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**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

**IMMIGRATION COURT**

**FORT SNELLING, MINNESOTA**

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**In the Matter of:** **)**

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**Y- G- P-** **)** **File No. A )**

**)**

**In Removal Proceedings** **)**

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**Judge Katherine Hansen                                     Next Hearing:**

**RESPONDENT’S OPPOSITION TO THE DEPARTMENT OF HOMELAND SECURITY’S MOTION TO DISMISS**

**June 15, 2022**

**Sarah Brenes**

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**Y- G- P-** **)** **File No. A XXX-XXX-XXX**

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**RESPONDENT’S OPPOSITION TO DHS’S MOTION TO DISMISS**

On June 14, 2022, Respondent received from the Department of Homeland Security (DHS) Office of the Principal Legal Advisor (OPLA) 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]](#footnote-2) For the reasons set forth below, the Court should deny DHS’s motion to dismiss.

**I.** **FACTS AND PROCEDURAL HISTORY**

Respondent, Ms. Y- G- P-, is a citizen of Guatemala. On February 7, 2015, Ms. G- P- and her children (collectively referred to hereinafter as “Respondents”) presented themselves at the Calexico West Port of Entry and requested asylum. Exh. 1A. Respondents were paroled into the United States and released from custody. They relocated to Sioux Falls, South Dakota. In June 2015, Ms. G- P- filed an application for asylum at a master calendar hearing, including her minor children as derivatives. Exh. 6A. Her individual hearing date was originally scheduled for August 5, 2015 but was rescheduled for November 25, 2015. Exh. 8A. Ms. G- P- attended and complied with all master calendar hearings before the Immigration Court.

 After she received emergency medical treatment in September 2015, she requested to appear for her November hearing by telephone. The Immigration Judge denied this request and ordered Ms. G- P- and her children to be removed *in absentia* for failing to appear at the hearing. Respondent filed a motion to reopen, and after denial by the Immigration Judge and The Board of Immigration Appeals appealed to the Eight Circuit. Following the Eight Circuit’s ruling, Respondent filed a motion to rescind and reopen with the Immigration Judge. In response, on March 16, 2022, the Immigration Judge issued an order to reopen Respondent’s removal proceedings to allow the Respondent the opportunity to participate in her individual hearing. Exh.\_\_\_, IJ Order dated 03/16/2022. On March 28, 2022, the Immigration Judge issued a hearing notice for the individual hearing currently scheduled for June 30, 2022. Exh. 35. Respondent promptly worked to assemble paperwork and gather filing fee funds for a request for humanitarian parole. The I-131 application for humanitarian parole was received by the US Citizenship and Immigration Service on May 20, 2022. On June 2, 2022, Respondent received notice from the U.S. Department of Homeland Security, Homeland Security Investigations Services Division confirming an estimated processing time of 90-120 days. *See* Exh. \_\_\_ Respondent’s Motion for Continuance at 11-13.

Ms. G- P- sought asylum in the United States after being subjected to violence in Guatemala. Her husband was attacked by gang members in Guatemala for refusing to cooperate with them. After her husband fled Guatemala, the gang members targeted her. When she refused and told them she would report them to the police, the gang members threatened to murder her, as well as kidnap, torture, rape, and murder her three daughters. After police and the government failed to take any action to protect her, Ms. G- P- fled Guatemala in 2015. She arrived at the U.S. border in February 2015 with her three daughters, the youngest not even a month old. Ms. G- P- explained her fear of return to an immigration officer and was given an I-94 and released from the custody of the U.S. Department of Homeland Security.[[2]](#footnote-3)

**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). This Court should deny DHS’s motion

to dismiss because Respondent wishes to have this Court adjudicate her pending application for asylum, and 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 she is not able to pursue her application for asylum before this Court. Even evaluating DHS’s position 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)).

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 Her Asylum 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 her asylum 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. *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 his or her 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 her asylum 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).

*1.* *Respondent Wishes to Pursue Asylum Before the Court and Will Suffer Harm If Not Able to Do So.*

Respondent has applied for asylum and wishes to continue to pursue this relief before the Court. Respondent has already been waiting for over seven years for adjudication of her asylum case and forcing her to start over would be detrimental to her case, her mental and physical health, and the efficiency of the Court system. As in *Matter of W-Y-U-*, here Respondent seeks a merits adjudication from this Court on her pending application for relief, which if granted would make her “eligible for lawful status in the United States,” whereas dismissal provides 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.* *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). Respondent has a statutory right to seek asylum. INA §208(a)(1). 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 her asylum claim would subvert Congress’s clearly articulated intent. It would also violate 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)).

Respondent is also seeking related mandatory[[3]](#footnote-4) forms of relief—withholding of removal under INA § 241(b)(3) and protection under the Convention Against Torture (CAT)—for which she is entitled to apply and which she can only pursue in removal proceedings.[[4]](#footnote-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.

In sum, dismissal is inappropriate here, given Respondent’s interest in having the case resolved on the merits and her right to be heard on her asylum claim. *See W-Y-U-*, 27 I&N Dec. at 19. 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—she remains eligible for asylum and continues to desire an adjudication on her claim on the merits by this Court. *See supra* Section II.B.

Respondent has been waiting for an adjudication of her asylum application and related humanitarian protection that only this Court has jurisdiction to grant for seven 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 G- P-, considering 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 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 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-](https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf)

[immigration-enforcement\_guidanceApr2022.pdf](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 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.

*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 her current position before the Court, after the passage of time and

expenditure of considerable government resources. This process would result in a much larger aggregate expenditure of resources than allowing Respondent’s claim to proceed now as she desires.

In contrast, this Court’s adjudication of Respondent’s asylum application promotes finality of the removal proceedings and prevents waste of government resources. If this case is allowed to move forward, the individual hearing 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 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.

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 the reasons stated above, this Court should deny DHS’s motion to dismiss and allow Respondent to proceed to the merits of the applications pending before the Court.

Respectfully submitted,

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ June 15, 2022

**Sarah Brenes**

***Pro Bono* Counsel for Respondent**

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**UNITED STATES DEPARTMENT OF JUSTICE**

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| **In the matter of:****Y- G- P-****In Removal Proceedings** | **File No. A XXX-XXX-XXX** |

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**A XXX-XXX-XXX**

**G- P-, Y-**

**PROOF OF SERVICE**

On June 15, 2022, I, Sarah Brenes, served a copy of this \_\_\_\_\_ Respondent’s Opposition To The Department Of Homeland Security’s Motion To Dismiss and any attached pages to \_Office of Principal Legal Advisor\_\_\_\_\_\_ at the following address: \_\_\_1 Federal Drive, Suite 1800, Fort Snelling, MN 55111\_\_\_\_\_\_\_\_\_ by hand delivery.

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(signature) (date)

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. [↑](#footnote-ref-2)
2. For a more detail procedural history, see Respondent’s Legal Brief on Her Motion to Reopen and Rescind her In Absentia Removal Order, 11/1/2021, Exh. 32 at 1-5. [↑](#footnote-ref-3)
3. S*ee* 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. ”). [↑](#footnote-ref-4)
4. *See* Form I-589 Instructions, at 2 (Aug. 25, 2020), https:/[/ww](http://www.uscis.gov/sites/default/files/document/forms/i-)w[.uscis.gov/sites/default/files/document/forms/i-](http://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.) [↑](#footnote-ref-5)