18-3460

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

J--- M---- B------ M------, AKA J--- B------
Petitioner,

v.

WILLIAM P. BARR,
United States Attorney General,
Respondent.

ON PETITION FOR REVIEW OF A DECISION AND ORDER BY THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR PETITIONER

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INTRODUCTION

This appeal presents the Court with an issue that will not only determine the future of Petitioner J--- B------ M------ ("Mr. B------")—a crime victim who enabled law enforcement to convict his attackers—but also the futures of thousands of other individuals who risk removal from the United States despite qualifying for lawful immigration status. These individuals include other noncitizen ("alien") crime victims, domestic violence victims, aliens in removal proceedings seeking provisional unlawful presence waivers, "Dreamers" with Deferred Action for Childhood Arrivals, and many others.

These individuals and Mr. B------ are at the heart of a conflict between two processes created by Congress: one that grants eligible aliens legal status in the United States, and another that removes aliens who lack such status. The result of this conflict is a tug of war in which justice requires the rope to stay centered. For decades, this balance existed. Then, in 2018, the Attorney General decided *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018), yanking the rope to one side.

Mr. B------, a victim of armed robbery, assisted with the prosecution of his attackers, making him eligible for a "U visa"—a nonimmigrant status that Congress created to enable alien crime victims to stay in the United States. Mr. B------ has been in the middle of this tug of war. At one end of the rope is Mr. B------'s U visa petition, pending before U.S. Citizenship and Immigration Services ("USCIS"), the arm of the Department of Homeland Security ("DHS") that adjudicates affirmative benefit applications. At the other end are proceedings to remove him from the United States, initiated by U.S. Immigration and Customs Enforcement ("ICE"), the arm of DHS that prosecutes individuals in removal proceedings. At first, the rope was centered, for immigration judges ("IJs") and the Board of Immigration Appeals ("BIA") could deploy a docket-management tool to balance these two processes: administrative closure. By administratively closing his case, IJs and the BIA could stay Mr. B------'s removal proceedings if they overtook his pending U visa petition, providing USCIS enough time to process the petition before a removal order was issued. But on May 17, 2018, in *Matter of Castro-Tum*, the Attorney

General abruptly stripped IJs and the BIA of their general authority to administratively close cases. Four days later, Mr. B------ was ordered removed, his U visa petition still pending.

The Attorney General's decision in *Matter of Castro-Tum* conflicts with the unambiguous language of federal regulations that grants IJs and the BIA the power to take "any action" that is "appropriate and necessary" to decide cases. *See* 8 C.F.R. §§ 1003.10(b), 1003.1(d)(1)(ii). Administrative closure is clearly an "action"—one that for decades immigration adjudicators have found to be "appropriate and necessary" in cases involving collateral agency or court proceedings.

Even if this Court finds these regulations ambiguous, the Attorney General's decision is nonetheless unreasonable and an unfair surprise that warrants no deference under either *Auer v. Robbins*, 519 U.S. 452 (1997) or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). By yanking the rope, the Attorney General has uprooted over three decades of administrative practice and the lives of thousands of individuals who relied on administrative closure. The elimination of administrative closure also fails to promote efficiency, the Attorney General's stated

goal. Instead, it will likely lead IJs and the BIA to recalendar hundreds of thousands of administratively closed cases in a system already flooded with over one million active cases.

To re-center the rope, this Court must refuse to grant the Attorney General's erroneous decision in *Matter of Castro-Tum* any deference, and instead give the plain language of the regulations the straightforward reading they warrant. That reading provides IJs and the BIA the general authority to administratively close cases, as they have done for decades.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 8 U.S.C. § 1252(a)(5) to review the Board of Immigration Appeals' final decision and order of removal against Mr. B------. Mr. B------ filed a petition for review with this Court on -------- --, 2018, eight days after the BIA's decision and order, dated ---------- --, 2018. AR 3–4,[1] Pet. Review 1. His Petition for Review was

[1] The notation "AR" refers to the Administrative Record, which consists of 626 pages. Pinpoint citations to the AR refer to the internal page numbering in the lower right-hand corner of the page, rather than the CM/ECF page numbering in the banner at the top of the page.

therefore timely. *See* 8 U.S.C. § 1252(b)(1) (imposing a thirty-day deadline on petitions for review). Venue is proper under 8 U.S.C. § 1252(b)(2) because Mr. B------'s immigration hearings were completed in New York, New York. AR 146.

STATEMENT OF THE ISSUES

I. Under 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii), immigration judges and the Board of Immigration Appeals can take "*any* action . . . appropriate and necessary" to decide cases. In *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018), the Attorney General concluded, for the first time, that IJs and the BIA cannot administratively close cases unless expressly authorized. Does the Attorney General's decision conflict with unambiguous language in these federal regulations?

II. For decades and in hundreds of thousands of cases, IJs and the BIA used administrative closure to manage their calendars and dockets efficiently, while allowing completion of relevant collateral matters. Even if the regulations are ambiguous, was the Attorney General's decision an unreasonable, unfair

surprise outside of his substantive expertise, thus not warranting deference under *Auer v. Robbins*, 519 U.S. 452 (1997)?

III. In *Matter of Castro-Tum*, the Attorney General purports to promote efficiency, and also promotes the recalendaring of 320,000 administratively closed cases. But he does not provide immigration adjudicators with a procedure to handle cases with pending collateral matters requiring more than a "brief pause." Does the Attorney General's decision lack the power to persuade, and therefore not warrant deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)?

STATEMENT OF THE CASE

A. Overview of Petitioner's injuries, petition for a U nonimmigrant status ("U visa"), and removal proceedings

Mr. B------ is a XX-year-old man from Honduras who entered without inspection and has been living in the United States for seventeen years. AR 242, 174–75. On ------ --, 2016, he became the

victim of and sole eyewitness to an armed robbery and stabbing when [Facts of Crime Redacted].

Mr. B------ was subsequently hospitalized. AR 252, 468. Once he was able, he

> cooperated with law enforcement in the investigation of this c[rime]. He identified his attackers and gave statements while [still] in the hospital recovering from his wounds. He has [since] cooperated by making himself available for the grand jury presentation.

AR 474. This cooperation, according to the E---- County Executive Assistant Prosecutor ("prosecutor"), convinced all three of Mr. B------'s attackers to plead guilty. AR 417.

While the crime was being investigated, Mr. B------ was placed in removal proceedings. AR 43. He filed a U visa petition and received the required law enforcement certification. AR 219, 249, 472–75. On May 21, 2018, an immigration judge ("IJ") refused to administratively close Mr. B------'s case to await adjudication of his U visa petition and ordered him removed. AR 44. On November 8, 2018, the Board of Immigration Appeals ("BIA") affirmed, relying on *Matter of Castro-*

Tum, 27 I. & N. Dec. 271 (A.G. 2018). AR 3–4. Mr. B------ now seeks review of the BIA's decision and order.

B. Background for U visas

Congress created the U nonimmigrant classification ("U visa") for two purposes: (1) to "facilitate the reporting of crimes to law enforcement officials by . . . victimized[ ] and abused aliens who are not in lawful immigration status;" and (2) to comply "with the humanitarian interests of the United States." Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, § 1513, 114 Stat. 1464, 1533–34; *Matter of Sanchez-Sosa*, 25 I. & N. Dec. 807, 809 (B.I.A. 2012). Congress recognized that alien victims of serious crimes "may [normally] be reluctant to help in the investigation or prosecution of criminal activity for fear of removal from the United States." New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,013, 53,014–15 (Sept. 17, 2007) (interim rule). Accordingly, the U visa provides eligible alien crime victims who help in the investigation or prosecution of crimes the ability to remain in the United States for up to four years and possibly become

permanent residents. *Id.* at 53,015. U.S. Citizenship and Immigration Services ("USCIS") can issue up to 10,000 U visas annually, and evaluates applicants as visas become available. 8 C.F.R. § 214.14(d)(1), (2).

An alien is eligible for a U visa when he (1) was the victim of a qualifying crime that caused him "substantial physical or mental abuse"; (2) possesses information about the crime; and (3) has been, is, or will be helpful to law enforcement, prosecutors, or similar authorities in investigating or prosecuting the crime. 8 U.S.C. § 1101(a)(15)(U)(i) (2012); 8 C.F.R. § 214.14(b). USCIS will generally defer to the criminal investigators or prosecutors regarding the alien's helpfulness. *See* 8 C.F.R. § 214.14(a)(12), (c)(2)(i); *Matter of Sanchez Sosa*, 25 I. & N. Dec. at 813. Thus, USCIS will likely find a victim helpful if the investigator or prosecutor signs a "Law Enforcement Certification." *See* 8 C.F.R. § 214.14(a)(12), (c)(2)(i); *Matter of Sanchez-Sosa*, 25 I. & N. Dec. at 811. If the alien is inadmissible, USCIS may also waive any grounds for that inadmissibility. *See* 8 C.F.R. §§ 212.17(b), 214.14(c)(2)(iv).

C. Petitioner's removal proceedings

On ---------- X, 2016—four months after Mr. B------ was assaulted—ICE commenced removal proceedings against him, charging him with presence in the United States without admission or parole. AR 220, 623–26. Three months later, on --------- X, 2017, the IJ found him removable, but continued the proceedings to allow him to pursue a U visa.[2] AR 50–51, 56.

On --- XX, 2017, the E---- County Executive Assistant Prosecutor signed a law enforcement certification supporting Mr. B------'s U visa petition, and attesting to Mr. B------'s helpfulness as a victim and eyewitness in the criminal case against his attackers. AR 201. The prosecutor also contacted ICE to remind them that "deporting Mr. B-----M------ is contrary to the spirit of the U visa law." AR 249, 470.

A few weeks later, Mr. B------ filed his U visa petition with USCIS. AR 182. In the petition, Mr. B------ described the armed robbery to which he was a victim and disclosed convictions from two driving

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[2] Mr. B------'s hearings were repeatedly continued after ------ --. AR 58, 66, 73, 78, 90, 94, 98. Some of these continuances were related to his assistance with the criminal prosecution, AR 53, 67, and some were related to the court's scheduling conflicts, AR 76, 95.

incidents.[3] At his -------- --, 2017 removal hearing, the IJ reviewed Mr. B------'s petition and described it as "a great case for a U visa," and "clearly . . . a prima facie case." AR 84, 85; *see* AR 117. ICE also did not contest Mr. B------'s prima facie eligibility for a U visa. *See* AR 117.

Also at his ------- ---, 2017 removal hearing, Mr. B------ filed a motion to administratively close his case so that he could continue assisting with the criminal prosecution of his attackers and pursue his U visa. AR 80–81. In support, he provided his law enforcement certification and an additional letter of support from the prosecutor's office. AR 92. At the next hearing, on -------- --, 2017, the IJ merely stated, "So I'm not going to administratively close, but I will continue it under the [sic] Matter of Sosa." AR 92. He made no further comments about administrative closure. *See* AR at 92–93.

A final hearing in immigration court was held on May 21, 2018 under visiting IJ Christensen. AR 146, 153. Hearing the case for the first time, IJ Christensen refused to grant further continuances or administrative closure. AR 148, 153. He reasoned that the U visa was

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[3] Mr. B------ disclosed [listing arrests, convictions, and sentences].

a "remote possibility,"—contradicting the initial IJ, who had found Mr. B------ prima facie eligible for a U visa—and that the processing times were too long. AR 148–49, 153.

On appeal, the BIA rejected Mr. B------'s arguments challenging the denial of both a continuance and administrative closure.[4] As to the denial of administrative closure, the BIA stated:

> During the pendency of the appeal, the Attorney General issued a decision in *Matter of Castro-Tum*, 27 I. & N. Dec. (A.G. 2018), discussing the authority of Immigration Judges and this Board to order administrative closure. The Attorney General held that "there is no general authority" for immigration judges or the Board to administratively close cases, and that such closure is unauthorized in the absence of any express regulatory authority or court-approved settlement. *Id.* at 286-289, 293. Based on the foregoing, neither the Immigration Judge nor the Board has the authority to grant administrative closure.[5]

AR 4.

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[4] This appeal does not challenge the denial of a continuance.

[5] The BIA's statement about the timing of *Castro-Tum* is incorrect. The Attorney General issued *Castro-Tum* on May 17, 2018, which was four days before the IJ ordered Mr. B------ removed on May 21, 2018, not during the pendency of Mr. B------'s appeal. However, the IJ did not rely on *Matter of Castro-Tum*, and indeed, seemed not to know of the case. AR 150.

Although Mr. B------ was detained in New Jersey for the pendency of his removal proceedings before the agency, he has since been released from detention on bond pursuant to the Third Circuit's decision in *Guerrero-Sanchez v. Warden York County Prison*, 905 F.3d 208 (3rd Cir. 2019), which requires bond hearings for individuals detained for six months or longer with final orders of removal.[6]

D. The Attorney General's decision in *Matter of Castro-Tum* eliminating administrative closure

On May 17, 2018, the Attorney General issued *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018). The case arose from an IJ's decision to administratively close the removal proceedings of Respondent Reynaldo Castro-Tum, an unaccompanied minor proceeding pro se, after he failed to appear. *Matter of Reynaldo Castro-Tum*, A206842910, 2017 Immig. Rptr. LEXIS 24703, at *1 (B.I.A. Nov. 27,

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[6] This Court may take judicial notice of the immigration judge's decision to grant bond to Mr. B------. *See Manguriu v. Lynch*, 794 F.3d 119, 121 (1st Cir. 2015) (recognizing that courts can take judicial notice of "agency determinations" including "agency actions in immigration proceeding [ ] [that] are outside the boundaries of the administrative record").

2017). The IJ reasoned that ICE may have sent the Notice to Appear to the wrong address. *Id.* at *2. The BIA disagreed, vacated the administrative closure order, and remanded. *Id.* at *5–6. A few weeks later, the Attorney General directed the BIA to refer Mr. Castro-Tum's case to him for review, pursuant to 8 C.F.R. § 1003.1(h). *Id.* at 271.

In *Matter of Castro-Tum*, the Attorney General eliminated IJs' and the BIA's general authority to administratively close cases, leaving administrative closure as an option only in cases in which regulations or settlement agreements expressly authorize or require it. 27 I. & N. Dec. at 271. In doing so, the Attorney General eliminated a docket management tool that IJs and the BIA have used since the 1980s. *See id.* at 273. The Attorney General reasoned that no statute or regulation, particularly 8 C.F.R. §§ 1003.1(d)(1)(ii) and 1003.10(b), provides these adjudicators any general authority to administratively close cases. *Id.* at 282–84, 291. The Attorney General further reasoned that "administrative closure encumbers the fair and efficient administration of immigration cases." *Id.* at 272. He then directed the BIA and IJs to recalendar administratively closed cases at the request

of either party. *Id.* at 292. The BIA and IJs would no longer need to find a "persuasive reason" to approve recalendaring. *Id.* at 274, 292. Once recalendared, the Attorney General added, the IJ or BIA "shall" decide each case impartially and expeditiously. *Id.* at 293.

As of October 23, 2019, over 320,000 cases were administratively closed, available for recalendaring under *Matter of Castro-Tum*. Executive Office for Immigration Review, Adjudication Statistics: Administratively Closed Cases, *available at* https://www.justice.gov/eoir/page/file/1061521/download (last visited Apr. 26, 2020) [hereinafter *EOIR Adjudication Statistics*].

E. The Fourth Circuit's rejection of *Matter of Castro-Tum* and this Court's appointment of counsel for Petitioner

On August 29, 2019, the Fourth Circuit refused to follow *Matter of Castro-Tum*, finding that "the plain language of 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii) unambiguously confers upon IJs and the BIA the general authority to administratively close cases." *Romero v. Barr*, 937 F.3d 282, 292 (4th Cir. 2019). The court added that, alternatively, "deference under either *Auer or Skidmore* . . . is not merited." *Id.*

The Second Circuit subsequently appointed undersigned counsel to represent Mr. B------ in his petition for review, "to brief, among any other nonfrivolous issues, whether the Attorney General erred in *Matter of Castro-Tum* . . . in concluding that the agency's regulations do not provide IJs and the BIA general authority to administratively close removal proceedings." *See B------ M------ v. Barr*, No. 18-3460 (Nov. 14, 2019) (order granting Petitioner's motions for IFP status and stay of removal); *B------ M------ v. Barr*, No. 18-3460 (Jan. 9, 2020) (order appointing counsel).

STANDARD AND SCOPE OF REVIEW

This Court reviews questions of law de novo. *See Ahmed v. Lynch*, 804 F.3d 237, 240 (2d Cir. 2015). It only grants deference to unpublished BIA decisions interpreting immigration regulations when they rely on a published interpretive decision that itself warrants deference. *See Bah v. Mukasey*, 529 F.3d 99, 110 n.15 (2d Cir. 2008); *Mizrahi v. Gonzales*, 492 F.3d 156, 158 (2d Cir. 2007). Further, this Court limits its review to the BIA's decision unless the BIA merely

adopts and supplements the IJ's decision. *Chen v. Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005).

This appeal warrants *de novo* review because it raises a question of law: whether the BIA's refusal to even consider administratively closing Mr. B------'s case was proper. Although this decision relied on a published decision, *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018), that decision does not warrant deference, as argued below.

The scope of this Court's review is limited to the BIA's decision, since the BIA relied on *Matter of Castro-Tum* and the IJ did not. AR 4, 150. Indeed, the IJ seemed unfamiliar with it. AR 150.

SUMMARY OF THE ARGUMENT

This case presents an issue of great significance not just to Mr. B----, but to thousands of other aliens who risk removal despite qualifying for lawful immigration status in the United States. For decades, IJs and the BIA have had the authority to stay removal proceedings for these individuals where appropriate, by using administrative closure, a docket-management tool. Administrative closure enabled IJs and the BIA to manage their cases efficiently while allowing completion of

collateral matters that could affect the outcome of these cases. These collateral matters—competency determinations, criminal appeals, petitions for immigration benefits, and the like—directly affect whether individuals can and should be removed.

Then, in 2018, the Attorney General abruptly stripped IJs and the BIA of this authority, holding for the first time that 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii) do not grant these adjudicators the general authority to administratively close cases after all. *See Matter of Castro-Tum*, 27 I. & N. Dec. at 271. As the Fourth Circuit—the only circuit court to have reviewed the Attorney General's decision—recently concluded, *Matter of Castro-Tum* was wrongly decided. *See Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019). Contrary to the Attorney General's decision, the regulations that set forth the authority of IJs and the BIA, 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii), are unambiguous. They grant immigration adjudicators the power to take "any action" that is "appropriate and necessary" to decide the cases before them, which plainly provides these adjudicators with the broad authority to manage their dockets, including through administrative closure. Therefore, this

Court need look no further to reverse the BIA's decision here, as it relied solely on *Matter of Castro-Tum* to deny Mr. B------ administrative closure.

Even if the Court determines that the regulations are genuinely ambiguous, it should not defer to the Attorney General's novel interpretation, which represents an unreasonable departure from decades of agency precedent. The decision is an unfair surprise that severely upsets parties' reliance interests, does not serve the efficiency goals the Attorney General purports to promote, and therefore does not warrant *Auer* deference. Nor does the decision warrant *Skidmore* deference as it lacks the power to persuade: not only does it deprive IJs and the BIA of an important docketing tool, but it will also add hundreds of thousands of cases to an overloaded system. As such, this Court should vacate the BIA's decision and remand Mr. B------'s case.

ARGUMENT

I. *MATTER OF CASTRO-TUM* WAS WRONGLY DECIDED BECAUSE FEDERAL REGULATIONS UNAMBIGUOUSLY VEST IMMIGRATION JUDGES ("IJs") AND THE BOARD OF IMMIGRATION APPEALS

("BIA") WITH THE AUTHORITY TO ADMINISTRATIVELY CLOSE CASES.

When regulations are unambiguous, their plain language controls. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019); *see Romero*, 937 F.3d at 291. The Attorney General's decision violated 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii), regulations that unambiguously confer on IJs and the BIA the authority to administratively close cases. Other regulations, as well as judicial settlement agreements, confirm this general authority by presupposing it. Because *Matter of Castro-Tum* is contrary to the plain language of these unambiguous regulations, it does not warrant this Court's deference.

A. Federal regulations 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii) unambiguously grant IJs and the BIA the general authority to administratively close cases by authorizing them to take "any action" that is "appropriate and necessary" for the disposition of cases.

Courts do not defer to an agency's interpretation of a regulation unless the regulation is "genuinely ambiguous." *Kisor*, 139 S. Ct. at 2414–15. The regulation must remain genuinely ambiguous even after the court "has resorted to *all* the standard tools of interpretation." *Id.*

at 2415 (emphasis added) (explaining the court must first consider "the text, structure, history, and purpose of a regulation" before it can find it ambiguous); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Otherwise, the court must give effect to the regulation's plain language. *Kisor*, 139 S. Ct. at 2415; *Romero*, 937 F.3d at 291.

Here, this Court should give effect to the plain language of 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii), just as the Fourth Circuit recently did. *See Romero*, 937 F.3d at 292. In *Romero v. Barr*, the first and only circuit court decision on this issue, the Fourth Circuit found,

> Applying the standard tools of interpretation—namely, a reading of the text of the relevant regulations—we clearly discern from the text that the authority of the IJs and the BIA to administratively close cases is conferred by the plain language of 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii)).

937 F.3d at 292; *see also Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 890 (9th Cir. 2018) ("From the regulatory language [in 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii)], it is evident that IJs and the BIA are empowered to take various actions for docket management . . . [A]dministrative closure is a tool that an IJ or the BIA must be able to

use, in appropriate circumstances, as part of their delegated authority, independence and discretion").

Of the two regulations, 8 C.F.R. § 1003.10(b) grants IJs the authority to "exercise their independent judgment and discretion," allowing them to take "any action" that is "appropriate and necessary" to decide their cases. *See also* 8 C.F.R. § 1240.1(a) (granting IJs the authority to order removal and withholding of removal, certify a decision, determinate applications, and "take any . . . action consistent with applicable law and regulations as may be appropriate" in removal proceedings). The other regulation, 8 C.F.R. § 1003.1(d)(1)(ii), grants identical authority to the BIA. By granting IJs and the BIA the power to take (1) "any" (2) "action" that is (3) "appropriate and necessary" in their (4) "independent judgment," these regulations unambiguously grant IJs and the BIA the general authority to administratively close cases. 8 C.F.R. §§ 1003.10(b), 1003.1(d)(1)(ii).

First, the term "any" in these regulations conveys that, so long as their actions are appropriate and necessary, IJs and the BIA are not restricted in the kinds of actions they may take. The plain meaning of

"any" is "one or some indiscriminately of *whatever kind*," which is "used to indicate one selected without restriction." *Any*, *Merriam-Webster Dictionary* (2020) (emphasis added), https://www.merriam-webster.com/dictionary/any; *see United States v. Rowland*, 826 F.3d 100, 108 (2d Cir. 2016) (relying on dictionary definitions, as well as statutory context, to determine plain meaning); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)); *Matter of Douglas*, 26 I. & N. Dec. 197, 199–200 (B.I.A. 2013) (quoting Webster's Collegiate Dictionary 1341 (10th ed. 2004)). The Fourth Circuit likewise understood the term "any" as used in these regulations to "encompass actions of whatever kind appropriate for the resolution of the case," thus giving the word "expansive meaning." *Romero*, 937 F.3d at 292 (quoting *Gonzales*, 520 U.S. at 5).

The Supreme Court has also recognized similar expansive definitions of "any" in other regulatory and statutory contexts. *See, e.g.*, *Massachusetts v. E.P.A.*, 549 U.S. 497, 529 (2007) (finding that the repeated use of the word "any" in the Clean Air Act's definition of 'air

pollutant' "embraces all airborne compounds of *whatever stripe*" (emphasis added)); *Brogan v. United States*, 522 U.S. 398, 400 (1998) (finding the word "any" in 18 U.S.C. § 1001 covers false statements of *whatever kind* (emphasis added)); *Gonzales*, 520 U.S. at 5 (finding the word "any," when used without restrictive language, refers to terms of imprisonment of *whatever kind* (emphasis added)).

Second, administrative closure indisputably constitutes an "action" under these regulations. *See Romero*, 937 F.3d at 293 ("[A]dministrative closure indisputably qualifies as an '*action*' under §§ 1003.10(b) and 1003(d)(1)(ii) (emphasis added)). The Attorney General himself, in *Matter of Castro-Tum*, referred to administrative closure as such. *See* 27 I. & N. Dec. at 271 ("Accordingly, immigration judges and the Board may only administratively close a case where a previous regulation or a previous judicially approved settlement expressly authorizes such an *action*." (emphasis added)).

Third, whether administrative closure is "appropriate and necessary" is for IJs and the BIA to determine. *See* 8 C.F.R. § 1003.10(b) (instructing IJs to exercise "their independent judgment and

discretion" to decide what actions to take); 8 C.F.R. § 1003.1(d)(1)(ii) (similar, for the BIA). And, as the Supreme Court has explained, "[o]ne does not need to open up a dictionary in order to realize the capaciousness of" the phrase "appropriate and necessary." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). The BIA had clarified this point in *Matter of Avetisyan*, holding for the first time that IJs and the BIA can grant administrative closure over a party's objection:

> [N]either an Immigration Judge nor the Board may abdicate the responsibility to exercise independent judgment and discretion in a case by permitting a party's opposition to act as an absolute bar to administrative closure . . . [Both] have the authority, in the exercise of independent judgment and discretion, to administratively close proceedings under appropriate circumstances, even if a party opposes.

Matter of Avetisyan, 25 I. & N. Dec. 688, 694 (B.I.A. 2012); *see Matter of W-Y-U-*, 27 I. & N. Dec. 17, 20 (B.I.A. 2017) (affirming *Matter of Avetisyan*, and clarifying that the primary consideration is whether the party objecting administrative closure has persuasive reasons for doing so). And no regulation—anywhere—prohibits IJs and the BIA from employing administrative closure, further confirming it as a tool left to each adjudicator's discretion.

For decades, IJs and the BIA have found administrative closure "appropriate and necessary" in various situations. *See Romero*, 937 F.3d at 293. In fact, they have found it so in approximately 500,000 cases since 1980, and of these, 320,000 remain administratively closed today. *See Matter of Castro-Tum*, 27 I. & N. Dec. at 272; *EOIR Adjudication Statistics*, *supra* p. 15. Many of these cases have been administratively closed to allow the parties to "await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time." *Matter of Avetisyan*, 25 I. & N. Dec. at 692; *see, e.g., Matter of Hashmi,* 24 I. & N. Dec. 785, 791 n.4 (B.I.A. 2009) (noting that administrative closure may be appropriate while the respondent awaits the adjudication of a prima facie approvable visa petition); *Matter of M-A-M-*, 25 I. & N. Dec. 474, 483 (B.I.A. 2011) (finding administrative closure may be appropriate while the respondent seeks mental health treatment to restore her competency); *Matter of Montiel*, 26 I. & N. Dec. 555, 555–57 (B.I.A. 2015) (finding

administrative closure appropriate while the respondent was awaiting the adjudication of a direct appeal of his criminal conviction).

Moreover, the Attorney General's assertion in *Matter of Castro-Tum* that administrative closure "is the antithesis of a final disposition," 27 I. & N. Dec. at 284, is erroneous. As the Fourth Circuit noted, *Matter of Avetisyan* highlights how administrative closure "may in fact expedite and result in a final disposition." *Romero*, 937 F.3d at 294 n.13. First, the factors provided in *Matter of Avetisyan*, which IJs and the BIA must assess before deciding whether to administratively close a case, "are particularly relevant to the efficient management of the resources of [IJs] and the Board . . . ."[7] 25 I. & N. Dec. at 695.

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[7] These factors are as follows:

> (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings . . . when the case is recalendared.

Matter of Avetisyan, 25 I&N Dec. at 696.

Second, the facts of the case are themselves illustrative. While Ms. Avetisyan was in removal proceedings, her husband became a naturalized citizen and filed, on her behalf, a family-based visa petition with USCIS. *Id.* at 689. Because of the visa petition, the IJ continued Ms. Avetisyan's removal proceedings several times. *Id.* Each time, however, Ms. Avetisyan's immigration file had to be shuttled back and forth between USCIS and the IJ presiding over her removal proceedings, which in turn prevented USCIS from completing its adjudication of her visa petition. *Id.* at 689–90; *see Romero*, 937 F.3d at 293–94. Finally, the IJ administratively closed Ms. Avetisyan's proceedings, providing USCIS an uninterrupted period to adjudicate the petition. *See Matter of Avetisyan*, 25 I. & N. Dec. at 690–91, 697. Of course, the argument that administrative closure expedites final disposition presumes that IJs and the BIA are truly adjudicators tasked with the efficient and equitable application of law, as opposed to removal at any cost.

In sum, the Attorney General's decision in *Matter of Castro-Tum* diverges from the plain language of unambiguous regulations, wrongfully stripping powers from IJs and the BIA.

B. Regulations and judicially approved settlements that expressly reference administrative closure presuppose that IJs and the BIA possess the general authority to administratively close cases.

In addition to the regulations that generally authorize IJs and the BIA to administratively close cases, there are regulations that expressly authorize or require administrative closure in specific circumstances, thereby presupposing IJs' and the BIA's general authority to do so. *See, e.g.*, 8 C.F.R. § 1214.3 (stating that the agency "*shall* administratively close the proceeding" when an alien may be eligible for V nonimmigrant status (emphasis added)); 8 C.F.R. § 1245.13(d)(3)(i) (same for nationals of Cuba and Nicaragua who are eligible for adjustment of status); 8 C.F.R. § 1245.15(p)(4)(i) (same for nationals of Haiti who are eligible for adjustment of status). Contrary to the Attorney General's assertion in *Matter of Castro-Tum*, the general authority to administratively close

cases does not render these specific regulations "largely superfluous." *See* 27 I. & N. Dec. at 286. Quite the opposite.

First, many of these specific regulations do not offer administrative closure as a discretionary option at all—they require it. For instance, 8 C.F.R. § 1245.13(d)(3)(i) provides that an IJ or the BIA "shall" administratively close proceedings involving certain aliens from Cuba or Nicaragua who are eligible for adjustment of status. Such mandatory language presupposes that IJs and the BIA can employ administrative closure when appropriate in some cases, but *must* do so in other cases.

True, some provisions, such as the regulation offering administrative closure for T visa applicants, use permissive language, providing that IJs and the BIA "may" grant administrative closure. 8 C.F.R. § 1214.2(a). But it is hardly unusual for regulations to grant a general authority in one provision and specific examples of that authority in other provisions. *Compare* 8 C.F.R. § 1003.29 (providing IJs the general authority to grant continuances for good cause) *and* § 1240.6 (providing IJs the general authority to grant a reasonable

adjournment for good cause) *with* 8 C.F.R. § 1003.30 (providing IJs the specific authority to grant a continuance for the respondent to respond to new allegations or charges of removability) *and* § 1003.47(f), (j) (providing IJs the specific authority to grant continuances when ICE has failed to report on the completion and results of investigations required for certain forms of relief from removal). By the Attorney General's logic, all of these regulations providing specific examples of when IJs "may" grant continuances would also be superfluous, and that cannot be correct.

Further, other regulations promulgated by DHS presuppose this power exists by requiring administrative closure without authorizing IJs or the BIA to take such an action. For instance, 8 C.F.R. § 212.7(e)(4)(iii) states that USCIS may not grant a provisional unlawful-presence waiver to aliens in removal proceedings "unless the removal proceedings are administratively closed and have not been recalendared at the time of filing the application." The Attorney General attempts to discount this regulation by stating that "[r]egulations that apply only to DHS do not provide authorization for an immigration judge or the

Board to administratively close or terminate an immigration proceeding." *Matter of Castro-Tum*, 27 I. & N. Dec. at 278 n.3. But this attempt misses the point, which is that DHS (or more specifically, USCIS) itself presupposes that IJs and the BIA possess general administrative-closure authority. Its presupposition here, moreover, has dispositive impact: the existence of administrative closure can determine whether an alien is eligible for a provisional unlawful-presence waiver or not.

Lastly, judicial settlement agreements requiring administrative closure—agreements that the Attorney General found were themselves the source for the administrative-closure authority, *Matter of Castro-Tum*, 27 I. & N. Dec. at 281—also presuppose the general authority of IJs and the BIA to administratively close cases. *See, e.g.*, *Barahona-Gomez v. Ashcroft*, 243 F. Supp. 2d 1029, 1035–36 (N.D. Cal. 2002) (approving a settlement agreement requiring administrative closure for alien class members who were improperly denied suspension of deportation); *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 806–07 (N.D. Cal. 1991) (approving a settlement agreement

requiring administrative closure for alien class members seeking the adjudication of claims by an asylum officer). No statute or regulation expressly authorized IJs or the BIA to administratively close the cases of class members included in the agreements, nor did any Attorney General delegate such authority. Instead, an Article III judge ordered IJs and the BIA to administratively close the subject cases. *Romero*, 937 F.3d at 294 n.13. Yet as the Fourth Circuit noted in *Romero*, "an Article III judge could not order IJs or the BIA to administratively close cases if IJs or the BIA lacked the authority to do so." *Id.* The only way these agreements can exist is if IJs and the BIA already had general administrative-closure authority.

II. EVEN IF THE FEDERAL REGULATIONS ARE AMBIGUOUS, *MATTER OF CASTRO-TUM* DOES NOT WARRANT *AUER* DEFERENCE.

Even if the Court finds the federal regulations genuinely ambiguous, it should not accord *Matter of Castro-Tum* deference under *Auer v. Robbins*, 519 U.S. 452 (1997) ("*Auer* deference"). The decision is an unreasonable, unfair surprise—a sudden reversal that strips IJs and the BIA of a power they have employed for decades. It effectively deprives *all* aliens in removal proceedings of the benefits Congress created through U visas, family-based visas, provisional unlawful-presence waivers, and many other forms of relief that enable deserving individuals to stay in the United States. As just one result of the Attorney General's decision, Mr. B------ and other alien crime victims who helped U.S. law enforcement convict their attackers now face removal with their U visa petitions still pending. This Court can prevent such results by refusing to defer to the Attorney General's decision, and instead relying on its own experience with docket management, a matter this Court is quite familiar with and is well-equipped to handle on its own.

If an agency's regulation is genuinely ambiguous, then courts must determine whether or not to accord *Auer* deference to the agency's interpretation of it. *See Kisor*, 139 S. Ct. at 2408, 2414–15; *Auer*, 519 U.S. at 454–55, 461. Courts will not automatically accord such deference. They will only do so when the interpretation is reasonable and the "character and context" entitles it to controlling weight. *Kisor*, 139 S. Ct. at 2415–16. The character and context do not, however, entitle the interpretation to such weight if the interpretation fails to (1) reflect the agency's "fair and considered judgment"; (2) implicate the agency's substantive expertise; or (3) represent the authoritative or official position of the agency's views. *Id.* at 2416–18 (labeling these three considerations "especially important markers").

A. The Attorney General's decision fails to reflect the agency's fair and considered judgment by conflicting with decades of administrative practice, thereby creating an unfair surprise that severely upsets reliance interests.

Courts may not defer to a new interpretation of an agency's regulations if that interpretation fails to reflect that agency's "fair and considered judgment." *Kisor*, 139 S. Ct. at 2414, 2417. This occurs

when the interpretation creates an "unfair surprise" to regulated parties, thereby upsetting the parties' reliance interests. *Id.* at 2417–18 (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007)). The potential for unfair surprise is great if the new interpretation conflicts with the agency's earlier position. *See id.* at 2418 ("We have therefore only rarely given *Auer* deference to an agency construction 'conflict[ing] with a prior' one." (quoting *Thomas Jefferson v. Shalala*, 512 U.S. 504, 515 (1994) (brackets in original)); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 263 (2d Cir. 2006) (refusing to defer to the BIA's new interpretation of 8 C.F.R. § 208.6 because it conflicted with prior "statements by the INS, the Justice Department, and the State Department"). And it is especially acute if the new interpretation "is preceded by a very lengthy period of conspicuous inaction." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 153, 157–58 (2012) (finding that the Department of Labor's interpretation of a regulation to encompass pharmaceutical sales representatives was an unfair surprise because it conflicted with decades of industry practice). For this reason,

the Fourth Circuit recently found that the Attorney General's "new interpretation in *Castro-Tum*" fails to reflect fair and considered judgment because it "(1) breaks with decades of the agency's use and acceptance of administrative closure and (2) fails to give 'fair warning' to the regulated parties of a change in a longstanding procedure." *Romero*, 937 F.3d at 296.

Like the Fourth Circuit, this Court should conclude that the Attorney General's decision in *Matter of Castro-Tum* fails to reflect fair and considered judgment. The Attorney General's new interpretation of 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii), which finds for the first time that these regulations do not provide IJs and the BIA with general administrative closure power, conflicts with three decades of administrative practice. *Cf. Lin*, 459 F.3d at 264 (refusing to defer to the BIA's new interpretation of a regulatory provision because it conflicted with the government's prior positions, as stated in an agency fact sheet, asylum manual, and memorandum).

Since the 1980s, the Department of Justice has taken the position that IJs and the BIA have the power to administratively close cases

when necessary, appropriate, and in the interest of justice. *See Matter of Avetisyan*, 25 I. & N. Dec. at 691–92 (explaining that an IJ or the BIA "may find it necessary or, in the interest of justice . . . to defer further action for some period of time" through administrative closure, among other procedures); Memorandum for All Immigration Judges, from William R. Robie, Chief Immigration Judge, EOIR, *Re: Operating Policy and Procedure 84-2: Cases in Which Respondents/Applicants Fail to Appear for Hearing* at 1–2 (Mar. 7, 1984), *available at* https://www.hsdl.org/?view&did=9904 (advising IJs to administratively close cases when appropriate); Memorandum for All Immigration Judges, et al., from Brian M. O'Leary, Chief Immigration Judge, EOIR, *Re: Operating Policy and Procedure 13-01: Continuances and Administrative Closure* at 4 (Mar. 7, 2013), *available at* https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/08/13-01.pdf [hereinafter *O'Leary Memo*] (advising the same, nearly thirty years later). While the boundaries of this authority may have changed during this period, the general understanding remains the same: IJs and the BIA have general administrative-closure power. Accordingly,

over these three decades, the immigration courts have administratively closed nearly 500,000 cases. 27 I. & N. Dec. at 272.

The BIA confirmed this position in 1988, and subsequently developed an entire body of law clarifying the use of administrative closure. *See Matter of Amico*, 19 I. & N. Dec. 652, 654 n.1 (B.I.A. 1988) (explaining that administrative closure may be used when appropriate); *Matter of Gutierrez-Lopez*, 21 I. & N. Dec. 479 (B.I.A. 1996); *Matter of Avetisyan*, 25 I. & N. Dec. at 692, 696; *Matter of W-Y-U-*, 27 I. & N. Dec. at 18, 20. In 2012, in *Matter of Avetisyan*, the BIA expanded administrative closure by allowing IJs and the BIA to administratively close cases over the objection of one of the parties. 25 I. & N. Dec. at 690, 697. It also articulated a multi-factor test, guiding IJs and the BIA's administrative closure decisions, *id.* at 696, and creating a meaningful standard for appellate review of those decisions. *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 893 (9th Cir. 2018). Five years later, the BIA confirmed this individualized evaluation. *See Matter of W-Y-U*, 27 I. & N. Dec. at 18, 20.

Federal courts have also long recognized IJs' and the BIA's general administrative closure power. *See, e.g.*, *Gonzalez-Caraveo*, 882 F.3d at 893 ("The IJ and the BIA must independently consider whether administrative closure is warranted."); *Hernandez-Castillo v. Sessions*, 875 F.3d 199, 207 (5th Cir. 2017) ("An immigration judge may use administrative closure to remove a case temporarily from his or her active calendar; the BIA may use it to remove a case temporarily from its docket."); *see also Mi Young Lee v. Lynch*, 623 F. App'x 33, 34–35 (2d Cir. 2015) (summary order) (reviewing the BIA's administrative closure decision); *Gonzalez-Vega v. Lynch*, 839 F.3d 738, 741 (8th Cir. 2016) (same); *Vahora v. Holder*, 626 F.3d 907, 914–15 (7th Cir. 2010) (same).

The Attorney General's new interpretation in *Matter of Castro-Tum* creates an unfair surprise to regulated parties, upsetting the reliance interests of Mr. B------ and other aliens in removal proceedings with pending collateral matters. Indeed, the unfair surprise is especially acute in this case because over three decades of conspicuous inaction by the Department of Justice allowing administrative closure when appropriate precedes *Matter of Castro-Tum*. *Cf. Christopher*, 567

U.S. at 153, 157–58 (finding that the Department of Labor's interpretation of a regulation to encompass pharmaceutical sales representatives was unfair surprise because it conflicted with longstanding industry practice).

Matter of Castro-Tum abruptly foreclosed Mr. B------'s right to a substantive review of the Immigration Judge's erroneous decision denying him administrative closure. AR 4, 153. In doing so, it abruptly foreclosed Mr. B------'s chance for administrative closure pending the adjudication of U visa petition. AR 174–85. As a result, Mr. B------ was ordered removed, even after the E---- County Assistant Executive Prosecutor praised him because he

> cooperated with law enforcement in the investigation of [the] c[rime]. He identified his attackers and gave statements *while in the hospital recovering* from his wounds. He [ ] cooperated by making himself available for the grand jury presentation.

AR 474 (emphasis added). He was ordered removed, even though this cooperation was critical to the prosecutor's success in persuading Mr. B-----'s attackers to plead guilty. AR 417.

By issuing *Matter of Castro-Tum*, the Attorney General also unfairly surprised all other aliens in removal proceedings with pending

collateral matters. For example, children in removal proceedings with an approved Special Immigrant Juvenile Status petition are now more likely to be removed while their adjustment of status petition remains pending. *See* 8 U.S.C. § 1101(a)(27)(J)(iii); *Matter of J-A-A-G-*, AXXX XXX 844, at *1 (B.I.A. Mar. 8, 2017) (unpublished), Special App. at 34. Lawful permanent residents in removal proceedings pursuant to a criminal conviction are now more likely to be removed while their direct appeal of that conviction remains pending. *Matter of Montiel*, 26 I. & N. Dec. at 555–56. Aliens in removal proceedings suffering from mental competency issues are now more likely to be removed before receiving treatment to become competent. *See Matter of M-A-M-*, 25 I. & N. Dec. at 474–75, 483. Aliens in removal proceedings with pending family-based immigrant visa petitions are now more likely to be removed, forcing them to leave their open visa petitions and families behind. *See* 8 U.S.C. § 1101(a)(15)(K); *Romero*, 937 F.3d at 286; *Matter of Avetisyan*, 25 I. & N. Dec. at 696–97.

Further, *Matter of Castro-Tum* now prohibits aliens in removal proceedings from applying for provisional unlawful presence waivers.

See Matter of Castro-Tum, 27 I. & N. at 277 n.3. DHS regulations require such proceedings first be administratively closed, yet no current regulation or Attorney General delegation expressly authorizes such closing. *See id.*; 8 C.F.R. § 212.7(e)(4)(iii). Thus, most aliens in removal proceedings will now be excluded from obtaining "immigrant visa[s], adjustment of status, or [ ] K or V nonimmigrant visa[s]," even when eligible, because *Matter of Castro-Tum* bars them from qualifying for a provisional waiver. 8 C.F.R. § 212.7(a); *see* 8 U.S.C. § 1182(a) (listing many classes of inadmissible aliens requiring a provisional waiver).

B. The Attorney General's decision is unreasonable because it is inconsistent with regulations requiring cases to be decided in a timely manner and eliminates a docketing tool that allowed IJs and the BIA to focus limited judicial resources on cases ripe for adjudication.

Courts also will not defer to an agency's interpretation of its regulations unless the interpretation is reasonable. *Kisor*, 139 S. Ct. at 2408, 2415–16. "And let there be no mistake: That is a requirement an agency can fail." *Id.* at 2416. An agency fails this requirement if its interpretation is plainly erroneous, inconsistent with the regulations, or

otherwise outside the "bounds of permissible interpretation," as defined by the text, structure, history, and purpose of the regulations. *Kisor*, 139 S. Ct. at 2416; *see Auer*, 519 U.S. at 461–62; *Christopher*, 567 U.S at 155.

The regulations at issue in *Matter of Castro-Tum*, 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii), require IJs and the BIA to resolve the issues before them in a "timely" manner. Accordingly, before *Matter of Castro-Tum*, the BIA had tailored its guidance for administrative closure to promote efficiency. *See Matter of Avetisyan*, 25 I. & N. Dec. at 695 ("[T]he decision to administratively close proceedings . . . involves an assessment of factors that are particularly relevant to the *efficient* management of the resources of the Immigration Courts and the Board" (emphasis added)); *see, e.g.*, *Matter of Montiel*, 26 I. & N. Dec. at 557 ("[W]e conclude that administrative closure is warranted as a matter of administrative *efficiency*" (emphasis added)).

When used appropriately, administrative closure is inherently efficient: it allows IJs and the BIA to temporarily remove cases from their active calendars and dockets that have collateral relief pending

before another agency. *Matter of Avetisyan*, 25 I. & N. Dec. at 692. By staying these "unripe" cases, IJs and the BIA can then focus their limited resources on other cases that are actually ripe for a final disposition. *See id.* at 694–95; *Matter of Hashmi*, 24 I. & N. Dec. at 791 n.4; *O'Leary Memo*, *supra* p. 38, at 4 ("Administrative closure . . . provides judges with a powerful tool to help them manage their dockets, by helping to focus resources on those matters that are ripe for resolution.").

In *Matter of Castro-Tum*, the Attorney General deprived IJs and the BIA of this important docket management tool and now requires them to recalendar up to 320,000 cases. 27 I. & N. Dec. at 272; *EOIR Adjudication Statistics*, *supra* p. 15. He does so by eliminating the requirement that IJs first assess whether recalendaring is appropriate, instead ordering them to recalendar closed cases whenever either party moves for it. *Compare Matter of Castro-Tum*, 27 I. & N. Dec. at 272, 292 (instructing IJs and the BIA to recalendar administratively closed cases on the motion of either party, and "expect[ing] the recalendaring process [to] proceed in a measured but deliberate fashion that will

ensure that cases ripe for resolution are swiftly returned to active dockets") *with Matter of W-Y-U-*, 27 I. & N. Dec. at 18 n.4 (instructing IJs to first weigh the *Avetisyan* factors before determining whether to recalendar administratively closed proceedings). The number of cases to be recalendared represents a nearly 30% increase over the 1,129,890 cases the immigration system is already struggling to handle. *See* TRAC Reports, *Immigration Court Backlog Tool*, *available at* https://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Apr. 26, 2020).

Thus, although the Attorney General purports to promote the timeliness goals of 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii), *see Matter of Castro-Tum*, 27 I. & N. Dec. at 291–92, he has done the opposite. The Fourth Circuit noted this very inconsistency:

> *Castro-Tum* is internally inconsistent. Although one of its purported concerns is efficient and timely administration of immigration proceedings, it would in fact serve to lengthen and delay many of these proceedings by: (1) depriving IJs and the BIA of flexible docketing measures sometimes required for adjudication of an immigration proceeding, as illustrated by *Avetisyan*, and (2) leading to the reopening of over 330,000 cases upon the motion of either party, straining the burden on immigration courts that *Castro-Tum* purports to alleviate.

Romero, 937 F.3d at 297.[8]

Moreover, the Attorney General also erroneously assumes these additional 320,000 cases can be decided "expeditiously." *See Matter of Castro-Tum*, 27 I. & N. Dec. at 292–93; TRAC Reports, *Crushing Immigration Judge Caseloads and Lengthening Hearing Wait Times* (Oct. 25, 2019) *available at* https://trac.syr.edu/immigration/reports/579/ [hereinafter *TRAC Reports, Crushing Immigration Caseloads*]. In fact, "expeditious" resolution of these recalendared cases will be rare. It may be years before immigration courts can schedule hearings for these recalendared cases.[9] *TRAC Reports, Crushing Immigration Caseloads*. IJs are already scheduling hearings years into the future because of the

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[8] Not only is the recalendaring of 320,000 cases inconsistent with the regulations' timeliness goals, it is also inconsistent with the new EOIR performance plan. Memorandum for All Immigration Judges, et al., from James R. McHenry III, EOIR *Re: Case Priorities and Immigration Court Performance Measures* (Jan 17, 2018), *available at* https://www.justice.gov/eoir/page/file/1026721/download.

[9] For many recalendared cases, IJs will have to schedule multiple hearings: an initial "master calendar hearing," as well as hearings to take testimony and collect other evidence. 8 U.S.C. § 1229a(a), (b)(4).

current backlog. *See id.* (noting that, in 2019, New York City Immigration Court was scheduling hearings into December 2024); TRAC Reports, *Immigration Court Backlog Jumps While Case Processing Slows* (June 8, 2018), *available at* https://trac.syr.edu/immigration/reports/516/. And as more cases are recalendared, the longer these hearings will be delayed. *TRAC Reports, Crushing Immigration Caseloads*, *supra* p. 47 (citing *Matter of Castro-Tum* for "exacerbate[ing] the immigration court crisis").

Also plainly erroneous is the Attorney General's decision to consider only the "strong public interest in bringing litigation to a close," *Matter of Castro-Tum*, 27 I. & N. Dec. at 288 (quoting *INS v. Abudu*, 485 U.S. 94, 107 (1988) (addressing motions to reopen)), thereby disregarding the public's interest in conserving immigration agencies' already limited resources. *See Matter of Avetisyan*, 25 I. & N. Dec. at 695 (encouraging immigration agencies to conserve limited resources); *Matter of Hashmi*, 24 I. & N. Dec. at 791 n.4 (same); *O'Leary Memo*, *supra* p. 38, at 4 (same). As noted above, IJs and the BIA can conserve these resources by administratively closing unripe cases and focusing

on matters ripe for resolution. *See Matter of Avetisyan*, 25 I. & N. Dec. at 691–92, 695; *Matter of Hashmi*, 24 I. & N. Dec. at 791 n.4 (explaining that administrative closure "assist[s] in ensuring that only those cases that are likely to be resolved are before the Immigration Judge[, and] avoid[s] the repeated rescheduling of a case that is clearly not ready to be concluded."). Thus, as the Chief Immigration Judge has explained, this tool enables adjudicators to avoid "taking up valuable judge and court time" in cases with collateral relief. *O'Leary Memo*, supra p. 38, at 4. Failing to administratively close cases with pending visa petitions would therefore "make[ ] little sense." *Id.* By now disallowing such closures, the Attorney General's decision in *Matter of Castro-Tum* is outside the bounds of permissible interpretation, for it makes little sense.

C. The decision also fails to implicate the agency's substantive expertise; rather, it deals with docket management—a matter this Court is well-equipped to handle.

An interpretation warrants *Auer* deference only if it actually implicates the agency's substantive expertise; that is, technical or policy

expertise. *Kisor*, 139 S. Ct. at 2417 (listing regulations regarding an "active moiety" and the diagnosis of occupational disease as examples of rules implicating agencies' substantive expertise). But "[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity," and federal courts are well-equipped to handle the matter, no court should defer to the agency's interpretation. *Kisor*, 139 S. Ct. at 2417 ("Some interpretive issues may fall more naturally into a judge's bailiwick."); *see Attipoe v. Barr*, 945 F.3d 76, 80 (2d Cir. 2019). For example, in *Attipoe*, this Court found the BIA lacked comparative expertise in resolving whether it had the power to equitably toll the petitioner's appeal deadline under 8 C.F.R. § 1003.38(b), the BIA's appeals regulation. 945 F.3d at 79–80. This Court reasoned that filing deadlines were not a matter within the BIA's substantive expertise, but rather a matter federal courts are well-equipped to handle. *Id.* at 80; *see Iavorski v. I.N.S.*, 232 F.3d 124, 133 (2d Cir. 2000) (citing *Bamidele v. I.N.S.*, 99 F.3d 557, 561 (3d Cir. 1996) ("A statute of limitations is not a matter within the particular expertise of the INS.")).

Agencies also lack any comparative expertise over interpretations that rely on "general common-law principles." *See, e.g.*, *Jicarilla Apache Tribe v. Federal Energy Regulatory Commission*, 578 F.2d 289, 292–93 (10th Cir. 1978) (finding the agency lacked comparative expertise over the interpretation of "purchase," which relies on common-law property concepts); *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960) (finding the agency lacked comparative expertise over the interpretation of a contract clause, which relies on common-law contract principles). These principles may include judge-made procedural processes, like staying a proceeding, which form a "procedural common law." Amy C. Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 813–16, 823–24, 844 n.91 (2008). The power to make this procedural common law is incidental to a judge's "need[ ] to get its job done," for "'wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.'" *Id.* at 848 (quoting The Federalist No. 44, at 285 (James Madison) (Clinton Rossiter ed., 1961)). Further, "[w]hen federal courts make procedural common law,

they are speaking on a matter within their particular competence." *Id.* at 841.

Here, although the Attorney General provides many policy arguments to support his decision in *Matter of Castro-Tum*, his decision does not implicate the agency's substantive expertise. The decision does not address whether administrative closure is appropriate in a particular case. Rather, it addresses whether administrative closure, as a docket management tool, could ever be "appropriate and necessary" to timely decide immigration cases. *See* 8 C.F.R. §§ 1003.10(b), 1003.1(d)(1)(ii); *Matter of Castro-Tum*, 27 I. & N. Dec. at 283–84. This issue does not implicate any policy or technical concerns, but instead deals with matters that "fall more naturally into a judge's bailiwick." *See Kisor*, 139 S. Ct. 2410, 2417 (listing the interpretations of "active moiety" and the diagnosis of occupational disease as examples that implicate agencies' technical and policy expertise, in contrast to the clarification of common-law concepts, which does not).

Administrative closure is a tool of docket management. *Matter of W-Y-U-*, 27 I. & N. Dec. at 17–18 (explaining that administrative

closure is not a form of relief, but rather a docket management tool); *see Matter of Castro-Tum*, 27 I. & N. Dec. at 271; *cf. Gonzalez-Caraveo*, 882 F.3d at 890 ("IJs and the BIA have the authority to regulate the course of immigration proceedings" and to "take various actions for docket management," including "administrative closure . . . as part of their delegated authority, independence and discretion"). Docket management, including the power to stay proceedings, is a concept that federal courts are, to say the least, familiar with. *See Kisor*, 139 S. Ct. at 2417; *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). As the Supreme Court has articulated, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis*, 299 U.S. at 254; *see Clinton v. Jones*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."); *cf. Ex Parte Peterson*, 253 U.S. 300, 312 (1920) ("Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for

the performance of their duties."). As such, this staying power is part of the federal courts' procedural common law.

Indeed, federal district courts themselves employ administrative closure to stay proceedings. *See Lehman v. Revolution Portfolio L.L.C.*, 166 F.3d 389, 392 (1st Cir. 1999) ("Administrative closings comprise a familiar, albeit essentially ad hoc, way in which courts remove cases from their active files . . . The method is used in various districts throughout the nation in order to shelve pending, but dormant cases." (internal citations omitted)); *Mire v. Full Spectrum Lending Inc.*, 389 F.3d 163, 167 (5th Cir. 2004) ("District courts frequently make use of [administrative closure] to remove from their pending cases suits which are temporarily active elsewhere."); *Matter of Avetisyan*, 25 I. & N. Dec. at 690 n.2 ("Administrative closure is not limited to the immigration context. It is utilized throughout the Federal court system, under a variety of names, as a tool for managing a court's docket.").

The Attorney General in *Matter of Castro-Tum* has no greater expertise over docket management than the BIA had over the filing deadlines in *Attipoe v. Barr*. Neither does he have any comparative

expertise over the more nuanced issue of whether administrative closure, specifically, is an action that could ever be appropriate and necessary to decide cases in a timely manner. For this issue squarely relies on the procedural common-law principle of a stay, an issue which courts, not the Attorney General, are particularly competent to speak on. *Cf. Jicarilla Apache Tribe*, 578 F.2d at 292–93 (finding the court particularly competent to speak on the interpretation of "purchase," which relies on common-law property concepts). Because this Court is well-equipped to address the issue *de novo*, the Attorney General's elimination of administrative closure does not warrant *Auer* deference.

III. THE ATTORNEY GENERAL'S DECISION IN *MATTER OF CASTRO-TUM* DOES NOT WARRANT *SKIDMORE* DEFERENCE BECAUSE IT LACKS THE POWER TO PERSUADE.

If an agency interpretation does not warrant *Auer* deference, a court should only consider it to the extent it has the "power to persuade" ("*Skidmore* deference"). *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Kisor*, 139 S. Ct. at 2414; *see United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001). Whether it has this power or not depends on

the thoroughness of the agency's consideration, the validity of its reasoning, and consistency with its prior pronouncements. *Skidmore*, 323 U.S. at 140.

Here, *Matter of Castro-Tum* does not warrant *Skidmore* deference because it lacks the power to persuade. The Attorney General's decision fails to reflect thorough consideration and valid reasoning because, as noted above, the decision is inconsistent—inconsistent with three decades of prior pronouncements, *see supra* Part II.A, and inconsistent internally and with federal regulations. *See supra* Part II.B.

Moreover, the decision also fails to provide meaningful guidance on how IJs and the BIA should replace administrative closure. The Attorney General merely stated, "for cases that truly warrant a brief pause, the regulations expressly provide for continuances." *Matter of Castro-Tum*, 27 I. & N. Dec. at 291. But how should IJs and the BIA avoid wasting time and resources when aliens like Mr. B------ have collateral relief pending that will not be resolved for a significant period of time? In Mr. B------'s case, and in many others, the relief requires

more than a "brief pause," and is not covered by a regulation expressly granting or requiring administrative closure.

Despite the Attorney General's assertions to the contrary, *see Matter of Castro-Tum*, 27 I. & N. Dec. at 291, continuances cannot replace administrative closure; they operate differently and serve different purposes. *See Jaime v. Holder*, 570 F. App'x 78, 80 (2d Cir. 2014) (summary order) ("[A]dministrative closure would alleviate the IJ's concerns about granting an open-ended and lengthy continuance."). While administrative closure removes cases from an IJ's active docket until they are recalendared, a continuance is only a "brief pause"; *Matter of Castro-Tum*, 27 I. & N. Dec. at 292; keeps the case on the IJ's active calendar; *see Matter of Avetisyan*, 25 I. & N. Dec. at 691; and requires the parties to regularly report to the court after each short continued period, regardless of whether the collateral relief is resolved. *See id.* at 689–90, 697. Continuances are often more appropriate in cases where the reason for the delay will be resolved quickly, whereas administrative closure is more appropriate when the respondent is

awaiting collateral relief that will not be completed for a significant period of time. *Id.* at 691–92.

The Attorney General's decision further fails to reflect thorough consideration because it impedes Congress's ability to advance its objectives in creating various forms of collateral relief, such as the U visa. Congress created the U visa to mitigate an alien crime victim's fear of removal, which would then encourage the victim to help law enforcement investigate and prosecute the crime. Victims of Trafficking and Violence Protection Act, § 1513, 114 Stat. 1464, 1533–34; *see* New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. at 53,014–15 (discussing Congress's intentions in creating the U visa). Although the U visa helps mitigate this fear by allowing such victims to temporarily remain in the United States, the visa is no longer enough. Its long processing times leave a gap within which alien victims can still be removed. *See* 8 C.F.R. § 214.14(c)(1); AR 165 (noting the long processing times of U visas). To fill this gap, and ensure the victim's fear of removal is meaningfully mitigated, administrative closure is both appropriate and necessary.

Administrative closure strikes the proper balance by allowing IJs and the BIA to stay removal proceedings until the U visa petition is adjudicated. *See Matter of Hashmi*, 24 I. & N. Dec. at 791 n.4 (citing *Matter of Gutierrez*, 21 I. & N. Dec. 479 (B.I.A. 1996) for the position that administrative closure is appropriate "where there is a pending prima facie approvable visa petition"). If USCIS then grants the petition, the alien can legally live and work in the U.S. for up to four years, and seek to adjust his or her status to lawful permanent resident. 8 C.F.R. § 214.14(g); 8 U.S.C. § 1255(m)(1). But if the visa petition is ultimately denied, ICE would be free to recalendar the removal proceedings. *See Matter of Avetisyan*, 25 I. & N. at 695. Under *Matter of Castro-Tum*, however, alien crime victims are far more likely to be removed with their petitions still pending, or even before they can finish assisting criminal law enforcement. *See* 8 C.F.R. § 214.14(c)(1)(ii); U.S. Immigration and Customs Enforcement, *Fact Sheet: Revision of Stay of Removal Request Reviews for U Visa Petitioners* (last updated Nov. 12, 2019), *available at* https://www.ice.gov/factsheets/revision-stay-removal-request-reviews-u-visa-petitioners. And as more victims are ordered

removed prematurely, fewer will be willing to help law enforcement, frustrating Congress's objectives in creating the U visa.

CONCLUSION

For the reasons above, this Court should reverse and remand the BIA's decision, for it relied exclusively on the Attorney General's erroneous decision in *Matter of Castro-Tum*. On remand, this Court should instruct the agency to consider, for the first time, the merits of Mr. B------'s application for administrative closure.

Dated: April 28, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that:

This brief complies with the type-volume limitations of 2d Cir. R. 32.1(a)(4)(A) because this brief contains 11,165 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Microsoft Word 2020 using Century Schoolbook, a proportionately spaced, serif typeface, in 14-point font.

Dated: April 28, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2020, I electronically filed an electronic copy of the foregoing Brief for Petitioner with the Clerk of the Court using this Court's CM/ECF system.

I further certify that the foregoing brief was served electronically via the Court's CM/ECF system by Notice of Docket Activity.

Dated: April 29, 2020

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