U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Chief Clerk
P.O. Box 8530
5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

November 14, 2012

American Immigration Lawyers Association
1331 G Street, NW, Suite 300
Washington, DC 20005

Federation for American Immigration Reform
25 Massachusetts Avenue, NW, Suite 330
Washington, DC 20001

Re: Matter of E. S. I.
A [redacted]

Dear Counsel:

The Board requests Amicus Curiae AILA & FAIR to submit supplemental briefs for the subject case. Amicus Curiae are granted until **December 14, 2012**, to submit briefs to the Board of Immigration Appeals. The briefs or an extension request must be RECEIVED at the Board on or before this date. **Please note: The supplemental brief is limited to 30 double-spaced pages.** Two copies of this letter have been sent to you. Please attach one copy of this letter to the front of your brief when you mail or deliver it to the Board, and keep one for your records. Please address the following:

1. If a person is not mentally competent and *is* confined in an institution, whom must the DHS serve with the Notice to Appear? Who is served when the mentally incompetent person is confined in an institution not operated by or affiliated with the DHS?

2. If a person is not mentally competent and is *not* confined in an institution, whom must the DHS serve with the Notice to Appear?

3. What information should the DHS consider when making a determination about whether or not a person is mentally competent for purposes of serving the Notice to Appear?

4. If the DHS does not properly serve a mentally incompetent person, what is the appropriate action for the Immigration Judge to take?

Proof of service on the parties at the addresses below is required for ALL submissions to the Board of Immigration Appeals–including correspondence, forms, briefs, motions, and other documents. Your certificate of service must clearly identify the document sent, the party's name and address, and the date it was sent. Any submission filed with the Board without a certificate of service on the parties will be rejected.

Filing Address:

To send by courier or overnight delivery service, or to deliver in person:
Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

Business hours: Monday through Friday, 8:00 a.m. to 4:30 p.m.

To mail by regular first class mail:
Board of Immigration Appeals
Clerk's Office
P.O. Box 8530
Falls Church, VA 22041

Sincerely,

Rebecca Noguera

Rebecca Noguera
Legal Assistant
Information Management Team

cc: Golparvar Q. Kuyomars
Deputy Director, Field Legal Operations
Department of Homeland Security
5201 Leesburg Pike, Suite 1300
Falls Church, VA 22041

Walter Ruehle, Esq.
Legal Aid Society
One West Main Street, Room 800
Rochester, NY 14614

DHS Office of Chief Counsel/ SND
880 Front St., Room 1234
San Diego, CA 92101

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Chief Clerk
P.O. Box 8530
5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

November 14, 2012

American Immigration Lawyers Association
1331 G Street, NW, Suite 300
Washington, DC 20005

Federation for American Immigration Reform
25 Massachusetts Avenue, NW, Suite 330
Washington, DC 20001

Re: Matter of E. S. I.
A [redacted]

Dear Counsel:

The Board of Immigration Appeals is in receipt of a supplemental briefing extension request, dated December 12, 2012. The request is hereby **GRANTED**.

The Department of Homeland Security's brief, Respondent's brief, and Curiae's AILA & FAIR must be received at the Board of Immigration Appeals on or before **January 15, 2013.** Please note: The Board generally does not grant more than one extension per party or per case. Therefore, if you have received an extension, you should assume that you will not be granted any further extensions. Each party's due date is stated above.

If you file your brief late. You must file it along with a motion for consideration of your late-filed brief. There is no fee for such a motion. The motion must set forth in detail the reasons that prevented you from filing your brief on time. You should support the motion with affidavits, declarations, or other evidence. Only one such motion will be considered by the Board.

IMPORTANT: The Board of Immigration Appeals has included two copies of this letter. Please attach one copy of this letter to the front of your brief when you mail or deliver it to the Board and keep one for your records. Thank you for your cooperation.

Proof of service on the opposing party at the address above is required for ALL submissions to the Board of Immigration Appeals-including correspondence, forms, briefs, motions and other documents. If you are the Respondent or applicant, the "Opposing Party" is the District Counsel for the DHS at the address shown above. Your certificate of service must clearly identify the document sent to the opposing party's name, address and the date it was sent to them. **Any submission filed with the Board without a certificate of service on the opposing party will be rejected.** If you have any questions about how to file something at the Board, you should review the Board's Practice Manual at www.justice.gov/eoir.

Filing Address:

To send by courier or overnight delivery service, or to deliver in person:
Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

Business hours: Monday through Friday, 8:00 a.m. to 4:30 p.m.

To mail by regular first class mail:
Board of Immigration Appeals
Clerk's Office
P.O. Box 8530
Falls Church, VA 22041

Sincerely,

Rebecca Noguera

Rebecca Noguera
Legal Assistant
Information Management Team

cc: Golparvar Q. Kuyomars
Deputy Director, Field Legal Operations
Department of Homeland Security
5201 Leesburg Pike, Suite 1300
Falls Church, VA 22041

DHS Office of Chief Counsel/ SND
880 Front St., Room 1234
San Diego, CA 92101

Walter Ruehle, Esq.
Legal Aid Society
One West Main Street, Room 800
Rochester, NY 14614

Steven H. Schulman
Akin Gump Strauss Hauer & Feld, LLP
Robert Strauss Building
1333 New Hampshire Ave, N.W.
Washington, D.C. 20036

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

In the Matter of:	)	
	)	**File Nos.: A 024 140 281**
Elijah Samuel Ibanga	)	
	)	
In removal proceedings	)	
	)	

AMICUS CURIAE BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION WITH TEXAS APPLESEED, THE AMERICAN IMMIGRATION COUNCIL, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES, AMERICAN CIVIL LIBERTIES UNION OF ARIZONA, NORTHWEST IMMIGRANT RIGHTS PROJECT, PUBLIC COUNSEL, AND MENTAL HEALTH ADVOCACY SERVICES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER SOURCES

STATEMENT OF INTEREST

The Board of Immigration Appeals, in its letter of November 14, 2012, requested that *amicus curiae* American Immigration Lawyers Association (AILA) submit a supplemental brief in this case addressing four separate questions relating to the issue of proper service on a mentally incompetent respondent. The Board of Immigration Appeals, in its letter of November 14, 2012, granted *amicus curiae* an extension until January 15, 2013. AILA requested assistance from the American Immigration Council's Legal Action Center, the ACLU Immigrants' Rights Project, the ACLU of Southern California, and Texas Appleseed, all of which have significant expertise in the representation of mentally incompetent individuals in removal proceedings. Accordingly, this Amicus brief is filed by the following organizations: the American Immigration Lawyers Association, Texas Appleseed, the American Immigration Council, the American Civil Liberties Union Foundation, the American Civil Liberties Union, the American Civil Liberties Union of Southern California, the American Civil Liberties Union of San Diego & Imperial Counties, the American Civil Liberties Union of Arizona, Northwest Immigrant Rights Project, Public Counsel, and Mental Health Advocacy Services. A full *Amici* statement of interest can be found at **Appendix A**.

INTRODUCTION

This brief describes the safeguards that the Department of Homeland Security ("DHS"), as well as immigration judges, must adopt to protect the rights of individuals who are not mentally competent when DHS seeks to institute removal proceedings against them by serving a Notice to Appear ("NTA"). The Board requested that *Amici* address the following four questions relating to the issue of proper service on a mentally incompetent respondent:

1. **If a person is not mentally competent and *is* confined in an institution, whom must the DHS serve with the Notice to Appear? Who is served when the mentally incompetent person is confined in an institution not operated by or affiliated with the DHS?**
2. **If a person is not mentally competent and is *not* confined in an institution, whom must the DHS serve with the Notice to Appear?**
3. **What information should the DHS consider when making a determination about whether or not a person is mentally competent for purposes of serving the Notice to Appear?**
4. **If the DHS does not properly serve a mentally incompetent person, what is the appropriate action for the immigration judge to take?**

Amici's answer to each of the questions follows from a basic premise: an individual who is not mentally competent to represent him or herself must be afforded legal representation in order to participate meaningfully in all aspects of removal proceedings. Because service of the NTA is designed to serve a substantive function – providing information concerning the nature of the charges so that the respondent can prepare to defend against those charges prior to the first hearing – service cannot be accomplished on an incompetent respondent without service on counsel. Where counsel is not available, an immigration judge should ordinarily terminate the proceedings without prejudice and require re-service in a manner consistent with fundamental fairness. However, the judge must also take additional steps necessary to ensure that the hearing is fundamentally fair, and – in cases where this proves impossible – terminate the proceedings with prejudice.

Amici's answers to the four questions posed by the Board follow from these basic principles. *First*, if a respondent is not mentally competent and is confined in an institution, whether or not the institution is operated by or affiliated with DHS, the NTA must be served on counsel for the respondent in addition to any individual specified in 8 C.F.R. § 103.8(c)(2). *Second*, where the mentally incompetent person is not confined, the same requirements regarding service on counsel apply. In either case, if the individual is unrepresented at the outset and DHS

knows or should know of the individual's mental incompetence, DHS must inform the immigration court of the individual's incompetence and request the provision of legal representation. DHS must then serve the NTA upon counsel for the respondent to initiate removal proceedings. Service on counsel is the only effective way to provide fair notice of the charges against an individual and allow him or her the opportunity to prepare a response prior to the initial master calendar hearing.

A federal district court recognized this requirement in two preliminary injunction orders, holding that the Rehabilitation Act requires that the government provide legal representation to individuals not competent to represent themselves. *See Franco-Gonzales v. Holder*, 767 F.Supp.2d 1034, 1058 (C.D. Cal. 2010); 828 F.Supp.2d 1133, 1145-47 (C.D. Cal. 2011). *Franco* is a certified class action on behalf of unrepresented individuals with serious mental disorders detained for removal proceedings in Washington, California, and Arizona. Mr. Ibanga was a member of the *Franco* class at the time of his proceedings before the immigration judge. Although *Franco* does not specifically concern the service of a Notice to Appear, the same principles established by the district court in *Franco* apply in this context. *See Covey v. Town of Somers*, 351 U.S. 141, 146 (1950) (holding that service of a notice of impending foreclosure on a "known incompetent" individual violated due process, even though service had complied with applicable statutory notice provisions). For both incompetent respondents who are confined and those who are not, service on counsel must be effected *in addition* to service on the individuals required by 8 C.F.R. § 103.8(c)(2). For that reason, *amici* support the respondent's position that DHS violated § 103.8(c)(2) by serving the NTA upon an ICE officer in this case. *See* Supplemental Brief of Respondent at 1-4.

Third, when making a determination about whether or not a person is mentally competent for purposes of serving the Notice to Appear, an immigration judge must require DHS to demonstrate that it has considered any relevant information available to it that bears on a respondent's mental health – in other words, what DHS either knows or should know about the respondent's mental competence. This disclosure must include both information in DHS's possession and any reasonable inferences from that information (including interactions with the respondent). Any presumption of competency is overcome where there is available evidence that the respondent is not mentally competent, especially where, as here, the respondent enters DHS custody from a mental health treatment facility.

Fourth, an immigration judge ("IJ") may normally terminate proceedings without prejudice where service of an NTA was not effected in a manner that adequately safeguards an incompetent respondent's rights. However, in cases where an immigration judge cannot provide adequate safeguards that would ensure fundamental fairness in removal proceedings for unrepresented respondents who are not competent to represent themselves—whether through the fault of DHS (as in this case) or not, termination with prejudice is warranted.

ARGUMENT

1. **If a person is not mentally competent and *is* confined in an institution, whom must the DHS serve with the Notice to Appear? Who is served when the mentally incompetent person is confined in an institution not operated by or affiliated with the DHS?**

2. **If a person is not mentally competent and is *not* confined in an institution, whom must the DHS serve with the Notice to Appear?**

The due process Clause, the Immigration and Nationality Act ("INA"), and the Rehabilitation Act all require that service of a Notice to Appear ("NTA") on an unrepresented individual—whether detained or not—who is not competent to represent himself in immigration

proceedings *must* be effected on the respondent's counsel.[1] All noncitizens in removal proceedings, whether or not they are confined in an institution or detained by DHS, have a statutory and constitutional right to a fair hearing, and those noncitizens not competent to represent themselves must have counsel to safeguard that right. *See* Part A *infra*. The right to a fair hearing starts with fair notice of the charges; proper service of an NTA serves that essential due process function, and that function cannot be satisfied for an individual who is not competent to understand the nature of the charges or to defend against them without the assistance of counsel unless counsel is served. Nor can service on any of the individuals named in § 103.8(c)(2), such as the custodian of an institution, "near relative, guardian, committee, or friend," suffice to protect a mentally incompetent respondent's rights by itself. *See* Part B *infra*.

Proper service of an NTA where DHS knows in advance that the case involves an unrepresented and mentally incompetent respondent must involve the immigration court at the outset of the process. Where DHS has reason to know that the respondent is not competent to represent himself and the respondent is unrepresented at the time the NTA is served, governing statutory and constitutional law requires DHS to file the NTA with the immigration court and request the provision of legal representation. DHS must then serve the NTA on counsel before removal proceedings may commence.[2] In cases where DHS is uncertain as to the degree of the respondent's mental incompetency and disputes the need for legal representation, it must nonetheless provide the immigration court with all materials in its possession relevant to the

[1] *Amici* use the term "unrepresented" to mean those mentally incompetent respondents who do not have the resources and/or ability to obtain counsel on their own.

[2] Such undisputed cases of incompetency may occur where, for example, there has been a prior finding of incompetency. Here, an immigration judge had previously found Mr. Ibanga to be incompetent by virtue of a mental disability, a finding which the BIA upheld, and his continued residence in a mental institution suggested little change in his mental state. Therefore, there should have been no dispute at the outset that Mr. Ibanga was not competent to represent himself. *Matter of Elijah Samuel Ibanga*, A 024-140-281 (BIA Mar. 7, 2011).

individual's competency and the potential applicability of § 103.8(c)(2), to enable the immigration judge to make a finding on competency. If the immigration judge finds that the respondent is not competent to represent him or herself, that finding then requires re-service (and legal representation to accept service). Such a requirement should not impose any significant burden or delay on the government in proceedings beyond what is already required by § 103.8(c)(2). *See* Part C *infra*.

Therefore, in all cases involving a mentally incompetent respondent —whether confined or not and whether in DHS custody or not— DHS must serve counsel for the respondent to ensure that a mentally incompetent individual receives fair notice of the charges against him.

A. Due Process, the Immigration and Nationality Act, and the Rehabilitation Act Require The Provision of Legal Representation For Unrepresented Noncitizens Whose Mental Disabilities Render Them Incompetent To Represent Themselves in Removal Proceedings.

i. All Noncitizens, Including Those Who Are Not Competent to Represent Themselves Because of a Mental Disability, Have a Right To a Fair Hearing.

All noncitizens have both a constitutional and a statutory right to a full and fair hearing. *Reno v. Flores*, 507 U.S. 292, 306 (1993) (noting that it is "well-established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings"); *Cinapian v. Holder*, 567 F.3d 1067, 1073 (9th Cir. 2009) (noting the protections of constitutional due process for a noncitizen facing deportation); *Matter of Beckford*, 22 I&N Dec. 1216 (BIA 2000) ("A removal hearing must be conducted in a manner that satisfies principles of fundamental fairness."). Furthermore, Congress has explicitly established certain procedural rights in immigration proceedings, including the right to be advised of the charges. *See* INA § 239(a)(1)(D); 8 C.F.R. § 239.1. These rules, among others, have been interpreted to create a general statutory requirement that removal proceedings be fundamentally fair. *See generally*

Colmenar v. INS, 210 F.3d 967, 971 (9th Cir. 2000) ("[A]n alien who faces deportation is entitled to a full and fair hearing of [her] claims and a reasonable opportunity to present evidence on [her] behalf.").

Congress attempted to ensure that individuals with mental disabilities receive fair hearings by requiring that procedural "safeguards" be implemented for individuals found "mentally incompeten[t]." *See* INA § 240(b)(3) ("If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.") (emphasis added). Several regulations implement this statutory requirement, including the regulation governing service of an NTA at issue in this case. *See* 8 C.F.R. § 103.8(c)(2) (setting service requirements for "Persons confined, minors, and incompetents"); *see also* 8 C.F.R. § 1240.10(c) (prohibiting an IJ from accepting an admission of removability from "an unrepresented respondent who is incompetent"). Although these regulations are not sufficient in themselves to protect the right to a fair hearing for one who is not competent to represent himself, they nonetheless demonstrate Congress's recognition that separate rules are required to preserve the right to a fair hearing for incompetent individuals.

The Board's decision in *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), established a framework for immigration judges to determine a respondent's mental competency and whether safeguards are necessary to preserve the right to a full and fair hearing. The Board articulated the test for competency as whether a respondent "has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses." *Id*. at 479. Where a respondent "lacks sufficient competency to proceed with the

hearing," the immigration judge has "discretion to determine which safeguards are appropriate, given the particular circumstances in a case." *Id*. at 481-82.[3]

ii. Noncitizens Whose Mental Disabilities Render Them Incompetent to Represent Themselves Cannot Receive a Fair Hearing Without Counsel.

The service regulation at issue in this case applies to individuals who are not competent to represent themselves and thus require counsel to ensure a fair hearing. By its terms, 8 C.F.R. § 103.8(c)(2) governs service of process for "[p]ersons confined, minors, and incompetents."[4] Given *Matter of M-A-M-*'s definition of competency, the regulation's reference to "incompetents" refers to individuals who do not have "a rational and factual understanding of the nature and object of the proceedings" and cannot have "a reasonable opportunity to examine and present evidence and cross-examine witnesses." *See Matter of M-A-M-*, 25 I&N Dec. at 479 (describing the test for "mental competency" in immigration proceedings). *Matter of M-A-M-* itself requires that such individuals receive additional "safeguards to protect the rights and privileges of the alien," including most obviously the right to a fair hearing. *Id*. at 481. As explained below, for individuals who are so impaired that they cannot meet even the minimal competency test set forth in *M-A-M-*, the only safeguard short of terminating proceedings that may guarantee that they obtain a fair hearing is representation by counsel.

[3] *Amici* believe that *Matter of M-A-M-* is an incomplete and insufficient expression of the rights of respondents who are incompetent to represent themselves and provides inadequate protections of those same rights. Our reliance on the decision here is merely an acknowledgement that, at a minimum, the Board has recognized that different rules must apply to such individuals.

[4] Section 103.8(c)(2) has two subsections that address, respectively, service on individuals who are confined and "not competent to understand," § 103.8(c)(2)(i), and service "[i]n case of mental incompetency," § 103.8(c)(2)(ii). The latter section presumably also applies to those individuals who are "not competent to understand" under § 103.8(c)(2)(i). *See* DHS Supplemental Brief at 3 (noting that where an individual is not mentally competent *and* is confined, the provisions of both §§ 103.8(c)(2)(i) and (ii) apply).

For immigration proceedings to be "full and fair," any respondent who suffers from mental disabilities that render him incompetent to represent himself must have counsel. The Supreme Court recognized this essential due process principle – that people incompetent to represent themselves must be assisted by counsel – more than fifty years ago, even *before* *Gideon v. Wainwright*, 372 U.S. 335 (1963), where it recognized the Sixth Amendment right to appointed counsel in criminal cases generally. In its unanimous decision in *Massey v. Moore*, 348 U.S. 105 (1954), the Supreme Court held that the due process clause requires states to appoint counsel for indigent criminal defendants with mental illnesses where they are not competent to represent themselves. The Court did not consider this a close question: "if he were then insane as claimed, he was effectively foreclosed from defending himself . . . his need of a lawyer to tender the defense is too plain for argument." *Id*. at 108. The Court was unequivocal that "[n]o trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court." *Id*.[5] While *amici* recognize that this holding concerned criminal proceedings, the essential reasoning—that procedural protections are meaningless if the defendant is not competent to represent himself—applies with full force to immigration proceedings.[6]

[5] Prior to *Massey*, the Supreme Court recognized that someone could lack the mental capacity to *represent himself* at trial even while having the mental capacity to stand trial *with the assistance of counsel*. *See Wade v. Mayo*, 334 U.S. 672, 684 (1948) (reversing conviction of *pro se* defendant because "[t]here are some individuals who, by reason of age, ignorance or mental capacity are incapable of representing themselves adequately in a prosecution of a relatively simple nature"). The Supreme Court recently reaffirmed this rule, holding that a defendant may have "sufficient mental competence to stand trial" yet "lack[] the mental capacity to conduct his trial defense unless represented." *Indiana v. Edwards*, 554 U.S. 164, 174 (2008).

[6] Indeed, at the time the Court decided cases such as *Massey* and *Wade*, the standards governing the due process Clause's protections in criminal proceedings were no more robust than those provided in removal proceedings today. Courts of that era typically required only that states' criminal procedures be "fundamentally fair," *see Cicenia v. Lagay*, 357 U.S. 504, 509 (1958), a bare minimum that is substantively indistinguishable from the "fundamental fairness" that the law requires in today's immigration proceedings. That the Supreme Court in 1954 unanimously found it "too plain for

That the due process Clause requires legal representation for incompetent respondents follows logically from the well-accepted constitutional requirement that the government provide translation services for respondents in removal proceedings. *See, e.g.*, *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000); *Tejada-Mata v. INS*, 626 F.2d 721, 726 (9th Cir. 1980) ("[T]his court and others have repeatedly recognized the importance of an interpreter to the fundamental fairness of such a [deportation] hearing if the alien cannot speak English fluently."). While there are no doubt differences between counsel's "translation" for an incompetent respondent and an interpreter's translation of proceedings into a foreign language, none of them suffices to explain why only the latter should be required for a "full and fair" hearing. The answer cannot be money: the cost of translators is potentially far greater than counsel, yet translation is nonetheless required to ensure that non-English-speaking respondents have a meaningful opportunity to contest the charges pursued and obtain any relief that might be available. Legal representation is equally necessary to accomplish those purposes for people who are not mentally competent to represent themselves.[7] *See Vitek v. Jones*, 445 U.S. 480, 497 (1980) (White, J., for plurality) ("[W]e have recognized that prisoners who are illiterate and uneducated have a great[]

---

argument" that people with mental disabilities could not obtain a fair trial without counsel speaks volumes for the rule that should apply in removal proceedings today. *See Massey*, 348 U.S. at 108.

[7] Even if the Board does not conclude that the fair hearing requirement mandates legal representation for incompetent respondents, because the interests at stake for mentally incompetent respondents are so grave, the Board should find such representation required under the Supreme Court's right-to-counsel jurisprudence in civil cases. The due process Clause unquestionably requires the appointment of counsel in some civil cases. *In re Gault*, 387 U.S. 1, 41 (1967) (requiring appointed counsel in juvenile delinquency proceedings); *Lassiter v. Dep't Soc. Serv*., 452 U.S. 18 (1981) (requiring appointed counsel on a case-by-case basis for some parental termination proceedings); *Lin v. Ashcroft*, 377 F.3d 1014, 1034 (9th Cir. 2004) ("Absent a minor's knowing, intelligent, and voluntary waiver of the right to counsel, the IJ may have to take an affirmative role in securing representation by competent counsel."); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 n.3 (6th Cir. 1975) ("[W]here an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense. Otherwise, 'fundamental fairness' would be violated."). The Supreme Court's recent decision in *Turner v. Rogers*, 131 S. Ct. 2507 (2011), strongly suggests that individuals who are not competent to represent themselves are entitled to appointed counsel under the due process Clause. *Id*. at 2519 (emphasizing, *inter alia*, importance of liberty interest, complexity of proceedings, and whether government has representation).

need for assistance in exercising their rights[;] A prisoner thought to be suffering from a mental disease or defect requiring involuntary treatment probably has an even greater need for legal assistance, for such a prisoner is more likely to be unable to understand or exercise his rights.").

iii. The Rehabilitation Act Also Requires the Provision of Legal Representation, as a "Reasonable Accommodation," for Unrepresented Individuals Who Are Not Competent To Represent Themselves Because of Their Mental Disabilities.

The Rehabilitation Act provides an additional ground for requiring appointed counsel for unrepresented individuals who are not competent to represent themselves in immigration court. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 ("Section 504"), bars the federal government, including both the Department of Justice ("DOJ") and DHS, from discriminating against any individual on the basis of his or her mental disability. It provides that "[n]o qualified individual with a disability in the United States, shall, by reason of his or her disability, be excluded from the participation in, be denied benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the [DHS]." 6 C.F.R. § 15.30(a); 28 C.F.R. § 39.130 (same for DOJ). Section 504 bars not only intentional discrimination, but also "disparate impact" discrimination. *See* 28 C.F.R. § 39.130(b)(3); 6 C.F.R. § 15.30(b)(4) (prohibiting methods of administration that have the "purpose or effect" of discriminating against a person with disabilities). If a person with a mental disability is unable to access the immigration court system and its procedural safeguards, he or she is effectively denied a fair hearing because of the disability in violation of the Rehabilitation Act. Because the only way to ensure a fair hearing for such an individual is the assistance of counsel, the Rehabilitation Act requires appointed counsel as a "reasonable accommodation." The federal district court in *Franco-Gonzales v. Holder* has held in two preliminary injunction orders that the Rehabilitation Act requires legal representation for individuals not competent to represent themselves. *See* 767

F.Supp.2d 1034, 1058 (C.D. Cal. 2010) (holding that "it is a reasonable accommodation for Defendants to provide a Qualified Representative(s) to represent Plaintiffs in the entirety of their immigration proceedings, whether such Qualified Representative is performing the services *pro bono* or at Defendants' expense"); 828 F.Supp.2d 1133, 1145-47 (C.D. Cal. 2011) (specifying that the qualified representative must be an attorney or "accredited representative" as defined by federal regulations and that a family member appearing on behalf of an incompetent respondent does not satisfy the Rehabilitation Act).

B. A Notice To Appear Must Provide Fair Notice of the Charges Against an Individual, Which Can Only Be Accomplished By Service on Appointed Counsel For Unrepresented Individuals Who Are Not Competent To Represent Themselves.

One of the essential functions of a Notice to Appear is to provide an individual with fair notice of the charges against him, and enable him to mount a defense against those charges. Because the requirement of fair notice is a necessary component of the constitutional and statutory requirement of a fair hearing, and because an unrepresented individual who is not competent to represent himself must have counsel to receive a fair hearing, fair notice on an incompetent respondent can only be accomplished by serving the NTA on counsel.

i. A Notice to Appear Must Provide Meaningful Notice of the Substance of the Charges Against the Respondent.

One key element of due process in immigration proceedings is fair notice of charges and a meaningful opportunity to respond. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-98, (1953) (noting that noncitizens are entitled to due process before deportation, which includes an "entitle[ment] to notice of the nature of the charge and a hearing"); *Martinez-de Bojorquez v. Ashcroft*, 365 F.3d 800, 803-04 (9th Cir. 2004) (discussing the requirements of due process as including adequate notice of immigration proceedings). What constitutes fair notice may vary

depending on the context and the individual. *See Covey v. Town of Somers*, 351 U.S. 141, 146 (1950) (holding that service of a notice of impending foreclosure on a "known incompetent" individual violated due process, even though the service complied with applicable statutory notice provisions, because "'[a]n elementary and fundamental requirement of the process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections'" (citing *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314-315 (1950))).

The Notice to Appear, as required by statute, must specify among other requirements: the "nature of the proceedings against the alien," the "legal authority under which the proceedings are conducted," the "acts or conduct alleged to be in violation of law," and the "charges against the alien and the statutory provisions alleged to have been violated." INA § 239(a)(1)(D). In addition, the NTA must include "[t]he time and place at which the proceedings will be held," and the "consequences … of the failure … to appear at such proceedings." *Id*. *See also Brown v. Ashcroft*, 360 F.3d 346, 351 (2d Cir. 2004) ("Congress, in enacting the immigration laws, has codified these rights [to notice and a meaningful opportunity to respond] by requiring that a Notice to Appear be served upon aliens in removal proceedings.").

Thus, one of the fundamental purposes of serving an NTA is to enable the respondent to have a meaningful understanding of the charges and prepare a defense. *See Matter of Camarillo*, 25 I&N Dec 644, 650 (BIA 2011) ("A primary purpose of a notice to appear is to inform an alien that the Government intends to have him or her removed from the country . . . ."); *Matter of Chery and Hasan*, 15 I&N Dec. 380, 381 (BIA 1975) (noting the purposes of the predecessor to the NTA are "to obtain direct jurisdiction over the person of the alien, *to advise him of his*

alleged violation with sufficient precision to allow him to defend himself, and to set in motion an[] inquiry in which the Service must establish that a violation occurred, and the alien has a[n] opportunity to defend himself") (emphasis added).

The purpose of the NTA is *not* solely to communicate the time and place of the initial hearing, and thereby ensure that the respondent appears in immigration court. The Board has recognized that an individual may suffer prejudice by improper service even where he physically appears at his immigration hearing. *See Matter of Hernandez*, 21 I&N Dec. 224, 226 (BIA 1996) (rejecting a claim of improper service, but nonetheless noting the possibility that an individual might be prejudiced by not receiving fair notice, such as when "the alien asserts that, *had he fully understood the nature of the proceedings*, he would have sought more time to prepare his case, or he would have appeared [in court] with counsel") (emphasis added). Similarly, in *Nolasco v. Holder*, 637 F. 3d 159 (2nd Cir. 2011), the court considered the predecessor to the service regulation at issue in this case as applied to a minor child.[8] The child argued that the regulation was violated because DHS did not serve her parents or any other individual but her—a minor—with the NTA. The court rejected the claim on the ground that the child had not suffered a violation of a fundamental right or any prejudice, but rested its holding on the fact that she had received full and fair notice of the charges against her and therefore had had a "meaningful opportunity to be heard" as required by due process. The court noted "[s]he was aware of the nature of the immigration proceedings and the time and place when those proceedings would be held; she was informed of the Government's allegations against her and the statutory violations which she was alleged to have committed; she was advised that she could be represented by counsel and, indeed, counsel appeared on her behalf; and she appeared before the immigration

[8] 8 C.F.R. § 103.5a was revised and redesignated as 8 C.F.R. § 103.8, effective November 2011. 76 Fed. Reg. 53771 (Aug. 29. 2011). The revisions addressed electronic service, and the operative language for service on confined and mentally incompetent individuals did not change.

judge and was granted a full opportunity to pursue relief from removal." *Id*. at 164. In contrast, an unrepresented individual who is mentally incompetent is not, by definition, "aware of the nature of the immigration proceedings," "informed of the … allegations," supplied with the assistance of counsel, or able to pursue any relief from removal. *See Matter of M-A-M-*, 25 I&N Dec. at 479 (describing the test for competency). An incompetent individual therefore requires adequate safeguards to prevent prejudice from service of an NTA.

Lastly, the fact that the NTA functions as more than a mere clerical notice is made clear by the potentially severe consequences it engenders. Service of an NTA triggers the "stop-time" rule, whereby an individual's period of continuous presence is deemed to end for purposes of seeking cancellation of removal and adjustment of status. INA § 240A(d)(1); *see also Guamanrrigra v. Holder*, 670 F.3d 404, 409-11 (2nd Cir. 2012) (noting that proper service of an NTA will trigger the stop-time rule and impact an individual's ability to seek cancellation of removal). And, of course, an individual who does not appear in immigration court in response to an NTA is subject to an order of removal *in absentia*. *See* INA § 240(b)(5)(A) ("Any alien who, after written notice . . . has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed *in absentia* if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable . . . ."). Thus, serious consequences may ensue solely from service of an NTA, demonstrating the need for the respondent to understand it and have the ability to respond accordingly.

ii. Fair Notice of the Charges For An Unrepresented Individual Who Is Not Competent To Represent Himself Can Only Be Accomplished By Serving A Notice To Appear on Appointed Counsel.

Because the Notice to Appear must provide fair notice of the charges, and is not simply a device to communicate the initial hearing date and location, DHS must serve counsel in cases where respondents are not competent to represent themselves, regardless of whether or not they are confined in an institution or in DHS custody. Otherwise, all unrepresented incompetent respondents would lack the ability to meaningfully respond to the charges (because, by definition, they cannot represent themselves). Where an incompetent respondent is unrepresented, DHS must ensure that the respondent has a legal representative, who can then be served with the NTA.

Legal representation is required in such cases because none of the other individuals specified in 8 C.F.R. § 103.8(c)(2) in cases of mental incompetency can either provide or ensure the representation required to receive and respond to notice of charges; thus, service on any of these individuals is not sufficient by itself. The individuals specified in 8 C.F.R. § 103.8(c)(2) consist of the person with whom the incompetent respondent "resides," the person "in charge of the institution or the hospital" if an incompetent respondent is confined (namely, the custodian), and the "near relative, guardian, committee, or friend" "whenever possible." 8 C.F.R. § 103.8(c)(2)(i) and (ii). As such, § 103.8(c)(2) is closely analogous to 8 C.F.R. § 1240.4, which permits "the attorney, legal representative, legal guardian, near relative, or friend" or "the custodian" to appear on behalf of a mentally incompetent respondent. However, for the reasons discussed below, none of the non-attorneys listed in either regulation can protect an incompetent respondent's right to a fair hearing or fair notice of the charges. For this reason, the district court in *Franco* has rejected the argument that the individuals identified in 8 C.F.R. § 1240.4 (other

than legal representatives) can provide adequate safeguards to protect a mentally incompetent respondent's rights.

First, noncitizens have both a statutory and constitutional right to counsel that must be knowingly and voluntarily waived, and because an individual who is incompetent cannot provide such consent, incompetent individuals cannot be "represented" by the non-attorneys listed in 8 C.F.R. § 103.8(c)(2). Congress has codified a right to be represented by counsel in immigration proceedings, albeit at no cost to the government, at 8 U.S.C. § 1362. This right is grounded in the due process Clause of the Fifth Amendment. *See Ray v. Gonzales*, 439 F.3d 582, 587 (9th Cir. 2006) ("[Section 1362] stems from a constitutional guarantee of due process"). Given this statutory and constitutional right to counsel in immigration proceedings, the Ninth Circuit has held that any waiver of this right must be "knowing" and "voluntary." *See Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004). A valid waiver requires an IJ to: "(1) inquire specifically as to whether petitioner wishes to continue without a lawyer; and (2) receive a knowing and voluntary affirmative response." *Tawadrus*, 364 F.3d at 1103 (internal citation omitted). An IJ's failure to obtain a knowing and voluntary waiver constitutes "an effective denial of the right to counsel" rising to the level of a due process violation. *See id.* (internal quotation marks omitted). For that reason, the federal court in *Franco* explained that if "a mentally incompetent immigrant detainee were to agree to be represented by a non-attorney identified in 8 C.F.R. § 1240.4, such detainee would, in any case, be required to knowingly and voluntarily waive his right to counsel . . . a dubious proposition for someone who is mentally incompetent." 828 F.Supp.2d at 1145-46. Because an incompetent respondent will, in most cases, be unable to knowingly and voluntarily waive his statutory and constitutional right to counsel, he will not be

able to consent to representation for purposes of notice by any of the individuals named in 8 C.F.R. § 103.8(c)(2).[9]

Second, none of the individuals named in § 103.8(c)(2) are subject to any form of sanction in immigration court, and allowing such individuals to take on the responsibility of representing an incompetent respondent at the NTA stage would create a system entirely absent of any accountability. Sanctions for attorneys and accredited representatives who breach their ethical obligations to clients are in place to deter misconduct and to preserve confidence in the fairness of the legal system. *See* American Bar Ass'n, *Standards for Imposing Lawyer Sanctions* at 4 (2005).[10] EOIR itself has recognized the importance of sanctions, insofar as it has created a system for disciplining legal representatives who do not meet their obligations before the immigration courts. *See Matter of Lozada*, 19 I&N Dec. 637 (1988); BIA Practice Manual, Ch. 11.1 ("The Board has authority to impose disciplinary sanctions upon attorneys and qualified representatives who violate rules of professional conduct in practice before the Board, the immigration courts, and the Department of Homeland Security.").[11] The Ninth Circuit has also

[9] Courts have recognized that whether or not someone can act as *a guardian*—that is, make decisions on behalf of someone unable to make decisions for themselves—presents a different question from whether that person can also act as *an attorney*—that is, effectuate their client's stated interests through representation in a legal proceeding. *See In re Gault*, 387 U.S. at 35-36 (rejecting the notion that a probation officer or judge can protect a juvenile's interests and refusing to find that a parent could alone appropriately defend a child's interests); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1098-99 (E.D. Wis. 1972) *vacated and remanded on other grounds by Schmidt v. Lessard*, 414 U.S. 473 (1974) (rejecting, in involuntary commitment context, the "state's contention that appointment of a guardian ad litem may displace a requirement of appointed counsel"); *see also Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1129 (D. Hawaii 1976) ("appointment of a guardian *ad litem* is not a substitute for appointment of counsel."). The federal courts do not permit guardians to act as attorneys. *See, e.g., Johns v. County of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997) (holding that a minor could not be "represented" by his father acting as a guardian in a federal civil proceeding under Fed. R. Civ. Pro. 17(c)).

[10] *See* http://www.americanbar.org/content/dam/aba/migrated/cpr/regulation/standards_sanctions.authcheckdam.pdf (last accessed Jan. 10, 2013).

[11] Although 8 C.F.R. § 292.3 also permits the BIA or an adjudicating official to "impose disciplinary sanctions against any practitioner if it finds it to be in the public interest to do so," these sanctions do not provide any meaningful redress for an individual in removal proceedings who has been harmed by the

recognized the critical importance of such oversight, finding that non-attorney consultants who are not subject to "professional rules or statutes that impose ethical duties" are not presumed to be "necessary or desirable to ensure fairness in removal proceedings; indeed, they are specifically barred from representing individuals in removal proceedings." *Hernandez v. Mukasey*, 524 F.3d 1014, 1019 (9th Cir. 2008). The role of sanctions in ensuring ethical conduct and fair proceedings is even more critical where a respondent cannot act to protect his rights as a result of mental incompetency.

Third, the third parties listed in § 103.8(c)(2) may (and often do) have conflicts of interest with the respondent that fundamentally undermine their ability to represent fairly and vigorously the interests of a respondent who has no capacity to waive such conflicts.[12] Such a conflict of interest is obviously presented by this case, where DHS argues that it satisfied its service obligations by serving an ICE Field Office Director ("FOD"), an official of the very entity prosecuting the respondent and who, of course, has no obligation (or interest) to ensure that the respondent understands the charges against him. *See* DHS Supplemental Brief at 10-11, 14. Thus, in this context, by permitting service on the custodian of a facility where an incompetent respondent is detained, § 103.8(c)(2)(i) violates fundamental fairness. Noncitizens detained by DHS are held in facilities operated by DHS, a state or local government, or a private company.

---

misconduct of non-attorneys because they cannot serve as the basis for an ineffective assistance of counsel claim. *See, e.g.*, *Hernandez v. Mukasey*, 524 F.3d 1014, 1015-16 (9th Cir. 2008) (holding that erroneous and prejudicial advice by non-attorney "immigration consultant" could not support ineffective assistance claim). Moreover, it is not clear that these regulations necessarily apply to family members or other "reputable individuals," as the BIA Practice Manual does not state that they must comply with standards of professional conduct. *Compare* BIA Practice Manual, Chs. 2.8 & 2.9 *with* BIA Practice Manual, Chs. 2.3, 2.4, & 2.5. In any event, it is not clear what sanction the BIA could impose on someone who does not regularly practice in immigration court.

[12] The court in *Franco-Gonzales* recognized that even a family member may present a conflict of interest. *See Franco-Gonzales*, 828 F.Supp.2d at 1147 (finding father of incompetent respondent inadequate representative in part because there is nothing "in the record to suggest that Plaintiff has knowingly or voluntarily waived any potential conflict between himself and his father").

In any of these situations, the custodian is either employed by DHS or acting under contractual authority to detain on behalf of DHS, the very agency seeking the respondent's removal. Under these circumstances, the appearance of a custodian on the respondent's behalf in immigration court creates an irreconcilable conflict of interest, undermining the respondent's trust in his representative and the integrity of the adjudicative process.[13] *See* 8 C.F.R. § 1003.102(n) (prohibiting "conduct that is prejudicial to the administration of justice or undermines the integrity of the adjudicative process"). Moreover, most custodial officers are neither licensed to practice law nor trained to identify and diagnose competency problems. Presumably for these reasons, the *immigration judge Benchbook* suggests that termination of proceedings on due process grounds may be appropriate where no one other than a DHS custodian is available to protect the interests of a severely incompetent respondent in detention. *See* IMMIGRATION JUDGE BENCHBOOK at 121. Thus, because of the conflict of interest alone, the Board should hold that service of an NTA on any ICE or DHS-affiliated custodian or official can never satisfy the requirements of fair notice to an incompetent respondent.[14] Moreover, even a custodian unaffiliated with DHS cannot serve as an adequate representative for the reasons discussed above.

Because none of the individuals named in § 103.8(c)(2) can protect an incompetent respondent's right to adequate representation and fair notice, it is logical to read the regulation as

[13] *Cf. In re Gault*, 387 U.S. at 35-36 (1967) (holding that a juvenile's probation officer, who was also superintendent of the detention facility where the child was being held, could not serve as counsel for the child).

[14] *Amici* do not agree with DHS that service on a FOD satisfies the regulatory requirement of service "upon the person with whom the incompetent or the minor resides," § 103.8(c)(2)(ii), or "on the person in charge of the institution or hospital in which [the incompetent respondent] is confined," § 103.8(c)(2)(i). As stated above, *amici* support the respondent's position that DHS violated § 103.8(c)(2) by serving the NTA upon an ICE officer in this case, *see* Supplemental Brief of Respondent at 1-4, but write separately to emphasize that regardless of who else must be served under § 103.8(c)(2), the NTA must *also* be served on counsel.

a means to address only *one* of the functions of an NTA—appearance in court. DHS's argument that, in this case, service on the ICE FOD was proper because the FOD was the "person … most likely to be responsible for ensuring that an alien appears before the immigration court at the scheduled time," is thus insufficient, because ensuring that the respondent appears in court is not the only component of fair notice. DHS Supplemental Brief at 14 (internal quotation marks and citation omitted). Because ensuring appearance alone does not satisfy the requirements of meaningful notice, and because neither a FOD nor any other individual specified in § 103.8(c)(2) can adequately represent an incompetent respondent such that he has fair notice of the charges against him, appointed counsel is required to accept service of an NTA for an unrepresented respondent. *See Franco-Gonzales v. Holder,* 828 F.Supp.2d at 1145-47 (holding that the Rehabilitation Act requires the provision of an attorney or "accredited representative" for an incompetent respondent).[15]

C. Serving an NTA on Appointed Counsel Will Not Impose Any Significant Burden Or Delay.

The service rule proposed by *amici* would place no significant burden or delay on the government beyond the requirements that DHS admits are already imposed by § 103.8(c)(2). *Amici* propose that where there is no dispute as to the competency of an unrepresented individual at the time of service of the NTA, DHS should be required to file the NTA with the immigration court and request the provision of counsel who can be served before the first master calendar hearing. In cases where DHS disputes mental competency and the need for legal representation,

[15] In the *Franco-Gonzales* case, DHS has argued that the provision of legal representation may place incompetent respondents in a better position than other *pro se* respondents. That issue, however, is irrelevant to the question of what service requirements are necessary to comply with due process and statutory requirements in this case. Moreover, ample case law has recognized that the Rehabilitation Act may require giving preferences in order to ensure meaningful access to rights and benefits for people with disabilities. *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (noting that "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal").

it must nonetheless provide the immigration court with all materials in its possession relevant to the individual's competency and the potential applicability of § 103.8(c)(2), to enable the immigration judge to make a finding on competency and order re-service upon counsel where necessary.

This rule will occasion no additional delay in cases of incompetency beyond those necessary delays already acknowledged by DHS. DHS argues that the terms of § 103.8(c)(2) apply only *after* an immigration judge has made a determination of mental incompetency and that if, during the course of proceedings, an immigration judge determines that the respondent is mentally incompetent, the judge should grant the government a continuance to properly serve the respondent in accordance with § 103.8(c)(2). *See* DHS Supplemental Brief at 15-16. DHS further acknowledges that where it is aware of a respondent's indicia of mental incompetency at the time it files an NTA with the immigration court, it will file a motion asking the court to adjudicate the respondent's competency per *M-A-M-*. *See* DHS Supplemental Brief at 15. At that time, the government is under an obligation to provide the immigration court with all of the information and evidence in its possession relevant to mental competency. *See Matter of M-A-M-*, 25 I&N Dec. at 480 ("DHS has an obligation to provide the court with relevant materials in its possession that would inform the court about the respondent's mental competency.").

Thus, in cases where DHS has reason to know that it will have to comply with the requirements of § 103.8(c)(2) at the time it initially files the NTA with the immigration court, DHS must inform the court and request the appointment of counsel who can be served before the first hearing. Where DHS properly presumes competency, it must serve the respondent in accordance with INA § 239 and 8 C.F.R. § 103.8(c)(2) (including 103.8(c)(2)(i) for detained respondents), file the NTA with the immigration court as usual, and provide the court with all

materials in its possession bearing on the individual's competency. If the immigration judge determines that an unrepresented respondent is not competent to represent himself, proceedings must be terminated without prejudice to permit the appointment of counsel and enable DHS to serve counsel and comply with the requirements of 8 C.F.R. § 103.8(c)(2)(ii). Because DHS admits that it could not proceed against an incompetent respondent without re-service of the NTA, it would impose no additional burden or delay for DHS to serve the NTA on respondent's counsel.

3. What information should DHS consider when making a determination about whether or not a person is mentally competent for purpose of serving the Notice to Appear?

By the time an unrepresented detained noncitizen makes an initial appearance before an immigration judge, DHS typically has had multiple interactions with him or her. An immigration judge has had none. It is both right and reasonable to place a burden on DHS to produce affirmative evidence that the NTA was properly served when, in the course of those interactions, DHS knows or should know that the respondent may not have the mental competence to understand the charges in the NTA.

When determining whether service of the NTA was proper, the immigration judge must confirm that DHS has considered any relevant information available to it that bears on a respondent's mental health. In its March 2011 Order affirming the termination of proceedings in this case, the Board correctly held that service of the NTA on the respondent, who was transferred from a mental hospital into DHS custody, was improper because "DHS knew or should have known that the respondent's case involved mental competency issues." *Matter of E-S-I-*, March 7, 2011. The Board suggested that DHS has an obligation to consider any information about mental competency in its possession – "what it knows" – and to make

reasonable inferences from its files and from its routine interactions with the noncitizen – "what it should know" – when it determines whether a respondent has been properly served.

This "knew or should have known" standard was not discussed at length in the Board's March 2011 Order, but is echoed and amplified in the Board's analysis of an immigration judge's duty to evaluate a respondent's mental competence issued just weeks later in *Matter of M-A-M*, 25 I&N Dec. 474, 477 (BIA 2011). In *Matter of M-A-M-*, the Board explained that "immigration judges … need to consider whether there is good cause to believe that the alien lacks sufficient competency to proceed without safeguards. Indicia of incompetency include a wide variety of observations and evidence." Id. at 479. In its Supplemental Brief filed in this matter, DHS ignores this critical part of the Board's analysis in *Matter of M-A-M-*, instead relying heavily on *M-A-M's* presumption that respondents are competent. DHS at 15, citing *Matter of M-A-M-*, 25 I&N Dec. at 477 ("an alien is presumed to be competent to participate in removal proceedings"). But this presumption is relevant only when there is no indication that a respondent may lack the mental competence to carry out a particular task; it is not an excuse to ignore available evidence of mental disability, particularly where, as here, the respondent entered ICE custody from a mental health treatment facility.

DHS construes *M-A-M-* much too narrowly, arguing that only the immigration judge has an obligation to determine a respondent's competency. DHS at 15-16. Of course, *Matter of M-A-M* focused on the immigration judge's duty to determine a respondent's competence, as that was the issue before the Board, but there is nothing to suggest that the logic of its analysis should not apply to DHS. Indeed, the Board held DHS must provide evidence in its possession concerning a respondent's mental competency even when the issue of competence is properly before the immigration judge. *Matter of M-A-M-*, 25 I&N Dec. at 480 ("The DHS will often be in

possession of relevant evidence, particularly where the alien is detained. The DHS has an obligation to provide the court with relevant materials in its possession that would inform the court about the respondent's mental competency.").

Accordingly, the holding of *Matter of M-A-M-* reaffirms the Board's March 2011 opinion in this case that DHS has the obligation to determine what it "knows or should know" about an alien's mental competence before serving the NTA. Consistent with *Matter of M-A-M-* then, DHS has an obligation, within the bounds of its role in apprehending, detaining and/or prosecuting a noncitizen, to consider indicia of mental competency. Although DHS does not play the same role as an immigration judge, many of the factors outlined by the Board in *Matter of M-A-M-* should be considered by DHS in order to fulfill its obligation to communicate to the IJ information in its possession concerning the respondent's mental health. In order to determine whether the NTA is properly served on a respondent, DHS must therefore examine:

- Documents in the record containing evidence of mental illness or incompetency, such as direct assessments of the respondent's mental health, medical reports or assessments from past medical treatment or from criminal proceedings, or testimony from medical health professionals;
- Medical treatment reports, documentation from criminal proceedings, or letters and testimony from other third party sources;
- School records such as special education classes or individualized education plans, reports or letters from teachers, counselors, or social workers;
- Evidence of participation in programs for persons with mental illness;
- Evidence of applications for disability benefits;
- Behaviors, such as the inability to understand and respond to questions, the inability to stay on topic, or a high level of distraction.

In addition, during any routine interaction with the respondent prior to the issuance of an NTA, DHS officers should ask basic questions to elicit any indicia of mental disability; otherwise, DHS is not determining what it "should know."

Given that DHS is already under an obligation to provide medical care for all detainees in its custody, this obligation should be uncontroversial in many cases. For instance, DHS should

inquire whether the respondent understands the reasons for the apprehension or interrogation, and whether he or she currently takes or has taken medication to treat a mental illness (including the purpose and effects of the medication). DHS is correct that it need not make a formal determination of competency, and indeed DHS officers have a far more limited role than immigration judges in making that determination. *See* DHS Supplemental Brief at 16; *see also Matter of M-A-M*, 25 I&N at 480. Still, DHS frequently has access to substantial information about noncitizens, particularly those who are detained, and thus is in a good position to know or determine indicia of mental disability.

This case presents a clear example, as the respondent was transferred to DHS custody from a State of California Psychiatric Hospital. But the duty of DHS should not be limited to such obvious cases. A majority of DHS detainees come from state and federal penal systems, and are transferred with medical records that may indicate mental disability. In other cases, DHS will be well aware that noncitizens facing removal proceedings are fleeing alleged persecution or have been victimized by traffickers, and therefore may suffer from trauma that limits their ability to understand the nature of the charges being levied against them. Such cases illustrate DHS's general obligation to examine all available evidence to determine whether it knows or should know whether the respondent's mental incompetency warrants alternative service procedures.

4. If the DHS does not properly serve a mentally incompetent person, what is the appropriate action for the immigration judge to take?

BIA precedent dictates that the government's failure to effect proper service of a notice to appear may justify termination of proceedings. *See, e.g., Matter of Mejia-Andino*, 23 I&N Dec. 533 (BIA 2002) (upholding an immigration judge's decision to terminate proceedings due to lack of proper service under 8 C.F.R. § 103.5a(c)(2)(ii), the predecessor to the regulation at issue in this case); *Matter of G.Y.R.*, 23 I&N Dec. 181 (BIA 2001) (dismissing appeal of immigration

judge's decision to terminate proceedings based on lack of proper service); *Matter of Huete*, 20 I&N Dec. 250 (BIA 1991) (same). Normally, termination without prejudice is sufficient to protect the due process rights of a respondent who has not been properly served. *See Matter of G.Y.R.*, 23 I&N Dec. 181; DHS Supp. Brief at 17-18 (conceding that if the agency fails to properly serve an NTA, the immigration judge may terminate without prejudice). However, in cases where the immigration judge cannot provide adequate safeguards that would ensure fundamental fairness for unrepresented respondents who are not competent to represent themselves – whether through the fault of DHS or not – termination with prejudice is warranted.

Citing to two irrelevant regulations, DHS argues that an immigration judge lacks any authority to terminate proceedings in cases involving incompetent respondents. DHS Brief on Appeal at 11. Aside from the fact that this position is inconsistent with the practice of immigration judges in a number of recent cases, DHS's position ignores that Congress indisputably vested the Executive Office for Immigration Review (EOIR)—*i.e.*, immigration judges and the Board—with adjudicatory authority over removal proceedings and administrative appeals. *See, e.g.*, 8 U.S.C. § 1229a(a)(1) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.")[16] As part of this authority, Congress requires EOIR to "prescribe safeguards to protect the rights and privileges" of respondents for whom it is "impracticable" to be present at removal proceedings due to mental incompetency. INA § 240(b)(3).[17] DHS seems to suggest that because the regulations do not specify termination in cases involving unrepresented respondents who are not competent to represent

[16] As the government has candidly acknowledged in correspondence between the parties in the Franco litigation, immigration judges are terminating cases, sometimes without opposition from DHS, in cases involving respondents with serious mental disorders where appropriate safeguards, including the provision of counsel, have not been available. See **Appendix B**.

[17] This provision has been construed to encompass incompetent respondents able to make a physical appearance, but unable to meaningfully participate without representation. *See, e.g., Mohamed v. Gonzales*, 477 F.3d 522, 526 (8th Cir. 2007).

themselves, INA § 240(b)(3) does not permit an immigration judge to prescribe this safeguard. Neither regulation cited by DHS restricts an immigration judge's statutory authority.[18] To the contrary, the applicable regulations authorize immigration judges to take "*any action*" that is "appropriate and necessary" to resolve the cases before them. 8 C.F.R. § 1003.10(b) (emphasis supplied); *see also* 8 C.F.R. § 1240.1(a)(1)(iv).

The Board's decision in *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), established a framework for immigration judges to determine a respondent's mental competency and the need for safeguards to preserve the right to a full and fair hearing. *Id.* at 479-83. The decision set forth a non-exhaustive list of such safeguards, and further noted that the immigration judge has discretion to determine, on a case-by-case basis, which safeguards—if any—are appropriate. *Id.* at 481-83. *Matter of M-A-M* does not directly address an immigration judge's power to terminate proceedings, but the logic of the decision certainly supports such action, which is consistent with the *immigration judge Benchbook.* IMMIGRATION JUDGE BENCHBOOK, Part II, B, 1 (suggesting that immigration judges consider "terminating cases where respondents are unable to proceed in light of mental health issues and a corresponding inability to secure adequate safeguards"); *cf. Matter of Sinclitico*, 15 I&N Dec. 320, 323 (BIA 1975) (terminating deportation proceedings based on Board's conclusion that respondent was incompetent to renounce U.S. citizenship when he had allegedly done so).

DHS's reliance on *Rodriguez-Gonzalez v. INS*, 640 F.2d 1139 (9th Cir. 1981), and *Barahona-Gomez v. Reno*, 236 F.3d 1115 (9th Cir. 2001), is misplaced. Both cases relate to the unavailability of judicial review over prosecutorial discretion decisions, which fall within the

[18] Indeed, EOIR cannot, as a matter of law, adopt regulations to limit its own statutory jurisdiction. *See Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S.Ct. 584, 590, 597-98 (2009) (Congress alone controls an agency's jurisdiction and, unless Congress gives an agency authority to "adopt rules of jurisdictional dimension," any attempt to limit its jurisdiction cannot stand).

government's exclusive discretion. Here, the immigration judge's decision to terminate proceedings was not an exercise of discretion, but rather the only conceivable way to regulate the course of the proceedings. 8 C.F.R. §§ 1003.14(a), 1240.1(c).

DHS ultimately concedes that an immigration judge may terminate proceedings, but only for lack of jurisdiction. However, 8 C.F.R. § 1003.14(a) vests jurisdiction with the immigration court when the government files a Notice to Appear. Although this regulation requires that a Notice to Appear be accompanied by a certificate showing that the respondent has been served, it does not suggest any other jurisdictional requirements.

Finally, DHS argues that termination with prejudice cannot be granted in the absence of a ruling on the merits, a position that has no support in *Matter of M-A-M-* and would negate an immigration judge's ability to ensure a fair hearing. As the respondent notes, a federal judge need not reach the merits of a civil case before dismissing it with prejudice. *See, e.g., Federated Dept. Stores v. Moitie*, 452 U.S. 394 (1981) (treating dismissal with prejudice for failure to state a claim as an adjudication on the merits). Similarly, in this case, the immigration judge made every effort to prescribe adequate safeguards for the respondent, as required by 8 U.S.C. § 1229a(b)(3), and proceed to the merits. Concerned that the respondent's mental disabilities rendered him incompetent to represent himself, the immigration judge finally ordered DHS to help find counsel for the respondent.[19] I.J. Dec. at 7. When the government responded by ignoring the court's order, *id.* at 29, a fair hearing on the merits became impossible. Termination

[19] Specifically, the court directed DHS to either attempt to find a friend or relative to speak on behalf of the respondent, assist in providing legal representation, or assign a competent legal representative. I.J. Dec. at 7. For the reasons discussed above, *Amici* believe that only a lawyer or accredited representative could have ensured the respondent fair notice of the charges against him and an opportunity to defend against them.

with prejudice was the only viable option when no adequate safeguards could protect the respondent's right to a fair hearing.[20]

CONCLUSION

For these reasons, *Amici* respectfully request that the Board adopt the positions set forth herein and affirm the decision of the immigration judge.

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

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

Judy Rabinovitz
Esha Bhandari
125 Broad Street, 18th Floor
New York, New York 10004
Telephone: 212-549-2618
Facsimile: 212-549 2654
Attorneys for Amicus Curiae ACLU Immigrants' Rights Project

Ahilan T. Arunlanantham
Carmen Iguina
1313 West 8th Street
Los Angeles, California 90017
Telephone: (213) 977-5211
Facsimile: (213) 417-2211
Attorneys for Amicus Curiae ACLU of Southern California

[20] Admittedly, administrative closure would remove the case temporarily from the Board's docket pending the exploration of other options such as treatment. However, unlike termination, administrative closure does not result in a final order. *Matter of Avetisyan*, 25 I&N Dec. 688, 695. Thus, an individual might languish in detention indefinitely while his case remains administratively closed. *Amicus* ACLU has documented the prolonged detention of respondents whose cases were administratively closed due to mental competency. *See* Press Release, American Civil Liberties Union, "Immigrants with Mental Disabilities Lost in Detention for Years" (March 25, 2010), available at http://www.aclu.org/immigrants-rights-prisoners-rights/immigrants-mental-disabilities-lost-detention-years.

David Loy
Sean Riordan
Attorneys for Amicus Curiae ACLU of San Diego & Imperial Counties
P.O. Box 87131
San Diego, California 92138
Telephone: (619) 232-2121
Facsimile: (619) 232-0036

James Lyall
3707 N. 7th Street, Suite 235
Phoenix, Arizona 85014
Telephone: (602) 650-1854
Facsimile: (602) 650-1376
Attorneys for Amicus Curiae ACLU of Arizona

Judy London
Talia Inlender
610 South Ardmore Avenue
Los Angeles, California 90005
Telephone: (213) 385 2977
Facsimile: (213) 385-9089
Attorneys for Amicus Curiae Public Counsel

James Preis
Advocacy Services
3255 Wilshire Boulevard, Suite 902
Los Angeles, California 90010
Telephone: (213) 389-2077
Facsimile: (213) 389-2595
Attorneys for Amicus Curiae Mental Health Advocacy Series

Matt Adams
Riddhi Mukhopadhyay
615 2nd Avenue, Suite 400
Seattle, Washington 98104-2244
Telephone: (206) 957-8611
Facsimile: (206) 587-4025
Attorneys for Amicus Curiae Northwest Immigrant Rights Project

Dated: January 15, 2013

cc: Federation for American Immigration Reform
25 Massachusetts Avenue, NW, Suite 330
Washington, D.C. 20001

Certificate of Service

I certify that on January 15, 2013, a true and correct copy of this *Amicus Curiae* Brief was mailed to the following counsel of record by first class mail:

Martin D. Soblick
Chief Counsel
DHS Office of Chief Counsel/SND
880 Front Street, Room 1234
San Diego, CA 92101

_____
Steven H. Schulman

Appendix A

INTERESTS OF *AMICI CURIAE*

1. *Amicus* 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.

2. *Amicius* 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.

3. *Amici* American Civil Liberties Union ("ACLU") and American Civil Liberties Union Foundation ("ACLU Foundation") have a direct interest in the issues raised by this case. The ACLU is a nationwide, nonprofit, nonpartisan organization of more than 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and the laws of the United States. The ACLU Foundation is a nonprofit organization that educates the public about civil liberties and employs lawyers who provide legal representation free of charge in cases involving civil liberties. In particular, through the Immigrants' Rights Project

("ACLU-IRP"), the ACLU Foundation engages in a nationwide program of litigation and advocacy to enforce and protect the civil and constitutional rights of immigrants.

4. *Amicus* American Civil Liberties Union of Southern California ("ACLU-SC") is a state-wide, nonpartisan, nonprofit organization of over 40,000 members dedicated to the preservation of civil liberties and civil rights. The ACLU-SC has litigated a number of landmark immigrants' rights cases as part of its overall mission of litigation and advocacy to protect immigrants' rights.
5. *Amicus* American Civil Liberties Union of San Diego & Imperial Counties ("ACLU-SDIC") is one of the local affiliates of the American Civil Liberties Union, a non-profit, nonpartisan organization, dedicated to defending the principles of the Constitution.
6. *Amicus* American Civil Liberties Union of Arizona ("ACLU-AZ") is a non-profit, nonpartisan organization and is the statewide affiliate of the American Civil Liberties Union. Since 1959, the ACLU-AZ has advocated for the rights of Arizonans under the United States and Arizona Constitutions. Through litigation and public education, the ACLU-AZ protects and advocates for the civil and constitutional rights of immigrants, including those detained by immigration authorities in Arizona.
7. *Amicus* Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal organization dedicated to the defense and advancement of the rights of non-citizens in the United States. NWIRP provides direct representation to low-income immigrants in Washington State before the Board of Immigration Appeals and in other immigration proceedings, is the leading source of pro bono attorneys for indigent immigrants in Washington State, and is the Executive Office of Immigration Review's Legal Orientation Program service provider for detained *pro se* immigrants at the Northwest Detention Center.

8. *Amicus* Public Counsel is the largest pro bono law firm in the nation. Based in Los Angeles, Public Counsel's Immigrants' Rights Project represents persons fleeing persecution and torture, survivors of domestic violence and human trafficking, children, and detained immigrants before the Executive Office for Immigration Review, U.S. Customs and Immigration Services and at the U.S. Court of Appeals for the Ninth Circuit.
9. *Amicus* Mental Health Advocacy Services ("MHAS"), Inc., a public interest law firm in Los Angeles, has provided free legal services to people with mental and developmental disabilities for over 30 years. MHAS assists clients by protecting rights, fighting discrimination and obtaining government benefits and services. Clients include detained immigrants with mental disabilities.
10. *Amici* ACLU Foundation Immigrants' Rights Project, ACLU-SC, ACLU-SDIC, ACLU-AZ, Public Counsel, NWIRP, and MHAS are counsel in *Franco-Gonzales v. Holder*, No. CV 10-02211 (DMG), a class action lawsuit in the Central District of California on behalf of all immigration detainees in California, Arizona and Washington who have a serious mental disorder or defect that may render them incompetent to represent themselves in detention or removal proceedings, and who presently lack counsel in their immigration proceedings. These *Amici* have an interest in this case both because Mr. Ibanga was a member of the *Franco* class at the time of his proceedings before the immigration judge and because *amici* have developed expertise on these issues through the course of the *Franco* litigation.

Appendix B

U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section

Liberty Square Building
450 Fifth Street, NW, Room 6033
Washington, D.C. 20530
Tel: (202) 305-8788
Fax: (202) 305-7000
Email: Victor.Lawrence@usdoj.gov

October 10, 2012

VIA EMAIL

Ahilan T. Arulanantham
ACLU Foundation of Southern California
1313 West 8th Street
Los Angeles, California 90017

Re: *Franco-Gonzalez v. Napolitano,* Case No. 2:10-cv-2211 (C.D. Cal.)

Dear Ahilan,

I write in response to your September 28, 2012 letter, as well as Talia Inlender's October 4, 2012 letter, and other matters.

In your September 28, 2012 letter, you ask about several Subclass One members. Below, you will find some of the information you requested.

1. [redacted] – [redacted]'s case was terminated by an Immigration Judge on September 17, 2012. However, DHS is appealing the termination decision to the Board, and [redacted] remains in ICE custody. At the September 7, 2012 hearing, I indicated that 20 of the 21 Subclass One members whose cases were highlighted by Plaintiffs in their briefing were no longer class members. [redacted] was the one individual I was referring to who remained a Subclass One member from that original list.[1] Given that [redacted] s case is back on appeal, it will be re-submitted to the BIA Pro Bono Project to see if *pro bono* counsel may be willing to represent [redacted] in [redacted] current Board proceedings. An Immigration Judge granted [redacted] bond in the amount of [redacted] on [redacted].
2. [redacted] – [redacted]

[redacted]

3. [redacted] – As we previously told you, an Immigration Judge terminated [redacted] case on July 16, 2012. DHS appealed that decision, and [redacted] became represented on appeal as of [redacted] when an attorney entered an appearance for [redacted] Thus, [redacted] is no longer a class member. [redacted] case remains on appeal.
4. [redacted] – As we previously told you, an Immigration Judge terminated [redacted] case on August 13, 2012. DHS appealed that decision. As of October 5, 2012, [redacted] has been detained for 276 days. [redacted] case has been screened by the BIA Pro Bono Project, and we await information to see if *pro bono* counsel will take [redacted] case. [redacted] case remains on appeal.
5. [redacted]
6. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Sincerely,

/s/ *Victor M. Lawrence*

Victor M. Lawrence

U.S. Department of Justice

Civil Division

DJK:VML:spg
39-12C-37405

Telephone: (202) 353-9923
Washington, D.C. 20530

November 14, 2012

VIA ELECTRONIC MAIL

Ahilan T. Arulanantham
ACLU Foundation of Southern California
1313 West 8th Street
Los Angeles, California 90017

Re: Franco-Gonzalez v. Napolitano, Case No. 2:10-cv-2211 (C.D. Cal.) - Defendants' Response to Plaintiffs' November 9, 2012 Letter Regarding Subclass One Members

Dear Ahilan,

I am writing this letter in response to your November 9, 2012 letter inquiring about the status of immigration proceedings for the ten particular individuals identified in your correspondence. Several of these individuals are not Subclass One members (e.g., [redacted], and [redacted]).

1. [redacted]

2. [redacted]

3. [redacted]

4. [redacted]

5. [redacted]

6. [redacted]

7. [redacted] (A[redacted]: [redacted]

8. [redacted] (A[redacted]): [redacted]

9. [redacted] (A[redacted]: [redacted]

10. [redacted] (A[redacted]): As of November 14, 2012, [redacted] has been detained for 412 days. The Immigration Judge terminated [redacted] s case on December 7, 2011. DHS filed an appeal on [redacted] and that appeal remains pending. [redacted] is represented on appeal by an attorney who entered an appearance on [redacted], and has been continuously represented since that date. [redacted] is not a Subclass One member.

Sincerely,

/s/ Samuel P. Go

SAMUEL P. GO
Senior Litigation Counsel
District Court Section
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044