department of Justice funds the LOPC, which provides orientation and legal support services to sponsors of unaccompanied children and the children themselves. It also funds the ICH, which is not specifically child-focused, but can serve pro se children. Some jurisdictions may have similar programs available through other funding.

In a recent solicitation, the Health and Human Services Office of Refugee Resettlement ("ORR") published a request for proposals to provide self-help workshops to unaccompanied children who have been released from ORR custody.[15] The Request for Proposal (RFP) specifies:

> The Contractor shall provide self-help workshops to eligible unaccompanied children in removal proceedings, and for whom the Contractor does not have capacity to offer direct representation. Workshops shall provide information on the immigration system, including explanations on how to complete applications for affirmative asylum, Special Immigrant Juvenile Status, and work authorization. The presentation shall be delivered in the language of the unaccompanied child and in an age-appropriate manner.
>
> Contractor staff shall provide self-help workshops in coordination with the juvenile dockets at the Region 1a - West Immigration Courts (see Section 1.6 Place of Performance for the full list of covered immigration courts). Self-help workshops shall be held at, or in the vicinity of, the immigration court or in other locations accessible for the population served. At least one self-help workshop shall be provided in the geographic jurisdiction of each immigration court located in Region 1a - West on a monthly basis.[16]

Because they preside over immigration court proceedings, the IJs are uniquely able to refer pro se children who appear before them to such self-help workshops, where they exist.

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[15] *See* SAM.gov, Post Release Legal Services Tas Order Performance Work Statement: Request For Proposal Awardable Task Order 1b – East (August 5, 2024), available at: https://sam.gov/api/prod/opps/v3/opportunities/resources/files/22a8517ce2e249548f61deb79815be39/download?&token=; (last visited August 15, 2024).

[16] *See* SAM.gov, Post Release Legal Services Task Order Performance Work Statement: Request For Proposal Awardable Task Order 1a – West (August 5, 2024), https://sam.gov/opp/8ff74c3263ea40cc863dd09c890a49dd/view, https://sam.gov/api/prod/opps/v3/opportunities/resources/files/22a8517ce2e249548f61deb79815be39/download?&token=, at p. 14. (last visited August 15, 2024).

Given ORRs intention to create a program to specifically provide self-help workshops for pro se children, the BIA should articulate a robust standard for these cases so that the IJ is able to refer pro se children to the appropriate self-help workshop. IJs should be required to ask questions to identify whether pro se children may be eligible for asylum, SIJS, T Visas, U Visas, and family-based visa petitions. IJs should also screen for potential derivative and acquired citizenship claims. If the IJs finds that there is evidence that a child is eligible for such forms of relief, the IJ should refer the child to the appropriate self-help workshop and consider whether to refer the child to local organizations that offer LOPC and ICH services as well as any local programs providing such services.

1. The BIA should require IJs to implement the child-friendly courtroom practices set forth in the EOIR memorandum

The 2023 EOIR memorandum provides guidance on children's cases and juvenile dockets in immigration court. The memo sets forth a number of "child-friendly courtroom practices" that IJs should implement when hearing children's cases.[17] These practices include:

(a) Explain the proceedings: Using child-friendly language, the IJ should give an opening statement to explain the nature of the proceedings, introduce the participants and describe each person's role, and explain operational matters such as interpretation and note-taking. "The goal is to help child respondents understand the process and to alleviate their anxiety about the hearing." *Id.* at 5.

(b) Replace the robe: To make the child feel more comfortable and enhance their ability to participate. *Id.* at 6.

(c) Courtroom orientation: IJs should permit children, along with their parent or guardian or legal representative, to visit the courtroom ahead of the hearing and be permitted to explore the courtroom, to sit in all locations, including the witness stand and the immigration judge's bench, and to prepare for testimony by practicing answering simple questions. *Id.*

(d) Courtroom modifications: Immigration judges should permit reasonable modifications to the courtroom setting to foster an atmosphere in which children can participate more fully in the proceedings. Examples of such modifications include allowing a young respondent or witness to bring a book, quiet toy, or other personal item to court, allowing them to

[17] David L. Neal, *Children's Cases in Immigration Court*, (Dec. 21, 2023), 5-7. available at: https://www.justice.gov/d9/2023-12/dm-24-01_1.pdf (last visited August 15, 2024).

testify sitting next to an adult companion, and allowing them to testify sitting anywhere reasonable in the courtroom, as opposed to requiring them to testify from the witness stand. *Id.*

(e) Interpretation: Before a child testifies, the IJ should allow the child and interpreter to establish a rapport by talking about matters unrelated to the proceeding. The judge should watch for any indication that the child and interpreter are having trouble communicating.

(f) Testimony: The IJ should ensure that a child is sufficiently competent to testify, including capable of understanding the oath and giving sworn testimony. The judge should explain the oath to the child in an age-appropriate manner. In addition, it is often appropriate for the IJ to rely on a child's written statement in lieu of their oral testimony.

(g) Child-sensitive questioning: The IJ should speak to the child using the appropriate language and tone, and the judge should ensure that others questioning the child do so as well.

(h) Length and Number of Hearings: IJs should, as much as possible, limit the number of times a child must be brought to court, as well as the duration of hearings and the length of a child's testimony. Judges should also recognize that, for emotional and physical reasons, children may require more frequent breaks than adults. As much as possible, IJs should prompt parties to resolve issues through pre-hearing conferences and stipulations.

(i) Control Access to the Courtroom: It is best to have as few people in the courtroom as possible. Children may be reluctant to testify about painful or embarrassing incidents or may simply be intimidated when there are too many adults in the room. Thus, IJs should, to the extent possible, limit the number of individuals present in the courtroom to only those necessary to complete the hearing.

It is reassuring to see EOIR take seriously its commitment to ensuing that children are treated with dignity and respect when appearing before the immigration court and that IJs take special care in ensuring that children have meaningful access to due process and an opportunity to apply for the forms of relief for which they are eligible. The BIA should ensure that these efforts become part of the IJ's duty to develop the record when the respondent is a pro se child by requiring these "child-friendly courtroom practices" be offered to each pro se child who appears before the immigration court.

ii. IJs should robustly screen for and advise children of potential relief including forms of relief only available at USCIS

Given the particular vulnerabilities of children, as part of the requirement that the IJ develop the record, the IJ must also screen for and identify forms of relief and advise children of

such relief. This will be more complicated for judges who have not been trained on cases involving children, do not regularly hear children's cases, and are not familiar with the specific forms of relief available for children. Thus, as part of this requirement to screen for and identify forms of relief, all IJs should be trained on the forms of relief available to children, and the particular accommodations that should be implemented when hearing children's cases.

In an en banc decision, the Ninth Circuit held that the IJ is required to advise a child of their apparent eligibility to apply for SIJS if the facts before the IJ raise a "reasonable possibility that the petitioner may be eligible for relief." *CJLG v. Barr*, 923 F.3d 622, 626 (9th Cir. 2019) *quoting Moran-Enriquez v. INS*, 884 F.2d 420, 423 (9th Cir. 1989). Congress created SIJ status in 1990 to provide a path to lawful permanent residency for certain children. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5005-06; s*ee also Bianka M. v. Superior Court,* 5 Cal.5th 1004, 236 Cal.Rptr.3d 610, 423 P.3d 334, 337-38 (2018). A child seeking SIJS must first obtain a state-court order declaring him or her dependent or placing him or her under the custody of a court-appointed "individual or entity." 8 U.S.C. § 1101(a)(27)(J)(i) (2023). The child then must file an I-360 petition with USCIS. 6 USCIS Policy Manual, pt. J, ch. 2(A), ch. 4(A) (current as of July 2024).

Given that many unaccompanied children are eligible for forms of relief such as SIJS that the child must apply for at USCIS, and ORR's anticipated creation of self-help workshops for pro se unaccompanied children, the IJ should advise all children of the potential for SIJS and screen children for a reasonable possibility that they may be eligible for such relief. *CJLG v. Barr*, 923 F.3d 622, 626. In so doing, the IJ will ensure that eligible children are afforded a meaningful opportunity to apply for SIJS and if they are unable to find an attorney, they are referred to the appropriate ORR funded self-help workshop to do so. The IJ should ask all children the following adaptable questions in a comfortable and appropriate setting with learned strategies for talking with children. These questions are not exhaustive but provide an example of

the information the IJ should elicit, and the themes the IJ should probe and clarify during the hearing.

(a) What is the main reason that made you come to the United States?

(b) Who made the decision for you to come to the U.S.?

(c) What was life like in your home country?

a. Did you go to school?

b. Did you work? If so, what kind of job?

c. Did your parents ever hit you or hurt you?

d. Who did you live with in your home country?

e. If not parents, why not?

f. Has anyone ever used cruel words towards you?

g. Has anyone ever threatened to hurt you or someone in your family?

h. Has anyone ever touched you in a way that made you feel uncomfortable?

i. Are you afraid to return to your country?

j. Did anyone ever hurt or threaten you or your family in your country of origin

k. Has anyone ever forced you to work or engage in an activity when you didn't want to? [has anyone had you work and not pay you? Did anyone threaten to harm you or a loved one if you did not work?]

l. Have you or anyone in your family ever been the victim of a crime in the US?

m. Has anyone in your family been born in the U.S. or become a U.S. citizen after they were born?

VI. CONCLUSION

Given the particular concerns discussed above, the BIA should establish that (1) the IJ has a duty to thoroughly develop the record in all cases involving pro se respondents; (2) the IJ's duty is especially heightened in cases involving individuals detained by ICE; (3) the IJ has special duties under the NQRP program; (4) the IJ has a heightened duty to develop the record

for individuals with physical, neurological, developmental, and cognitive disabilities, as well as chronic illness; (5) the IJ owes a particular duty to pro se children.

Respectfully submitted this 16th day of August 2024,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing **Request to Appear as Amicus Curiae and Amicus Curiae Brief of Acacia Center for Justice was** personally served on August 16, 2024 to:

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