This template was prepared by attorneys at the National Immigration Project of the National Lawyers Guild. It is not legal advice or a substitute for independent legal advice supplied by a legal representative familiar with a client's case. Nor is it a substitute for independent research, analysis, and investigation into local practices and legal authority in a given jurisdiction. This document was last updated on October 20, 2023.

Practitioner Notes for Template Opposition to DHS Unilateral Motion to Dismiss

- This template opposition is intended for practitioners who represent a client in removal proceedings where DHS has filed a unilateral, boilerplate motion to dismiss under 8 C.F.R. § 239.2(a)(7)—such as this one—stating that circumstances have changed such that it is no longer in the government's best interest for the case to continue, and where the client wishes to proceed to a merits adjudication of an application for relief in immigration court.

- The template contains bracketed placeholders for case-specific facts in [yellow highlighted text] and instructions/notes for practitioners in [*green, italicized highlighted text*]. Some arguments and/or information in this template may be inapplicable to a given case.

- Highlighting and arguing the specific facts of a client's case are key to a persuasive opposition. Practitioners should be sure to cite to the record when asserting facts, as assertions by counsel are not evidence. *See Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) (stating that "statements in a brief, motion, . . . are not evidence and thus are not entitled to any evidentiary weight").

- The cases cited in this template do not constitute an exhaustive search of relevant case law in all jurisdictions. Practitioners should conduct legal research in their jurisdiction based on the facts of their case and ensure that the arguments are viable in their jurisdiction.

- Practitioners could add any additional arguments that may be available based on the circumstances of the case, such as highlighting the legislative history behind the specific form of relief and arguing that congressional intent to provide permanent legal status to certain noncitizens is relevant to what is in the government's "best interest" under 8 C.F.R. § 239.2(a)(7).

- This template does not incorporate the 2019 BIA case of *Andrade Jaso & Carbajal Ayala*, 27 I&N Dec. 557 (BIA 2019), where the BIA affirmed an IJ's grant of a DHS motion to dismiss under 8 C.F.R. § 239.2(a)(7) despite the respondents' desire to seek cancellation of removal. In that case the BIA held that an IJ has the authority to grant an 8 C.F.R. § 239.2(a)(7) motion to dismiss "upon a finding that it is an abuse of the asylum process to file a meritless asylum application with the USCIS for the sole purpose of seeking cancellation of removal in the Immigration Court." *Id.* at 558. The BIA also rejected respondents' due process argument, stating that "the desire to regularize their status through discretionary relief, such as cancellation of removal, does not entitle them to the commencement and continuation of removal proceedings," further noting that there was no prejudice because respondents were not in "imminent danger of removal" and could pursue cancellation if placed into proceedings again in the future. *Id.* at 559. Practitioners should be ready to distinguish this case if DHS raises it in their motion.

[ATTORNEY NAME, EOIR I.D.#
FIRM/ORGANIZATION
ADDRESS
TELEPHONE
EMAIL]

[**NON-DETAINED/DETAINED**]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
[NAME] IMMIGRATION COURT
[CITY, STATE]

In the matter of: **[NAME]** **In Removal Proceedings**	**File No. A [###-###-###]**

Hon. [JUDGE'S NAME] **Next Hearing: [DATE, TIME]**

RESPONDENT'S OPPOSITION TO THE DEPARTMENT OF HOMELAND SECURITY'S MOTION TO DISMISS

[ATTORNEY NAME, EOIR I.D.#
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
[CITY] IMMIGRATION COURT
[CITY, STATE]

In the matter of: **[NAME]** **In Removal Proceedings**	**File No. A [###-###-###]**

RESPONDENT'S OPPOSITION TO DHS'S MOTION TO DISMISS

On [DATE] counsel for the Department of Homeland Security (DHS) Office of the Principal Legal Advisor (OPLA) filed a motion to dismiss these proceedings citing its "sole and unreviewable prosecutorial discretion." DHS alleges that, pursuant to 8 C.F.R. §§ 1239.2(c), 239.2(a)(7) and (c), circumstances have changed to such an extent that continuation is no longer in the best interest of the government. OPLA did not seek Respondent's position before filing the motion to dismiss, and Respondent opposes the motion.[1] For the reasons set forth below, the Court should deny DHS's motion to dismiss.

[1] The Immigration Court Practice Manual (ICPM) states that a party "should make a good faith effort to ascertain the opposing party's position on the motion." EOIR Policy Manual, Pt. II – ICPM, Ch. 5.2(i). In a footnote DHS acknowledges it has not followed this provision of the ICPM, stating that "obtaining the respondent's concurrence, or that of the respondent's legal representative, prior to filing this motion would generally require the expenditure of more effort than the preparation, service, and filing of the motion itself." DHS Motion at 1 n.1. The fact that DHS would have to expend effort to call or email undersigned counsel, or that DHS has a heavy caseload, does not excuse DHS from following the ICPM. The Court should reject DHS's motion for their admitted failure to comply with the ICPM by not only not making a good faith effort to contact Respondent's counsel, but in determining it was not worth the time to make *any* effort to seek Respondent's position.

I. FACTS AND PROCEDURAL HISTORY

Respondent is a citizen of [COUNTRY] and entered the United States on or around [DATE] in [STATUS]/[to seek asylum]/[without inspection]. *[If accurate:* Respondent filed for asylum with USCIS on [DATE].] Respondent was served with a Notice to Appear on [DATE] and [pled to the charges at a master calendar hearing on [DATE]/submitted written pleadings on [DATE].] *[If accurate:* Respondent filed for [FORM OF RELIEF] before this Court on [DATE]. *[If accurate:* Respondent filed documentary evidence in support of this application on [DATE].] *[If accurate:* This court has scheduled an individual hearing on Respondent's [FORM OF RELIEF] claim on [DATE].]

[*For asylum claims, **briefly** fill in facts about why Respondent left their country/why they fear return/how they got into removal proceedings, if such facts are part of the record.]*

[For other cases where Respondent has filed or intends to file a form of relief with the immigration court, briefly describe the facts in the record underlying the respondent's eligibility; for example, in a 42B cancellation case, briefly describe the exceptional and extremely unusual hardship facts and note if a qualifying relative child is close to aging out.]

II. ARGUMENT

This Court should deny DHS's motion to dismiss. In adjudicating DHS's unilateral motion, this Court must consider Respondent's arguments in opposition to the motion, as DHS does not have "absolute veto power over the authority of an Immigration Judge or the Board." *Matter of Avetisyan*, 25 I&N Dec. 688, 693 (BIA 2012). Accordingly, as a 2023 EOIR Director's Memorandum directs, "When an OPLA attorney moves to dismiss a particular case, the immigration judge should be prepared to adjudicate that motion as is appropriate under the law, taking into consideration any objection to dismissal by the respondent." Memorandum from

David L. Neal, EOIR Dir., Department of Homeland Security Enforcement Priorities and Prosecutorial Discretion Initiatives, DM 23-04, at 4 (Sept. 28, 2023), https://www.justice.gov/eoir/book/file/1596081/download [hereinafter "2023 Neal Memo"]. This Court should deny DHS's motion to dismiss because Respondent wishes to have this Court adjudicate [his/her] [pending] application for [FORM OF RELIEF], and [he/she] has a right to be heard on that claim. Further, Respondent will suffer serious harm if this Court grants DHS's motion to dismiss and [he/she] is not able to pursue her application for [FORM OF RELIEF] before this Court. Even evaluating DHS's motion solely on its stated basis pursuant to 8 C.F.R. § 239.2(a)(7), the motion must be denied because DHS has failed to establish that circumstances in *this case* have changed since the NTA's issuance, or that it is not in the government's best interest for the case to proceed to a final merits adjudication.

A. This Court Has a Duty to Consider the Respondent's Arguments in Opposition to DHS's Motion to Dismiss.

Despite DHS's assertion that its motion is based on its "sole and unreviewable prosecutorial discretion," the authority to dismiss these removal proceedings rests exclusively with this Court. *See* 8 C.F.R. § 1239.2(c); *Matter of G-N-C-*, 22 I&N Dec. 281, 284 (BIA 1998).

Board of Immigration Appeals (BIA) precedent recognizes that, in adjudicating a DHS motion to dismiss, an Immigration Judge must consider both parties' arguments. *Id.* at 284-85 ("To the extent that these proceedings were terminated without considering arguments from both sides, the Immigration Judge erred."). In interpreting Immigration Judge and BIA regulatory authority to control removal proceedings and adjudicate other types of motions that bear on a case's finality, the BIA has repeatedly confirmed that DHS does not have "absolute veto power over the authority of an Immigration Judge or the Board to act in proceedings." *Avetisyan*, 25 I&N Dec. at 693; *accord Matter of W-Y-U-*, 27 I&N Dec. 17, 20 n.5 (BIA 2017); *see also*

Gonzalez-Caraveo v. Sessions, 882 F.3d 885, 890 (9th Cir. 2018) ("In the context of . . . motions to reopen and requests for continuances—the BIA and the Ninth Circuit, as well as other circuits, have rejected allowing such veto power to a party."). Instead, Immigration Judges are required to "exercise [their] independent judgment and discretion and may take any action consistent with the Act and regulations that is appropriate and necessary for the disposition of such cases." *Avetisyan*, 25 I&N Dec. at 691 (citing 8 C.F.R. § 1003.10(b)).

Indeed, September 2023 guidance issued by EOIR Director Neal recognizes that when adjudicating a DHS motion to dismiss such as this one, Immigration Judges must adjudicate the motion as is appropriate under the law, including by taking the respondent's objection to dismissal into consideration. 2023 Neal Memo at 4.

Thus, this Court must consider the Respondent's arguments against dismissal despite DHS's reference to its "sole and unreviewable" prosecutorial discretion.

B. This Court Should Deny DHS's Motion to Dismiss Because Respondent Wishes to Proceed to a Merits Adjudication on [His/Her] [FORM OF RELIEF] Application and Has a Right to Be Heard by This Court on That Claim.

This Court should deny DHS's motion to dismiss because the Respondent desires to have his [FORM OF RELIEF] claim adjudicated on the merits. In adjudicating an opposed DHS motion to dismiss, as here, the Court must consider whether dismissal would be fair to the Respondent, including the Respondent's desire to have an application for relief adjudicated on the merits. As EOIR guidance directs, Immigration Judges "should focus on cases where the respondent . . . desires a full adjudication of a claim for immigration relief." 2023 Neal Memo at 3; *cf. Avetisyan*, 25 I&N Dec. at 691 (recognizing that in considering whether to defer action on a case, an Immigration Judge considers "justice and fairness to the parties"). Once DHS has initiated removal proceedings by filing an NTA, it is the Court's "responsibility to . . . adjudicate

the respondent's application for relief from removal, if any." *Id.*; *accord W-Y-U-*, 27 I&N Dec. at 19 ("The role of the Immigration Courts and the Board is to adjudicate whether [a noncitizen] is removable and eligible for relief from removal in cases brought by the DHS.").

In *Matter of W-Y-U-*, where the respondent, who had filed an application for asylum with the court, opposed a DHS motion for administrative closure, the BIA recognized that in exercising their administrative closure authority an Immigration Judge must consider the respondent's "interest in having the case resolved on the merits." 27 I&N Dec. at 18-19. The BIA further acknowledged that a noncitizen in removal proceedings has a right to seek asylum and related relief and a "right to a hearing on the merits of his claim." *Id.* at 19. The BIA explained that, unlike DHS, an immigration court may not base its decision about whether to remove a case from the calendar solely on a balancing of "the most efficient use of limited resources" and instead must resolve cases that are in dispute. *Id.* at 19. ("[W]hile the DHS's actions may suggest that the respondent's case is not a priority for enforcement, they are not dispositive of whether the case is in dispute."). The BIA concluded that these were persuasive reasons for the case to proceed and be resolved on the merits and reversed the Immigration Judge's grant of DHS's motion for administrative closure. *Id.* at 20.

Similarly, here, the Court should deny DHS's motion because the Respondent wishes to have his [FORM OF RELIEF] claim resolved on the merits by this Court and has a right to have that claim heard. *See* Ex. A, G-C-D-, AXXX XXX 178 (BIA May 15, 2017) (unpublished) (applying *W-Y-U-* to respondents' appeal of an Immigration Judge decision granting DHS's motion to terminate, and sustaining appeal where respondents wished to have their applications for relief adjudicated by the court). The guidance provided by EOIR Director Neal in the 2023 memo also supports denying DHS's motion in this case and thereby allowing the Respondent to

have [her/his] day in court. That policy directs that Immigration Judges should focus resources on cases like this one where the respondent desires a full adjudication on their claim for immigration relief. 2023 Neal Memo at 3.

1. *Respondent Wishes to Pursue [FORM OF RELIEF] Before the Court and Will Suffer Harm If Not Able to Do So.*

Respondent has applied for [FORM OF RELIEF] and wishes to continue to pursue this relief before the Court. [*If the Respondent would be able to re-file with USCIS if the court dismisses, e.g. if seeking asylum or adjustment of status, insert any facts in the record relevant to why having to go back to USCIS would be prejudicial. E.g. OYFD issues,*[2] *loss of EAD, how long Respondent has already waited, fact that Respondent is prepared for merits hearing and evidence may go stale, mental health issues Respondent has faced because of being in extended limbo which will be worse if the IJ dismisses and Respondent has to start over with USCIS, immediate family members abroad facing hardship or danger, etc. If adjustment or asylum was previously denied by USCIS, note that Respondent is entitled to renew their application before the court and the court is the only forum where Respondent can obtain meaningful review given likely futility of re-filing with USCIS in this situation, where USCIS has already found the individual ineligible.*] As in *Matter of W-Y-U-*, here Respondent seeks a merits adjudication from this Court on [his/her] pending application for relief, which if granted would make [him/her] "eligible for lawful status in the United States," whereas dismissal provides [him/her] no legal status. *Id.* at 19; *see also id.* at 20. ("An unreasonable delay in the resolution of the proceedings may operate to the detriment of [noncitizens] by preventing them from obtaining relief that can provide lawful status. . . .").

[2] [*If relevant:* If the Court grants DHS's motion to dismiss forcing Respondent to start over before the USCIS Asylum Office, Respondent will rely on this decision to invoke an exception to the asylum one-year filing deadline should USCIS allege that the I-589 was not timely filed.]

2. Respondent Has a Right to Pursue Relief Before the Court.

Noncitizens in removal proceedings have a right to apply for relief from removal and to a hearing on their applications for relief. *See* INA § 240(b)(4)(B); 8 C.F.R. § 1240.10(a)(4); *see also, e.g.*, *Matter of M-A-M-*, 25 I&N Dec. 474, 479 (BIA 2011) ("Included in the rights that the Due Process Clause requires in removal proceedings is the right to a full and fair hearing."). The regulations state that the Immigration Judge "*shall* inform the [noncitizen] of his or her apparent eligibility to apply for *any of the benefits enumerated in this chapter* and *shall afford the alien an opportunity to make application during the hearing*, in accordance with the provisions of § 1240.8(d)." 8 C.F.R. § 1240.11(a)(2) (emphases added).

[*For asylum and related relief:* Respondent has a statutory right to seek asylum. INA § 208(a)(1) ("[A noncitizen] who is physically present in the United States or who arrives in the United States . . . irrespective of such [noncitizen's] status, may apply for asylum . . . ."). In the asylum statute, Congress directed the Department of Justice to provide an avenue for asylum seekers to present their case. INA § 208(d)(1) (directing the attorney general "establish a procedure for the consideration of asylum applications filed under subsection (a)"). Granting DHS's motion to dismiss where, as here, Respondent wishes to present [his/her] asylum claim would subvert Congress's clearly articulated intent. It would also violate [his/her] "right to a hearing on the merits of his claim." *W-Y-U-*, 27 I&N Dec. at 19; *see* 8 C.F.R. § 1240.11(c)(3) (directing that applications for asylum and withholding "*will be decided by the immigration judge* . . . after an evidentiary hearing to resolve factual issues in dispute" (emphasis added)).

[*Continuation paragraph if Respondent is seeking asylum and related relief:* While DHS may argue that Respondent can seek asylum affirmatively[3] if these proceedings are dismissed,

[3] Congress also conferred certain rights on noncitizens in removal proceedings, including "a reasonable opportunity to examine the evidence against the [noncitizen], to present evidence on the [noncitizen's] own behalf, and to cross-

Respondent is also seeking related mandatory[4] forms of relief—withholding of removal under INA § 241(b)(3) and protection under the Convention Against Torture (CAT)—for which [he/she] is entitled to apply and which [he/she] can only pursue in removal proceedings.[5] Since Respondent cannot pursue withholding of removal or CAT protection before USCIS, the immigration court (acting on the Attorney General's behalf) cannot dismiss these proceedings over Respondent's objection, because doing so would ignore the mandatory language in the relevant statute and regulations and leave Respondent with no ability to seek these mandatory forms of relief.

[*If asylum application was referred to court by USCIS, add:* Dismissing this case over Respondent's objection would also violate [his/her] regulatory right to have the court adjudicate [his/her] asylum claim following USCIS's referral of [his/her] claim to this Court on [DATE] pursuant to 8 C.F.R. § 208.14(c)(1).]

[*For other relief, e.g. cancellation of removal, adjustment of status, or INA § 237(a)(1)(H) waiver, argue that relevant statute and regulations provide the respondent a right to apply for this form of relief. Sources of statutory and regulatory authority for common forms of relief are listed here:*

- Cancellation of removal under INA § 240A(a), (b)(1), or (b)(2)

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examine witnesses presented by the Government." INA § 240(b)(4)(B). These rights would cease to exist if DHS could unilaterally dismiss removal proceedings. Even if Respondent may be able to file affirmatively for asylum, USCIS does not afford the same statutory rights in asylum interviews for the asylum seeker to examine government evidence or to cross-examine witnesses.

[4] *See* INA § 241(b)(3) (stating that "the Attorney General *may not remove* [a noncitizen] to a country if the Attorney General decides that the [noncitizen's] life or freedom would be threatened in that country because of the [noncitizen's] race, religion, nationality, membership in a particular social group, or political opinion" (emphasis added)); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987) (recognizing that this statute "requires the Attorney General to withhold deportation of [a noncitizen] who demonstrates that his 'life or freedom would be threatened' on account of one of the listed factors if he is deported"); 8 C.F.R. § 1208.16(c)(4); *id.* § 1208.17(a) (CAT regulations stating that noncitizens meeting CAT requirements "*shall be granted* deferral of removal" (emphasis added)); *see also* 8 C.F.R. § 1208.3(b) ("An asylum application shall be deemed to constitute at the same time an application for withholding of removal. . . .").

[5] *See* Form I-589 Instructions, at 2 (Mar. 1, 2023), https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf; *see also* 8 C.F.R. § 1208.16(a) (providing that in "removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted"); *id.* § 1208.17 (setting forth procedures for Immigration Judges to consider applications for withholding of removal and deferral of removal under CAT.)

    - 8 C.F.R. § 1240.11(a)(1) ("In a removal proceeding, [a noncitizen] may apply to the immigration judge for cancellation of removal under section 240A of the Act. . . .")
- Adjustment of status
    - 8 C.F.R. § 1240.11(a)(1) ("In a removal proceeding, [a noncitizen] may apply to the immigration judge for . . . adjustment of status. . . .")
    - *If USCIS previously denied the adjustment, argue regulatory right to renew adjustment application in court under 8 C.F.R. § 1245.2(a)(5)(ii)* ("No appeal lies from the denial of [an adjustment application by USCIS], but the applicant, if not an arriving [noncitizen], retains the right to renew his or her application in proceedings under 8 CFR part 1240.").
- INA § 237(a)(1)(H) waiver
    - 8 C.F.R. § 1240.11(d) ("The respondent may apply to the immigration judge for relief from removal under section[] 237(a)(1)(H) . . . of the Act.")]

In sum, dismissal is inappropriate here, given Respondent's interest in having the case resolved on the merits and [his/her] right to be heard on [his/her] [FORM OF RELIEF] claim. *See W-Y-U-*, 27 I&N Dec. at 19; 2023 Neal Memo at 3-4. Indeed, the facts of this case are similar to unpublished BIA decisions where the BIA has sustained respondents' appeal of a DHS motion dismiss in light of respondents' desire to seek relief before the immigration court. *See, e.g.*, Ex. A, G-C-D-, AXXX XXX 178 (BIA May 15, 2017) (unpublished) (sustaining appeal where respondents wished to have their applications for cancellation of removal and asylum adjudicated by the court); Ex. B, R-G-H-M-, AXXX XXX 972 (Aug. 9, 2017) (unpublished) (sustaining appeal where the respondents wished to seek cancellation of removal, noting that a respondent being a low DHS enforcement priority was no guarantee that she would remain so in the future and was not a sound basis for terminating her case and denying her the opportunity to have her cancellation claim adjudicated).

C. Even When Evaluated Solely on Its Stated Basis, DHS's Motion Must Be Denied.

Even evaluating DHS's motion solely on its stated basis, if this Court conducts "an informed adjudication . . . based on an evaluation of the factors underlying [DHS's] motion," *G-N-C-*, 22 I&N Dec. at 284, that motions fails on its own terms and must be denied. The

regulation underlying DHS's motion allows DHS to seek dismissal where "[c]ircumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government." 8 C.F.R. § 239.2(a)(7). This provision encompasses a case-specific component— "circumstances of the case"— and a government-specific component— "best interest of the government." Here, DHS has failed to establish that circumstances in Respondent's case have changed since the NTA's issuance and has separately failed to demonstrate that continuation is no longer in the government's best interest.

1. *DHS Has Failed to Show How Circumstances of This Case Have Changed Since the NTA's Issuance.*

Dismissal is inappropriate because the "circumstances of the case" have not changed. 8 C.F.R. § 239.2(a)(7). DHS's motion does not even attempt to articulate how circumstances in this case have changed since the issuance of Respondent's NTA. In fact, DHS's motion references no facts specific to this case whatsoever. Contrary to DHS's conclusory statement that circumstances have changed, in fact no relevant circumstances have changed with respect to Respondent's case—[he/she] remains eligible for [FORM OF RELIEF] and continues to desire an adjudication on [his/her] claim on the merits by this Court. *See supra* Section II.B. Respondent has been waiting for an adjudication of [his/her] [FORM OF RELIEF] application, [*if asylum*: and related humanitarian protection that only this Court has jurisdiction to grant], for [X YEARS].

Though DHS does not articulate the alleged changed circumstance in its motion, presumably DHS would argue that the fact that it does not regard Respondent as an enforcement priority is the changed circumstance here. *See* DHS Motion at 1 n.1. But even if DHS's immigration enforcement policy has changed since the NTA was issued—again, something DHS does not argue in its motion—a nationwide change in the government's enforcement policy is

insufficient to show a changed circumstance in "the case," meaning this specific case of Respondent [NAME], considering [his/her] individualized circumstances and facts.

DHS's motion must also fail because DHS never reached out to Respondent before filing its motion in violation of the ICPM. Ascertaining the relevant "circumstances of the case" for purposes of making a motion under 8 C.F.R. § 239.2(a)(7) necessarily must encompass contacting Respondent to understand [his/her] position, which DHS has failed to do. Because DHS has not shown that circumstances in this case have changed since the issuance of the NTA, the Court should deny DHS's motion to dismiss.

2. DHS Has Failed to Show Why Continuation Is Not in the "Best Interest of the Government."

Even if DHS had articulated changed circumstances in this case since the NTA's issuance, which it has not, DHS has failed to show why continuation is not in the "best interest of the government." Again, DHS's motion contains nothing more than a conclusory assertion in a footnote that continuation is not in the government's best interest because it does not deem this case an enforcement priority. DHS Motion at 1 n.1. DHS's motion fails to consider key factors necessary to determining the government's best interest in an individual case, as required by the regulation and fundamental fairness. Those factors include Respondent's individual circumstances, Respondent's position on dismissal, and the efficient use of limited government resources. Consideration of these factors compels the conclusion that this case should proceed to a merits determination, as Respondent desires.

a. The Respondent's Individual Circumstances and Position on Dismissal

Determining whether dismissal of any given case is in the government's best interest necessarily requires DHS to reach out to the respondent, as required by ICPM, prior to filing for dismissal in order to understand the respondent's viewpoint and reasons why the respondent

opposes dismissal. This is particularly true given that OPLA's own prosecutorial discretion guidance recognizes that "the government wins when justice is done." Memorandum from Kerry E. Doyle, ICE Principal Legal Advisor, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion, at 2 (Apr. 3, 2022) (internal citation omitted), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf [hereinafter "Doyle Memo"]. An individual's interest in having their claim for permanent immigration relief adjudicated on the merits is certainly relevant to "justice" in a particular case and must inform the government's view of whether dismissal is in the government's best interest. Moreover, what is in the government's best interest necessarily includes knowing the respondent's current case circumstances[6] and how a strategy one way or the other impacts lawful permanent residents and U.S. citizens in the respondent's life. Thus, OPLA's failure to seek Respondent's position before filing this motion itself defeats their assertion that dismissal is in the government's best interest, and therefore the motion must be denied.

[*If the case arose from a USCIS denial of adjustment of status, denial of Form I-751, or referral of asylum:* Further, the fact that DHS's motion in this case appears to violate OPLA's own guidelines about which cases are appropriate for dismissal without seeking the respondent's consent independently refutes DHS's claim that dismissal is in the government's best interest here. The Doyle Memo directs that in cases, as here, where the noncitizen has an "established right to be placed into removal proceedings," OPLA should not seek dismissal absent the noncitizen's affirmative consent. Doyle Memo at 10-11 n.22. Here, [USCIS referred Respondent's asylum case to EOIR on [DATE] pursuant to 8 C.F.R. § 208.14(c)(1)] /

[6] [*If accurate*: DHS cannot know what the current circumstances of this case are because the last [hearing/filing] in this case was [X] years ago, on [DATE].]

[Respondent was placed into proceedings after USCIS denied [his/her] Form I-751, pursuant to [8 C.F.R. § 216.4(d)(2) OR 8 C.F.R. § 216.5(f)] / [Respondent was placed into proceedings after USCIS denied [his/her] adjustment of status application, *see* 8 C.F.R. § 1245.2(a)(5)(ii)]. Thus dismissal over Respondent's objection cannot be in the government's best interest because it violates OPLA's own policy.]

b. Efficient Use of Limited Government Resources

DHS has not established that dismissal of this case is in the government's best interest because it has failed to address a key factor, the efficient use of limited government resources. OPLA's own prosecutorial discretion guidance stresses that one key purpose is to conserve government resources for priority cases. Doyle Memo at 9 ("Sound prioritization of our litigation efforts through the appropriate use of prosecutorial discretion can preserve limited government resources, achieve just and fair outcomes in individual cases, [and] reduce government redundancies. . . ."). In this case, Respondent wishes to pursue relief before the Court, [including relief that only the immigration court has authority to grant]. By moving to dismiss over Respondent's objection, DHS is not accomplishing its stated goal of efficiently using resources and reducing redundancies.

In fact, dismissing these proceedings over Respondent's objection would waste rather than conserve government resources. If this case is dismissed, Respondent will likely appeal the dismissal. DHS will then have to invest considerable resources in defending its decision to dismiss these proceedings and potentially the use of the Doyle Memo itself. Likewise, the Department of Justice will expend considerable resources if this case is dismissed. The BIA will expend resources to issue a decision on appeal. The case may then be remanded to this Court, restoring Respondent to [his/her] current position before the Court, after the passage of time and

expenditure of considerable government resources. [*If accurate*: If this case is dismissed, Respondent will also file affirmatively for [FORM OF RELIEF] with USCIS, requiring the use of more government resources to adjudicate the claim in another forum.] [Given that USCIS already found Respondent ineligible for [FORM OF RELIEF], it is likely that USCIS will again deny the claim, and Respondent will once again be back before this Court seeking the same adjudication on the merits.] / [If USCIS does not grant Respondent's application, [he/she] may end up back before this Court again seeking the same adjudication on the merits.] This process would result in a much larger aggregate expenditure of resources than allowing Respondent's claim to proceed now as [he/she] desires.

In contrast, this Court's adjudication of Respondent's [FORM OF RELIEF] application on [INDIVIDUAL HEARING DATE] promotes finality of the removal proceedings and prevents waste of government resources. If this case is allowed to move forward, the Court will schedule Respondent for an individual hearing which will use a limited amount of the Court's time and of OPLA's time. Indeed, current OPLA guidance recognizes OPLA's broad authority to narrow the issues before the court through stipulation, or even to stipulate to relief. Doyle Memo at 9. Using its prosecutorial discretion in this manner would be more efficient for DHS and for the Court and would permit Respondent to exercise [his/her] right to a day in court. And complying with the ICPM by reaching out to a respondent before filing a motion to dismiss promotes these sorts of stipulations, which further administrative economy. As the 2023 Neal Memo recognizes, "efficiency and fairness will be served" by dismissal *"[w]here there is no dispute between the parties*." *Id.* at 4 (emphasis added).

Because DHS cannot establish either of the necessary requirements for bringing a motion to dismiss under 8 C.F.R. § 239.2(a)(7), this Court must deny the motion and allow Respondent's case to proceed to an adjudication on the merits.

III. CONCLUSION

For all of the reasons stated above, this Court should deny DHS's motion to dismiss and allow Respondent to proceed to the merits of the application[s] pending before the Court.

Respectfully submitted,

[Signed]

[ATTORNEY NAME, EOIR I.D.#
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
[CITY] IMMIGRATION COURT
[CITY, STATE]

In the matter of: **[NAME]** **In Removal Proceedings**	**File No. A [###-###-###]**

INDEX OF EXHIBITS

Tab	Description	Pages
A	G-C-D-, AXXX XXX 178 (BIA May 15, 2017) (unpublished) [*attach the decision, which is available here: https://www.scribd.com/document/500251131/G-C-D-AXXX-XXX-178-BIA-May-15-2017?secret_password=efbkWh821i8qbdPgsDRz*]	1
B	R-G-H-M-, AXXX XXX 972 (Aug. 9, 2017) (unpublished) [*attach the decision, which is available here: https://www.scribd.com/document/357071637/R-G-H-M-AXXX-XXX-972-BIA-Aug-9-2017*]	4

[RESPONDENT'S NAME]
[A #]

PROOF OF SERVICE

On [DATE], I, [NAME OF PERSON COMPLETING SERVICE], served a copy of this **OPPOSITION TO THE DEPARTMENT OF HOMELAND SECURITY'S MOTION TO DISMISS** and any attached pages to the ICE Office of Chief Counsel, at the following address: [ADDRESS OF THE OFFICE OF CHIEF COUNSEL], by [METHOD OF SERVICE].

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[NAME OF PERSON COMPLETING SERVICE]