Steven H. Schulman
Kevin R. Amer
Akin Gump Strauss Hauer & Feld, LLP
Robert Strauss Building
1333 New Hampshire Ave, N.W.
Washington, DC 20036
Tel: (202) 887-4000
Fax: (202) 887-4288
Attorneys for Amicus Curiae Texas Appleseed

Melissa Crow
Ben Winograd
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
Tel: (202) 507-7523
Fax: (202) 742-5619
Attorneys for Amicus Curiae American Immigration Council

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	
[redacted]	**File No.:** [redacted]
In removal proceedings	

AMICUS CURIAE BRIEF OF NON-GOVERNMENTAL ORGANIZATIONS
TEXAS APPLESEED AND AMERICAN IMMIGRATION COUNCIL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS AND RULES

OTHER AUTHORITIES

INTERESTS OF *AMICI CURIAE*

Texas Appleseed is an independent, non-profit organization whose mission is to promote justice for all by using the volunteer skills of lawyers and other professionals to find practical solutions to broad-based problems. Texas Appleseed, in collaboration with Akin Gump Strauss Hauer & Feld, LLP ("Akin Gump"), an international law firm, published a study in 2010 examining how the nation's immigration courts and detention systems fail to address and accommodate the basic needs of people with mental disabilities – and how this failure compromises humane treatment and just adjudication of immigration cases for this vulnerable population. The study, *Justice for Immigration's Hidden Population,* available at http://bit.ly/9EXugi, is the result of numerous interviews with practicing attorneys, mental health professionals, Immigration Judges, detainees, and the nation's leading advocates for immigrants with mental disabilities. The report was also the product of site visits to detention facilities, review of relevant government documents, as well as first-hand observations of immigration court proceedings.

The report concludes that immigrants with mental disabilities fare poorly in immigration courts and that their legal challenges are compounded by poor treatment in detention. Among other things, the report recommends that immigrants who have mental disabilities be recognized as a vulnerable population deserving special protections; be treated in community settings; be provided appropriate diagnosis and care in detention; and be provided representation and where necessary, a guardian *ad litem*.

The American Immigration Council ("AIC") (formerly, the American Immigration Law Foundation) was established in 1987 as a not-for-profit educational and charitable organization. AIC works to promote the just and fair administration of our immigration laws and to protect the constitutional and legal rights of immigrants, refugees and other noncitizens. To this end, AIC

engages in impact litigation, including appearing as *amicus curiae* before administrative tribunals and federal courts in significant immigration cases on targeted legal issues.

AIC has a substantial interest in the issues presented in this case, which impact whether noncitizens with serious mental disabilities are provided a meaningful opportunity to be heard during the removal adjudication process. Based on extensive experience in immigration law and practice, AIC is well-placed to assist the Board in understanding the rights of noncitizens in removal proceedings, the limitations of the current statutory and regulatory framework, and the need for reform to ensure that the rights of noncitizens with serious mental disabilities are protected.

INTRODUCTION

The Immigration Judge reached the correct result in this case, holding that the Fifth Amendment's due process guarantees did not allow a removal proceeding to go forward against [redacted], a respondent who could not understand the purpose of the proceeding, assist counsel with his defense, or present coherent testimony. In its brief, DHS argues that the Immigration Judge's failure to hold a competency hearing warrants reversal, but cites no law or regulation that would require such a hearing. In any event, the record amply demonstrates that a competency hearing would have been unnecessary, as the expert report, assertions by Mr. [redacted]'s counsel, and Mr. [redacted]'s own behavior established that any attempt to proceed would have been a sham.

Amici take this opportunity to urge the Board to adopt more specific safeguards for respondents with serious mental disabilities and to use its influence within the Department of Justice to advocate for binding guidance, preferably new regulations. Such guidance should set forth uniform standards for assessing competency and making appropriate accommodations in the immigration courts. It also should allow Immigration Judges to appoint counsel and, where

appropriate, guardians *ad litem* for respondents with serious mental disabilities. In addition, more specific guidance is needed to clarify that Immigration Judges have the authority to terminate proceedings where no conceivable safeguards would enable a respondent to participate meaningfully in proceedings and the record supports some inference of eligibility for relief.

Here, the Immigration Judge took appropriate steps to protect the respondent's right to a full and fair hearing. A psychologist's report, the sworn statement of counsel, and the Immigration Judge's own observations confirmed that the respondent's serious mental disabilities precluded a meaningful opportunity to be heard under any circumstances. Thus, his decision to terminate Mr. [redacted]'s removal proceedings should stand.

ARGUMENT

I. THE IMMIGRATION AND NATIONALITY ACT AND APPLICABLE REGULATIONS DO NOT PROVIDE ADEQUATE PROCEDURAL PROTECTIONS FOR NONCITIZENS WHO HAVE SERIOUS MENTAL DISABILITIES.

A. All Noncitizens in Removal Proceedings, Including Those With Serious Mental Disabilities, Have a Right to a Full and Fair Hearing.

The Immigration Judge properly terminated Mr. [redacted]'s case pursuant to 8 C.F.R. § 1240.12(c) after determining that proceeding in this matter would violate his due process rights. The law is clear that noncitizens' due process rights in removal proceedings are protected by the Fifth Amendment. *Reno v. Flores*, 507 U.S. 292, 306 (1993) (citing *The Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903)); *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985). In this context, due process requires the government to provide respondents a full and fair hearing. *See Cinapian v. Holder*, 567 F.3d 1067, 1073-74 (9th Cir. 2009); *Matter of D-*, 20 I. & N. Dec. 827, 831 (BIA 1994). To this end, respondents must have a reasonable opportunity to examine adverse evidence, present favorable evidence, and cross-examine government witnesses. 8 U.S.C. § 1229a(b)(4)(B); *see also* 8 C.F.R. § 1240.10(a)(4).

To carry out these tasks, a respondent must be able to participate meaningfully in his removal proceedings. Yet some respondents with serious mental disabilities will, at a minimum, require the assistance of an attorney to understand the charges against them, recall relevant biographical facts, compile evidence, testify credibly, and cross-examine witnesses. *See* Human Rights Watch, *Deportation By Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the U.S. Immigration System*, at 25-31 (Jul. 25, 2010), *available at* http://www.hrw.org/en/reports/2010/07/26/deportation-default-0; Texas Appleseed, *Justice for Immigration's Hidden Population*, at 57 (Mar. 10, 2010), *available at* http://bit.ly/9EXugi. Without adequate representation, these individuals effectively will be denied their statutory and regulatory rights. *See* 8 U.S.C. § 1229a(b)(4)(B); *see also* 8 C.F.R. § 1240.10(a)(4). Denial of these rights has been deemed to violate due process where the respondent suffers prejudice as a result. *See, e.g., Ram v. Mukasey*, 529 F.3d 1238, 1241 (9th Cir. 2008); *Colindres-Aguilar v. INS*, 819 F.2d 259, 261-62 (9th Cir. 1987).

B. The Attorney General Has a Statutory Duty to Provide Safeguards for Respondents Who are Mentally Incompetent, but Existing Regulations Do Not Provide for Competency Determinations In a Manner Consistent With Established Assessment Standards and Due Process.

Under the Immigration and Nationality Act ("INA"), the Attorney General "*shall* prescribe safeguards to protect the rights and privileges" of respondents in for whom it is "impractical" to be present at removal proceedings by reason of mental incompetency. 8 U.S.C. § 1229a(b)(3) (emphasis added). Courts have construed this provision to protect respondents able to appear in person. *Mohamed v. Gonzales,* 477 F.3d 522, 526 (8th Cir. 2007) ("A mentally incompetent person, although physically present, is absent from the hearing for all practical purposes.") (citing *Drope v. Missouri*, 420 U.S. 162, 171 (1975)).

Notwithstanding this statutory directive, the existing regulatory framework fails to implement comprehensive safeguards for respondents with serious mental disabilities and lacks any prescriptions for making threshold competency determinations. Of the extensive regulations that govern the conduct of removal proceedings, only a handful address the subject of mental competency. *See, e.g.,* 8 C.F.R. § 103.5a(c)(2)(ii) (providing for service of Notice to Appear upon the person with whom a mentally incompetent respondent resides); 8 C.F.R. § 1240.4 (providing that an attorney, legal representative, legal guardian, near relative, or friend may appear on behalf of a respondent whose mental incompetency prevents meaningful participation in a hearing); 8 C.F.R. § 1003.25(a) (permitting an Immigration Judge to waive the presence of a mentally incompetent respondent who is represented by an individual from one of the preceding categories); 8 C.F.R. § 1240.10(c) (prohibiting an Immigration Judge from accepting an admission of removability from an incompetent respondent unless accompanied by an attorney or legal representative, near relative, legal guardian, or friend, and requiring a "hearing on the issues"). These regulations necessarily require Immigration Judges to determine whether a respondent is "incompetent"—without defining that term—but do not provide any meaningful guidance for determining competency in a manner consistent with established assessment standards and due process. *See* section II, *infra,* for a discussion of proposed competency assessment standards and procedures.

The deficiencies in existing regulations have been acknowledged by practicing attorneys, mental health professionals, and the government itself. In 2009, the U.S. House of Representatives passed a bill encouraging the Executive Office for Immigration Review ("EOIR") to consult with experts and interested parties to develop standards for competency

assessments in immigration court.[1] Later that year, *Amici* and more than sixty other concerned organizations and individuals submitted a detailed letter to U.S. Attorney General Holder asking for basic accommodations for people with mental disabilities in the immigration system, including:

> The revision of existing regulations and the adoption of new regulations and practices to standardize proceedings and provide increased protections for respondents with mental disabilities (especially those respondents found mentally incompetent).[2]

Since then, EOIR has trained agency legal staff on mental health issues in removal proceedings,[3] and expanded the Immigration Judge Benchbook to cover mental health issues in immigration court.[4] Laudable as these efforts are, they fail to answer many important questions and do not provide an adequate substitute for a comprehensive regulatory scheme that would provide standards, processes, and rules for Immigration Judges to make competency determinations. Indeed, EOIR itself acknowledged in May 2010 that many issues concerning competency standards for noncitizens in removal proceedings remained to be addressed.[5]

---

[1] H.R. 1105, 111th Cong. (2009); 155 Cong. Rec. H1762 (daily ed. Feb. 23, 2009) (statement of Rep. Obey).

[2] Letter to Eric Holder at 1, Atty. Gen. (July 24, 2009), *available at* http://www.legalactioncenter.org/sites/MentalDisability-7-24-09.pdf. A response was received on October 6, 2009, stating that EOIR "is committed to ensuring due process and fair treatment for all individuals in removal proceedings. EOIR is sensitive to the needs of vulnerable individuals, including respondents with mental disabilities...."

[3] AILA-EOIR Liaison Meeting Agenda Questions and Answers, at 2-3 (Oct. 28, 2009), *available at* www.justice.gov/eoir/statspub/eoiraila102809.pdf.

[4] U.S. Dep't of Justice, EOIR, *Benchbook for Immigration Judges*, "Mental Health Issues," *available at* www.justice.gov/eoir/vll/benchbook/tools/MHI/index.html.

[5] *See* U.S. Dep't of Justice, EOIR, *Competency Standards Report to the U.S. House and Senate Committees on Appropriations*, May 11, 2010; *see also* Letter from the Board of Immigration Appeals to the American Immigration Council (June 24, 2010) (requesting supplemental briefing by *amicus curiae* in *Matter of L-T-*).

C. The Board Should Adopt Revised Uniform Standards for Assessing and Accommodating Competency in the Immigration Courts.

Although the Attorney General has ultimate authority over these matters, *Amici* note that the authority to interpret and clarify applicable regulations has been delegated to the Board.[6] We urge the Board to exercise this authority to ensure that noncitizens are afforded their constitutional and statutory rights and privileges. Specifically, we urge that revised uniform standards for assessing and accommodating competency in the immigration system be adopted and include:

1. Clear and distinct standards of competency for respondents with and without legal representation;

2. An established process that an Immigration Judge must use to evaluate a respondent's ability to understand and meaningfully participate in immigration proceedings;

3. An independent network of pre-qualified psychiatrists or psychologists whom the court can direct to undertake a competency evaluation; and

4. The appointment of an attorney or other qualified representative for respondents found to have serious mental disabilities as well as the appointment of a guardian *ad litem* for those individuals who would otherwise be unable to understand and assist in their cases.

Amici also recommend procedural changes to the way cases involving immigrants with serious mental disabilities are handled by immigration courts. Specifically, we recommend a mental health docket in each court for any respondent with a serious mental disability; a competency evaluation as part of the first hearing in the mental health docket to determine if a person is competent to proceed *pro se*; and then a competency hearing, if indicated, to determine if a guardian *ad litem* is necessary, but only after counsel has been provided. If these safeguards do not satisfy the Immigration Judge that a respondent with a serious mental disability will get a

[6] *See, e.g*, 8 C.F.R. § 1003.1(d) ("[T]he Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.").

full and fair hearing, then the proceedings should be halted. An attorney and guardian *ad litem* must provide meaningful assistance to a respondent; their presence cannot be used as a fig leaf to hide a violation of due process. Only by making systemic changes to the regulations will the "rights and privileges" of noncitizens adequately be protected. *See* 8 U.S.C. § 1229a(b)(3).

II. THE BOARD SHOULD ADOPT A "REASONABLE CAUSE TO BELIEVE" OR "GOOD CAUSE" STANDARD TO DETERMINE WHEN COMPETENCY EVALUATIONS ARE REQUIRED, AS WELL AS ADDITIONAL SAFEGUARDS TO PROTECT THE RIGHTS AND PRIVILEGES OF REPRESENTED RESPONDENTS WHO ARE UNABLE TO UNDERSTAND AND ASSIST IN THEIR CASES.

Any bona fide doubts about a represented respondent's competency raised by the Immigration Judge, DHS counsel, the respondent's counsel, the respondent, a near relative, friend, or medical provider should trigger a competency evaluation (*i.e.*, an examination by a qualified psychiatrist or psychologist), as well as a hearing, if necessary, to determine whether the respondent is competent to participate meaningfully in the proceedings. While there is a dearth of case law on this issue in the immigration context, the "reasonable cause to believe" and "good cause" standards generally have been accepted in the criminal and civil contexts, respectively, to determine the need for a competency evaluation and/or hearing. We urge the Board to adopt a similar standard for immigration proceedings. We further advocate the adoption of additional safeguards to protect the rights of respondents whose serious mental disabilities would otherwise preclude a meaningful opportunity to be heard.

A. Similar Standards Are Applicable in the Federal Criminal and Civil Contexts.

The adoption of the "reasonable cause to believe" or "good cause" standard would conform removal proceedings with the established practice in other federal proceedings and would provide judges, lawyers, and respondents alike with a clearer understanding of when competency evaluations are required. Title 18 of the Federal Code of Criminal Procedure

codifies the circumstances and the standard under which a mental competency evaluation is triggered. The Code provides:

> (a) Motion To Determine Competency of Defendant. -- At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is *reasonable cause to believe* that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is *unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.*
>
> (b) Psychiatric or psychological examination and report. -- Prior to the date of the hearing, the court *may order that a psychiatric or psychological examination* of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

18 U.S.C. § 4241(a) and (b) (emphasis added).

Section 4241 contemplates that, upon reasonable cause, either the prosecution, the defendant or the court *sua sponte* may raise the issue of competency—to move for a hearing (§ 4241(a)) or to move for the court to order a mental evaluation (§ 4241(b)). The "understand and assist" standard is based on *Dusky v. United States*, in which the Supreme Court articulated the legal test for competency to stand trial with the assistance of counsel in criminal cases. *See* 362 U.S. 402 (1960). *Dusky* holds that competency requires that an individual have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings." *Id.* at 402. The "reasonable cause to believe" measure under § 4241(a) stems from *Drope v. Missouri*, 420 U.S. 162 (1975), where the Supreme Court held that a *bona fide* doubt as to the defendant's competency triggers an obligation on the part of the court to inquire further into the defendant's

mental capacity to stand trial.[7] In *Drope*, the Court elaborated on the criteria that should be considered:

> [E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts.

Drope, 420 U.S. at 180.

A similar standard applies in the civil context. Upon a motion by either party for good cause shown, the court may also order a psychiatric examination under Fed. R. Civ. P. 35(a). *See* Fed. R. Civ. P. 35(a); *Thomas v. Humfield*, 916 F.2d 1032, 1033-34 (5th Cir. 1990). In addition, Rule 17(c) of the Federal Rules of Civil Procedure addresses the issue of mental competency and provides:

> A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

Fed. R. Civ. P. 17(c)(2). In general, the court has authority to appoint a guardian *ad litem* to protect the interests of a party and ensure legal representation in the proceedings. *See, e.g.*, *Zaro v. Strauss*, 167 F.2d 218, 220 (5th Cir. 1948).

---

[7] When there is no evidence sufficient to raise a bona fide doubt as to the competency of the defendant, the court need not inquire further. *See, e.g., United States v. Nickels,* 324 F.3d 1250, 1252 (11th Cir. 2003).

B. Upon "Good Cause" or "Reasonable Cause to Believe" That A Represented Respondent May Be Unable to Understand and Assist With His Case, An Immigration Judge Should Affirmatively Inquire Into the Respondent's Competency and, Where Appropriate, Order a Competency Evaluation.

A competency evaluation normally should be conducted in any case where a represented respondent appears to be unable to understand and assist with his case. Although some case law indicates that an Immigration Judge is not constitutionally required to inquire into the competency of represented respondents,[8] such an inquiry should be required as a matter of best practices when warranted. *Cf.* 8 C.F.R. § 1003.10(b) ("[I]mmigration judges shall exercise their *independent judgment and discretion* and may take any action consistent with their authorities under the [Immigration and Nationality] Act and regulations that is appropriate and necessary for the disposition of such cases.") (emphasis added). An exception could be made in extreme cases—such as the one at bar—where the record amply demonstrates the futility of proceeding.

A competency evaluation can advance the process in several respects. Based on a competency evaluation, an Immigration Judge may gain important insight into whether treatment may help a respondent to understand the nature of the proceedings and assist counsel in his defense. *Cf.* U.S. Dep't of Justice, EOIR, *Benchbook for Immigration Judges*, "Mental Health Issues," *available at* http://www.justice.gov/eoir/vll/benchbook/tools/MHI/index.html ("[T]he Immigration Judge may wish to inquire of counsel whether issues of competency make this an appropriate case for administrative closure until the respondent can receive proper psychiatric care, with the aim that he or she is then able to understand the nature of the proceedings."). A competency examination may also assist the Immigration Judge in determining whether adequate

---

[8] *See, e.g., Munoz-Monsalve v. Mukasey*, 551 F.3d 1, 6 (1st Cir. 2008) (holding that the Immigration Judge was not required to raise the issue of competency *sua sponte*, when the respondent was represented by counsel and the attorney did not raise the issue). *Cf. Mohamed v. TeBrake*, 371 F. Supp. 2d 1043, 1046-47 (D. Minn. 2005) (Immigration Judge must inquire as to competency of unrepresented respondent or 8 C.F.R. § 1240.4 would be a nullity; incompetent respondents cannot be relied upon to assert their own procedural rights).

procedural safeguards have been implemented. *See, e.g.,* 8 C.F.R. § 1240.10(c) (prohibiting an Immigration Judge from accepting an admission of removability from an incompetent individual unless accompanied by an attorney or legal representative, a near relative, legal guardian, or friend); 8 C.F.R. § 103.5a(c)(2)(ii) (requiring service upon the person with whom a mentally incompetent respondent resides). Finally, a competency evaluation can assist the respondent's attorney in determining whether to seek the appointment of a guardian *ad litem.*[9]

C. Competency Evaluations Must Be Performed By Professional Evaluators Free of Conflicts of Interest.

Current regulations do not specify who is authorized to conduct a competency evaluation for purposes of immigration court. Anecdotally, attorneys report a range of scenarios, from DHS conducting a competency evaluation at the government's expense, to DHS agreeing to conduct an evaluation but producing a report that lacks any meaningful information about the respondent's ability to participate in the proceedings—even, in some cases, when the request comes from the Immigration Judge. In other cases, the respondent's family has been required to obtain a competency examination at its own expense. *See generally* Texas Appleseed, *Justice for Immigration's Hidden Population*, *supra*, at 49-58.

Because DHS is a party to removal proceedings, the agency's involvement in conducting competency evaluations creates a conflict of interest and undermines the integrity of the adjudicative process. The Board could avoid these problems by requiring Immigration Judges to designate an independent professional evaluator.[10]

---

[9] *See* Model Rules of Prof'l Conduct R. 1.14(b) ("When the lawyer reasonably believes that the client has diminished capacity... the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem....").

[10] In federal criminal cases, a competency evaluation must be conducted by a licensed or certified psychiatrist or psychologist designated by the court. 18 U.S.C. § 4247(b). The defendant may also request the appointment of an additional examiner. *Id.*

Just as EOIR maintains a list of free legal service providers, the agency should be required to maintain a list of mental health specialists willing to conduct competency evaluations on short notice and at an established rate if the Immigration Judge believes that a professional opinion is required. This "on call" system would allow Immigration Judges to determine, on an expedited and cost-efficient basis, whether additional safeguards are necessary to ensure a full and fair hearing. *See* 8 U.S.C. § 1229a(b)(3).

III. THE BOARD SHOULD ENSURE THAT RESPONDENTS UNABLE TO PROCEED *PRO SE* ARE AFFORDED LEGAL REPRESENTATION AND, WHERE UNABLE TO UNDERSTAND AND ASSIST COUNSEL, A GUARDIAN *AD LITEM*.

The touchstone for any procedurally sound removal hearing should be whether the respondent can participate meaningfully in the proceedings, which will depend in part on the nature of the proceedings and the safeguards available to that respondent. The Supreme Court has noted that "[m]ental illness itself is not a unitary concept" and may manifest itself differently depending on the circumstances and individuals involved. *Indiana v. Edwards*, 554 U.S. 164, 175 (2008). Because respondents with mental disabilities have a range of capabilities and needs, the procedural safeguards required under 8 U.S.C. § 1229a(b)(3) differ from case to case. As in the criminal context described in *Edwards,* an individual in removal proceedings may be sufficiently competent to work with an attorney to present his case, but may not have the mental capacity to represent himself. *Id.* at 175-76. In the removal context, the Immigration Judge must, at a minimum, appoint counsel to protect the statutory and due process rights of respondents whose serious mental disabilities would otherwise preclude meaningful participation in their removal hearings. However, additional safeguards, including the appointment of a guardian *ad litem*, may also be required for respondents who are so severely incapacitated that

they cannot understand and assist with their hearings even with counsel.[11] As discussed further below, the roles of attorneys and guardians *ad litem* are distinct, and the presence of one (or even both) does not necessarily ensure that due process will be provided to a respondent with a serious mental disability.

A. Legal Representation, While Critical, May Not Be Sufficient To Ensure A Full and Fair Hearing for Respondents with Serious Mental Disabilities.

The Supreme Court has long recognized the potentially grave consequences of deportation. *See, e.g., Bridges v. Wixon*, 326 U.S. 135, 164 (1945) ("The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence . . . Return to his native land may result in poverty, persecution and even death."); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (holding that the Sixth Amendment requires competent advice as to immigration consequences in part given "[t]he severity of deportation—the equivalent of banishment or exile").

Congress, recognizing the high stakes involved in removal proceedings, provided that noncitizens have a statutory right to counsel:

> In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

8 U.S.C. § 1362; *see also* 8 U.S.C. § 1229a(b)(4)(A). The legislative history of 8 U.S.C. § 1362 confirms that Congress intended to confer a *right*. *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312

---

[11] While the current regulations permit a "near relative" or "friend" to appear on behalf of a respondent, *Amici* caution that this should be done only when the Immigration Judge is assured that the near relative or friend can assist the court and the respondent without prejudicing the respondent. *See, e.g.,* 8 C.F.R. § 1240.4.

(9th Cir. 1988) (citing H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1712).

Legal representation is particularly critical to help respondents with serious mental disabilities navigate the complex maze of immigration law.[12] However, for respondents such as Mr. [redacted], who cannot communicate effectively with his counsel, participate in his representation, meaningfully complete an application for relief, or testify coherently, representation by counsel certainly could not guarantee a full and fair hearing.

Decisions of the Board and the Ninth Circuit emphasize the need for individualized consideration of a respondent's ability to participate in proceedings and what, if any, safeguards are required. In *Nee Hao Wong v. INS*, 550 F.2d 521 (9th Cir. 1977), for example, the Ninth Circuit held the petitioner's deportation proceedings need not have been postponed until he was able to intelligently participate, but reviewed the proceedings below to ensure they were consistent with due process. *Id.* at 523. The panel upheld the petitioner's order of deportation upon finding that the presence of numerous procedural protections—such as representation by counsel *and* a state-appointed conservator who testified "fully" on his behalf—rendered the hearing consistent with due process. *Id.* at 522-23. Similarly, in *Matter of H-*, 6 I. & N. Dec.

---

[12] Indeed, such respondents may not even have the capacity to effect a waiver of counsel, which must be knowing and voluntary. *See, e.g., Matter of Gutierrez*, 16 I. & N. Dec. 226, 228 (BIA 1977) (requiring waivers of counsel to be "competently and understandingly made" and instructing Immigration Judges to consider a respondent's "intelligence" and "ability to comprehend" in determining the validity of a waiver); *DeSouza v. Barber*, 263 F.2d 470, 477 (9th Cir. 1959) (listing "intelligence, education, information, understanding and ability to comprehend" as factors to consider in determining whether a respondent knowingly waived counsel); *United States ex. Rel. Shaw v. Van De Mark*, 3 F.Supp. 101, 102-03 (W.D.N.Y. 1933) (holding removal hearing not fair where unrepresented individual with serious mental disabilities verbally waived her right to counsel, because she "did not even have the mental capacity to understand that she was entitled to be represented at the hearing by counsel"). The government has itself suggested that mental incompetence may undermine the validity of a waiver of counsel. *See, e.g., Ram v. Mukasey,* 529 F.3d 1238, 1242 (9th Cir. 2008) (quoting contention in government brief that respondent provided valid waiver because no evidence existed to suggest he was "unsophisticated, *incompetent*, or in any way confused") (emphasis added). *Cf. Indiana v. Edwards*, 554 U.S. at 164-65 (holding that states may prohibit otherwise competent criminal defendants from proceeding *pro se* if unable to carry out basic tasks needed to present own defense).

358 (BIA 1954), the Board found the deportation hearing comported with the Fifth Amendment because the respondent was represented by counsel, a medical doctor appeared at the hearing "to protect the alien's interests," *and* the respondent himself answered questions "intelligently and rationally." *Id.* at 359-360. If the presence of counsel alone were sufficient to satisfy due process concerns, much of the analysis in *Nee Hao Wong* and *Matter of H-* would be superfluous.

Moreover, as Mr. [redacted]'s counsel emphasized in her brief to this Board, representation of mentally incompetent respondents can raise serious ethical dilemmas for attorneys that could require them to withdraw from a case. The ABA Model Rules of Professional Conduct, which have been adopted to some extent in most states, provide that a lawyer must abide by a client's decisions concerning the objectives of legal representation and, when appropriate, must consult with the client about the means by which they are to be pursued.[13] Where respondents are unable to make decisions or effectively communicate their preferences and goals, attorneys are ethically prohibited from substituting their own judgment for that of their clients.[14] When representing a client with diminished capacity, attorneys may "take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian."[15] In cases where a guardian can stand in the shoes of a respondent and provide direction to the attorney, this safeguard may remove the potential ethical

---

[13] *See* Model Rules of Prof'l Conduct R. 1.2(a), *available at* http://www.abanet.org/cpr/mrpc/rule_1_2.html.

[14] *See* Model Rules of Prof'l Conduct R. 1.14(a), *available at* http://www.abanet.org/cpr/mrpc/rule_1_14.html (providing that a lawyer representing a client with diminished capacity "shall, as far as reasonably possible, maintain a normal client-lawyer relationship"); R. 1.4(a)(2), *available at* http://www.abanet.org/cpr/mrpc/rule_1_4.html (requiring reasonable consultation with the client about the means by which his objectives are to be accomplished).

[15] *See* Model Rules of Prof'l Conduct R. 1.14(b), *available at* http://www.abanet.org/cpr/mrpc/rule_1_14.html.

conflict. *See United States v. Mandycz,* 447 F.3d 951, 962-63 (6th Cir. 2006) (stating that Due Process Clause requires courts to appoint guardians to protect the interests of private civil parties).

B. Immigration Judges Should Have The Authority to Appoint a Legal Representative, Guardian *Ad Litem*, or Both, Depending on the Circumstances of a Particular Case.

The Immigration Judge, who understands the complexities of immigration law and has an obligation to uphold fundamental fairness in court proceedings, is in the best position to appoint a legal representative and, if necessary, a guardian *ad litem* for a respondent with serious mental disabilities. In such cases, the Immigration Judge should determine whether, following the guidance from *Dusky*, a represented respondent's mental capacity hinders his ability to "understand and assist" in his case and, if so, consider whether to appoint a guardian *ad litem.*[16] The appointment of a guardian *ad litem* under these circumstances could help to facilitate effective representation by the respondent's counsel and ensure a full and fair hearing. *See, e.g., Johns v. Dept. of Justice*, 624 F.2d 522, 524 (5th Cir. 1980) (ordering appointment of guardian *ad litem* for five-year-old child allegedly kidnapped by U.S. couple from Mexico shortly after birth and illegally brought into United States; both child and U.S. couple were represented by the same counsel, who could not be presumed to represent the child's interests).

To protect the interests of respondents who lack the mental capacity to consent or object to the appearance of third parties on their behalf, Immigration Judges should follow the example of federal court judges by examining the qualifications and motivations of individuals appearing

---

[16] The guardian *ad litem* should be an individual who has been certified by EOIR as a volunteer advocate; a professional, other than an attorney, who holds a relevant professional license and whose training relates to the determination of the best interests of a person with a mental disability; or an adult having sufficient training and expertise as determined by the Immigration Judge to represent the best interests of the respondent. *See* Texas Appleseed, *Justice for Immigration's Hidden Population, supra*, at 57-58.

as guardians. *See Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (explaining, in the habeas context, that "'next friend' standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another" as certain prerequisites must be met); *Vargas v. Lambert*, 159 F.3d 1161, 1168 (9th Cir. 1998) (finding mother successfully met prerequisites of "next friend" to a son when she presented evidence of his mental incapacity and because she represented his "best interests"). Even in the absence of clear guidance as to the requisite qualifications of individuals acting in these capacities, Immigration Judges have implicit authority to question their fitness under 8 U.S.C. § 1229a(b)(3).

While an attorney may, in some cases, secure the appointment of a guardian *ad litem* through state court, this process may not always be a viable or efficient option. First, it is unreasonable to expect that an unrepresented respondent will have the knowledge, ability, or desire to seek out a guardian in the state court system.[17] Second, the state court judge may lack familiarity with the immigration system or an understanding of the extent of participation required by the respondent in immigration court proceedings. Third, this avenue may be unavailable in states that impose residency restrictions for the appointment of guardians in state courts. Fourth, even if a respondent were able to secure a guardian in state court, a host of problems may result if the respondent is transferred out of the state court's jurisdiction—including whether the guardianship continues to be valid. Lastly, the appointment of a legal guardian usually involves the filing of a separate lawsuit and thus is inefficient and will certainly translate into further delay for respondents. If the respondent is detained, arrangements will have to be made to transport the respondent to the state court, which often presents logistical challenges. The prolonged and continued detention of immigrants also raises serious due process

[17] For example, if the respondent is suffering from paranoid schizophrenia, he may believe that there is nothing wrong with his mental capacities, and may actually resist the appointment of a guardian *ad litem*.

concerns. The appointment of a guardian *ad litem* by an Immigration Judge would obviate these concerns in many cases.

C. Legal Representatives and Guardians *Ad Litem* Play Distinct Roles.

Current regulations make no distinction between the critical role that lawyers play in representing respondents incapable of proceeding *pro se* and the support provided by guardians *ad litem* and other individuals authorized to appear on behalf of respondents with serious mental disabilities. *See, e.g.*, 8 C.F.R. § 1240.4 (permitting an attorney, legal representative, legal guardian, near relative, *or* friend who was served to "appear on behalf of" a mentally incompetent respondent). While non-legal assistance may be helpful or even indispensable in providing due process to respondents with serious mental disabilities, it cannot serve as a substitute for legal representation. Notably, the ABA Model Rules of Professional Conduct specifically distinguish the function of an attorney—tasked with representing a client in a legal capacity—from that of "family members or other persons" who may exercise decision-making authority on behalf of a client with mental disabilities under particular circumstances.[18] Some sections of the immigration regulations make similar distinctions. *See, e.g.,* 8 C.F.R. § 103.2(a)(2) (permitting a legal guardian to sign an application or petition for a mentally incompetent person); 8 C.F.R. § 103.2(a)(3) (specifying that an applicant or petitioner may be represented by an attorney or BIA accredited representative).

The Departments of Justice and Homeland Security have promulgated comprehensive regulations governing the practice of immigration attorneys, *see* 8 C.F.R. §§ 292.3, 1003.101-108, 1292.3, the primary purpose of which is to protect noncitizens from practitioners unable to meet those standards. Professional Conduct for Practitioners—Rules and Procedures, 65 Fed.

---

[18] Model Rules of Prof'l Conduct R. 1.14 cmt., *available at* http://www.abanet.org/cpr/mrpc/rule_1_14_comm.html.

Reg. 39513, 39514 (June 27, 2000). Because guardians *ad litem* and other non-legal representatives are not subject to this framework, it would violate these regulations to permit them to provide legal representation in immigration court.

Given the different skill sets and obligations of guardians *ad litem* and attorneys, many courts have found in other contexts that guardians are not qualified to provide legal representation. *See, e.g., Johns v. Cnty. of San Diego*, 114 F.3d 874, 876-877 (9th Cir. 1997) (holding that a minor could not be "represented" by a non-attorney acting as a guardian in a federal civil proceeding, and stating that "[i]t goes without saying that it is not in the interest of minors or incompetents that they be represented by non-attorneys. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.") (internal citations omitted); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1098-99 (E.D. Wis. 1972) (rejecting, in involuntary commitment context, the "state's contention that appointment of a guardian *ad litem* may displace a requirement of appointed counsel" and finding it "apparent... that appointment of a guardian *ad litem* cannot satisfy the constitutional requirement of representative counsel"), *vacated and remanded on other grounds*, 414 U.S. 473 (1974); *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1129 (D. Haw. 1976) ("appointment of a guardian *ad litem* is not a substitute for appointment of counsel").

Further, some respondents who suffer from a serious mental disability retain the capacity to decide what is in their best interests even though they are not competent to proceed *pro se*. While such respondents cannot represent themselves in removal proceedings, they should not be forced to relinquish their decision-making authority. *See Indiana v. Edwards*, 554 U.S. at 175 (stating that because "[m]ental illness itself is not a unitary concept," defendant could be competent to stand trial but not to represent himself). In such cases, the appointment of a

guardian *ad litem* or other third party to appear on a respondent's behalf would undermine due process. *See, e.g., Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 651 (2d Cir. 1999) ("Because a litigant possesses liberty interests in avoiding the stigma of being found incompetent and in retaining personal control over the litigation, the Due Process Clause of the Fifth Amendment limits the district court's discretion with respect to the procedures used before appointing a guardian ad litem.") (internal citations omitted); *In re Guardianship of Reyes*, 152 Ariz. 235, 236 (Ariz. Ct. App. 1986) ("The appointment of a guardian often involves significant loss of liberty similar to that present in an involuntary civil commitment for treatment of mental illness where constitutionally proof must be by clear and convincing evidence.").

IV. TERMINATION OF PROCEEDINGS IS PROPER WHERE PROCEDURAL SAFEGUARDS WOULD NOT ENABLE THE RESPONDENT TO PARTICIPATE MEANINGFULLY IN PROCEEDINGS AND THE RECORD SUPPORTS SOME INFERENCE OF ELIGIBILITY FOR RELIEF.

The flexible nature of due process ensures that immigration courts confronted with cases such as the one at bar can fashion a broad range of measures to guarantee that noncitizens with serious mental disabilities receive adequate procedural protections. *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.") (internal quotations omitted). *Cf.* Fed. R. Civ. P. 17(c) (requiring courts to take whatever measures deemed proper to protect a minor or person who is legally incompetent during litigation). Such flexibility encompasses the authority to terminate proceedings when the record supports an inference that the respondent is eligible for relief, but cannot communicate effectively with his counsel, participate in his representation, meaningfully complete an application for relief, or testify coherently.

To be sure, removal proceedings have been allowed to proceed against respondents who lack competence when they are provided constitutionally and statutorily adequate representation.

See, e.g., *Nee Hao Wong*, 550 F.2d at 522-23 (upholding order of deportation upon finding that representation by counsel and a state-appointed conversator who testified fully on respondent's behalf rendered the hearing fundamentally fair); *Brue v. Gonzales*, 464 F.3d 1227, 1234 (10th Cir. 2006) (finding that because the petitioner "largely was able to answer the questions posed to him and provide his version of the facts surrounding his past" and that his claims "turned on undisputed facts and legal issues unaffected by his competence," he received "the opportunity to be heard at a meaningful time and in a meaningful manner"). But where, as here, a respondent's mental disability is sufficiently severe as to prevent even the most basic participation in preparing and advancing an application for relief, and relevant evidence cannot be obtained from family members or other third parties, termination is within the range of protective measures an immigration judge may properly consider where the record supports an inference that the respondent is eligible for relief. *See* 8 C.F.R. § 1240.10.

Amici do not advocate a rule in which proceedings must be terminated in every case involving a respondent with serious mental disabilities. But in cases such as this one, where a psychologist's report, the sworn statement of counsel, and the Immigration Judge's own colloquy with the respondent uniformly demonstrate that no further safeguards could materially assist the respondent in participating meaningfully in his proceedings, termination may be the only available avenue. This problem will continue to be particularly acute until Immigration Judges receive adequate guidance concerning standards and procedures for competency determinations and the procedural safeguards necessary "to protect the rights and privileges" of respondents found to lack mental competency. *See* 8 U.S.C. § 1229a(b)(3).

CONCLUSION

For the foregoing reasons, the order of the Immigration Judge terminating removal proceedings against Mr. [redacted] should be affirmed.

Respectfully submitted,

Melissa Crow /ICRA
Melissa Crow
Ben Winograd
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
Tel: (202) 507-7523
Fax: (202) 742-5619
Attorneys for Amicus Curiae American Immigration Council

Steven H. Schulman /ICRA
Steven H. Schulman
Kevin R. Amer
Akin Gump Strauss Hauer & Feld, LLP
Robert Strauss Building
1333 New Hampshire Ave, N.W.
Washington, DC 20036
Tel: (202) 887-4000
Fax: (202) 887-4288
Attorneys for Amicus Curiae Texas Appleseed

Dated: March 15, 2011

CERTIFICATE OF SERVICE

I certify that on March 15, 2011, a true and correct copy of this *Amicus Curiae* Brief was served upon the following counsel of record by first class mail:

Michael P. Davis
Chief Appellate Counsel
Department of Homeland Security
520 Leesburg Pike, Suite 1300
Falls Church, VA 22041

Rachel Kling, Esq.
Florence Immigrant and Refugee Rights Project
P.O. Box 654
Florence, AZ 85132

Kevin R. Amer