Immigration Court is Out of Sessions: Restoring Nonregulatory Termination to Immigration Judges Post–*Matter of S-O-G- & F-D-B-*

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In 2018, Attorney General Jeff Sessions promulgated three Board of Immigration Appeals (BIA) decisions that sharply curtailed the power of immigration judges (IJs) to manage their own dockets and safeguard the due process rights of immigrant respondents. One such decision, Matter of S-O-G- & F-D-B-*, eliminated IJs' ability to terminate proceedings outside of specific circumstances, removing a traditional tool IJs used to dispense with unnecessary or unconstitutional proceedings.*

Yet recent circuit court decisions undergird the conclusion that Matter of S-O-G- & F-D-B-*'s reasoning is incorrect. This Note first traces the long history of expanding IJ authority, highlighting IJs' gradual recognition of a discretionary termination power. After examining the reasoning of* S-O-G- & F-D-B-*, this Note then argues that, contrary to the Attorney General's interpretation, IJs do possess the inherent authority to terminate removal proceedings, even outside of circumstances specifically identified by statute. Finally, this Note considers the viability of eventual challenges to* S-O-G- & F-D-B- *and argues that either executive, legislative, or judicial action is necessary to restore IJs' power to discretionarily terminate proceedings and protect the rights of immigrant respondents.*

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I. INTRODUCTION

In April 2019, J.J. Rodriguez Rodriguez sought asylum at the U.S.-Mexico border.[1] Like the many thousands of other asylum-seekers at the time, U.S. Customs and Border Patrol agents returned Mr. Rodriguez Rodriguez to Mexico pursuant to the Trump administration's "Remain in Mexico" policy.[2] Officers handed him a piece of paper telling him to return to the U.S. border crossing six weeks later. Upon returning for the first of likely several hearings, he would then plead his case before an immigration judge (IJ) and seek protection from persecution in his native Honduras.[3]

But again like thousands of asylum-seekers subject to the Remain in Mexico policy, Mr. Rodriguez Rodriguez never made it to the port of entry for the hearing.[4] The consequences for this failure to appear are severe: the Immigration and Nationality Act (INA) requires IJs to issue a removal order if the Department of Homeland Security (DHS) establishes removability, and this removal order carries significant penalties.[5] It bans the recipient from reentering the United States for five years, bars the recipient from eligibility for most discretionary immigration relief, and may even subject the recipient to criminal sanctions if she tries to return to the United States.[6] Uncertain that DHS informed Mr. Rodriguez Rodriguez of the date of the hearing or the proper procedures for crossing the border, the IJ declined to enter a removal order and instead terminated Mr. Rodriguez Rodriguez's proceedings,[7] following the rulings of other IJs in hundreds of other cases for

1. Matter of J.J. Rodriguez Rodriguez, 27 I. & N. Dec. 762, 762 (B.I.A. 2020).

2. *Rodriguez Rodriguez*, 27 I. &. N Dec. at 763; *see also* AM. IMMIGR. COUNCIL, THE "MIGRANT PROTECTION PROTOCOLS" 1 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/migrant_protection_protocols.pdf [https://perma.cc/9RKQ-CLL8] (explaining that Migrant Protection Protocols (MPP) are often referred to as the "Remain in Mexico" program).

3. *Id.*; see also Transactional Records Access Clearinghouse, *Details on MPP (Remain in Mexico) Deportation Proceedings*, TRAC IMMIGR., (2021), https://trac.syr.edu/phptools/immigration/mpp/ (stating that as of February 2021, DHS returned over 71,000 people to Mexico pursuant to the MPP program) [https://perma.cc/KM8R-W495].

4. *Id.*

5. 8 U.S.C. § 1229a(b)(5) (requiring IJs to issue an in absentia removal order).

6. 8 U.S.C. § 1182(a)(6)(B) (imposing five-year reentry bar after entry of in absentia removal order); 8 U.S.C. § 1229a(b)(7) (barring noncitizens with in absentia removal orders from cancellation of removal, voluntary departure, Violence Against Women Act (VAWA) relief, and other forms of immigration relief for 10 years after the removal order becomes final); 18 U.S.C. § 1326 (criminalizing the reentry of immigrants who reenter while still subject to a reentry bar after the issuance of a removal order).

7. *Rodriguez Rodriguez*, 27 I. & N. Dec. at 763.

asylum-seekers subject to the Remain in Mexico policy.[8] The grant of termination completely ended Mr. Rodriguez Rodriguez's proceedings, leaving him free to seek asylum in the future.[9]

Despite the substantial due process issues in Mr. Rodriguez Rodriguez's case, the Board of Immigration Appeals (BIA) reversed the IJ's order.[10] The BIA instead ruled that the IJ lacked the authority to terminate Mr. Rodriguez Rodriguez's proceedings, limiting IJs' power to prevent a disproportionate and unjust outcome.[11]

The Trump administration was notorious for its major changes to substantive immigration policy: the travel bans,[12] the separation of children from their parents at the border,[13] and the attempted elimination of the Deferred Action for Childhood Arrivals program[14] all garnered major media attention. But lost in the shuffle amidst these drastic changes in substantive immigration law are the many ways the administration curtailed the procedural rights of immigrants like Mr. Rodriguez Rodriguez in immigration court. In 2018, Attorney General Sessions decided a trio of cases — *Matter of Castro-Tum*,[15] *Matter of L-A-B-R*,[16] and *Matter of S-O-G- & F-D-B-*[17] — that significantly limited IJs' discretion to manage their dockets through administrative closures, continuances, and terminations.[18] These decisions fundamentally changed immigration court procedure, requiring IJs to prioritize efficiency and the

8. Alicia A. Caldwell, *Judges Quietly Disrupt Trump Immigration Policy in San Diego*, WALL ST. J. (Nov. 28, 2019, 7:00 AM), https://www.wsj.com/articles/judges-quietly-disrupt-trump-immigration-policy-in-san-diego-11574942400 [https://perma.cc/5UKD-KYDQ].

9. *Rodriguez Rodriguez*, 27 I. & N. Dec. at 763.

10. *Id.* at 766.

11. *Id.*

12. *See* Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017); Proclamation No. 9983, 85 Fed. Reg. 6699 (Feb. 3, 2020).

13. Aric Jenkins, *Jeff Sessions: Parents and Children Illegally Crossing the Border Will Be Separated*, TIME (May 7, 2018, 7:00 PM), https://time.com/5268572/jeff-sessions-illegal-border-separated/ [https://perma.cc/D2MJ-C59Y].

14. Memorandum from Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs., et al., Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca [https://perma.cc/NCM8-P7JL].

15. 27 I. & N. Dec. 271 (Att'y Gen. 2018).

16. 27 I. & N. Dec. 405 (Att'y Gen. 2018).

17. 27 I. & N. Dec. 462 (Att'y Gen. 2018).

18. Sessions acted pursuant to his authority under 8 C.F.R. § 1003.1(h)(1)(i) (2021), which allows an Attorney General to subsume the role of the Board of Immigration Appeals, and to decide a case and publish an opinion on the Board's behalf. Administrative closure, continuances, and termination are all procedural devices that IJs may use to manage their caseload and control the pace of proceedings. They will each be discussed *infra* Part II.

speedy resolution of cases at the expense of noncitizen respondents' due process rights.[19] They also altered longstanding agency policy and required respondents and advocates to change their litigation strategies without prior notice.[20] Coupled with the Department of Justice's (DOJ) new quota system requiring IJs to complete 700 cases per year or receive an unsatisfactory performance review,[21] these policy changes effectively transformed IJs from impartial, independent adjudicators to — as a former head of the National Association of Immigration Judges, put it — "assembly-line workers."[22]

The Fourth Circuit, however, recently overruled the first Attorney General decision from the trio in *Romero v. Barr*.[23] There, the Fourth Circuit held that IJs possessed inherent authority to administratively close cases and overruled *Matter of Castro-Tum*. The decision restored administrative closure to IJs presiding in only Charlotte, North Carolina; Arlington, Virginia; and Baltimore, Maryland, the three immigration courts within the Fourth Circuit's jurisdiction.[24]

This Note queries whether the Fourth Circuit's reasoning in *Romero v. Barr* might extend to another of the three decisions, *Matter of S-O-G- & F-D-B-*, and whether a court might restore the power of nonregulatory termination to IJs under *Romero*'s broad

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19. *See* Aaron Reichlin-Melnick, *Sessions Ends Administrative Closure at the Expense of Due Process in Immigration Court*, IMMIGR. IMPACT (May 18, 2018), http://immigrationimpact.com/2018/05/18/sessions-administrative-closure-immigration-court/ [https://perma.cc/3SVG-62J9].

20. *See, e.g.*, AM. IMMIGR. LAWS. ASS'N, PRACTICE POINTER: *MATTER OF S-O-G- & F-D-B-* (2018), https://www.shusterman.com/pdf/Practice_Pointer_Matter_of_S_O_G_F_D_B.pdf [https://perma.cc/P6HY-TLJP]; AM. IMMIGR. COUNCIL & ACLU IMMIGRANTS' RTS. PROJECT, ADMINISTRATIVE CLOSURE POST-*CASTRO-TUM*: PRACTICE ADVISORY (2019), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post-castro-tum.pdf [https://perma.cc/SK4G-B8LN] [hereinafter ADMINISTRATIVE CLOSURE POST-*CASTRO-TUM*]; CATH. LEGAL IMMIGR. NETWORK, INC., PRACTICE ADVISORY: SEEKING CONTINUANCES IN IMMIGRATION COURT IN THE WAKE OF THE ATTORNEY GENERAL'S DECISION IN *MATTER OF L-A-B-R-* (2018), https://cliniclegal.org/resources/removal-proceedings/practice-advisory-matter-l-b-r-27-dec-405-ag-2018 [https://perma.cc/VZT5-SVYL].

21. Joel Rose, *Justice Department Rolls Out Quotas for Immigration Judges*, NPR (Apr. 3, 2018, 1:09 PM), https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges [https://perma.cc/VC4U-9Z75].

22. John Bowden, *Justice Criticized for Turning Immigration Judges Into "Assembly-Line Workers,"* HILL (Oct. 13, 2017), http://thehill.com/homenews/administration/355348-group-justice-dept-is-turning-immigration-judges-into-assembly-line [https://perma.cc/P8AH-69JY].

23. 937 F.3d 282 (4th Cir. 2019).

24. *Id.* at 289.

reading of the governing IJ regulations. Part II of this Note contextualizes the docket management trio within the historical authority of IJs to manage their own dockets, and briefly describes the reasoning of the trio. Part III argues that, as in *Romero*, the Attorney General's interpretation of IJ governing regulations as precluding termination outside of the cases identified by regulation — referred to as nonregulatory or discretionary termination — should not be afforded *Kisor* deference.[25] Part IV underscores the importance of discretionary termination and proposes judicial and legislative solutions to restore this critical authority. This Note concludes by arguing that advocates should consider using *Romero* to challenge the underlying reasoning of *Matter of S-O-G- & F-D-B-*, though it recognizes that Congress is best poised to restore IJs' discretionary termination power as a tool to safeguard the rights of immigrant respondents.

II. BACKGROUND ON IMMIGRATION JUDGE AUTHORITY AND NONREGULATORY TERMINATION

For several decades, the power of IJs trended towards expanding authority and discretion, with the Attorney General's decisions in *Matter of Castro-Tum*, *Matter of L-A-B-R-*, and *Matter of S-O-G- & F-D-B-* marking a departure from this historical precedent. This Part explains the historical authority of IJs, tracing IJs' historical use of administrative closure and termination in Part II.A. Part II.B provides a brief overview of the facts and legal reasoning of the docket-management trio of cases.

A. HISTORICAL AUTHORITY OF IMMIGRATION JUDGES

In 1983, the DOJ established the Executive Office of Immigration Review (EOIR), largely in response to public concerns of biased adjudicators and a desire for a more independent immigration adjudication system.[26] This regulation placed the immigration

25. *See* Auer v. Robbins, 519 U.S. 452 (1997).

26. *See* Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (and Rise?) of Judicial Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 674–76 (2006). The EOIR, a DOJ department, manages IJs, who are Attorney General-appointed EOIR employees. *See* 8 C.F.R. § 1003.10 (2021) (delegating authority to IJs). Before the creation of EOIR, immigration adjudicators were employees of the Immigration and Naturalization Service, the same body responsible for the prosecution of immigrants. *See Evolution of the U.S. Immigration Court System: Pre-1983*, U.S. DEP'T OF JUST. (last

courts in a separate agency within DOJ. While the EOIR remained under the supervision of the Attorney General, it fell outside the control of the Immigration and Naturalization Service (INS).[27] This organizational decision reflected the growing recognition that administrative courts needed greater independence to fairly and impartially do their jobs.[28]

In 1997, the DOJ promulgated a regulation that explicitly delegated immigration adjudicatory authority from the Attorney General to IJs.[29] The first version of the regulation, 8 C.F.R. § 1003.10, was sparse, stating simply: "Immigration Judges . . . shall exercise the powers and duties in this chapter regarding the conduct of exclusion, deportation, removal, and asylum proceedings and such other proceedings which the Attorney General may assign them to conduct."[30] The DOJ amended 8 C.F.R. § 1003.10 in 2007 to provide greater detail about the role and authority of IJs.[31] The amendment gives IJs the power to subpoena witnesses, receive evidence, interrogate and cross-examine witnesses, and administer oaths,[32] expanding IJs' power and giving them the tools necessary to conduct fair and effective hearings. Notably, the 2007 amendment requires IJs to "exercise their independent judgment and discretion" and gives IJs the authority to "take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases."[33] The DOJ last amended 8 C.F.R. § 1003.10 in 2014 to provide for the

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updated Apr. 30, 2015), https://www.justice.gov/eoir/evolution-pre-1983 [https://perma.cc/6693-FWMK].

27. INS was the predecessor agency to the Department of Homeland Security. It was responsible for adjudication of affirmative immigration relief, the inspection of applicants for admission at U.S. borders, and the apprehension and removal of immigrants with removal orders. Its officers served both prosecutorial and adjudicative functions. The Homeland Security Act of 2002 dissolved INS on March 1, 2003, and created the DHS in its place. USCIS HIST. OFF. & LIBR., U.S. CITIZENSHIP & IMMIGR. SERVS., OVERVIEW OF INS HISTORY 10–11 (2012), https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf [https://perma.cc/2WEX-TKFW]. Now, an attorney from the division of the Office of the Principal Legal Advisor of Immigration and Customs Enforcement, a legal program in DHS, serves as the prosecutor during adversarial removal proceedings. *See Who We Are*, U.S. IMMIGR. & CUSTOMS ENF'T (last updated Jan. 26, 2021), OFF. OF THE PRINCIPAL LEGAL ADVISOR, https://www.ice.gov/about-ice/opla [https://perma.cc/J8NE-AT27].

28. *See* Durham, *supra* note 26, at 675.

29. 8 C.F.R. § 1003.10 (1997).

30. *Id.*

31. Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge, 72 Fed. Reg. 53,673, 53,673, 53,677–78 (Sept. 20, 2007) (codified as amended at 8 C.F.R. § 1003.10 (2021)).

32. *Id.* at 53,678.

33. *Id.*

appointment of temporary IJs, keeping the expansive language of the 2007 amendment intact.[34]

Outside of these structural changes by regulation, the Board of Immigration Appeals (BIA) gradually issued decisions that legitimized expanding IJ power by recognizing IJs' inherent authority to manage their own dockets through mechanisms like administrative closure, continuances, and termination.[35] For decades, IJs utilized administrative closure, a docket management device that allowed IJs to remove cases from their active dockets without issuing a final disposition for the case.[36] IJs routinely granted administrative closure to indefinitely pause proceedings while awaiting the resolution of a collateral matter outside of the IJs' jurisdiction, such as post-conviction relief or adjudication of an affirmative

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34. Designation of Temporary Immigration Judges, 79 Fed. Reg. 39,953 (July 11, 2014) (codified as amended at 8 C.F.R. § 1003.10 (2021)). The final language of 8 C.F.R. § 1003.10(b) states:

> In conducting hearings under section 240 of the Act and such other proceedings the Attorney General may assign to them, immigration judges shall exercise the powers and duties delegated to them by the Act and by the Attorney General through regulation. In deciding the individual cases before them, and subject to the applicable governing standards, 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. Immigration judges shall administer oaths, receive evidence, and interrogate, examine, and cross-examine aliens and any witnesses. Subject to § 1003.35 and § 1287.4 of this chapter, they may issue administrative subpoenas for the attendance of witnesses and the presentation of evidence. In all cases, immigration judges shall seek to resolve the questions before them in a timely and impartial manner consistent with the Act and regulations.

8 C.F.R. § 1003.10(b) (2021).

35. The BIA hears all appeals of IJs' decisions and has the power to affirm or reverse an IJ's determination. 8 C.F.R. § 1003.1(d) (2021). Under the BIA's governing regulations, the BIA has the power to issue precedential and non-precedential decisions to provide "clear and uniform guidance" on the proper interpretation of immigration law. 8 C.F.R. § 1003.1(d)(1) (2021). The Attorney General may certify a decision on appeal to the BIA to himself and promulgate a decision on behalf of the BIA. *See supra* note 18 and accompanying text. A circuit court may review the AG or the BIA's decision if the respondent files a "petition for review," unless Congress explicitly proscribed the circuit court's jurisdiction. 8 U.S.C. § 1252. Either party — the respondent or DHS — may then file a petition for a writ of certiorari to the Supreme Court to obtain review of the circuit court's decision. 28 U.S.C. § 1254.

36. Cath. Legal Immigr. Network, Inc., *The End of Administrative Closure: Sessions Moves to Further Strip Immigration Judges of Independence*, CLINIC LEGAL (Apr. 4, 2018), https://cliniclegal.org/resources/removal-proceedings/end-administrative-closure-sessions-moves-further-strip-immigration [https://perma.cc/E5DK-R5YX]. A grant of administrative closure indefinitely pauses proceedings, before an IJ issues a disposition, such as the entry of a removal order or the grant of certain immigration relief. During this time, the respondent does not need to attend further hearings, and ICE may not deport her. *Id.*

application for an immigration benefit whose jurisdiction rested solely with U.S. Citizenship and Immigration Services (USCIS).[37]

In *Matter of Gutierrez-Lopez*,[38] the BIA held that an IJ could not grant administrative closure "if opposed by either of the parties,"[39] effectively giving DHS[40] full veto power over an IJ's decision to administratively close a case.[41] The BIA subsequently decided *Matter of Avetisyan* and explicitly overruled *Matter of Gutierrez-Lopez* in part, holding that IJs may override objections to administrative closure if they find that administrative closure is "otherwise appropriate under the circumstances."[42] The BIA explained that the single-party veto rule enshrined in *Matter of Gutierrez-Lopez* "directly conflicts with the delegated authority of the Immigration Judges . . . and their responsibility to exercise independent judgment and discretion in adjudicating cases and to take any action necessary and appropriate for the disposition of a case."[43]

Shortly after the BIA decided *Matter of Avetisyan*, EOIR released an operational memorandum to IJs that underscored the importance of administrative closure and recognized IJs' authority to grant it.[44] The memorandum stated that administrative closure

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37. For example, administrative closure might be used while a respondent awaits the adjudication of their I-130 Petition for Alien Relative. Before a respondent might adjust status to permanent residence through their U.S. citizen or Lawful Permanent Resident relative, USCIS must determine that their claimed relationship to this relative is "bona fide." Once USCIS grants the I-130 petition, an IJ, in their discretion, may grant the petitioner adjustment of status. However, only USCIS has jurisdiction to grant the I-130 petition, *not* the IJ. USCIS might take several years to adjudicate this I-130 petition. It would not be practical for an IJ to grand endless continuances of proceedings while waiting for USCIS to adjudicate the I-130, considering that the IJ has no control over when USCIS will adjudicate the petition. *See* 8 U.S.C. § 1154 (a)(1)(A)(i) (granting USCIS jurisdiction over immediate relative petitions); 8 U.S.C. § 1255(a) (authorizing adjustment of status for beneficiaries of approved immediate relative petitions); *see generally* Matter of Hashmi, 24 I. & N. Dec. 785, 791 n.4 (B.I.A. 2009) (suggesting that administrative closure may be appropriate when a respondent is the beneficiary of a pending prima facie approvable I-130 petition).

38. 21 I. & N. Dec. 479 (B.I.A. 1996).

39. *Id.* at 480 (citing Matter of Lopez-Barrios, 20 I. & N. Dec. 203 (B.I.A. 1990)).

40. Immigration proceedings are adversarial between the noncitizen respondent and the DHS trial attorney. DHS trial attorneys act as prosecutors and have the right to appeal an IJ's decision. 8 C.F.R. § 1240.2a (2021) (establishing the role of DHS trial attorneys and granting DHS trial attorneys the right to appeal an IJ's decision).

41. *See* Kristin Bohman, Avetisyan*'s Limited Improvements Within the Overburdened Immigration Court System*, 85 U. COLO. L. REV. 189, 199 (2014).

42. Matter of Avetisyan, 25 I. & N. Dec. 688, 690 (B.I.A. 2012).

43. *Id.* at 693.

44. Memorandum from Brian M. O'Leary, Chief Immigration Judge, Exec. Office for Immigration Review, U.S. Dep't of Justice, to All Immigration Judges et al., Operating Policies and Procedures Memorandum 13-01: Continuances and Administrative Closure 3 (Mar. 7, 2013), https://www.justice.gov/sites/default/files/eoir/legacy/2013 /03/08/13-01.pdf [https://perma.cc/YT2A-FVYH] (explaining that administrative closure "is a docketing tool"

is a legitimate way to preserve "limited adjudicative resources" and ensure fairness for noncitizen respondents.[45] The memorandum also advised IJs to grant continuances when appropriate.[46]

Outside of administrative closure and continuances, IJs also terminated proceedings in limited circumstances as another way to manage their busy and overburdened dockets.[47] When an IJ administratively closes a case, the proceedings are deemed "paused" and the case is removed from the IJ's active docket. There is no final disposition of the case; either party may later file a motion to re-calendar the case after the case has been administratively closed.[48] Conversely, termination *fully* concludes proceedings. Following an order of termination, DHS may file a new Notice to Appear (NTA) and commence proceedings once again, unless the proceedings are terminated with prejudice.[49] IJs have regulatory authority to terminate proceedings in specific circumstances pursuant to 8 C.F.R. § 1239.2, 8 C.F.R. § 214.14(c)(1), and 8 C.F.R. § 214.11(d)(1).[50] IJs must also terminate proceedings if the DHS

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that judges can use to close the case; however, at a later date "either party may request to 'reactivate' the case through the filing of a motion to recalendar"). EOIR rescinded this memorandum on November 7, 2018. *See* Memorandum from James R. McHenry III, Director, Exec. Office for Immigration Review, to All of EOIR, New Format for Memoranda and Cancellation of OPPMs (Nov. 7, 2018), https://www.justice.gov/eoir/page/file/1109416/download [https://perma.cc/YGD8-2CLV].

45. *Id.* at 2.

46. *Id.* at 2–3. A continuance allows an IJ to reschedule a hearing to a later date or pause an ongoing hearing and finish it at a later date. *See* AM. IMMIGR. COUNCIL, PRACTICE ADVISORY: MOTIONS FOR A CONTINUANCE 1 (2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/motions_for_a_continuance_practice_advisory.pdf [https://perma.cc/3FXN-T75X]. IJs have the authority to grant a motion for a continuance made by either party upon a showing of "good cause," such as to allow the respondent to pursue collateral relief. 8 C.F.R. § 1003.29 (2021); *see also* Matter of Hashmi, 24 I. & N. Dec. 785, 790 (B.I.A. 2009) (listing factors considered in "determining whether to continue proceedings to afford the respondent an opportunity to apply for adjustment of status premised on a pending visa petition").

47. *See* Amelia Wilson et al., *Addressing All Heads of the Hydra: Reframing Safeguards for Mentally Impaired Detainees in Immigration Removal Proceedings*, 39 N.Y.U. REV. L. & SOC. CHANGE 313, 358–61 (2015).

48. *See* Matter of Avetisyan, 25 I. & N. Dec. 688, 695 (B.I.A. 2012).

49. *See* IMMIGRANT LEGAL RES. CTR., PRACTICE ADVISORY: SANCHEZ V. SESSIONS: TERMINATION BASED ON REGULATORY VIOLATIONS IN THE NINTH CIRCUIT 3 n.13 (2019), https://www.ilrc.org/sites/default/files/resources/ilrc_sanchez_v._sessions.pdf [https://perma.cc/D7DK-EW7H]. IJs can either terminate without prejudice or with prejudice. If proceedings are terminated without prejudice, DHS may file a new NTA and recommence proceedings. If proceedings are terminated with prejudice, DHS is barred from filing the same NTA charges and potentially from filing a subsequent NTA at all. *See id.*; 8 C.F.R. § 1239.2(c) (2021) (authorizing IJs to dismiss proceedings without prejudice).

50. *See* 8 C.F.R. § 1239.2(f) (2021) (allowing an IJ to terminate removal proceedings to proceed on an application for naturalization, as long as the respondent has "established prima facie eligibility for naturalization and the matter involves exceptionally appealing or

fails to prove the respondent's removability.[51] There is debate, however, as to whether these regulations are exhaustive, or if IJs may use their discretionary authority to terminate proceedings outside of these limited circumstances.[52] A policy memorandum issued by EOIR in 2015 stated that "[j]udges are encouraged to use the *docketing tools* available to them to ensure the fair and timely resolution of cases before them. That includes continuances, *termination* and administrative closure in appropriate cases."[53]

IJs also used termination as a way to safeguard respondents' due process rights.[54] In *Matter of Lopez-Barrios*, the BIA determined that termination is the only proper remedy when an immigrant does not receive proper notice of their hearing.[55] In *Matter of Garcia-Flores*, the BIA held that termination may be necessary when DHS has violated its own regulations in gathering evidence.[56] IJs occasionally terminated the proceedings of mentally incompetent respondents, such as when the respondent was unable to meaningful participate in the proceedings due to her mental

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humanitarian factors"); 8 C.F.R. § 214.14(c)(1)(i) (2021) (allowing a respondent to seek termination while USCIS adjudicates their petition for U nonimmigrant status); 8 C.F.R. § 214.11(d)(1)(i) (2021) (allowing a respondent to seek termination while USCIS adjudicates their petition for T nonimmigrant status).

51. *See* 8 C.F.R. § 1240.8 (2021).

52. *See* Zoe Tillman, *Jeff Sessions' Latest Immigration Decision is Another Blow to the Independence of Immigration Judges, The Judges Union Said*, BUZZFEED NEWS (Sept. 19, 2019, 3:17 PM), https://www.buzzfeednews.com/article/zoetillman/the-immigration-judges-union-says-a-new-jeff-sessions [https://perma.cc/S3HH-M2ET] (explaining that the scope of the regulations governing termination authority is open to interpretation).

53. Memorandum from Brian M. O'Leary, Chief Immigr. Judge, Exec. Office for Immigr. Rev., to All Immigr. JJ., All Ct. Adm'rs, All Att'y Advisors & Jud. L. Clerks, and All Immigr. Ct. Staff, Operating Policies and Procedures Memorandum 15-01: Hearing Procedures for Cases Covered by New DHS Priorities and Initiatives (Apr. 6, 2015), https://www.justice.gov/eoir/pages/attachments/2015/04/07/15-01.pdf [https://perma.cc/97CE-YELW] [hereinafter OPPM 15-01] (emphasis added). EOIR rescinded this OPPM on June 15, 2017. *See Rescinded OPPM*, U.S. DEP'T OF JUSTICE (Jan. 8, 2021), https://www.justice.gov/eoir/rescinded-oppm [https://perma.cc/UH2J-8C66] [hereinafter *Rescinded OPPM*].

54. *See* Jeffrey S. Chase, *The BIA and Selective Dismissal*, JEFFREY S. CHASE: BLOG (June 7, 2019), https://www.jeffreyschase.com/blog/2019/6/7/the-bia-and-selective-dismissal [https://perma.cc/NYK9-AFYP] ("Some immigration judges used their authority to . . . dismiss, or terminate proceedings where appropriate in the hopes of affording justice to those in proceedings."); Kate Morrissey, *San Diego Immigration Court "Overwhelmed" by Remain in Mexico Cases*, SAN DIEGO UNION-TRIB. (June 3, 2019, 5:00 AM), https://www.sandiegouniontribune.com/news/immigration/story/2019-05-31/san-diego-immigration-court-overwhelmed-by-remain-in-mexico-cases [https://perma.cc/W6HU-CKUX] ("Normally, if a judge believes the government violated an asylum seeker's due process rights, the judge can terminate immigration proceedings against that person.").

55. 20 I. & N. Dec. 203, 204 (B.I.A. 1990); *see also* Matter of Sanchez-Herbert, 26 I. & N. Dec. 43 (B.I.A. 2012).

56. 17 I. & N. Dec. 325, 327–29 (B.I.A. 1980).

illness.[57] The EOIR Benchbook, a practice manual for IJs, states that IJs may use their discretion to terminate cases "where respondents are unable to proceed in light of mental health issues and a corresponding inability to secure adequate safeguards."[58] Furthermore, DHS has argued in litigation that termination is an appropriate safeguard to protect the rights of mentally incompetent respondents.[59] In *Matter of M-J-K-*, the BIA reversed a termination of proceedings for a mentally incompetent respondent by finding that the IJ did not consider other possible safeguards before granting the motion to terminate.[60] Yet the BIA did not question the IJ's authority to discretionarily terminate the case, implicitly upholding the practice as long as the IJ conducts a thorough, fact-specific inquiry before using her discretion to terminate a case for a mentally incompetent respondent.[61]

Still, the BIA has never explicitly upheld IJs' ability to discretionarily terminate, and instead has issued decisions suggesting that termination is limited to the specific circumstances described in 8 C.F.R. § 1239.2(f) and other similar regulations. In *Matter of J-A-B- & I-J-V-A-*,[62] the BIA explained that "it is well settled that an Immigration Judge may only 'terminate proceedings when the DHS cannot sustain the charges [of removability] or *in other specific circumstances consistent with the law and applicable regulations*.'"[63] However, the BIA declined to elaborate on these "specific circumstances," and IJs continued to terminate cases at their discretion.[64]

Several circuit courts have held that IJs lack any discretionary authority to terminate proceedings. In *Panova-Bohannan v.*

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57. *See* Wilson et al., *supra* note 47, at 335, 338.

58. *Immigration Judge Benchbook: Mental Health Issues*, U.S. DEP'T OF JUSTICE, EXEC. OFF. FOR IMMIGR. REV. (Aug. 8, 2017), https://www.justice.gov/eoir/immigration-judge-benchbook-mental-health-issues [https://perma.cc/BLZ3-D49Q].

59. Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034, 1048 (C.D. Cal. 2010).

60. 26 I. & N. Dec. 773 (B.I.A. 2016); *see also* Matter of M-A-M-, 25 I. & N. Dec. 474, 480 (B.I.A. 2011) (requiring IJs to impose "appropriate safeguards" in removal proceedings for mentally incompetent respondents).

61. *See Matter of M-J-K-*, 26 I. & N. Dec. at 777 n.4 ("Immigration Judges should be *particularly reluctant* to terminate proceedings where, as here, the alien has a history of serious criminal conduct and may pose a danger to himself or others upon his release into the community." (emphasis added)).

62. 27 I. & N. Dec. 168 (B.I.A. 2017).

63. *Id.* at 169 (quoting Matter of Sanchez-Herbert, 26 I. & N. Dec. 43, 45 (B.I.A. 2012) (emphasis added)).

64. Wilson et. al, *supra* note 47, at 358–61 (describing IJs' continued practice of terminating proceedings for mentally incompetent respondents).

Ashcroft, an unpublished decision, the Fifth Circuit granted *Chevron* deference to the BIA's position that IJs lacked *any* discretionary authority to terminate proceedings, and that they may only terminate proceedings under 8 C.F.R. § 1239.2.[65] The Ninth Circuit ruled similarly in *Barahona-Gomez v. Reno*.[66] In *Ahmed v. Gonzales*, the Seventh Circuit held that IJs have no discretion to terminate removal proceedings in lieu of ordering a respondent removed in absentia, even if the respondent has voluntarily departed the United States before the issuance of the removal order.[67] Other circuits have remained silent on the issue. No circuit has explicitly upheld an IJ's discretionary power to terminate proceedings, in stark contrast to courts' jurisprudence on administrative closure. Yet despite this lack of judicial approval, IJs continued to exercise their power to terminate proceedings, claiming that their governing regulations give them the authority to do so.[68]

B. RECENT CASES LIMITING IJ DOCKET MANAGEMENT

In 2018, Attorney General Sessions issued three decisions that severely curtailed IJs' discretion to use administrative closure, continuances, and termination to manage their own dockets: *Matter of Castro-Tum*, *Matter of L-A-B-R-*, and *Matter of S-O-G- & F-D-B-*. These three cases work in tandem to force IJs to adjudicate cases as quickly as possible, often compromising the due process rights of respondents and the fair, just, and equitable resolution of cases.[69]

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65. 74 F. App'x 424, 425–26 (5th Cir. 2003) (per curiam). The Fifth Circuit held that the BIA's interpretation was not "arbitrary, capricious, or manifestly contrary to the state" and decided to defer to this interpretation. *See also* Rasool v. Ashcroft, 81 F. App'x 515, 516 (5th Cir. 2003) (per curiam) (citing *Panova-Bohannan* for the proposition that IJs lack the discretionary authority to terminate proceedings); Maredia v. Gonzales, 232 F. App'x 413, 417 (5th Cir. 2007) (per curiam) (same).

66. 236 F.3d 1115, 1119 (9th Cir. 2001) (explaining that "'[i]mmigration judges are creatures of statute' and that, under Ninth Circuit law, 'the immigration judge is without discretionary authority to terminate deportation proceedings so long as enforcement officials of the INS choose to initiate proceedings against a deportable alien and prosecute those proceedings to a conclusion'" (quoting Lopez-Telles v. INS, 564 F.2d 1302, 1303–04 (9th. Cir. 1977))).

67. 423 F.3d 709, 711–12 (7th Cir. 2005).

68. *See* Tillman, *supra* note 52.

69. *See* Jill E. Family, *Immigration Adjudication Bankruptcy*, 21 U. PA. J. CONST. L. 1025, 1042 (2019).

1. Matter of Castro-Tum *and* Matter of L-A-B-R-

Sessions' first attack on the discretion of IJs to manage their dockets came in May 2018, when Sessions issued *Matter of Castro-Tum* after certifying the decision to himself.[70] As in a number of earlier BIA cases, such as *Matter of A-B-*, Sessions certified *Matter of Castro-Tum* to himself.[71] He directed Board of Immigration Appeals to certify the matter for his review and invited interested parties to submit briefs explaining whether IJs have the inherent authority to administratively close cases.[72] After considering the parties' arguments and briefs from fourteen amici, the Attorney General issued a decision holding that IJs lack the "general authority" to grant administrative closure.[73] The decision states that "for cases that truly warrant a brief pause, the regulations expressly provide for continuances."[74] Sessions held that the IJ governing regulations should be read narrowly. Because the regulations do not specifically and explicitly provide for administrative closure, Sessions held that administrative closure goes beyond the authority delegated to IJs in their governing regulations and overruled *Matter of Avetisyan*.[75]

Three months after *Matter of Castro-Tum*, Sessions decided *Matter of L-A-B-R-*,[76] which imposed stringent procedural requirements that IJs must follow before granting a motion for continuance. The Attorney General promulgated this decision in response to what he viewed as a dramatic increase in "the number of continuances granted by immigrations judges . . . over the past decade,"[77] and instructed IJs to consider "administrative efficiency" when determining whether to grant a continuance.[78] Citing his own reasoning in *Matter of Castro-Tum*, Sessions held that once DHS initiates proceedings, "immigration judges . . . must proceed

70. *See* Matter of Castro-Tum, 27 I. & N. Dec. 271 (Att'y Gen. 2018).
71. Sessions' rampant use of self-certification is discussed *infra* Part IV.
72. Matter of Castro-Tum, 27 I. & N. Dec. 187 (Att'y Gen. 2018).
73. Matter of Castro-Tum, 27 I. & N. Dec. 271 (Att'y Gen. 2018).
74. *Id.* at 292.
75. *See id.* at 285 ("Neither section 1003.10(b) nor section 1003.1(d)(1)(ii) confers the authority to grant administrative closure. Grants of general authority to take measures 'appropriate and necessary for the disposition of such cases' would not ordinarily include the authority to suspend cases indefinitely.").
76. 27 I. & N. Dec. 405 (Att'y Gen. 2018).
77. *Id.* at 406.
78. *Id.* at 416.

'expeditious[ly]' to resolve the case"[79] and argued that the IJ governing regulations "promote the 'timely' and 'expeditious' resolution of removal proceedings."[80]

2. Matter of S-O-G- & F-D-B-

The next month-, the Attorney General decided *Matter of S-O-G & F-D-B-*,[81] two consolidated cases that clarified the standards IJs should use before granting dismissal or termination.[82]

In *Matter of S-O-G-*, the respondent was a native and citizen of Mexico.[83] At her first hearing, S-O-G- conceded that she was removable as charged but indicated that she would apply for relief from removal.[84] DHS later learned that S-O-G- had previously been ordered removed in absentia.[85] DHS moved to terminate proceedings because the prior removal order foreclosed S-O-G-'s eligibility for relief.[86] S-O-G- argued that termination would violate her due process rights, but the IJ held that DHS's motion to terminate was a valid exercise of its prosecutorial discretion and granted the motion.[87] The BIA affirmed.[88] The Attorney General again affirmed, holding that the BIA and the IJ had properly terminated S-O-G-'s removal proceedings because she had already been ordered removed once before.[89] Sessions concluded that repeating the removal proceeding would be duplicative and "no longer in the best interest of the Government."[90] While Sessions held that the IJ's action was properly characterized as a "dismissal" rather than

79. *Id.* at 406–07. Immigration advocates worry that the Attorney General's repeated emphasis on speed will overly prejudice respondents and will result in higher rates of deportation, as well as higher incidence of burnout and turnover for IJs. *See* INNOVATION L. LAB & S. POVERTY L. CTR., THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 30 n.84 (2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf [https://perma.cc/79AH-ZERW].

80. *L-A-B-R-*, 27 I. & N. Dec. at 406.

81. 27 I. & N. Dec. 462 (B.I.A. 2018).

82. *Id.* at 463.

83. *Id.*

84. *Id.*

85. *Id.* An IJ may order a respondent removed in absentia if the respondent fails to appear at a hearing, as long as DHS can meet its burden to show, by "clear, unequivocal, and convincing evidence," that the respondent received proper notice and is removable as charged. 8 U.S.C. § 1229a(b)(5)(A).

86. *S-O-G- & F-D-B-*, 27 I. & N. Dec. at 463.

87. *Id.*

88. *Id.* at 464.

89. *Id.* at 467.

90. *Id.*

a "termination," he held that the error was harmless and affirmed the BIA's ruling.[91]

Similarly, in *Matter of F-D-B-*, an IJ had previously ordered the respondent removed in absentia at a prior hearing.[92] F-D-B- subsequently filed an unopposed motion to reopen.[93] The IJ granted her motion to reopen, and F-D-B- conceded that she was removable as charged.[94] However, F-D-B- was the beneficiary of an approved I-130 petition, filed by her U.S. citizen immediate relative.[95] The IJ administratively closed her removal proceedings so that F-D-B- could seek a provisional unlawful presence waiver, called an I-601A waiver, a form of relief only USCIS may grant.[96] USCIS granted F-D-B-'s I-601A waiver, and F-D-B- moved to terminate her proceedings.[97] DHS opposed the motion, but the IJ granted it, writing that there "appears [to be] no apparent reason why this case should remain on the court['s] busy docket when she is simply waiting for an interview abroad."[98] The BIA affirmed, concluding that termination of F-D-B-'s removal proceedings was appropriate in light of the risk a removal order or a grant of voluntary departure could have on F-D-B-'s provisional waiver.[99]

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91. *Id.* at 467 n.2.

92. *Id.* at 464.

93. *Id.*

94. *Id.*

95. However, because F-D-B- entered without inspection, F-D-B- was ineligible to adjust status under 8 U.S.C. § 1255(i) and was required to complete her visa processing abroad.

96. Many immigrants, such as F-D-B-, are the beneficiaries of approved immigrant relative petitions, but cannot seek an immigrant visa on the basis of this approved petition because of their unlawful presence in the United States. If F-D-B- accumulated over one year of unlawful presence in the United States and departed the U.S. to complete her visa interview at a consulate abroad, F-D-B- would be barred from entering the U.S. for ten years after her departure. *See* 8 U.S.C. § 1182(a)(9)(B). If F-D-B- accumulated between six months and one year of unlawful presence and departed the U.S. to complete her visa interview at a consulate abroad, F-D-B- would be barred from entering the U.S. for three years after her departure. *Id.* The I-601A Provisional Unlawful Presence waiver allows a family-based immigrant visa applicant to waive the 3-year or 10-year bar upon a showing that they are the spouse or child of a U.S. citizen or lawful permanent resident; that the three-year or ten-year bar would result in extreme hardship for the qualifying U.S. citizen or lawful permanent resident relative; and that the applicant warrants a favorable exercise of discretion. 8 C.F.R. § 212.7(e)(3)(iii) (2021). USCIS has sole jurisdiction over the granting of a provisional unlawful presence waiver; an IJ may not consider the I-601A application. 8 C.F.R. § 212.7(e)(1) (2021). While a person subject to the unlawful presence bars may still petition for waivers of inadmissibility from abroad, an I-601A approval provides certainty to people *before* they leave, rather than forcing them to risk a denied waiver from abroad.

97. *S-O-G- & F-D-B-*, 27 I. & N. Dec. at 464.

98. *Id.* at 465.

99. *Id.* A removal order would likely render F-D-B-'s provisional waiver moot, as a removal order would likely bar F-D-B-'s reentry even with a valid provisional waiver.

Sessions reversed.[100] Relying on his own reasoning in *Matter of Castro-Tum*, the Attorney General explained that no regulation concerning IJ authority grants IJs the power to dismiss or terminate proceedings in their discretion.[101] The Attorney General identified only three circumstances in which IJs may dismiss or terminate proceedings: first, on motion by DHS when "the [N]otice to [A]ppear was improvidently issued";[102] second, when the "[c]ircumstances of the case have changed after the [N]otice to [A]ppear was issued to such an extent that continuation is no longer in the interest of the government";[103] and third, under the terms of 8 C.F.R. § 1239.2(f) that allow an IJ "to permit the alien to proceed to a final hearing on a pending application or petition for naturalization. . . ."[104] Sessions concluded that these regulations were exhaustive,[105] and that a general termination power would conflict with the INA's mandate that an IJ "shall decide whether an alien is removable from the United States."[106] Additionally, Sessions found that giving an IJ the discretion to terminate proceedings would compromise the "jurisdictional scheme" laid out in the INA, by usurping DHS's power to prosecute removal cases.[107]

The trio of decisions incensed immigration advocates, who immediately called for the decisions to be overturned. The American Immigration Lawyers' Association, for example, published a "practice pointer" that recommended legal strategies for challenging *Matter of S-O-G- & F-D-B*.[108] Similarly, the American Immigration Council published a practice advisory that encouraged practitioners to challenge *Matter of Castro-Tum*.[109] The next Part discusses the outcome of one such challenge brought in the Fourth Circuit, *Romero v. Barr*.[110]

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100. *Id.* at 463.

101. *Id.* Sessions wrote: "Given that the provision does not permit the immigration judge to suspend indefinitely a respondent's removal proceedings, the provision similarly cannot be read to provide the authority to end removal proceedings entirely." *Id.* at 466 (internally citing Matter of Castro-Tum, 27 I. & N. Dec. 271, 285 (Att'y Gen. 2018)).

102. *Id.* (quoting 8 C.F.R. § 239.2(a)(6) (2018)) (alterations in original).

103. *Id.* (quoting 8 C.F.R. § 239.2(a)(7) (2018)) (alterations in original).

104. *Id.* (quoting 8 C.F.R. § 1239.2(f) (2018)).

105. *Id.* at 468 ("The authority to terminate under 8 C.F.R. § 1239.2(f) is specific and circumscribed.").

106. *Id.* at 466–67 (quoting 8 U.S.C. § 1229a(c)(1)(A)) (emphasis omitted).

107. *Id.* at 468.

108. *See* AM. IMMIGR. LAWYERS' ASS'N, *supra* note 20.

109. *See* ADMINISTRATIVE CLOSURE POST-*CASTRO-TUM*, *supra* note 20.

110. 937 F.3d 282 (4th Cir. 2019).

III. THE DECISION IN ROMERO V. BARR AND ITS IMPACT ON *MATTER OF S-O-G- & F-D-B-*

In *Romero v. Barr*, the Fourth Circuit became the first Court of Appeals to hold that *Castro-Tum* was wrongly decided.[111] Focusing on the Supreme Court's recent decision in *Kisor v. Wilkie*,[112] the Fourth Circuit found that, contrary to Sessions' ruling in *Castro-Tum*, the IJ governing regulations should be read broadly to authorize administrative closure.[113] Consequently, the Fourth Circuit declined to afford *Kisor* deference to Sessions' interpretation of the regulations.[114]

This Part uses the *Romero* decision to consider potential strategies for challenging *Matter of S-O-G- & F-D-B-*. Part III.A provides a brief synopsis of *Kisor* and *Romero*. Parts III.B and III.C then apply the Fourth Circuit's reasoning in *Romero* to the question in *Matter of S-O-G- & F-D-B-*, querying whether *Romero* may be used as a guide for a future challenge to *Matter of S-O-G- & F-D-B-*.[115] Ultimately, Parts III.B and III.C argue that advocates should use the Fourth Circuit's expansive reading of the IJ governing regulations in *Romero* to argue that IJs have the authority to discretionarily terminate proceedings when appropriate.

A. *KISOR V. WILKIE* AND ITS POTENTIAL IMPACT ON THE DOCKET-MANAGEMENT TRIO

In the last weeks of the Supreme Court's 2018 Term, the Court decided *Kisor v. Wilkie*, a case with broad implications for judicial review of agency interpretations of regulations such as those at issue in *Matter of Castro-Tum*, *Matter of L-A-B-R-*, and *Matter of S-O-G- & F-D-B-*. The Court in *Kisor* considered the continued appropriateness of *Auer* deference, a form of judicial deference under which court defer to "agencies' reasonable readings of genuinely

111. *Id.* at 292; *see also* Elizabeth Montano, *The Rise and Fall of Administrative Closure in Immigration Courts*, 129 YALE L.J.F. 576, 569 (2020) (recognizing *Romero v. Barr* as the first circuit court decision to reject *Matter of Castro-Tum*). The court's ruling only applies to immigration courts within the Fourth Circuit's jurisdiction. See *id.*

112. 139 S. Ct. 2400 (2019).

113. *Romero*, 937 F.3d at 292.

114. *Id.* at 297. See *infra* Part III.A for a discussion of *Kisor* deference.

115. *See supra* Part II.B for a discussion of the facts and legal reasoning of *Matter of S-O-G- & F-D-B-*.

ambiguous regulations[.]"[116] The Court declined to overrule *Auer*, but made it much more difficult for an agency's interpretation to receive judicial deference. In this newly-formulated "*Kisor*" deference, a court must cross several hurdles before it can defer to an agency's interpretation.[117] First, a court may only afford *Kisor* deference if it determines that the regulation is "genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation."[118] Second, the court must determine that the agency's interpretation is actually reasonable.[119] Third, the agency's interpretation must be the agency's authoritative or official position; it must "emanate" from the agency's leadership, such as the head of the agency or her chief advisors.[120] Fourth, the agency's interpretation must reflect the agency's substantive expertise.[121] Finally, the agency's interpretation must reflect its "'fair and considered judgment' to receive *Kisor* deference."[122] Most importantly, the court should not defer to the agency interpretation if it constitutes an "unfair surprise," that is, if the interpretation conflicts with a prior agency interpretation with no "fair warning" to protect those who might have mistakenly relied on the prior agency interpretation.[123] The majority opinion only briefly considered *Skidmore* deference, in which the court must decide whether the agency's interpretation has the "power to persuade."[124]

While the Supreme Court did not overrule *Auer*, *Kisor*'s significant narrowing of the *Auer* doctrine will likely have a major, long-lasting impact on the deference courts will afford to the Attorney General and the BIA for their interpretations of immigration regulations. Previously, courts deferred regularly to BIA

116. *Kisor*, 139 S. Ct. at 2408; *see* Auer v. Robbins, 519 U.S. 452, 457–58 (1997).

117. *Kisor*, 139 S. Ct. at 2414–18.

118. *Id.* at 2414.

119. *Id.* at 2416. The Court emphasized that "[reasonableness] is a requirement an agency can fail." *Id.*

120. *Id.*

121. *Id.* at 2417 (noting that the agency must have "comparative expertise in resolving a regulatory ambiguity" in the specific regulations at issue).

122. *Id.* (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).

123. *Id.* at 2418.

124. *Id.* at 2414. Taken from the case of Skidmore v. Swift & Co., 323 U.S. 134 (1944), *Skidmore* deference is another form of judicial deference that does not give the agency's interpretation "controlling weight," but asks courts to consider the thoroughness of consideration, validity of reasoning, consistency, and general persuasiveness of the agency's interpretation before deciding the if the interpretation is persuasive, *see id.* at 140. However, these factors are almost identical to the new factors required by *Kisor*, and thus, a *Skidmore* inquiry would almost certainly be redundant. This Note will discuss the applicability of the *Skidmore* deference to the question of discretionary termination *infra* Part III.C.

interpretations. Applying *Auer*, circuit courts recently deferred to the BIA's interpretation of the regulations establishing the necessary components of the Notice to Appear charging document,[125] to its interpretation of a regulation determining whether an adjustment of status applicant may be "grandfathered in" for a status for which they are no longer eligible,[126] and to its interpretation of a regulation governing its own *sua sponte* authority to reopen final removal proceedings.[127]

It should be no surprise, then, that one of the first cases applying *Kisor*'s reformulated *Auer* framework was an immigration case. In *Romero v. Barr*,[128] petitioner Jesus Humberto Zuniga Romero challenged the Attorney General's reasoning in *Matter of Castro-Tum* and argued that the Attorney General's interpretation of 8 C.F.R. § 1003.10(b), precluding IJs from granting administrative closure, should not be afforded *Auer* deference.[129] The Fourth Circuit agreed and ruled for Romero on two grounds.

First, the Fourth Circuit found that the "plain language" of 8 C.F.R. § 1003.10(b) unambiguously vested IJs with the authority to administratively close cases as part of their authority to "take *any* action" that is "appropriate and necessary for the disposition of a case."[130] The Fourth Circuit examined other case law discussing how "any" should be interpreted, and it agreed that "any" should have an "expansive meaning, that is, one or some indiscriminately of whatever kind."[131] Based on this capacious reading of "any action," the Fourth Circuit held that "'any action . . . for the disposition of' the case is read most naturally to encompass actions of whatever kind appropriate for the resolution of a case. In turn, this would plainly include docket management actions such as

125. Hernandez-Perez v. Whitaker, 911 F.3d 305, 313–15 (6th Cir. 2018) (affording *Auer* deference to the BIA's interpretation in *Matter of Bermudez-Cota* that a Notice to Appear may tell the respondent the time and place of their hearing in a separate document). A Notice to Appear charges the respondent with specific violations of the Immigration and Nationality Act, such as being present in the United States without proper documentation, overstaying a valid visa, or being convicted of a specified crime. The Notice to Appear also alleges the country of the noncitizen respondent's alienage. 8 U.S.C. § 1229(a).

126. Mansour v. Holder, 739 F.3d 412, 414, 417 (8th Cir. 2014). There, the Eighth Circuit even decided to afford *Auer* deference to an *unpublished* BIA opinion. *See id.*

127. Zhang v. Holder, 617 F.3d 650, 655 (2d Cir. 2010).

128. 937 F.3d 282 (4th Cir. 2019).

129. *Id.* at 290.

130. *Id.* at 292 (citing 8 C.F.R. § 1003.10 (2019)) (emphasis in original). *See supra* note 34 for the full language of 8 C.F.R. § 1003.10(b) (2021).

131. *Romero*, 937 F.3d at 292 (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997)).

administrative closure, which often facilitate . . . case resolution."[132] While the Fourth Circuit acknowledged that 8 C.F.R. § 1003.10 requires that the "action" taken by the IJ must be "appropriate and necessary," the Fourth Circuit reasoned that the BIA had repeatedly recognized administrative closure as an "appropriate and necessary" docket management device.[133] The Fourth Circuit considered 8 C.F.R. § 1240.1(a), another regulation governing IJ authority,[134] and held that it supported Romero's theory that IJs possess broad discretion as to how they manage their dockets.[135] Using these tools of statutory interpretation, the Fourth Circuit held that 8 C.F.R. § 1003.10 was not genuinely ambiguous and, as such, "there is no *Auer* deference analysis to be conducted."[136]

The Fourth Circuit then found that even if 8 C.F.R. § 1003.10 *was* ambiguous, *Kisor* and *Christopher v. SmithKline Beecham Corporation*[137] foreclosed the Fourth Circuit from granting *Kisor* deference to Sessions' interpretation.[138] The Court held that the Attorney General's interpretation of the regulation announced in *Matter of Castro-Tum* amounted to an "unfair surprise," which would make deference inappropriate under *Kisor* and *Christopher*.[139] Recognizing the longstanding practice of administrative closure in immigration court, the Court held that the change in interpretation in *Matter of Castro-Tum* "fails to give fair warning to the regulated parties of a change in longstanding procedure"[140] and thus does not qualify for *Kisor* deference.

Finally, the Court considered whether the *Matter of Castro-Tum* interpretation of 8 C.F.R. § 1003.10 nevertheless merited *Skidmore* deference.[141] The Court held that the Attorney General's

132. *Id.* at 292 (internal citation omitted).

133. *Id.* at 293–94 (citing Matter of Avetisyan, 25 I. & N. Dec. 688, 689 (B.I.A. 2012); Matter of Rajah, 25 I. & N. Dec. 127, 135 n.10 (B.I.A. 2009); Matter of Hashmi, 24 I. & N. Dec. 785, 791 n.4 (B.I.A. 2009)).

134. *See* 8 C.F.R. § 1240.1(a)(1)(iv) (2021) (authorizing IJs to "take any other action consistent with applicable law and regulations as may be appropriate").

135. *Romero*, 937 F.3d at 294.

136. *Id.*

137. 567 U.S. 142 (2012).

138. *Romero*, 937 F.3d at 295.

139. *Id.*; *see also Christopher*, 567 U.S. at 153–59 (declining to grant *Auer* deference to agency interpretation of regulation when the agency had changed its interpretation after decades of interpreting it differently, because the interpretation was an "unfair surprise" to affected parties).

140. *Romero*, 937 F.3d at 295.

141. *Id.* at 297.

interpretation did not merit *Skidmore* deference for the same reasons that it did not merit *Kisor* deference: it marked a stark departure, without notice, from decades of agency policy.[142] As such, it "cannot be deemed consistent with earlier and later pronouncements" — one of the *Skidmore* factors — and thus, lacked "the power to persuade."[143]

Immigration advocates were thrilled with the outcome in *Romero*.[144] Two days after the ruling, Jeremy MicKinney, vice president of the American Immigration Lawyers Association, wrote that *Romero*, "gives new hope to people appearing in immigration courts in other circuits that *Castro-Tum* . . . must be challenged nationwide."[145] The American Immigration Council published a practice advisory examining *Romero*'s reasoning and suggested that *Romero* "supports arguments for challenging *Matter of Castro-Tum* in other circuits."[146] Indeed, since the Fourth Circuit decided *Romero*, the Third, Sixth, and Seventh Circuits have considered whether the IJ governing regulations authorize administrative closure, and whether *Matter of Castro-Tum* was wrongly decided. The Third Circuit and the Seventh Circuit both overruled *Matter of Castro-Tum* for reasons largely consistent with the Fourth Circuit's in *Romero*.[147] The Sixth Circuit, however, rejected this reasoning, and held that the regulations do not authorize IJs to administratively close proceedings.[148] Additionally, there are currently several challenges to the Attorney General's interpretation in *Matter of Castro-Tum* pending before other Courts of Appeals.[149]

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142. *Id.*

143. *Id.* (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

144. *See* Press Release, Am. Immigr. Laws. Ass'n, AILA: Fourth Circuit Strikes Down Attorney General Opinion, Restores Fundamental Power to Immigration Judges (Aug. 30, 2019), https://www.aila.org/advo-media/press-releases/2019/aila-fourth-circuit-strikes-down-attorney-general [https://perma.cc/DB5H-RHH7] ("With this ruling, the Fourth Circuit has given those who support the rule of law and an independent judiciary cause for celebration.").

145. *Id.*

146. ADMINISTRATIVE CLOSURE POST-*CASTRO-TUM*, *supra* note 20, at 7.

147. *See* Meza Morales v. Barr, 973 F.3d 656, 667 (7th Cir. 2020) (declining to afford *Auer* deference to *Matter of Castro-Tum*); Arcos Sanchez v. Att'y Gen., 997 F.3d 113 (3d Cir. 2021) (following *Meza Morales* and *Romero* and holding that the IJ governing regulations unambiguously grant IJs the authority to administratively close proceedings). Of note, now-Justice Amy Coney Barrett wrote the decision in *Meza Morales*.

148. Hernandez-Serrano v. Barr, 981 F.3d 459, 466 (6th Cir. 2020).

149. *See* Benitez Marquez v. Garland, No. 18-3460 (2d Cir. filed Nov. 16, 2018); Umana-Escobar v. Garland, No. 19-70964 (9th Cir. filed Apr. 4, 2019); Santiago-Ramirez v. Garland,

B. APPLICABILITY OF THE *KISOR* AND *ROMERO* FRAMEWORKS TO *MATTER OF S-O-G- & F-D-B-*

This next subpart queries whether the Fourth Circuit's reasoning in *Romero* might be extended to the termination context, and whether the Fourth Circuit's capacious reading of the IJ governing regulations in *Romero* might encompass termination outside of the circumscribed scenarios proscribed in *Matter of S-O-G- & F-D-B-*. Part III.B applies *Kisor*'s new formulation of the *Auer* framework to the termination question: Part III.B.1 argues that the IJ governing regulations are not genuinely ambiguous and Part III.B.2 argues that the Attorney General's interpretation of the governing regulations is unreasonable. Part III.C contends that in the absence of *Kisor* deference, a court should still decline to afford the DOJ's interpretation *Skidmore* deference.

1. *8 C.F.R. § 1240.1(a)(1) is Not Genuinely Ambiguous*

In deciding whether to defer to an agency's interpretation, a court must first determine whether the regulation itself is "genuinely ambiguous," or whether the regulation speaks clearly to the issue.[150] *Kisor* mandates that the court conduct an aggressive assessment of the regulatory meaning before concluding that ambiguity exists.[151] The court should employ all of the traditional tools of statutory interpretation, including examining the "text and structure" of the regulation coupled with its "purpose and history."[152] While discretionary termination is not clearly mandated by the text of § 1240.1(a)(1) alone, such a reading is not only plausible, but also the reading that best reflects the text itself, intent of the drafters, and the strong policy implications. As such, this subpart argues that § 1240.1(a)(1) unambiguously authorizes discretionary termination.

No. 20-71162 (9th Cir. filed Apr. 22, 2020); Gonzalez-Penaloza v. Garland, No. 20-60241 (5th Cir. filed Mar. 27, 2020); Gomes v. Garland, No. 20-2196 (1st Cir. filed Dec. 23, 2020).

150. Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019).

151. *Id*. at 2423–24 ("[T]he court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning.").

152. Sec'y of Labor v. Seward Ship's Drydock, Inc., 937 F.3d 1301, 1308–09 (9th Cir. 2019) (declining to afford *Auer* deference to Department of Labor regulation after using "all the traditional tools of construction" to determine that the regulation was not ambiguous).

The court must begin its *Kisor* inquiry by examining the "plain words of the regulation."[153] In *Matter of S-O-G- & F-D-B-*, Sessions interpreted 8 C.F.R. § 1240.1(a)(1), a regulation similar to the regulation the Fourth Circuit examined in *Romero v. Barr*, 8 C.F.R. § 1003.10.[154] Both 8 C.F.R. § 1003.10 and 8 C.F.R. § 1240.1(a)(1) speak to the authority of IJs, and should be read in tandem. 8 C.F.R. § 1003.10 speaks to the general authority of IJs, and provides, in relevant part: "[I]mmigration judges . . . may take any action consistent with their authority under the Act and regulations that is appropriate and necessary for the disposition of [removal proceedings]."[155] 8 C.F.R. § 1240.1(a)(1), on the other hand, specifies which actions the IJ may take to conclude a removal proceeding. The regulation provides:

> In any removal proceeding pursuant to section 240 of the Act, the immigration judge shall have the authority to:
>
> (i) Determine removability pursuant to section 240(a)(1) of the Act; to make decisions, including orders of removal as provided by section 240(c)(1)(A) of the Act;
>
> (ii) To determine applications under sections 208, 212(a)(2)(F), 212(a)(6)(F)(ii), 212(a)(9)(B)(v), 212(d)(11), 212(d)(12), 212(g), 212(h), 212(i), 212(k), 237(a)(1)(E)(iii), 237(a)(1)(H), 237(a)(3)(C)(ii), 240A(a) and (b), 240B, 245, and 249 of the Act, section 202 of Pub. L. 105-100 section 902 of Pub. L. 105-277, and former section 212(c) of the Act (as it existed prior to April 1, 1997);
>
> (iii) To order withholding of removal pursuant to section 241(b)(3) of the Act and pursuant to the Convention Against Torture; and
>
> (iv) *To take any other action consistent with applicable law and regulations as may be appropriate.*[156]

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153. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

154. 27 I. & N. Dec. 462, 466 (Att'y Gen. 2018). While *Romero* did not examine the bearing of 8 C.F.R. § 1240.1 on an IJ's authority to administratively close proceedings, *Romero* cites 8 C.F.R. § 1240.1 twice to explain the "powers and duties" of IJs. Romero v. Barr, 937 F.3d 282, 288, 294 (4th Cir. 2019).

155. 8 C.F.R. § 1003.10 (2021).

156. 8 C.F.R. § 1240.1(a)(1) (2021) (emphasis added). Of note, the text of what is now 8 C.F.R. § 1003.1 — allowing IJs to take "appropriate and necessary" actions "for the disposition of [ ] cases" — appeared within 8 C.F.R. § 1240 until 2007, when it was removed from 8 C.F.R. § 1240(a)(2) and codified at 8 C.F.R. § 1003.10.

While 8 C.F.R. §§ 1240.1(a)(1)(i)–(iii) each provide specific authority to the IJ to determine removability and grant applications for relief under specified sections of the Immigration and Nationality Act, § 1240.1(a)(1)(iv) may be read to grant broad authority to IJs. There are only two limitations to this broad grant of authority: the action must be "consistent with applicable law and regulations" and must be "appropriate."[157]

a. The Text of "Any Other Action" Encompasses Discretionary Termination

The language of the first clause of § 1240.1(a)(1)(iv) suggests that termination is an "other action" IJs may take. Regulations undoubtedly establish termination as an "action" that IJs may lawfully take in the course of their adjudications. Indeed, IJs have express authority to terminate proceedings when the respondent is prima facie eligible for naturalization;[158] when DHS fails to meet its burden to show removability;[159] and when DHS and the respondent jointly move to terminate on the basis of a T or U visa application.[160] The word "other" suggests that the contemplated action is distinct from the IJ's authority to determine removability or grant relief; an IJ may decide to take this "other" action without determining if the respondent is removable first.[161]

Further, courts have regularly interpreted the word "any" or phrases including the word "any" broadly. In *Ali v. Federal Bureau of Prisons*,[162] the Supreme Court declined to limit "the unmodified, all-encompassing phrase 'any other law enforcement officer,'" where Congress "easily could have written" a narrower phrase.[163]

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157. 8 C.F.R. § 1240.1(a)(1)(iv) (2021).

158. 8 C.F.R. § 1239.2(f) (2021).

159. 27 I. & N. Dec. at 463 (citing 8 C.F.R. § 1240.12 (c) (2021)); *see also* Matter of R-D-, 24 I. & N. Dec. 221 (B.I.A. 2007).

160. 8 C.F.R. § 214.11 (2016) (T visa); 8 C.F.R. § 214.14 (2016) (U visa).

161. *But see* 8 U.S.C. § 1229a(c)(1)(A) (2021) ("At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States."). Still, an IJ is not required to determine removability when the IJ terminates proceedings for a non-discretionary reason, *i.e.*, when the Department of Homeland Security has not properly pled the charges in the Notice to Appear or when the Department of Homeland Security motions to dismiss the proceedings on the grounds that the Notice to Appear was "improvidently issued." 8 C.F.R. § 239.2(c) (2021).

162. 552 U.S. 214 (2008).

163. *Id.* at 227–28; *see also* Brogan v. United States, 522 U.S. 398, 400 (1998) ("By its terms, 18 U.S.C. § 1001 covers 'any' false statement — that is, a false statement 'of whatever kind.'").

In *Romero*, the Fourth Circuit considered the expansiveness of 8 C.F.R. § 1003.10, the companion regulation to 8 C.F.R. § 1240.1, and found that "'*any* action . . . for the disposition of' the case is read most naturally to encompass actions of whatever kind appropriate for the resolution of a case."[164] A court considering a challenge to *Matter of S-O-G- & F-D-B-* would likely similarly read 8 C.F.R. § 1240.1 expansively. Consequently, the "any other action[s]" an IJ could take might be the granting of a continuance, administrative closure, or even termination.

This reading is also supported by the broader regulatory context of § 1240.1(a)(1)(iv). The phrase "any other action" appears four other times in Chapter 8 of the Code of Federal Regulations, the chapter concerned with immigration.[165] Each of the four other usages of "any other action" within the Chapter appear in regulations governing the authority of IJs or other immigration adjudicators. 8 C.F.R. § 342.5, for example, prescribes the authority for naturalization examiners, who are given the authority to "take any other action as may be appropriate to the conduct and disposition of the case."[166] This phrase appears after a list of ten other specific actions the naturalization examiner may take in the course of the naturalization exam, including "tak[ing] testimony of respondent and witness," "grant[ing] continuances," and "issu[ing] subpoenas."[167] As such, the existence of the ten preceding actions may suggest that "any other action" refers to conduct by the naturalization examiner during the time of a naturalization examination, but beyond that, the phrase is broad. There is nothing else in 8 C.F.R. § 342.5, or any other pertinent regulation, limiting the "any other action" language.

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164. Romero v. Barr, 937 F.3d 282, 288, 292 (4th Cir. 2019).

165. *See* 8 C.F.R. §§ 342.5, 1246.4, 1240.41, 246.4 (2021). The phrase "any other action" appears once in the Immigration and Nationality Act, the statute interpreted by the regulations as 8 C.F.R., at 8 U.S.C. § 1253(a)(1)(C). That regulation penalizes noncitizens who "connives or conspires, or takes any other action, designed to prevent or hamper" the noncitizen's removal. The Fifth Circuit examined the meaning of "any other action" at length in United States v. Bucic, 930 F.3d 383 (5th Cir. 2019), and it found that the statutory interpretation cannons of *ejusdem generis* and *noscitur a sociis* did not apply to the phrase because it was "disjunctive," *id.* at 390–91. The Fifth Circuit additionally found that Congress intended the phrase "any other action" to be given broad meaning, as it could have easily limited the phrase by writing "any other joint action" or "any other similar action." *Id.* at 391.

166. 8 C.F.R. § 342.5(a) (2021).

167. *Id.*

b. Discretionary Termination Is "Consistent with Applicable Law and Regulations"

A court must also consider what limits the qualification "consistent with applicable law and regulations" puts on the phrase "any other action." The regulation the Fourth Circuit examined in *Romero*, 8 C.F.R. § 1003.10, includes an almost identical clause: the "action" must be "consistent with [the IJs'] authority under the Act and regulations."[168] Again, IJs' authority to terminate proceedings for non-discretionary reasons, such as DHS's failure to meet its burden of proving removability, is universally accepted as an "action" that is "consistent with applicable law and regulations." It is a close question if discretionary termination is consistent with applicable law and regulations, and it turns on whether the regulations governing non-discretionary termination in 8 C.F.R. § 1239.2(f) are exhaustive. The regulation provides:

> An immigration judge may terminate removal proceedings to permit the alien to proceed to a final hearing on a pending application or petition for naturalization when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors; in every other case, the removal hearing shall be completed as promptly as possible notwithstanding the pendency of an application for naturalization during any state of the proceedings.[169]

In *Matter of S-O-G- & F-D-B-*, Sessions concluded that if IJs had discretionary authority to terminate removal proceedings, this discretionary authority would conflict with the enumerated circumstances in 8 C.F.R. § 1239.2(f).[170] Specifically, the Attorney General pointed to section 1239.2(f)'s language that in "*in every other case*, the removal hearing shall be completed as promptly as possible."[171] However, section 1239.2(f) does not explicitly exclude alternate forms of non-discretionary termination as possible outcomes for the removal proceedings. Section 1239.2(f) merely indicates that a case must be "completed," and does not specify *how*

168. 8 C.F.R. § 1003.10 (2021).
169. 8 C.F.R. § 1239.2(f) (2021).
170. 27 I. & N. Dec. 462, 466 (Att'y Gen. 2018).
171. *Id.* (quoting 8 C.F.R. § 1239.2(f) (2018)) (emphasis in original).

the case must be completed. If section 1239.2(f) is read exclusively to foreclose termination in every other circumstance except those enumerated in section 1239.2(f), it would contradict the other regulatory provisions that allow IJs to terminate upon joint motion when the respondent has a pending U or T visa application.

Each of these instances of termination would still fall within an IJ's authority under 8 C.F.R. § 1240.1(a)(1)(iv), as these actions' bases in regulations makes them "consistent with applicable law and regulations."[172] Yet under *Romero*, actions may also be "consistent with applicable law and regulations" without being explicitly mentioned or referenced in any law or regulations. For example, *Romero* recognized that administrative closure was an action "consistent with applicable law and regulations," even though 8 C.F.R. § 1003.10 and 8 C.F.R. § 1240.1 do not mention administrative closure as a valid action IJs may take in their discretion.[173] As in the termination context, the regulations provide that IJs may grant administrative closure in certain enumerated circumstances.[174] However, *Romero* holds that the regulations explicitly granting IJs the ability to administratively close proceedings in specific circumstances are not exhaustive; these regulations do not *preclude* IJs from using their discretion to administratively close cases in circumstances outside those expressly enumerated.

Even if section 1239.2 is neither exclusive nor exhaustive, discretionary termination may nevertheless be *inconsistent* "with applicable law and regulations" because it arguably usurps the power to commence proceedings granted to DHS by regulation.[175] Under section 1239.1, DHS has the authority to commence removal proceedings by filing a Notice to Appear with an immigration court.[176] As the Ninth Circuit explained in *Barahona-Gomez v. Reno*,[177] "after the case has been initiated before an IJ, there is no longer any discretion as to whether a matter should be adjudicated or not."[178] But that interpretation does not necessarily flow from the text of

172. *See* 8 C.F.R. § 1240.1(a)(1)(iv) (2021).
173. Romero v. Barr, 937 F.3d 282, 292 (4th Cir. 2019).
174. Pursuant to specific regulations, IJs may grant administrative closure upon a joint motion for respondents seeking adjustment of status under the Haitian Refugee Immigrant Fairness Act of 1998, as implemented by 8 C.F.R. § 1245.15 (2021), or under the Nicaraguan Adjustment and Central American Relief Act, as implemented by 8 C.F.R. § 1245.13(d)(3)(i) (2021).
175. *See* Barahona-Gomez v. Reno, 236 F.3d 1115, 1120 (9th Cir. 2001).
176. 8 C.F.R. § 1239.1 (2021).
177. *Barahona-Gomez*, 236 F.3d 1115.
178. *Id.* at 1120.

the DHS regulation, which only grants DHS the power to commence proceedings.[179] Still, circuit courts have held that "enforcement officials, not immigration judges" have the authority to not just commence proceedings,[180] but also to "prosecute those proceedings to a conclusion."[181] In *Lopez-Telles v. INS*, the Ninth Circuit recognized that IJs' powers are "sharply limited," and held that an IJ had no authority to terminate proceedings for purely humanitarian reasons.[182] But the Ninth Circuit decided *Lopez-Telles* in 1977, before the gradual growth of IJ authority detailed *supra* in Part II. Furthermore, *Lopez-Telles* did not consider the constitutional issues present in many modern termination cases and arguably misreads the governing regulations, which, again, do not explicitly foreclose IJs from terminating cases discretionarily.

Discretionary termination is also consistent with the second part of section 1239.2(f)'s mandate: that "removal hearing[s] shall be completed as promptly as possible."[183] In some circumstances, USCIS also has jurisdiction over an application for immigration relief and will adjudicate that petition more quickly, as in the case of *In re Jose Gabriel Alonzo-Octicla*,[184] discussed *infra* in Part III.B.1.c.ii. It follows that IJs have discretion to terminate proceedings in these cases, in order to ensure that an application for relief concludes "as promptly as possible." It may also comport with the "as promptly as possible" requirement when IJs are faced with the probability of granting endless continuances, as in cases where DHS cannot ensure that the respondents have received proper notice of the times and locations of their hearings,[185] or the court struggles unsuccessfully for years to locate an interpreter of a rare language.[186]

Even if discretionary termination is not consistent with section 1239.2, there are still circumstances where it would be required by the U.S. Constitution, an authority superior to the INA and its regulations. The Fifth Amendment secures immigrants' due process

179. 8 C.F.R. § 1239.1 (2021).
180. Ahmed v. Gonzales, 432 F.3d 709, 711 (7th Cir. 2005).
181. Lopez-Telles v. INS, 564 F.2d 1302, 1303–04 (9th Cir. 1977).
182. *Id.*
183. 8 C.F.R. § 1239.2(f) (2021).
184. 2018 WL 8062945 (B.I.A. Dec. 14, 2018).
185. *See* Brief for Am. Immigr. Laws. Ass'n as Amicus Curiae Supporting Petitioner at 3–6, Matter of J.J. Rodriguez Rodriguez, 27 I. & N. Dec. 762 (B.I.A. 2020) (No. 19-11-5) [hereinafter AILA Amicus Brief].
186. *See In re* Gaspar Samuel Zacarias-Poma, 2019 WL 3776089, at *1 (B.I.A. Apr. 23, 2019), discussed *infra* Part III.B.1.c.ii.

rights in removal proceedings.[187] IJs have a duty to ensure that respondents receive a "fundamentally fair" hearing, and when there is no way to ensure that a hearing is fair, IJs must terminate.[188]

c. Discretionary Termination May Be "Appropriate"

Finally, when interpreting 8 C.F.R. § 1240, a court must consider how the phrase "as may be appropriate" limits "any other action."[189] In *Romero*, the Fourth Circuit explained that, "as illustrated by *Matter of Avetisyan* and other BIA cases, administrative closure is 'appropriate and necessary' in a variety of circumstances."[190] There, the court examined the facts of *Avetisyan*, where administrative closure was necessary to guarantee USCIS the time to adjudicate the respondent's visa petition.[191] The Fourth Circuit also recognized that what is "appropriate" is "inherently context dependent."[192]

While discretionary termination may not be "appropriate" in every circumstance, in some cases it certainly is. Discretionary termination is "appropriate" when it advances either of two aims of the immigration system: to safeguard respondents' due process rights and to promote judicial economy.

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187. U.S. CONST. amend. V; Reno v. Flores, 507 U.S. 292, 306 (1993).

188. *See* Matter of Sanchez-Herbert, 26 I. & N. Dec. 43, 44 (B.I.A. 2012) (explaining that an IJ must terminate proceedings if it finds that the respondent did not receive proper notice of the hearing); Matter of Garcia-Flores, 17 I. & N. Dec. 325 (B.I.A. 1980). A longer discussion of discretionary termination as a due process safeguard follows *infra* in Part III.B.1.c.i.

189. 8 C.F.R. § 1240.1(a)(1)(iv) (2021).

190. Romero v. Barr, 937 F.2d 282, 293 (4th Cir. 2019).

191. *Id.* at 293–94 (discussing Matter of Avetisyan, 25 I. & N. Dec. 688, 689–91 (B.I.A. 2012)). For a longer discussion of *Avetisyan*, see *supra* Part II.A. In *Avetisyan*, the respondent had married an LPR who had applied to naturalize. After her husband naturalized and became a U.S. citizen, he filed an I-130 Alien Relative Petition on behalf of the respondent. An approved I-130 would allow the respondent to adjust status and become a permanent resident under § 245 of the Immigration and Nationality Act. However, only USCIS has jurisdiction to adjudicate an I-130 petition. The IJ in Avetisyan's case granted five continuances for USCIS to review the petition, but USCIS was unable to grant the petition in time because it had to send Avetisyan's file back to the immigration court before each of the five continuances. The IJ then administratively closed Avetisyan's case to allow USCIS enough time to adjudicate the petition.

192. *Romero*, 937 F.3d at 293 (quoting Sossamon v. Texas, 563 U.S. 277, 286 (2011)).

i. Discretionary Termination is Appropriate When It Safeguards Respondents' Due Process Rights

Termination is always "appropriate" when necessary to safeguard the due process rights of respondents. As explained *supra* in Part II, IJs have long terminated proceedings on due process grounds for respondents declared mentally incompetent — who might struggle to concede removability or adequately prosecute an application for relief from removal. The BIA tacitly approved of this practice in *Matter of M-J-K-*[193] and a district court recognized it in *Franco-Gonzales v. Holder*,[194] a class-action suit establishing the right to counsel for mentally incompetent respondents in removal proceedings. There, the court described the case of plaintiff Ever Francisco Martinez-Rivas.[195] Martinez was a Lawful Permanent Resident (LPR) for three years before being placed in removal proceedings following a criminal conviction. Martinez was schizophrenic, which caused him "to suffer from auditory hallucinations and a paucity of spontaneous thoughts, and render[ed] him unable to process and synthesize information."[196] At Martinez's merits hearing, the IJ found that Martinez was "unable to effectively participate in a coherent manner, to comprehend the nature and consequences of the proceedings, to communicate with the Court in any meaningful dialog, to assert or waive any rights, and to seek various forms of relief."[197] The IJ consequently terminated proceedings. The BIA never ruled if the termination was appropriate, since the *Franco-Gonzales* court granted a preliminary injunction before Martinez could file his appeal with the BIA.[198] But given that Martinez was unable to understand the charges against him, the IJ could not effectively conduct the hearing. Termination, therefore, must have been "appropriate."

Termination may also be an "appropriate" outcome to safeguard the rights of speakers of rare languages, for whom the court cannot secure adequate interpretation. In *In re Gaspar Samuel Zacarias-Poma*,[199] a case decided after *Matter of S-O-G- & F-D-B-*, the BIA

193. 26 I. & N. Dec. 773 (B.I.A. 2016).
194. 767 F. Supp. 2d 1034 (C.D. Cal. 2010).
195. *See id.* at 1041–43. The opinion in this case refers to plaintiff Ever Francisco Martinez-Rivas as "Martinez," which this Note does here.
196. *Id.* at 1041.
197. *Id.* at 1042.
198. *Id.*
199. 2019 WL 3776089 (B.I.A. Apr. 23, 2019).

reversed an IJ's decision to terminate proceedings.[200] In *Zacarias-Poma*, the respondent only spoke an indigenous Guatemalan language.[201] The IJ repeatedly attempted to obtain an interpreter who spoke Zacarias-Poma's language but was unsuccessful. She then terminated Zacarias-Poma's removal proceedings because she felt that not having a proper interpreter would violate Zacarias-Poma's due process rights.[202] The BIA reversed, holding that "the regulations do not provide for termination because an interpreter cannot be found."[203] The BIA's ruling requires the IJ to grant potentially infinite continuances in Zacarias-Poma's case, using up precious judicial resources while the court attempts to secure an interpreter who might be impossible to find.[204] Here, termination is the most "appropriate" option for the fair resolution of Zacarias-Poma's case. If the IJ is unable to terminate — and in a post-*Castro-Tum* world, not able to administratively close the proceedings — Zacarias-Poma will be forced to attend endless court hearings while he attempts, in vain, to communicate with the IJ.

Finally, terminating proceedings in cases where respondents have not received proper notice would safeguard respondents' due process rights, and would, consequently, be "appropriate." In 2019, some IJs conducting proceedings for respondents subject to the Migrant Protection Protocols (MPP)[205] began terminating those proceedings when the respondents failed to appear.[206] In one such

200. *Id.* at *2.
201. *Id.* at *1.
202. *Id.*
203. *Id.*
204. A continuance remains the only option, considering that *Castro-Tum* wiped administrative closure off the table. Zacarias-Poma could feasibly proceed without testifying, but such a proceeding would raise extraordinary due process issues. Zacarias-Poma's native language is so rare that securing a competent interpreter may prove impossible.
205. Commonly called the "Remain in Mexico" program, the MPP requires respondents to wait in Mexico during their removal proceedings as a way to deter migration flows. Respondents wait at shelters and camps, often far from the border, and must present themselves at a port of entry to be escorted by a Customs and Border Patrol officer across the border to their hearings. *See* 8 U.S.C. § 1225(b)(2)(C) ("In the case of an alien . . . arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding [for asylum]."); *see also Migrant Protection Protocols*, U.S. DEP'T OF HOMELAND SEC. (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols [https://perma.cc/PT87-X4YN].
206. AM. FRIENDS SERVS. COMM., DISMANTLING ASYLUM: A YEAR INTO THE MIGRANT PROTECTION PROTOCOLS 20–21 (2020), https://www.afsc.org/sites/default/files/documents/MPP_Final_Jan2020-300hi.pdf [https://perma.cc/EKN4-J2KQ] ("One judge decided to terminate cases instead of removing them in absentia when individuals did not appear in court stating that the government provided migrants with instructions on a non-official form. . . .

decision, an IJ in the San Diego Immigration Court held that DHS lacked authority to return the respondent to Mexico and wrote,

> If the court were not able to take appropriate action to terminate this case, DHS officials would be free to improperly remove an alien from the U.S. without legal authority and subject the alien to inappropriate and prejudicial procedures . . . If the court were not able to terminate, it would perpetuate the wholescale violations of law occurring in this case.[207]

The BIA soon responded to the IJs granting termination in these cases in *Matter of J.J. Rodriguez Rodriguez*, discussed *supra* in Part I, and held that *Matter of S-O-G- & F-D-B-* precluded IJs from terminating with discretion.[208] AILA, in an amicus curie brief in *Matter of J.J. Rodriguez Rodriguez*, argued that because "the insurmountable limitations on respondents in MPP proceedings has made fundamentally fair proceedings impossible . . . termination is the only just result."[209] AILA explained that while the respondent might have been served with his Notice to Appear, alerting him to the time and location of his hearing, DHS failed to show that it served the respondent with an "MPP Sheet," a document telling him when and where to present himself to be escorted across the border to his hearing.[210] The BIA addressed AILA's arguments in its opinion, but held that the respondent's due process rights were not violated because the respondent was "personally served" with the Notice to Appear, even if there was no record of service of the MPP Sheet.[211] As a result, the BIA reinstated the respondent's removal proceedings and noted that the IJ should

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In at least one case, a Detention Officer told a migrant that her hearing date was incorrect and that she did not have to present herself to the hearing. She nearly missed her court appearance. When she disclosed this to the judge, the judge terminated the following 5 cases of migrants who did not appear in court out of abundance of caution, expressing that the Detention Officer might also have given them misinformation about their court dates."). The Wall Street Journal reports that between January 2019 and September 2019, IJs in San Diego terminated 33% of more than 12,600 cases in which the respondent was subject to MPP. *See* Caldwell, *supra* note 8.

207. *IJ Terminates Removal Proceedings After Finding DHS Inappropriately Subjected Respondents to MPP Program*, AM. IMMIGR. LAWS. ASS'N (Sept. 17, 2019), https://www.aila.org/infonet/ij-terminates-removal-proceedings-after-finding [https://perma.cc/8DYQ-5XDW].

208. 27 I. & N. Dec. 762, 766 (B.I.A. 2020).

209. AILA Amicus Brief, *supra* note 185, at 12.

210. *Id.* at 5–7. This document is traditionally called the "MPP Tear Sheet."

211. Matter of J.J. Rodriguez Rodriguez, 27 I. & N. Dec. 762, 764 (B.I.A. 2020).

have granted the DHS's request to proceed with an in absentia hearing.[212] An order for removal in absentia would bar the respondent from most forms of immigration relief were he to reenter the United States.[213] Considering the stark consequences of the *in absentia* removal order and the uncertainty about service of the MPP Sheet, termination would be appropriate to safeguard respondent's due process rights.

ii. Discretionary Termination is Appropriate When It Promotes Judicial Economy and DHS's Regulatory Scheme

In some cases, preserving discretionary termination would be appropriate by furthering the goals identified by the Attorney General in the docket-management cases: promoting judicial expediency and efficiency, and maximizing judicial economy.[214] *Matter of S-O-G- & F-D-B-* now prevents IJs from terminating proceedings so that the respondent may seek relief from USCIS — a common practice before the issuance of *Matter of S-O-G- & F-D-B-*.[215] In *In re Jose Gabriel Alonzo-Octicla*,[216] a BIA decision issued after *Matter of S-O-G- & F-D-B-*, the BIA reversed an IJ's discretionary termination.[217] During his removal hearing, Alonzo-Octicla sought termination so that he might pursue an application for adjustment of status with USCIS.[218] The IJ granted the motion and terminated proceedings for two reasons: "First, the respondent will apply for adjustment of status with the USCIS in the first instance.

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212. *Id*. at 765.

213. 8 U.S.C. § 1229a(b)(7) (barring noncitizens with in absentia removal orders from cancellation of removal, voluntary departure, VAWA relief, and other forms of immigration relief for 10 years after the removal order becomes final).

214. *See* Matter of Castro-Tum, 27 I. & N. Dec. 271, 288 (Att'y Gen. 2018) ("Such an interpretation would further conflict with the policies underlying the INA and the regulations that obligate immigration judges and the Board to resolve immigration matters *expeditiously*." (emphasis added)).

215. *See* Alena Shautsova, *Immigration Lawyer NYC: No More Termination of Proceedings in Immigration Courts, US Immigration* (Sept. 21, 2018), https://www.youtube.com/watch?v=tY4nHfw38wI; *cf.* Matter of Hashmi, 24 I. & N. Dec. 785, 791 n.4 (B.I.A. 2009) (recognizing that "in appropriate circumstances," IJs may take discretionary actions, like administrative closure, when there is a "prima facie approvable visa petition" filed with USCIS (citations omitted)).

216. 2018 WL 8062945 (B.I.A. Dec. 14, 2018).

217. *Id.* at *2.

218. The basis underlying the adjustment of status application is not shared in the BIA decision.

Second, the Immigration Court's calendar is full until 2020."[219] The BIA reversed, and found that "the regulations do not authorize the Immigration Judge to unilaterally terminate proceedings on this basis."[220] By forcing IJs to hear cases that could otherwise be adjudicated by USCIS, *Matter of S-O-G- & F-D-B-* thus adds to their already-overwhelmed dockets and compromises IJs' ability to devote resources to effect the fair and just resolution of their cases.

Discretionary termination is also "appropriate" when a noncitizen respondent holds an I-601A Provisional Unlawful Presence waiver, so as to not frustrate the regulatory scheme and underlying purpose of these waivers.[221] In *In re Wilfredo Rodriguez*,[222] another BIA case decided after *Matter of S-O-G- & F-D-B-*, the BIA similarly reversed an IJ's decision to terminate proceedings, holding that the IJ did not have discretion to terminate.[223] Before the IJ terminated Rodriguez's proceedings, Rodriguez sought to adjust his status through an I-601A waiver.[224] However, even if Rodriguez received an I-601A waiver, he would have had to seek *another* waiver to reenter the United States if an IJ ordered him removed. Rodriguez thus moved to terminate his proceedings, since continued proceedings would render his I-601A waiver effectively useless.[225] The IJ agreed and terminated the removal proceedings.[226] The BIA reversed, holding that *Matter of S-O-G- & F-D-B-* prevented the judge from terminating proceedings outside of the circumstances described in 8 C.F.R. § 1239.2.[227] Contrary to the BIA's understanding, terminating proceedings so that an immigrant visa applicant could actually use an I-601A waiver, an extraordinary remedy granted rarely by USCIS, would be an "appropriate" action. If section 1240.1 precludes discretionary termination, then I-601A waiver regulations are moot for I-601A holders in removal proceedings. This reading frustrates the purpose of the I-601A waivers to spare U.S. citizens and LPRs "extreme and unusual hardship" because of a prolonged separation from their immediate relatives. The effect of such a reading needlessly punishes

219. Alonzo-Octicla, 2018 WL 8062945, at *2 (citations omitted).
220. *Id.*
221. For a detailed description of the I-601A waiver, see *supra* note 96.
222. 2019 WL 5067268 (B.I.A. Aug. 7, 2019).
223. *Id.* at *1.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*

U.S. citizens and LPRs, running contrary to the Immigration and Nationality Act's goal of family unity.[228]

In short, termination can be "consistent with applicable law and regulations" *and* "appropriate" in some circumstances. Accordingly, a court should find that 8 C.F.R. § 1240.1 unambiguously permits IJs to discretionarily terminate proceedings, and thus, should not afford *Kisor* deference to the Attorney General's interpretation of 8 C.F.R. § 1240.1 in *Matter of S-O-G- & F-D-B-*.

2. *The Attorney General's Interpretation of § 1240.1 is Unreasonable*

Even if a court decides that 8 C.F.R. § 1240.1 is genuinely ambiguous, *Kisor* requires the court to determine if the agency's interpretation is "reasonable," as well as whether it reflects the agency's official position, substantive expertise, and fair and considered judgment.[229] A court would likely find that the agency's interpretation is reasonable, as under the extremely deferential standard outlined in *Thomas Jefferson University v. Shalala*,[230] the interpretation is not "plainly erroneous or inconsistent with the regulation."[231] A court would also likely find that this interpretation is the agency's official position, as it was announced in a binding BIA decision, one way the agency announces its interpretations of agency regulations. The government could argue that the Attorney General has "substantive expertise" in interpreting immigration regulations, especially those determining the authority of IJs, whose authority is delegated by the Attorney General himself.[232] However, the Attorney General's interpretation of 8 C.F.R. § 1240.1 likely does not reflect the agency's fair and considered judgment, especially for children, mentally incompetent respondents, adjustment of status-eligible respondents, and holders

228. One of the purposes of the INA is "keeping families of United States citizens and immigrants united," not just deporting people. Fiallo v. Bell, 430 U.S. 787, 811 (1977) (Marshall, J., dissenting) (quoting H.R. REP. NO. 85-1199, at 7 (1957), *as reprinted in* 1957 U.S.C.C.A.N. 2016, 2020). Nwozuzu v. Holder, 726 F.3d 323 (2d Cir. 2013), held that the "prevailing purpose of the INA" is "the preservation of the family unit," *id.* at 332 (quoting H.R. REP. NO. 82-1365, at 29 (1952), *as reprinted in* 1952 U.S.C.C.A.N. 1653, 1680); *see also* INS v. Errico, 385 U.S. 214, 220 (1966) ("Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly" various restrictions in the immigration laws.).

229. Kisor v. Wilkie, 139 S. Ct. 2400, 2414–18 (2019).

230. 512 U.S. 504 (1994).

231. *Id.* at 512.

232. 8 C.F.R. § 1003.10(a)–(b) (2021).

of I-601A provisional waiver holders. As such, the interpretation should not be afforded *Kisor* deference.

a. The Attorney General's Interpretation of § 1240.1 Does Not Reflect His "Fair and Considered Judgment"

In *Romero*, the Fourth Circuit declined to afford the Attorney General's interpretation of 8 C.F.R. § 1003.10 deference because it found that the new interpretation constituted an "unfair surprise" for respondents in removal proceedings, and thus, did not reflect the agency's "fair and considered judgment."[233] The court rationalized that three BIA cases, *Matter of Gutierrez-Lopez*, *Matter of Avetisyan*, and *Matter of W-Y-U* all codified the practice of administrative closure, and the Attorney General's interpretation in *Matter of Castro-Tum* violated respondents' reasonable reliance interests.[234] However, administrative closure is a longstanding agency practice, while discretionary termination, on the other hand, is arguably not.

Discretionary termination has never been upheld in a BIA or circuit court case, though both the BIA and the Central District of California arguably tacitly approved of the practice by recognizing termination as an option for mentally incompetent respondents in *Matter of M-J-K-* and *Franco-Gonzales*.[235] Additionally, respondents seeking discretionary termination could potentially argue that they relied on the 2015 EOIR memorandum recommending that IJs use their discretion to terminate proceedings as a way to manage their dockets.[236] But that memorandum was rescinded by EOIR in 2017,[237] which undercuts a reliance argument.

Still, applicants for I-601A provisional waiver holders might have a colorable argument that *Matter of S-O-G- & F-D-B-* violated their reliance interests. As the BIA explained in several cases denying the motions to terminate of I-601A holders or applicants, "the Form I-601A approval notice issued by USCIS expressly advises respondents in removal proceedings to obtain a termination or dismissal order from the Executive Office for Immigration

233. Romero v. Barr, 937 F.3d 282, 295 (4th Cir. 2019).
234. *Id.* at 296.
235. Matter of M-J-K-, 26 I. & N. Dec. 773, 777 n.4 (B.I.A. 2016); Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034, 1041–43 (C.D. Cal. 2010).
236. OPPM 15-01, *supra* note 53, at 3 (emphasis added).
237. *Rescinded OPPM*, *supra* note 53.

Review."[238] The Form I-797 approval notice for an I-601A application continues to state that waiver holders should seek termination of their removal proceedings,[239] even after the Attorney General ruled in *Matter of S-O-G- & F-D-B-* that IJs lack the authority to discretionarily terminate removal proceedings for I-601A waiver holders.

Outside of reliance interests, the Attorney General's *categorical bar* on discretionary termination is nonsensical and not appropriately reasoned. The I-601A waiver regulations provide that a person actively in removal proceedings is ineligible to receive an I-601A waiver, unless the respondent successfully administratively closes their proceedings — an impossible outcome after *Matter of Castro-Tum*.[240] Preventing the termination of proceedings would render many potential beneficiaries of the I-601A waivers ineligible for the waiver — or worse, deportable. The I-601A waiver was created to prevent U.S. citizen and LPRs from suffering "extreme hardship" because of the deportation of their immediate relatives.[241] By dramatically decreasing the number of people eligible for this waiver, *Matter of S-O-G- & F-D-B-* frustrates this purpose.

Matter of S-O-G & F-D-B- also fails to address how IJs should proceed if respondents are unable to concede removability or understand the charges against them, such as in the case of child respondents or mentally incompetent respondents, suggesting that the opinion does not reflect the agency's "fair and considered judgment."[242] Under 8 C.F.R. § 1240.48(b), IJs "shall not accept an admission of deportability from an unrepresented respondent who is incompetent or under 16 and is not accompanied by a guardian, relative, or friend."[243] If the respondent cannot admit to the charges against them, and does not have legal representation or a trusted individual who can assist in proceedings, the IJ cannot

238. *In re:* Hector Enrique Sanchez-Leon, 2019 WL 2613125, at *1 n.1 (B.I.A. Mar. 15, 2019); *In re:* Rudy Osbaldo Catalan-Diaz, 2018 WL 7572455, at *1 n.1 (B.I.A. Nov. 29, 2018); *In re:* Henry Alexis Martinez-Rosales, 2019 WL 3857816, at *1 n.1 (B.I.A. June 5, 2019); *see also* Form I-797 — Approval Notice for I-601A Provisional Unlawful Presence Waiver, http://myorlandoimmigrationlawyer.com/wp-content/uploads/2013/11/I-601A-Approval-Orlando-Immigration-Lawyer-RF.pdf [https://perma.cc/PM22-UHAN].

239. *Id.*

240. 8 C.F.R. § 212.7(e)(4) (2021).

241. 8 C.F.R. § 212.7(e)(3)(iii) (2021).

242. *See* Matter of S-O-G- & F-D-B-, 27 I. & N. Dec. 462, 462 (B.I.A. 2018); Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019) (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)) (stating that an agency's interpretation of a rule must reflect its "fair and considered judgment").

243. 8 C.F.R. § 1240.48(b) (2021).

adequately complete the hearing. In those circumstances, termination of proceedings may be the best outcome and traditionally has been used for this purpose.

In sum, the Attorney General failed to consider the specific effects of *Matter of S-O-G- & F-D-B-* on I-601A waiver holders and applicants, respondents eligible to adjust status through an application with USCIS, children, and mentally incompetent respondents. Under *Kisor*, an agency interpretation may only be afforded deference if it reflects the agency's "fair and considered judgment."[244] Furthermore, an agency decision may not be upheld if "the agency . . . entirely failed to consider an important aspect of the problem."[245] The Attorney General's failure to adequately consider these effects of *Matter of S-O-G- & F-D-B-* undermines the Attorney General's claim that the interpretation was "fair and considered," and a court should decline to afford this interpretation *Kisor* deference.

C. THE ATTORNEY GENERAL'S INTERPRETATION SHOULD NOT BE AFFORDED *SKIDMORE* DEFERENCE

Even if a court declines to afford Sessions' interpretation of 8 C.F.R. § 1240.1 *Kisor* deference, a court may still consider the interpretation's "power to persuade" under *Skidmore v. Swift & Company*.[246] The court will balance the thoroughness of consideration, validity of reasoning, consistency, and general persuasiveness of the agency's interpretation before deciding if the interpretation is persuasive.[247] In *Romero*, the Fourth Circuit declined to afford Sessions' interpretation of 8 C.F.R. § 1003.10 *Skidmore* deference, holding:

> [A] court reviewing *Castro-Tum* for *Skidmore* deference would not be persuaded to adopt the agency's own interpretation of its regulation for substantially the same reasons it is not entitled to *Auer* deference: because it represents a stark departure, without notice, from long-used practice and

244. Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019).
245. Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).
246. 323 U.S. 134, 140 (1944).
247. *Id.*

> thereby cannot be deemed consistent with earlier and later pronouncements.[248]

A court evaluating the Attorney General's interpretation of 8 C.F.R. § 1240.1 would likely rule similarly. As stated *supra* in Part III.B.3, Sessions failed to consider the heightened effect of *Matter of S-O-G- & F-D-B-* on children, mentally incompetent respondents, respondents eligible to adjust status before USCIS, and I-601A provisional waiver holders. Evaluating the lack of thoroughness in the Attorney General's interpretation, coupled with the inconsistencies between the prior practice of terminating proceedings for I-601A waiver holders and mentally incompetent respondents, and the current interpretation of 8 C.F.R. § 1240.1, a court should find that the Attorney General's interpretation of 8 C.F.R. § 12401.1 in *Matter of S-O-G- & F-D-B-* lacks the power to persuade.

IV. JUDICIAL AND LEGISLATIVE SOLUTIONS TO *MATTER OF S-O-G- & F-D-B-*

This Part analyzes three potential avenues to restore a power of discretionary termination to IJs: (1) challenging the rationale of *Matter of S-O-G- & F-D-B-* in a petition for review at a circuit court; (2) arguing that other case law protects a *right* of discretionary termination for mentally incompetent respondents on due process grounds; and (3) promulgating a rule codifying the IJs' power to discretionarily terminate proceedings on non-constitutional grounds, or amending the INA to expressly allow for discretionary termination.

This Part first discusses the potential litigation strategies and legal arguments — outside of the *Romero* framework — that a noncitizen could bring to challenge *Matter of S-O-G- & F-D-B-*, and evaluates the viability of such a legal challenge. Next, this Part considers other case law and argues that, notwithstanding Sessions' ruling in *Matter of S-O-G- & F-D-B-*, *Matter of M-A-M-*[249] independently confers on IJs the authority to terminate proceedings in cases involving mentally incompetent respondents. Finally, this Part addresses the possibility of legislation or an agency

248. Romero v. Barr, 937 F.3d 282, 297 (4th Cir. 2019).
249. Matter of M-A-M-, 25 I. & N. Dec. 474 (B.I.A. 2011).

rule explicitly granting IJs the authority to discretionarily terminate proceedings and concludes that such legislation is the best fix, though litigation is the most realistic.

A. APPELLATE LITIGATION

Following the success of *Romero v. Barr* in abrogating *Matter of Castro-Tum*, a respondent in removal proceedings could appeal a denial of a motion to terminate in a federal circuit court and challenge the reasoning of *Matter of S-O-G- & F-D-B-*. The ideal respondent in such a challenge would either be mentally incompetent or hold an I-601A waiver, as members of these groups likely have the strongest claims that a discretionary grant of termination would be "appropriate and necessary" under 8 C.F.R. § 1240.1.

As discussed *supra* in Part III, a respondent may argue that 8 C.F.R. § 1240.1 unambiguously vests IJs with the inherent authority to terminate cases in their discretion. *Romero v. Barr* is a strong precedent that would provide a shortcut to litigators arguing for a broad reading of 8 C.F.R. § 1240.1 and, thus, a challenge to *Matter of S-O-G- & F-D-B-* is most likely to succeed in the Fourth Circuit, or in other circuits that have overruled *Matter of Castro-Tum*. Notably, *Matter of S-O-G- & F-D-B-* couches much of its reasoning on *Matter of Castro-Tum*, the case that *Romero v. Barr* vacated.[250] In his opinion in *Matter of S-O-G- & F-D-B-*, the Attorney General wrote, "Given that [8 C.F.R. 1240.1] does not permit the immigration judge to suspend indefinitely a respondent's removal proceedings, *see Castro-Tum*, 27 I. & N. Dec. at 285, the provision similarly cannot be read to provide the authority to end removal proceedings entirely."[251] Now that the Third, Fourth, and Seventh Circuits have explicitly rejected the rationale of *Castro-Tum*, it naturally follows that the extension of the *Castro-Tum* rationale in *S-O-G- & F-D-B-* is also unsound. Thus, a respondent should argue that 8 C.F.R. § 1240.1 unambiguously vests IJs with the authority to discretionarily terminate cases in select circumstances or, in the alternative, that the Attorney General's interpretation of 8 C.F.R. § 1240.1 should not be entitled to *Kisor* deference because the interpretation does not reflect the Attorney General's "fair and considered judgment."

250. Matter of S-O-G- & F-D-B-, 27 I. & N. Dec. 462, 466 (B.I.A. 2018).
251. *Id.*

There are other possible grounds on which to base a challenge to *Matter of S-O-G- & F-D-B-*. A respondent could argue that the rationale in *Matter of S-O-G- & F-D-B-* is arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706.[252] The Supreme Court has held that an agency action violates § 706 when the agency "entirely fail[s] to consider an important aspect of the problem."[253] Similarly, the Supreme Court applied APA review to the BIA in *Judulang v. Holder*,[254] holding that the BIA's failure to consider "relevant factors" in establishing a rule of decision rendered the rule arbitrary and capricious.[255] The Attorney General's failure to consider the heightened effects on special groups, like children and I-601A waiver-holders, suggests that he failed to consider all "relevant factors" when deciding *Matter of S-O-G- & F-D-B-*, thus rendering his determination arbitrary and capricious. Similarly, under *FCC v. Fox Television Stations, Inc.*,[256] an agency must provide "reasoned explanation for its action" to survive arbitrary and capricious review.[257] By arguably failing to provide adequate explanation justifying the broad reach of this interpretation, instead of a narrower rule, *Matter of S-O-G- & F-D-B-* potentially runs afoul of 5 U.S.C. § 706(2). However, the Supreme Court has also noted that arbitrary and capricious review is "not a high bar."[258] The Attorney General's interpretation of 8 C.F.R. § 1240 in *S-O-G- & F-D-B-* is at the very least plausible and in line with several BIA precedents and circuit court decisions, and is likely to survive arbitrary and capricious review.

A respondent could also argue that IJs must have the authority to discretionarily terminate cases to safeguard respondents' due process rights, even if such authority is not expressly delegated to them in 8 C.F.R. § 1240. Put another way, a respondent could argue that notwithstanding the limits on the authority delegated by

252. 5 U.S.C. § 706(2) provides that a reviewing court may "hold unlawful and set aside agency action, findings, and conclusions found to be — (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

253. Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see also* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913 (2020) (invalidating agency rescission of the Deferred Action for Childhood Arrivals program because the agency failed to consider reliance interests and possible reformulations of the program).

254. 565 U.S. 42 (2011).

255. *Id.* at 55 (quoting *State Farm*, 463 U.S. at 43).

256. 556 U.S. 502 (2009).

257. *Id.* at 515.

258. *Judulang*, 565 U.S. at 45.

section 1240, the Constitution itself mandates that IJs have the power to terminate in select circumstances. Courts have found that noncitizens have a due process interest in understanding the charges against them,[259] conducting the removal hearing in a language they understand, and, above all, having "a meaningful opportunity to be heard."[260] Admittedly, neither the BIA nor any circuit court has found that a respondent has a due process interest in the termination of their proceeding. Still, if a respondent cannot understand the charges against them — a situation made more likely by the fact that there is no right to appointed counsel in immigration court — termination may be the only appropriate way to safeguard a respondent's due process rights. This is especially true in the case of minor children, who do not have the right to appointed counsel,[261] and whom the regulations expressly forbid from admitting deportability.[262]

Finally, a respondent could challenge *Matter of S-O-G- & F-D-B-* on the grounds that the Attorney General did not have the right to self-certify the case to himself. The Attorney General is a political appointee, and as such, may feel constrained to follow the policy agenda of the president who appointed him.[263] As Professor Margaret H. Taylor wrote, "Attorney General review might also be seen as objectionable because it conflicts with a core value of our legal system: that disputes are resolved by an impartial adjudicator who has no interest in the outcome."[264] A respondent would argue that Sessions' bias and lack of substantive expertise in immigration law rendered him unable to decide *Matter of S-O-G- & F-D-B-* fairly and that the case should be overruled on those

259. *See, e.g.*, Matter of M-A-M-, 25 I. & N. Dec. 474, 479 (B.I.A. 2011) (explaining that fundamental fairness requires the respondent have "a rational and factual understanding of the nature and object of the proceedings").

260. Rusu v. I.N.S., 296 F.3d 316, 322 (4th Cir. 2002); *see also* Landon v. Plasencia, 459 U.S. 21 (1982).

261. *See* C.J.L.G. v. Barr, 923 F.3d 622, 629 (9th Cir. 2019) (Paez, J., concurring).

262. *See* 8 C.F.R. § 12401.10(c) (2021) ("The immigration judge shall not accept an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend; nor from an officer of an institution in which a respondent is an inmate or patient.").

263. *See* Jeffrey S. Chase, *The AG's Certifying of BIA Decisions*, JEFFREY S. CHASE: BLOG (Mar. 29, 2018), https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions [https://perma.cc/82L3-ZNPX].

264. Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions*, 102 IOWA L. REV. ONLINE 18, 19 (2016).

grounds.[265] However, the Attorney General's power to self-certify cases from the BIA is codified in 8 C.F.R. § 1003.1(h)(1)(i), and it has been employed by attorneys general in other presidential administrations for decades.[266]

While litigation may be the most easily accessible option for overturning *Matter of S-O-G- & F-D-B-*, there are strong downsides. First, *Matter of S-O-G- & F-D-B-* would likely only be overturned one circuit at a time, leaving circuits split on whether IJs may discretionarily terminate proceedings.[267] As such, respondents may have totally different outcomes depending on the location of their removal proceedings. Furthermore, it may be best to wait until other circuits have ruled upon the legality of *Matter of Castro-Tum* to strengthen claims that the Attorney General's limited reading of the IJ governing regulations is incorrect, but delaying litigation would harm respondents who could immediately benefit from an I-601A waiver or adjustment of status. Finally, it may be difficult to find a respondent with unique circumstances that make termination both "consistent with the Act and regulations" and "appropriate."

B. ARGUMENTS AROUND *MATTER OF S-O-G- & F-D-B-*

Unlike *Matter of Castro-Tum*, *Matter of S-O-G- & F-D-B-* does not overrule any other cases, including *Matter of M-A-M-*.[268] *Matter of M-A-M-* requires IJs to provide "appropriate safeguards" to mentally incompetent respondents in removal proceedings.[269] *Matter of M-A-M-* additionally states, "In some cases, even where the court and the parties undertake their best efforts to ensure appropriate safeguards, concerns may remain. In these cases, the Immigration Judge may pursue alternatives with the parties."[270]

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265. *See* Laura Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. Rev. 1766, 1775 (2010) (noting that the lack of procedural safeguards for Attorney General review of BIA decisions may make the process "politicized"). Furthermore, unlike the Board of Immigration Appeals, which is composed entirely of former IJs, Sessions has no substantive expertise in immigration law, having never worked within the immigration system before.

266. *See* Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. ONLINE 841, 857 (2016).

267. *See supra* notes 35, 111.

268. Matter of M-A-M-, 25 I. & N. Dec. 474, 483 (B.I.A. 2011).

269. *Id.* at 480.

270. *Id.*

It is unclear to what "alternatives" refers, but advocates can argue that the BIA implicitly recognized the possibility of termination in the event that traditional safeguards do not secure mentally incompetent respondents' due process rights. While *Matter of M-A-M-* does not specifically list termination as a possible safeguard, IJs have cited to *Matter of M-A-M-* in their opinions granting termination to mentally incompetent respondents.[271] Advocates may argue that *Matter of M-A-M-* still empowers IJs to terminate cases involving mentally incompetent respondents, who cannot concede removability or do not understand the charges against them.

C. REGULATORY FIXES

Finally, the DOJ may consider promulgating a rule or Congress might consider amending the Immigration and Nationality Act to codify IJs' power to discretionarily terminate proceedings in select circumstances. Mental health advocates have called for a DOJ regulation expressly granting IJs the power to discretionarily terminate proceedings for years.[272] However, such a rule would demand careful drafting, and authorize IJs to terminate cases in their discretion unless opposed by the respondent or respondent's counsel. Immigration advocates recognize the shortcomings of termination for mentally incompetent respondents — chiefly, that it disincentivizes IJs from appointing guardians *ad litem*.[273] Furthermore,

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271. *See* Matter of M-J-K-, 26 I. & N. Dec. 773, 777 n.4 (B.I.A. 2016).

272. Merrill Rotter et al., *Due Process for People with Mental Disabilities in Immigration Removal Proceedings*, 33 MENTAL & PHYSICAL DISABILITY L. REP. 882, 893 (2009):

> [T]he DOJ should adopt regulations that explicitly permit an immigration judge to terminate removal proceedings in those rare cases where the mental health of a respondent makes due process and fundamental fairness impossible to achieve without the provision of extensive additional protections. Such regulations would enable an immigration judge to terminate removal proceedings in lieu of appointing counsel and taking other necessary steps to provide due process to a mentally disabled respondent. Such discretionary authority is especially reasonable in cases where a respondent is found mentally incompetent and the U.S. Government is unable or unwilling to provide these protections. Discretionary termination is also reasonable given the complexity of proceedings involving mentally incompetent respondents, the exacerbating effects such proceedings usually have on the condition of respondents with mental disabilities, the costs of prolonged detention, and the grave consequences of a removal order (which often amount to permanent deprivation of adequate mental health treatment, homelessness, and other profound deprivations).

273. Wilson et. al, *supra* note 47, at 358–61 (advocating against a blanket allowance of discretionary termination for mentally incompetent respondents because it would disincentivize IJs from securing adequate representation for these respondents and bar them from their rightful immigration relief).

IJs might terminate proceedings and prevent an otherwise eligible applicant from receiving other relief such as welfare benefits, traveling abroad, or filing petitions to bring immediate relatives for the United States. While termination is clearly the ideal solution for some respondents, it is not ideal for every respondent, and the rule should be written narrowly to allow for termination only when it is in the respondent's best interest.

The DOJ may also consider promulgating a rule allowing for the termination of proceedings when the respondent has been granted an I-601A provisional waiver. As explained *supra* in Part III.B, after *Matter of S-O-G- & F-D-B-*, the inability of IJs to discretionarily terminate removal proceedings for respondents with I-601A waivers has frustrated the purpose of the I-601A waiver and prevented many noncitizens who would otherwise be eligible for permanent residence from obtaining lawful status. A rule giving IJs the power to terminate cases involving an I-601 waiver would rectify this problem and would allow I-601A waiver holders to reap the full benefits of their waivers.

The DOJ may also consider promulgating a rule allowing for the termination of proceedings when respondents are eligible to adjust their statuses before USCIS. This rule would incentivize adjustment-eligible noncitizens to file for adjustment with USCIS, thus splitting the adjudicatory burden between USCIS and the immigration courts. With a several-year backlog in many immigration courts, this rule would help to lessen the backlog and allow IJs to spend more time evaluating claims over which they have sole jurisdiction.

Finally, Attorney General Garland may vacate *Matter of S-O-G- & F-D-B-* and thus eliminate this precedent. This solution is less than ideal, as it would leave unresolved whether IJs have the ability to discretionarily terminate cases and is likely to result in disparate rulings based on IJs' fractured understandings of their authority. A rule that more clearly authorizes nonregulatory termination and identifies circumstances in which termination may be necessary to protect respondents' due process rights or safeguard the judicial economy would be preferrable.

V. CONCLUSION

After the Fourth Circuit's ruling in *Romero v. Barr*, immigration advocates finally have a concrete path for overruling *Matter of*

S-O-G- & F-D-B- and restoring the power of discretionary termination to IJs. The IJ governing regulations grant IJs the authority to discretionarily terminate cases in select circumstances. Yet even if courts read the regulations more conservatively, the Attorney General's interpretation of the regulation should not be entitled to *Kisor* deference because the interpretation does not reflect the Attorney General's "fair and considered judgment." The power to discretionarily terminate removal proceedings is of heightened importance to the most vulnerable respondents, and Sessions' failure to consider these effects of *Matter of S-O-G- & F-D-B-* renders his decision without legal support. Termination is an important due process safeguard and docket management tool for IJs, and advocates should use the court's ruling in *Romero* to finally restore this tool to IJs. However, if the courts are unwilling to act, advocates should also consider pushing Congress to pass legislation and the Department of Justice to promulgate regulations codifying IJs' discretionary termination power in select circumstances, thereby reinforcing IJs' authority to terminate and clarifying when it is appropriate to exercise that authority.