**UNITED STATES DEPARTMENT OF JUSTICE**
**OFFICE OF THE ATTORNEY GENERAL**

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MATTER OF L-A-B-R- ET AL.,
*Respondents.*

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Referred from:
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Interim Decision #3921
27 I&N Dec. 245 (A.G. 2018)

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# BRIEF OF AMICI CURIAE THE AMERICAN IMMIGRATION COUNCIL, HER JUSTICE, IMMIGRANT DEFENSE PROJECT, NORTHWEST IMMIGRANT RIGHTS PROJECT, AND SOUTHERN POVERTY LAW CENTER URGING VACATUR OF REFERRAL ORDER OR RECUSAL

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## INTRODUCTION AND SUMMARY OF ARGUMENT[1]

For the fourth time in three months, the Attorney General has invoked a Department of Justice ("DOJ") regulation, 8 C.F.R. § 1003.1(h)(1)(i), to refer a pending immigration matter to himself. That regulation requires the Board of Immigration Appeals ("Board") to refer to the Attorney General all cases that "[t]he Attorney General directs the Board to refer to him." *Id.* In the referral order here, the Attorney General has certified the following question for review: "Under what circumstances does 'good cause' exist for an Immigration Judge to grant a continuance for a collateral matter to be adjudicated?" *Matter of L-A-B-R-*, 27 I&N Dec. 245, 245 (A.G. 2018) ("AG Decision"). Any decision by the Attorney General will become binding precedent in immigration proceedings nationwide, and it will remain controlling unless and until each federal court of appeals or the Supreme Court vacates it.[2]

The referral order consolidates the cases of three respondents from three different jurisdictions. Although the referral order does not identify or provide

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person (other than amici curiae, their counsel, or their members) contributed money that was intended to fund the preparation or submission of this brief.

[2] A respondent in removal proceedings under 8 U.S.C. § 1229a may file a petition for review in a federal court of appeals only once a final administrative order of removal (i.e., a removal order entered by an Immigration Judge ("IJ") and affirmed by the Board) has issued. *See* 8 U.S.C. §§ 1101(a)(47)(B), 1252(a), 1252(b)(9). Given this process, it could take years for each court of appeals to resolve the legality of the Attorney General's decision in this matter, or for the Supreme Court to do so.

details about the underlying proceedings, amici understand the cases to involve respondents in Houston, Texas; Philadelphia, Pennsylvania; and Los Angeles, California.[3] In each case, DHS sought interlocutory review before the Board of an IJ's decision to continue proceedings, and the Board declined to address the merits of the appeal because it did not "present a significant jurisdictional question about the administration of the immigration laws" or involve a "recurring problem in Immigration Judges' handling of cases."[4] According to the decisions, two respondents were pro se before the Board, while one was represented by counsel.[5] The Attorney General referred all three cases to himself after the Board ordered each case returned to the immigration court with no further action.[6]

The Attorney General's referral order presents the question of whether, and if so when, an IJ may grant a continuance of immigration proceedings to allow the respondent to seek adjudication of a collateral matter from other authorities. Relevant collateral matters include pending petitions or applications before U.S. Citizenship and Immigration Services ("USCIS"), challenges to the validity and finality of criminal convictions, and other proceedings that could provide a basis

[3] The Board's decisions in these three cases are available on the Justice Department's website. *See* https://www.justice.gov/eoir/page/file/1050451/download; https://www.justice.gov/eoir/page/file/1051201/download; and https://www.justice.gov/eoir/page/file/1051196/download.

[4] *See* note 3, *supra*.

[5] *Id.*

[6] *Id.*

for immigration relief. For example, amici understand from respondent's counsel in the California case that the IJ continued proceedings to allow the respondent to pursue adjustment of status before USCIS based on the respondent's marriage to a U.S. citizen. The result of such collateral matters can be essential to determining the appropriate disposition in immigration court. Thus, like the Attorney General's previous referrals, *Matter of L-A-B-R-* raises questions of vital importance to both the parties in the referred cases and countless other participants in removal proceedings, including adjudicators, respondents, and DHS.[7] Those questions cannot be decided by the Attorney General, however, because due process requires a neutral decisionmaker in immigration proceedings, and the Attorney General's documented lack of neutrality disqualifies him from participation in this case.

The test for disqualification of an agency adjudicator is "whether 'a disinterested observer may conclude that [the adjudicator] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959),

[7] The Attorney General referred three other cases to himself between January and March 2018. *See Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018) (referring case "for review of issues relating to whether being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum and withholding of removal"); *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018) (referring case, vacating the Board's decision, and directing that the matter be recalendared and restored to the active docket of the immigration court); *Matter of Castro-Tum*, 27 I&N Dec. 187 (A.G. 2018) (referring case "for review of issues relating to the authority to administratively close immigration proceedings").

*cert. denied*, 361 U.S. 896 (1959)). In *Cinderella*, the D.C. Circuit held that disqualification is warranted where an agency head responsible for adjudicating a case has "ma[d]e speeches which give the appearance that the case has been prejudged." *Id.* at 590. Here, as set forth below, the Attorney General's public statements and other actions show prejudgment or the appearance of prejudgment with respect to the cases he has referred to himself.

At least three aspects of the Attorney General's conduct raise serious due process concerns. First, the Attorney General's recent official statements suggest that he decided the question he has referred to himself—whether to limit the availability of continuances based on pending collateral matters—prior to invoking the referral regulation in this case. Second, the volume, timing, and substance of the Attorney General's self-referrals create the appearance that he is strategically choosing cases to implement predetermined policy objectives, rather than to adjudicate those cases on their individual merits. Finally, the Attorney General's long history of public commentary on immigration, both as a United States senator and as Attorney General, reflects prejudgment as to whether noncitizens with certain personal characteristics—particularly those who do not meet specific standards for income, education, professional skills, and language ability, or whose family ties might provide a basis for immigration relief—should be excluded or removed from the United States. Based on these statements, a disinterested

observer would conclude that the Attorney General cannot impartially decide whether such individuals should be allowed to remain in the United States while pursuing collateral relief from other authorities.

For all these reasons, the Attorney General's public actions, considered under an objective standard, establish a "probability of actual bias" that "is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)); *see also Cham v. Att'y Gen. of the U.S.*, 445 F.3d 683, 694 (3d Cir. 2006) (stating that due process is violated where "the violation of a procedural protection . . . had the *potential* for affecting the outcome of [the] deportation proceedings"). In short, the Attorney General has referred to himself a matter that he may not decide without offending constitutional safeguards. Due process requires that the Attorney General vacate the referral order or recuse himself from these cases.

## INTEREST OF AMICI CURIAE

The American Immigration Council (the "Council") is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council previously has appeared as amicus curiae before the Attorney General, and regularly litigates issues relating to

due process, removal defense, and government accountability before the Board and the federal courts. The Council has a direct interest in ensuring that decisions in removal proceedings are made by fair, impartial, and open-minded adjudicators who are shielded from political influences.

Since 1993, Her Justice has been dedicated to making quality legal representation accessible to low-income women in New York City in family, matrimonial, and immigration matters. Her Justice recruits and mentors volunteer attorneys from the City's law firms to stand side-by-side with women who cannot afford to pay for a lawyer, giving them a real chance to obtain legal protections that transform their lives. Her Justice's immigration practice focuses on representing immigrant survivors of gender-based violence pursuing relief under the Violence Against Women Act (VAWA), many of whom are in removal proceedings. Her Justice has appeared before Courts of Appeals and the United States Supreme Court in numerous cases as amicus.

Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center that supports, trains, and advises criminal defense and immigration lawyers, immigrants themselves, as well as judges and policymakers on the intersection between immigration law and criminal law. IDP is dedicated to promoting fundamental fairness for immigrants at risk of detention and deportation

based on past criminal charges and therefore has a keen interest in ensuring the integrity and fairness of agency removal proceedings.

The Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal organization dedicated to the defense and advancement of the legal rights of noncitizens in the United States with respect to their immigrant status. NWIRP provides direct representation to low-income immigrants placed in removal proceedings.

The Southern Poverty Law Center ("SPLC") has provided pro bono civil-rights representation to low-income persons in the Southeast since 1971. SPLC has litigated numerous cases to enforce the civil rights of immigrants and refugees to ensure that they are treated with dignity and fairness. In 2017 the SPLC began the Southeast Immigrant Freedom Initiative (SIFI), a pro bono project dedicated to representing immigrants detained by ICE. SIFI is the largest project of its kind in the United States. SIFI represents clients in both custody and removal proceedings. SIFI serves detainees in Jena, Louisiana, and Lumpkin, Ocilla and Folkston, Georgia. The SPLC has a strong interest in protecting the due process rights of all immigrants in removal proceedings.

## ARGUMENT

### I. Due Process Guarantees an Impartial Decisionmaker at Every Stage of Removal Proceedings, Including Review by the Attorney General

"[T]he Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). It is well-settled that "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities," including in the immigration context. *Abdulrahman v. Ashcroft*, 330 F.3d 587, 596 (3d Cir. 2003) (quoting *Schweiker v. McClure*, 456 U.S. 188, 195 (1982)). "[N]o person [may] be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Wang v. Att'y Gen. of the U.S.*, 423 F.3d 260, 269 (3d Cir. 2005) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)); *see also Cano-Merida v. INS*, 311 F.3d 960, 964-65 (9th Cir. 2002) (remanding where IJ's statements showed that he had "already judged" the respondent's claim); *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) (same). In line with these principles, a respondent in removal proceedings is entitled to independent and impartial review "throughout all phases of [the] proceedings"—in hearings before the IJ, on appeal to the Board, and, on the rare occasion it occurs, on referral to the Attorney General. *Serrano-Alberto v. Att'y Gen.*, 859 F.3d 208, 213 (3d Cir. 2017).

The federal courts have not hesitated to vacate removal orders where the proceedings before the IJ failed to satisfy constitutional requirements. These requirements include "a full and fair hearing" by a "neutral and impartial arbiter of the merits of [the] claim." *Abulashvili v. Att'y Gen.*, 663 F.3d 197, 207 (3d Cir. 2011) (quoting *Cham v. Att'y Gen.*, 445 F.3d 683, 691 (3d Cir. 2006)); *see also Aligwekwe v. Holder*, 345 Fed. App'x 915, 922 (5th Cir. 2009) (citing *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 302 (5th Cir. 2002)); *Cruz Rendon v. Holder*, 603 F.3d 1104, 1109 (9th Cir. 2010).

The Board has recognized that "the constitutional due process requirement that the hearing be before a fair and impartial arbiter" requires the recusal of IJs under certain circumstances. *Matter of Exame*, 18 I&N Dec. 303, 306 (BIA 1982). First, an IJ must recuse where "it [is] demonstrated that [he] had a personal, rather than judicial, bias stemming from an 'extrajudicial' source which resulted in an opinion on the merits on some basis other than what the immigration judge learned from his participation in the case." *Id.* Second, even when the conduct at issue is internal to the proceedings, an IJ must recuse where "such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party." *Id.* (quoting *Davis v. Board of School Comm'rs*, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976)). An IJ's "conduct [is] improper . . .

whenever a judge appears biased, even if she actually is not biased." *Abulashvili*, 663 F.3d at 207.

The same constitutional requirements apply to members of the Board. A neutral Board ensures a layer of impartial review that is independent of both IJs and the Attorney General. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 264-68 (1954) (holding that the Board must exercise its own discretion as provided in the regulations and may not defer to the Attorney General in determining the outcome of a case). In *Accardi*, the Attorney General had "announced at a press conference that he planned to deport certain 'unsavory characters'" and subsequently prepared a list of individuals he wished to have deported, including Accardi, which was circulated to employees of the Immigration Service and Board. *Id.* at 264. After the Board denied Accardi's application for suspension of deportation, Accardi challenged the decision on a petition for writ of habeas corpus, "charg[ing] the Attorney General with precisely what the regulations forbid him to do: dictating the Board's decision." *Id.* at 267. The Court held that it violates due process for the Board to "fail[] to exercise its own discretion, contrary to existing valid regulations." *Id.* at 268. The Court emphasized that this requirement "applies with equal force to the Board and the Attorney General," and that Accardi was entitled to a "fair hearing" and a decision based on the Board's exercise of "its own independent discretion." *Id.* at 267-68.

The due process principles discussed above "ha[ve] long been established by the Supreme Court," and courts have applied them in many other adjudicative contexts. *Wang v. Att'y Gen.*, 423 F.3d 260, 269 (3d Cir. 2005). It is axiomatic that the right to an impartial decisionmaker is inherent in due process. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). This well-established principle "preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). "Fairness of course requires an absence of actual bias . . . [b]ut our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). Thus, in determining whether a decisionmaker possesses the requisite impartiality to adjudicate a matter, "[t]he inquiry is an objective one" that asks "not whether the [decisionmaker] is actually, subjectively biased, but whether the average [decisionmaker] in his position is 'likely' to be neutral." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009).

As a practical matter, the due process right to an impartial decisionmaker is secured by multiple overlapping safeguards, with the restraint of conscientious decisionmakers playing a key role. For example, adjudicators routinely identify their personal and financial interests so they can be appropriately screened from

matters that implicate those interests. *Cf. In re Murchison*, 349 U.S. at 136 ("[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."). Recusal, removal by agency superiors, and disqualification are all important tools. Although the appropriate protections vary by situation, their combined effect is "to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Marshall*, 446 U.S. at 242.

Where the Attorney General acts as an adjudicator in his own right, he is subject to the same due process requirements as any other agency decisionmaker, IJ, or Board member. *See Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970); *Serrano-Alberto v. Att'y Gen.*, 859 F.3d 208, 213 (3d Cir. 2017). There is no exception to the impartiality requirement for immigration matters the Attorney General refers to himself.

## II. The Attorney General Cannot Impartially Adjudicate This Case

### A. Due Process Bars Participation by an Adjudicator Whose Public Actions Show He Has Prejudged or Appeared to Prejudge a Case

In determining whether an adjudicator possesses the requisite impartiality, the ultimate question is whether he is "capable of judging a particular controversy fairly on the basis of its own circumstances." *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) (quoting *United States v.*

*Morgan*, 313 U.S. 409, 421 (1941)). The adjudicator "enjoys a presumption of honesty and integrity," but that presumption may be rebutted on various grounds. *Harline v. Drug Enforcement Admin.*, 148 F.3d 1199, 1204 (10th Cir. 1998) (citing *Withrow*, 421 U.S. at 47).

The D.C. Circuit's decision in *Cinderella* sets forth the standard that applies when an agency head's public actions call into question the fairness of an adjudication in which the official is involved. In that case, the court considered whether then-Chairman of the Federal Trade Commission Paul Rand Dixon should have recused himself from an adjudication involving charges of false, misleading, and deceptive advertising "due to public statements he had previously made which allegedly indicated pre-judgment of the case on his part." *Cinderella*, 425 F.2d at 584-85. While the case was pending, Chairman Dixon had delivered a speech setting forth several examples of advertisements that newspapers should reject on ethical grounds, including one that appeared to correspond to the facts of the pending case. *Id.* at 589-90.

Analyzing whether the Chairman should have recused, the D.C. Circuit explained that "[t]he test for disqua[l]ification . . . [is] whether a disinterested observer may conclude that [the adjudicator] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Id.* at 591 (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959), *cert.*

*denied*, 361 U.S. 896 (1959)). The court concluded that Chairman Dixon's statements required his disqualification. *Id.* at 590-91. Separately, the court noted that public statements by an adjudicator risk "entrenching [him] in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." *Id.* at 590.

The test for disqualification set out in *Cinderella* is consistent with the standard for recusal adopted by the Board for "personal, rather than judicial, bias." *Matter of Exame*, 18 I&N at 306 (explaining that recusal is required where the adjudicator has a "personal . . . bias stemming from an 'extrajudicial' source"). And the facts of *Cinderella* are instructive regarding the special concerns that arise when the decisionmaker is an agency head who performs a range of official duties other than adjudication. These concerns are especially pronounced in relation to the Attorney General, who serves as an immigration adjudicator only rarely and spends the majority of his time in roles that do not just involve but depend on partiality, such as serving as an Administration spokesperson on immigration and maintaining a political affiliation with the president.

### B. The Attorney General's Public Statements and Other Actions Raise an Unconstitutional Appearance of Bias in the These Particular Cases

Although no previous Attorney General has addressed the "good cause" standard for continuances on referral, the Board provided guidance in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). In that case, the Board identified a list of five factors for IJs to consider in determining whether to continue removal proceedings to allow for the adjudication of a family-based visa petition: (1) "the DHS's position on the motion to continue"; (2) "whether the underlying visa petition is prima facie approvable"; (3) "the respondent's statutory eligibility for adjustment of status"; (4) "whether the respondent's application for adjustment merits a favorable exercise of discretion"; and (5) "the reason for the continuance and any other relevant procedural factors." *Id.* at 794. The Board noted that the definition of "good cause" is specific to the facts and circumstances of a particular case. *Id.* at 788.

The Attorney General's public activities over a period of many years, including statements made in his official capacities as a United States senator and Attorney General, compromise his impartiality in these particular cases. Three categories of conduct, in particular, give rise to an unconstitutional potential for bias: (1) the Attorney General's public statements suggesting that he already has decided to limit the availability of continuances based on pending collateral

matters; (2) the volume, timing, and substance of referral orders, which create the appearance that the Attorney General is using the referral authority to pursue political and policymaking objectives rather than legitimate adjudicative ends; and (3) the Attorney General's statements expressing bias toward certain categories of noncitizens, among them categories that include respondents in the referred cases.

### 1. The Attorney General's Public Statements Evidence Prejudgment Regarding the Availability of Continuances

The Attorney General's public statements strongly suggest prejudgment as to the use of continuances, both in particular and as part of a larger set of practices that extend removal proceedings or allow noncitizens to remain in the United States. Because the Attorney General referred these cases to himself to review the standard for continuances, AG Decision at 245, these statements go to the heart of the case.

On December 5, 2017, the Attorney General issued a memorandum to the Executive Office for Immigration Review ("EOIR"), the agency that employs both IJs and members of the Board.[8] That memorandum, titled "Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest," emphasized the goal of speeding up removal proceedings and instructed EOIR staff to "increase productivity, enhance

[8] Att'y Gen., *Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest* (Dec. 5, 2017).

efficiencies, and ensure the timely and proper administration of justice."[9] It explained that "delayed decision making" does not serve the national interest and that "performance measures" aid in "[t]he efficient and timely completion of cases."[10] Notably, the Attorney General stated: "***I . . . anticipate clarifying certain legal matters in the near future that will remove recurring impediments to judicial economy and the timely administration of justice.***"[11] Weeks later, the Attorney General issued his first referral order in *Matter of Castro-Tum*, certifying to himself far-reaching questions related to the practice of administrative closure. 27 I&N Dec. 187 (A.G. 2018). Two months after that, he referred the underlying cases in *Matter of L-A-B-R-* for review of issues relating to the use of continuances. AG Decision at 245. Proximity in time is significant in determining whether an official's public statements give rise to an appearance of prejudgment. *See Cinderella*, 425 F.2d at 590 n.10 ("In light of the timing of the speech in relation to the proceedings herein, we think the reasonable inference a disinterested observer would give these remarks would connect them inextricably with this case.").

Moreover, in determining whether an adjudicator's involvement in a case gives rise to a "probability of unfairness," the overall "relationships" and "[c]ircumstances . . . must be considered." *In re Murchison*, 349 U.S. 133, 136

[9] *Id.* at 1.

[10] *Id.* at 2.

[11] *Id.* at 1 (emphasis added).

(1955). In January 2018, when the Attorney General first began to certify sweeping immigration questions to himself, EOIR's director issued a memorandum "in accordance with the Attorney General's principles" to "lay[] out EOIR's specific priorities and goals in the adjudication of immigration court cases."[12] This memorandum informed IJs that they would be subject to "court performance measures" and "case completion goals," in part to "ensure . . . that EOIR . . . is addressing its pending caseload in support of the principles established by the Attorney General."[13] More recently, DOJ announced annual case quotas, case adjudication deadlines, and remand rates that will apply to individual judges.[14] Sitting IJs and others have raised concerns that these requirements, once implemented, will promote hasty adjudications at the expense of due process, particularly in combination with curtailed use of continuances and administrative closure.[15] This sequence of events, in combination with the statements in the Attorney General's December 5 memorandum, strongly suggests that the Attorney

[12] James R. McHenry III, Dir., EOIR, *Case Priorities and Immigration Court Performance Measures*, at 1 (Jan. 17, 2018); *see also id.* App'x A.

[13] *Id.* at 4.

[14] Laura Meckler, *New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportations*, Wall Street J. (Apr. 2, 2018), https://www.wsj.com/articles/immigration-judges-face-new-quotas-in-bid-to-speed-deportations-1522696158.

[15] *See, e.g.*, Lorelei Laird, *Justice Department Imposes Quotas on Immigration Judges, Provoking Independence Concerns*, ABA Journal (Apr. 2, 2018), http://www.abajournal.com/news/article/justice_department_imposes_quotas_on_immigration_judges_provoking_independe (citing sitting IJ and president of the National Association of Immigration Judges A. Ashley Tabaddor for the proposition that "[a] quota system invites the possibility that judges will make decisions out of concern about keeping their jobs . . . rather than making what they think is the legally correct decision"); *see also* note 25, *infra*.

General had decided to limit the availability of continuances prior to referring these cases to himself.

These recent actions are consistent with the Attorney General's long history of opposition to any practice that extends removal proceedings, particularly where that extension authorizes or has the effect of allowing the respondent to remain in the United States. For example, in the following remarks as a senator, the Attorney General expressed the view that removal should occur immediately after adjudication by the agency, notwithstanding pending appeals:

> We have to simply understand that there is no right to be here after a final adjudication has occurred while your case is on appeal in the court of appeals. But we allow them to. We give them a right. . . . The court of appeals can override the adjudicating authority of the Immigration Service and allow the person to stay if they choose. We have had an abuse of that. We have had 10,000 such cases. With this amendment, we are going to see even more such cases.
>
> I suggest that we must get serious about immigration. The more we create appellate possibilities, the more we can confuse the law. The more we create exception after exception after exception, the more unable we are to operate a system effectively and fairly.
>
> The fair principle is, if you are adjudicated not to be here, you have no right to be here. But we give you a generous right to appeal to a court one step below the U.S. Supreme Court, but you have to go home until that court decision. If they override it, he can come back.
>
> I think that is preciously generous. I think that is fair and right, and it also provides that court, in narrow areas, to extend and allow a person to stay if they feel it is necessary to do so.

152 Cong. Rec. 9542 (2006) (statement of Sen. Sessions).

The Attorney General's public statements also implicate the additional concern raised by the D.C. Circuit in *Cinderella*: regardless of whether a decisionmaker is subjectively biased, public statements can "entrench[]" that decisionmaker in the "position which he has publicly stated" and "mak[e] it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." 425 F.2d at 590. Here, where the adjudicator in question is a political appointee associated with the current Administration's professed political agenda of rapid removals, those principles apply with particular force.[16] In light of the many public statements in which the Attorney General and President have "entrench[ed]" their position that noncitizens should be deported as quickly as possible, *Cinderella*, 425 F.2d at 590,

[16] *See, e.g.*, *Transcript of Donald Trump's Immigration Speech* (Sept. 1, 2016), https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html ("According to federal data, there are at least two million, two million, think of it, criminal aliens now inside of our country, two million people criminal aliens. We will begin moving them out day one. As soon as I take office. Day one . . . Day one, my first hour in office, those people are gone."); Donald Trump (@realDonaldTrump), Twitter (Feb. 12, 2017, 3:34AM), https://twitter.com/realdonaldtrump/status/830741932099960834 ("The crackdown on illegal criminals is merely the keeping of my campaign promise. Gang members, drug dealers & others are being removed!"); Donald Trump (@realDonaldTrump), Twitter (Apr. 18, 2017, 2:39AM), https://twitter.com/realdonaldtrump/status/854268119774367745 ("The weak illegal immigration policies of the Obama Admin. allowed bad MS 13 gangs to form in cities across U.S. We are removing them fast!); *President Trump Meeting with Cabinet* (June 12, 2017), https://www.c-span.org/video/?429863-1/president-touts-accomplishments-cabinet-meeting ("Great success, including MS-13. They're being thrown out in record numbers and rapidly. And, uh, they're being depleted. They'll all be gone pretty soon. So, you're right, Jeff. Thank you very much."); *Remarks by President Trump During Meeting with Immigration Crime Victims* (June 28, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-immigration-crime-victims/ ("MS-13 is a prime target . . . We're getting them out as fast as we can get them out."); Donald Trump (@realDonaldTrump), Twitter (Feb. 6, 2018, 5:32AM), https://twitter.com/realdonaldtrump/status/960868920428253184 ("We must get the Dems to get tough on the Border, and with illegal immigration, FAST!"); *see also* Elizabeth Landers, *White House: Trump's tweets are 'official statements,'* CNN (June 6, 2017), https://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html.

the "average [decisionmaker]" in the Attorney General's position is not "'likely' to be neutral" in an adjudication that requires him to either confirm or reject that position, *see Caperton*, 556 U.S. at 881.

### 2. The Attorney General's Use of the Referral Authority Departs from Previous Practice and Creates the Appearance That He is Choosing Cases to Achieve Predetermined Political and Policymaking Goals

Unlike IJs and Board members, the Attorney General does not serve as a day-to-day adjudicator of immigration proceedings. Rather, a case comes before the Attorney General only where it has been (1) referred by the Attorney General to himself; (2) referred to the Attorney General by the Chairman or a majority of the Board; or (3) referred to the Attorney General by the Secretary of Homeland Security or another designated DHS official. 8 C.F.R. § 1003.1(h)(1). Here, the relevant cases were self-referred. This unusual context distinguishes the Attorney General from typical adjudicators and creates a heightened potential for bias that factors into the impartiality inquiry.

In most adjudicative settings, the risk that a decisionmaker will preside over a case he or she lacks the requisite impartiality to decide can be significantly mitigated by use of safeguards like screening procedures and codes of conduct. For example, proper screening and case assignment processes can prevent a matter from ever reaching an adjudicator who has expressed an opinion on its merits or has a financial or other personal interest in its resolution. Similarly, ethical codes

of conduct can help eliminate behavior that would create the appearance of impropriety and require an adjudicator's disqualification, like the Chairman's speech in *Cinderella*.

The Attorney General's role in the immigration context differs from that of most adjudicators. Not only does the referral process lack formal safeguards like an external screening process, but—at least under the Attorney General's interpretation of the referral regulation—he may reach into the vast immigration system and pull out any case he wishes to decide. This latitude greatly heightens the risk of potential bias. Thus, the Attorney General must be careful to avoid giving rise to an appearance of prejudgment in either the selection of cases or their review. Unfortunately, his actions to date have had the opposite effect.

The Attorney General has invoked the self-referral provision of the referral regulation four times since January 2018. Out of all the cases the Attorney General could have certified, including many in which capable counsel have appeared for respondents before the Board, he has chosen at least three in which the respondents were pro se. In one of the referred matters, he vacated the Board's decision; in the three that remain pending, he certified sweeping questions to himself. This expansive use of the referral authority—particularly as applied to pro se respondents—departs from the practices of past Attorneys General and, in conjunction with the Attorney General's public statements and political

commitments, creates an appearance of bias that renders him unfit to decide this case.

Over the three-month period beginning in January 2018, the Attorney General referred the following four matters to himself:

- *Matter of Castro-Tum*, 27 I&N Dec. 187 (A.G. 2018) (issued Jan. 4, 2018): In his first referral order, which involved a pro se respondent, the Attorney General identified seven far-reaching questions as "relevant to the disposition of th[e] case." *Id.* at 187. These questions include whether "Immigration Judges and the Board have the authority . . . to order administrative closure in a case"; whether the Attorney General "should . . . withdraw that authority"; and "what actions should be taken regarding cases that are already administratively closed." *Id.*

- *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018) (issued Mar. 5, 2018): Two months later, the Attorney General referred to himself the Board's decision in *Matter of E-F-H-L-* and vacated that decision. *Id.* at 226. The IJ in that case had denied the respondent's application for asylum and withholding of removal without holding an evidentiary hearing, and the Board had remanded, "holding that a respondent applying for asylum and withholding of removal was ordinarily entitled to a full evidentiary hearing." *Id.* The respondent subsequently withdrew his application, and the IJ administratively closed the removal proceedings to allow for the adjudication of a collateral petition. *Id.* The Attorney General vacated the Board's decision, reasoning that respondent's withdrawal of the application had "effectively mooted" it, and directing that the matter be "recalendared and restored" to the IJ's docket. *Id.*

- *Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018) (issued Mar. 7, 2018): Two days after referring and vacating *Matter of E-F-H-L-*, the Attorney General self-referred another asylum case. He certified the following question for review: "Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an applicable for asylum or withholding of removal." *Id.*

- *Matter of L-A-B-R-* (issued Mar. 22, 2018): Most recently, the Attorney General referred three consolidated cases to himself "for review of issues relating to when there is 'good cause' to grant a continuance for a collateral matter to be adjudicated." AG Decision at 245.

This use of the referral authority departs from recent practice. During the eight years of the Obama Administration, the Attorney General issued a decision in a self-referred case, on average, only once every two years. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 796 (A.G. 2016); *Matter of Silva-Trevino*, 26 I&N Dec. 550 (A.G. 2015); *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011); *Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009). During the Bush Administration, Attorneys General were more active, but none matched the Attorney General's current pace or scope of review. This departure from past practice is significant. Although there is little case law addressing the referral authority itself—including its validity, scope, and the process required—the Third Circuit has suggested, in the context of rejecting the methodology used by Attorney General Mukasey in the referred case *Matter of Silva-Trevino*, that it "bear[s] mention" when the Attorney General takes an "unusual" approach in matters of referral and adjudication. *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 470 n.11 (3d Cir. 2009).

The risk of bias is further heightened by the Attorney General's specific role within the Administration, including his close association with and responsibility for the President's stated policy of facilitating rapid deportations. As recently as

April 2, 2018, the President expressed the view that certain respondents in removal proceedings are entitled to no process whatsoever, stating: "As ridiculous as it sounds, the laws of our country do not easily allow us to send those crossing our Southern Border back where they came from. A whole big wasted procedure must take place."[17] To the extent the policies expressed in these tweets require action by DOJ, the Attorney General is the cabinet-level official tasked with carrying them out. In official speeches on immigration issues, the Attorney General routinely references the President and acknowledges that he is speaking on the President's behalf. For example, in a December 12 speech explaining that the Administration is pursuing a practice of "completing, not closing, immigration cases," the Attorney General attributed those policies to the President and informed the audience of DOJ officials that he was "looking forward to working with you to . . . implement the President's ambitious agenda."[18]

That is not to say that every political operative is disqualified from participating in adjudication, or that an agency head's multiple overlapping roles automatically compromise that official's impartiality. On the contrary, courts have concluded in other contexts that "the combination of investigative and adjudicative

[17] Donald Trump (@realdonaldtrump), Twitter (Apr. 2, 2018, 5:00 PM), https://twitter.com/realDonaldTrump/status/980958298445885446.

[18] Jefferson B. Sessions III, Att'y Gen., *Attorney General Sessions Delivers Remarks on the Administration's Efforts to Combat MS-13 and Carry Out its Immigration Priorities* (Dec. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-administrations-efforts-combat-ms-13-and-carry.

functions does not, without more, constitute a due process violation." *Khouzam v. Att'y Gen.*, 549 F.3d 235, 258 (3d Cir. 2008) (quoting *Withrow*, 421 U.S. at 58). At the same time, "[courts] are not precluded in a particular case from finding 'that the risk of unfairness is intolerably high.'" *Id.* (quoting *Withrow*, 421 U.S. at 58); *see also Walker v. City of Berkeley*, 951 F.2d 182, 185 (9th Cir. 1991) (holding that, although "[d]ue process can permit the same administrative body to investigate and adjudicate a case," a city staff attorney's dual role "denied [plaintiff] an impartial decisionmaker"). *Cinderella* provides the guiding test: where the agency head has prejudged or appeared to prejudge a case, or where he has entrenched himself a position it would be difficult or impossible to contradict, disqualification is required. In this case, the Attorney General's competing roles create an impermissible risk of partiality.

Recent media reports establish that the Attorney General's actions have already created the appearance of bias in the matters he has referred to himself. An NPR article published shortly after the Attorney General's referral in this case described the recent referrals as related and suggested that they are intended to result in predetermined policy changes:

> Sessions is using his authority over the immigration court system to review a number of judicial decisions . . . . In this way, he is expected to end administrative closure, or scale it back. The attorney general

> may also limit when judges can grant continuances and who qualified for asylum in the United States.[19]

The ultimate goal, according to a clinical law professor quoted in the article, is "an immigration court system which is rapid, and leads to lots of deportations."[20] The article also quotes the president of the National Association of Immigration Judges for the view that the Attorney General's policies "raise[] very serious concerns about the integrity of the system" and that "judges are supposed to be free from these external pressures."[21]

A recent Breitbart article reflects a similar public perception regarding the Attorney General's strategic use of the referral authority. For example, the article explains that *Matter of Castro-Tum* "will allow Sessions to approve or end the practice of 'administrative closure,' in which judges officially forget about enforcing deportation orders and so effectively grant illegals the right to reside in the United States."[22] Similarly, the article quotes a former IJ and fellow at the Center for Immigration Studies for the proposition that the referral of *Matter of A-B-*, which sets forth a facially neutral question about asylum classification,

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[19] *Sessions Pushes to Speed Up Immigration Courts, Deportations*, National Pub. Radio (Mar. 29, 2018), https://www.npr.org/2018/03/29/597863489/sessions-want-to-overrule-judges-who-put-deportation-cases-on-hold.

[20] *Id.*

[21] *Id.*

[22] Neil Munro, *AG Sessions Helping Immmigration Courts End 'Catch-and-Release'*, Breitbart (Mar. 9, 2018), http://www.breitbart.com/big-government/2018/03/09/ag-sessions-helping-immigration-courts-end-catch-and-release/.

"represents a further attempt by the Attorney General to reduce the immigration-court backlog."[23] Ultimately, the article connects the Attorney General's expected decision in *Matter of A-B-* to a long-term goal: "Once the backlog is minimized, all future asylum-seeking migrants can be held in detention until their cases are heard. That option will allow officials to end the 'catch and release' policy which now allows many migrants through the border and into the U.S. jobs market."[24]

As these articles and others make clear, the Attorney General's actions have created the appearance that he is using the referral authority—in combination with other powers of the office—to remake the immigration system in line with policy goals he has already determined, rather than to decide individual cases on their merits.[25] Such an adjudicator is not "capable of judging a particular controversy fairly on the basis of its own circumstances." *Hortonville Joint Sch. Dist. No. 1 v.*

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[23] *Id.*

[24] *Id.*

[25] Laura Meckler, *New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportations*, Wall Street J. (Apr. 2, 2018), https://www.wsj.com/articles/immigration-judges-face-new-quotas-in-bid-to-speed-deportations-1522696158; Elise Foley, *Jeff Sessions Has the Power to Shape Asylum Policy. He Could Be Gearing Up to Use It to Deny Relief to Domestic Violence Victims.*, Huffington Post (Mar. 14, 2018), https://www.huffingtonpost.com/entry/sessions-asylum-deportations_us_5aa9729fe4b0600b82ff93b4; Manuel Madrid, *Jeff Sessions Is Just Getting Started on Deporting More Immigrants*, The Am. Prospect (Jan. 23, 2018), http://prospect.org/article/jeff-sessions-just-getting-started-on-deporting-more-immigrants; Christie Thompson, *The DOJ Decision That Could Mean Thousands More Deportations*, The Marshall Project (Jan. 9, 2018), https://www.themarshallproject.org/2018/01/09/the-doj-decision-that-could-mean-thousands-more-deportations; Sarah Sherman-Stokes, *Sessions's Immigration Orders Threaten Judicial Independence*, The Hill (Dec. 18, 2017), http://thehill.com/opinion/immigration/365319-sessions-immigration-orders-threaten-judicial-independence.

*Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)). The appearance of bias requires the Attorney General's recusal in this case.

### 3. The Attorney General's Public Statements Evidence Bias Toward Noncitizens Whose Interests Are Implicated in the Referral Order

Over a period of many years, as both a U.S. senator and in his current role, the Attorney General has expressed the view that noncitizens with certain personal characteristics—particularly those who do not meet specific standards for income, education, professional skills, and language ability, or whose family ties might provide a basis for immigration relief—should be excluded or removed from the United States. Here, the referred cases require the Attorney General to decide matters that turn on these characteristics, including whether respondents should be allowed to remain in the United States to pursue immigration relief based on family relationships. If the Attorney General limits the availability of continuances based on pending collateral proceedings, respondents could be removed even if they ultimately would qualify for immigration relief. Thus, the Attorney General's public statements create an impermissible risk of bias with respect to these specific respondents. The following statements, among others, call into question whether the Attorney General is sufficiently impartial to decide the cases he has referred to himself.

- "We should give priority to those who are likely to thrive here—such as those who speak English or are highly skilled—not someone chosen at random or who happens to be somebody's relative."[26]

- "Chain migration is going to increase until 2015. The portion of family-based migration versus merit-based migration will be worse than it is today, perhaps much worse. Think about that." 153 Cong. Rec. 13259 (2007) (statement of Sen. Sessions).

- "Well, if they are illiterate in their home country they're not likely to be a police officer the next week in the United States, are they?"[27]

- "We think under the bill that 70, 80 percent of the people entered will be low-skill immigrants. We know about two-thirds, over 60 percent at least, of those who are here illegally today and are proposed for amnesty are high school dropouts. They do not have high school degrees. They are not going to be able to be highly successful in our workplace."[28]

- "The American people have known for more than 30 years that our immigration system is broken. It's intentionally designed to be blind to merit. It doesn't favor education or skills. It just favors anybody who has a relative in America—and not necessarily a close relative. That defies common sense. Employers don't roll dice when deciding who they want to hire. Our incredible military doesn't draw straws when deciding whom to accept. But for some reason, when we're picking new Americans—the future of this country—our government uses a randomized lottery system and chain migration."[29]

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[26] *Attorney General Sessions Delivers Remarks on the Administration's Efforts to Combat MS-13 and Carry Out its Immigration Priorities* (Dec. 12, 2017).

[27] Adam Serwer, *Jeff Sessions's Fear of Muslim Immigrants*, Atlantic (Feb. 8, 2017), https://www.theatlantic.com/politics/archive/2017/02/jeff-sessions-has-long-feared-muslim-immigrants/516069/.

[28] Center for Immigration Studies, *Implications of the Hagel-Martinez Amnesty Bill* (June 15, 2006), https://cis.org/Implications-HagelMartinez-Amnesty-Bill.

[29] Jefferson B. Sessions III, Att'y Gen., *Attorney General Sessions Delivers Remarks on National Security and Immigration Priorities of the Administration* (Jan. 26, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-national-security-and-immigration-priorities.

- "[A] central idea of the President's immigration reform proposal is switching to a merit-based system of immigration. That means welcoming the best and the brightest but banning and deporting gang members, identity fraudsters, drunk drivers, and child abusers—making them inadmissible in this country. This merit-based system would better serve our national interest because it would benefit the American people, which is what the Trump agenda is all about."[30]

- "The President is exactly correct about the changes we need to our immigration system. We have now seen two terrorist attacks in New York City in less than two months that were carried out by people who came here as the result of our failed immigration policies that do not serve the national interest—the diversity lottery and chain migration. The 20-year-old son of the sister of a U.S. citizen should not get priority to come to this country ahead of someone who is high-skilled, well educated, has learned English, and is likely to assimilate and flourish here."[31]

- "I think we are too far down the road of an entitlement mentality. This whole bill contemplates people having an entitlement to come to America, to bring in their parents and children, and they are entitled to have them ultimately be on Medicare and go to hospitals and be treated, even though they are not properly here." 152 Cong. Rec. 8553 (2006) (statement of Sen. Sessions).

- "In seven years we'll have the highest percentage of Americans, non-native born, since the founding of the Republic. Some people think we've always had these numbers, and it's not so, it's very unusual, it's a radical change. When the numbers reached about this high in 1924, the president and congress changed the policy, and it slowed down immigration significantly, we then assimilated through the 1965 and created really the solid middle class of America, with assimilated immigrants, and it was good for America. We passed a law that went far

[30] *Id.*

[31] Jefferson B. Sessions III, Att'y Gen., *Attorney General Sessions Issues Statement on the Attempted Terrorist Attack in New York City* (Dec. 11, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-issues-statement-attempted-terrorist-attack-new-york-city.

beyond what anybody realized in 1965, and we're on a path to surge far past what the situation was in 1924."[32]

- "Fundamentally, almost no one coming from the Dominican Republic to the United States is coming here because they have a provable skill that would benefit us and that would indicate their likely success in our society."[33]

A disinterested observer would have no trouble concluding that the statements above render the Attorney General unable to fairly decide the referred cases. Considered under an objective standard, these statements display prejudgment as to whether respondents with certain personal characteristics—among them family ties that could provide a basis for immigration relief—should be allowed to remain in the United States. Were an IJ or member of the Board to express similar views in a case that turned on that issue, the federal courts would vacate the ensuing removal order, holding that the adjudicator's lack of impartiality violated basic principles of due process. *See* Section I, *supra*. At a minimum, an Attorney General who expresses such views must be held to the same standards as the Department of Justice employees he oversees; the Attorney General is not above the law.

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[32] Adam Serwer, *Jeff Sessions's Unqualified Praise for a 1924 Immigration Law*, Atlantic (Jan. 10, 2017), https://www.theatlantic.com/politics/archive/2017/01/jeff-sessions-1924-immigration/512591/ (describing interview between Sen. Sessions and Stephen Bannon of Breitbart).

[33] Sam Stein & Amanda Terkel, *Donald Trump's Attorney General Nominee Wrote Off Nearly All Immigrants From An Entire Country*, Huffington Post (Nov. 19, 2016), https://www.huffingtonpost.com/entry/jeff-sessions-dominican-immigrants_us_582f9d14e4b030997bbf8ded.

## CONCLUSION

For the foregoing reasons, principles of due process bar the Attorney General from participating in the matter he has referred to himself. The Attorney General must vacate the referral order or recuse himself from this case.

Dated: May 1, 2018

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the instructions in the Attorney General's referral order dated March 22, 2018 because the brief contains 8,229 words, excluding the cover page, Table of Contents, Table of Authorities, signature block, Certificate of Compliance, and Certificate of Service.

Dated: May 1, 2018

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## CERTIFICATE OF SERVICE

I hereby certify that, on May 1, 2018, the foregoing brief was submitted electronically to AGCertification@usdoj.gov and in triplicate via FedEx to:

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