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Practitioner Notes for Template Opposition to DHS Motion to Dismiss to Pursue Expedited Removal

- This template opposition is intended for practitioners who represent a client in removal proceedings where DHS has filed a 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, because DHS is now pursuing expedited removal.
- 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 cite to the record when asserting facts; assertions by counsel are not evidence. *See Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) (“[S]tatements in a brief . . . 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 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).
- If the IJ grants DHS's motion to dismiss, practitioners should consider timely filing a BIA appeal. During the period the BIA appeal is pending, practitioners should argue that DHS may not pursue expedited removal, as the IJ decision is not final. 8 C.F.R. §§ 1003.39, 1240.14. While EOIR has jurisdiction, it is the IJ, not DHS, who has authority to make determinations about a noncitizen's removability. INA §§ 240(a)(1), (a)(3), (c)(1)(A). While removal proceedings are pending, DHS may present evidence of the respondent's alleged inadmissibility, 8 C.F.R. § 1240.2(a), but it is the IJ who makes the inadmissibility determination. If the BIA dismisses the appeal but the client has since completed two years in the United States, noncitizens should argue they are not amenable to expedited removal. *See* INA § 235(b)(1)(A)(iii)(II) (authorizing expedited removal of certain noncitizens not admitted or paroled who have not been continuously physically present for the two-year period “immediately prior to the date of the *determination of inadmissibility under this subparagraph.*” (emphasis added)). The IJ's inadmissibility determination would not be considered final until the BIA dismisses the appeal and DHS's jurisdiction to make this unilateral determination through expedited removal is restored. DHS makes determinations of inadmissibility in expedited removal proceedings on Form I-860. 8 C.F.R. § 235.3(b)(2).

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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

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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. DHS alleges that, pursuant to 8 C.F.R. § 239.2(a)(7), the circumstances of this case have changed after the issuance of the Notice to Appear to such an extent that continuation is no longer in the best interest of the government because the government has now decided that it would like to pursue expedited removal against the Respondent. OPLA did not seek Respondent’s position before filing the motion to dismiss, and Respondent strenuously 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), <https://www.justice.gov/eoir/reference-materials/ic/chapter-5/2>. The Court should reject DHS’s motion for their failure to comply with the ICPM by not making a good faith effort to contact Respondent’s counsel.

I. FACTS AND PROCEDURAL HISTORY

DHS issued a Notice to Appear (NTA) to initiate these removal proceedings against Respondent on [DATE], alleging that Respondent [*summarize factual allegations and state charge(s)*]. DHS filed the NTA on [DATE], commencing these removal proceedings.

[If accurate: Respondent 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 the 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 marriage-based adjustment case, briefly describe the status of the I-130 petition and the Respondent's admission or parole satisfying INA § 245(a).]

[Generally summarize in this section what has happened in the removal proceedings so far, highlighting Respondent's efforts and behavior changes made in response to the removal proceedings, e.g. Respondent's retaining of counsel, number of master calendar hearings attended, etc.].

II. ARGUMENT

This Court should deny DHS's motion to dismiss. In adjudicating DHS's motion, this Court must consider Respondent's arguments in opposition to the motion. *Matter of G-N-C-*, 22 I&N Dec. 281, 284-85 (BIA 1998). 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, since DHS has chosen to commence INA § 240 proceedings, [he/she] has a right to be heard on that claim. Further, Respondent will suffer serious prejudice 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. In fact, DHS cannot lawfully apply expedited removal to the Respondent, as doing so would violate bedrock anti-retroactivity law. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

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

This Court has the exclusive authority to decide whether or not to dismiss these removal proceedings, and it must consider the Respondent's reasons for opposing DHS's motion. *See* 8 C.F.R. § 1239.2(c); *Matter of G-N-C-*, 22 I&N Dec. 281, 284-85 (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. *G-N-C-*, 22 I&N Dec. at 284-85 ("To the extent that these proceedings were terminated without considering arguments from both sides, the Immigration Judge erred."). In a 2023 case, the BIA reaffirmed its longstanding precedent that when DHS moves to dismiss removal proceedings, the Immigration Judge "must . . . independently adjudicate the motion." *Matter of H.N. Ferreira*, 28 I&N Dec. 765, 768 (BIA 2023). In adjudicating DHS's motion, the Court must consider all "underlying facts and circumstances," including "[t]he respondent's interest." *Id.* at 769. Recent EOIR guidance has affirmed the Immigration Judge's role as an independent and impartial adjudicator. *See*

Memorandum from Sirce E. Owen, EOIR Acting Dir., PM 25-02, EOIR’s Core Policy Values, at 1 (Jan. 27, 2025).

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.” *Matter of Avetisyan*, 25 I&N Dec. 688, 693 (BIA 2012); *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)).

In sum, this Court must consider the Respondent’s arguments against dismissal.

B. This Court Should Deny DHS’s Motion to Dismiss Because Dismissal for Expedited Removal Would Severely Prejudice the Respondent.

Dismissal of these proceedings so that DHS can subject the Respondent to expedited removal would result in [her/his] swift return to [COUNTRY], where [she/he] would face harm. [summarize e.g. separation from family, especially any LPR or U.S. citizen family members; economic, medical, or emotional harm; persecution, etc].

Dismissal of these proceedings would also deprive the Respondent of [his/her] right to have her meritorious claim for [RELIEF] adjudicated, as described below. BIA case law evaluating unilateral DHS dismissal motions has upheld dismissal where the respondent was not prejudiced. *See, e.g., Matter of Andrade Jaso & Carbajal Ayala*, 27 I&N Dec. 557, 559 (BIA

2019) (upholding Immigration Judge grant of DHS motion to dismiss noting that dismissal was without prejudice, as “[t]he respondents have not been ordered removed, . . . there is no indication that they are in imminent danger of removal,” and they could pursue relief in the future if DHS placed them into new removal proceedings); *G-N-C-*, 22 I&N Dec. at 286 (upholding DHS’s motion to dismiss where the respondent did not specify relief he was eligible for or “explain how he was prejudiced” by the Immigration Judge’s decision to dismiss). In contrast, here, the dismissal would severely prejudice the Respondent, and thus the Court must deny DHS’s motion.

1. *Respondent Has a Right to Pursue [RELIEF], and This Court Has a Responsibility to Adjudicate Respondent’s Application.*

This Court should deny DHS’s motion to dismiss because the Respondent has a right to have [her/his] [FORM OF RELIEF] claim adjudicated on the merits. 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 [noncitizen] 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 . . .”).

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 [their] 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)).

[*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].]

[*If Respondent’s removal proceedings began after a positive Credible Fear Interview, argue that dismissal for Expedited Removal is unlawful and in violation of 8 C.F.R. § 208.14(c)(1).*]

[*For other relief, e.g. adjustment of status, argue that relevant statutes and regulations provide the respondent a right to apply for this form of relief.*]

In adjudicating an opposed DHS motion to dismiss, as here, the Court must consider whether dismissal would prejudice the Respondent, including considering 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.*; *see also Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. 168, 170 (BIA 2017) (recognizing IJ’s “duty to adjudicate the respondents’ case once the removal proceedings were initiated.”). The BIA has repeatedly recognized that “[t]he 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.” *J-A-B- & I-J-V-A-*, 27 I&N at 170 (quoting *W-Y-U-*, 27 I&N Dec. at 19); *J-A-B- & I-J-V-A-*, 27 I&N at 170 (noting that terminating proceedings upon unilateral motion may be “inconsistent with [the IJ’s] role in our adjudicative process.”).

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 [their] claim.” *Id.* at 19. 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 20.²

Similarly, here, the Court should deny DHS’s motion 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; *H.N. Ferreira*, 28 I&N Dec. at 769-70 (reversing dismissal noting the respondent’s “significant” interest in having her Form I-751 reviewed). Indeed, the facts of this case are similar to unpublished BIA decisions where the BIA has sustained respondents’ appeal of a DHS motion to 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

² *Matter of W-Y-U-* was partially superseded on other grounds via the 2024 EOIR Rule, Efficient Case and Docket Management in Immigration Proceedings, 89 Fed. Reg. 46742, 46753 (May 29, 2024).

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); Ex. C, AXXX XXX XXX (BIA Jan. 8, 2024) (unpublished) (sustaining appeal where the respondent wanted an adjudication on their pending asylum application, noting that DHS’s reason for dismissal to preserve limited resources “is not a sufficient basis to terminate these proceedings over the objection of the respondent after DHS filed a Notice to Appear, and the respondent filed an application for relief from removal”); *[include only if helpful: Ex. D, AXXX XXX XXX (BIA Feb. 29, 2024) (similar, also noting that multiple hearings had already happened where testimony had been taken)]*.

2. *Respondent Will Suffer Harm If Not Able to Pursue [FORM OF RELIEF]*

Respondent has applied for [FORM OF RELIEF] and wishes to continue to pursue this relief. *[If the Respondent is seeking asylum/WH/CAT before the Court: Argue that forcing the Respondent to re-start their asylum process via Credible Fear would be an incredible waste of resources and severely harmful to the Respondent. Consider noting, as relevant, 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 via expedited removal/CFI, immediate family members abroad facing hardship or danger, etc. In addition, fewer rights are afforded to individuals in the CFI process than in removal proceedings, which would prejudice the Respondent. See Matter of E-R-M- & L-R-M-, 25 I&N Dec. 520, 521 n.1 (BIA 2011) (noting that respondents in removal proceedings have “more rights available to*

them” than in expedited removal proceedings) compare, e.g., INA § 240(b)(4), 8 C.F.R. §§ 1240.3, 1240.10(a), 1003.1(b)(3) (rights in removal proceedings), with 8 C.F.R. §§ 1003.42(c), 1208.30(g)(2)(iv)(A) (limited rights in credible fear process.)

[If the Respondent entered with parole, for example via a CBP One appointment, consider adding a fairness/reliance argument stressing that they followed the lawful process in place at the time with the belief that they would be able to pursue asylum, and now they may be removed with virtually no opportunity to present their claim].

[If the Respondent is seeking a form of relief other than asylum/WH/CAT: Argue/note that they will be completely foreclosed from pursuing this relief if the IJ grants dismissal and DHS pursues expedited removal; also highlight any harms Respondent and their family would suffer if Respondent is summarily removed.]

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. . . .”).

Unlike in other cases where the BIA has considered DHS unilateral motions to dismiss, here the prejudice to the Respondent would be immediate and extreme. If the Court grants dismissal, DHS will subject [him/her] to expedited removal, likely resulting in [his/her] swift deportation from the United States with no ability to have [his/her] meritorious claim for relief heard in any forum. See, e.g., *Matter of Andrade Jaso & Carbajal Ayala*, 27 I&N at 559 (upholding IJ grant of DHS motion to dismiss noting that “[t]he respondents have not been

ordered removed, . . . there is no indication that they are in imminent danger of removal,” and they could pursue relief in the future if DHS placed them into new removal proceedings).

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. *See Matter of Andrade Jaso & Carbajal Ayala*, 27 I&N Dec. at 559 (considering whether DHS’s motion under 8 C.F.R. § 239.2(a)(7) complied with that provision’s requirements). 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.” *Id.* 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. Further, DHS’s sole reason for requesting dismissal is to pursue expedited removal against Respondent, which it cannot lawfully do as explained below.

1. DHS Cannot Lawfully Pursue Expedited Removal Against Respondent

DHS’s sole reason for requesting dismissal under 8 C.F.R. § 239.2(a)(7) is so that DHS can pursue expedited removal against Respondent. The Court should deny DHS’s motion to dismiss because DHS’s intended post-dismissal actions are unlawful for at least two reasons.

First, subjecting Respondent to expedited removal would violate Congress’s carefully crafted statutory scheme for processing noncitizen applicants for admission. INA § 235(b)

provides DHS with several choices for how to process a noncitizen whom it alleges is an inadmissible applicant for admission, but there is no statutory authority for DHS to later reverse that choice. For certain allegedly inadmissible noncitizens, DHS can *either* place them into expedited removal under 8 U.S.C. § 1225(b)(1) *or* place them into full removal proceedings under 8 U.S.C. § 1225(b)(2). *See Matter of E-R-M- & L-R-M-*, 25 I&N Dec. at 523 (holding that “DHS has discretion to put [noncitizens] in section 240 removal proceedings even though they may also be subject to expedited removal under section 235(b)(1)(A)(i) of the Act”); *Matter of Cabrera-Fernandez*, 28 I&N Dec. 747, 748 (BIA 2023). If DHS at the time of initial processing of the individual makes the choice to use its INA § 235(b)(2) authority by issuing the noncitizen an NTA, as DHS did in Respondent’s case, DHS has no authority to later reverse that choice. Nor does DHS point to any such authority in their motion to dismiss.

The Supreme Court’s interpretation of INA § 235(b) in *Jennings v. Rodriguez*, 583 U.S. 281 (2018), also supports a reading of the statute that permits DHS to subject any given inadmissible applicant for admission to one process or the other, with no mechanism for later reversing course. In *Jennings*, the Supreme Court differentiated between (b)(1) noncitizens and (b)(2) noncitizens. The Court observed that “applicants for admission fall into one of two categories, those covered by [INA §235](b)(1) and those covered by [INA § 235](b)(2). [INA § 235](b)(2) . . . serves as a catchall provision that applies to all applicants for admission not covered by [INA § 235](b)(1).” *Id.* at 287–88. Indeed, the statute itself states that INA § 235(b)(2) applies to applicants for admission “to whom paragraph [(b)](1)” does not apply.³ Here, because DHS has elected to commence removal proceedings in Respondent’s case, paragraph (b)(1) does not apply.

³ INA § 235(b)(2)(B)(ii); *accord Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1083 (9th Cir. 2020), *vacated and remanded sub nom. Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021), and *vacated as moot sub nom. Innovation L. Lab v. Mayorkas*, 5 F.4th 1099 (9th Cir. 2021).

Similarly, a number of provisions in the INA describe INA § 235(b)(2) noncitizens as those “to whom proceedings under [INA § 240] are . . . initiated *at the time of such [noncitizen’s] arrival.*”⁴ This language makes clear that Congress understood that DHS’s processing decision for a noncitizen applicant for admission—whether to proceed with (b)(1) or (b)(2)—would occur at the time of the noncitizen’s arrival or initial apprehension, not at some other point months or years later. In a 2003 decision, the U.S. District Court for the Eastern District of Michigan questioned DHS’s authority to use expedited removal against noncitizens who had been paroled into the United States at some earlier point, concluding that the government had “not provided any authority to show that expedited removal applies to [noncitizens] who are ‘arriving aliens’ based solely on the entry fiction doctrine and who have been residing in the interior of the United States for some time.” *Am.-Arab Anti-Discrimination Comm. v. Ashcroft*, 272 F. Supp. 2d 650, 667-68 (E.D. Mich. 2003).

Second, subjecting Respondent to expedited removal would be unlawful because it would violate the long-held doctrine that new rules may not be applied retroactively in the absence of a clear congressional grant of retroactive rulemaking authority. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In this case, DHS purports to have the authority to subject Respondent to expedited removal pursuant to the January 24, 2025 Federal Register Notice expanding expedited removal to its full legislative scope. DHS, Designating Aliens for Expedited Removal, 90 Fed. Reg. 8139 (Jan. 24, 2025). While Congress granted DHS the authority to determine the scope of expedited removal up to the statutory maximum, *see* INA §

⁴ *See, e.g.*, INA § 240B(a)(4) (referring to a noncitizen “who is arriving . . . and with respect to whom proceedings under section 1229a of this title are . . . initiated *at the time of such alien’s arrival*” (emphasis added)); INA § 212(a)(9)(A)(i) (making inadmissible certain noncitizens “ordered removed under [INA § 235(b)(1)] or at the end of proceedings under [INA § 240] initiated upon the [noncitizen’s] arrival”); INA § 241(b)(1)(A) (“[a noncitizen] who arrives at the United States and with respect to whom proceedings under [INA § 240] of this title were initiated at the time of such [noncitizen’s] arrival”); INA § 241(c)(1) (“[A noncitizen] arriving at a port of entry of the United States who is ordered removed either without a hearing under [INA § 235(b)(1) or § 235(c)] or pursuant to proceedings under [INA § 240] initiated at the time of such [noncitizen’s] arrival. . .”).

235(b)(1)(A)(iii)(I), it did not grant DHS the authority to apply new expedited removal designations retroactively. The Supreme Court has long recognized that “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” *Bowen*, 488 U.S. at 208. To do so would add “new legal consequences to events completed [prior to the expansion].” *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994). Because Congress did not grant DHS the power to retroactively expand expedited removal, DHS cannot subject the Respondent, whose removal proceedings were initiated before the January 2025 expansion, to expedited removal; as described above, doing so would cause [him/her] significant prejudice.

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

Further, dismissal is inappropriate because the “[c]ircumstances 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 its new desire to pursue expedited removal against

Respondent is a change in circumstances. But even if DHS's immigration enforcement policy may have changed since the NTA was issued, a political change underlying 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. *See also Andrade Jaso & Carbajal Ayala*, 27 I&N Dec. at 559 (concluding that the respondent's post NTA behavior constituted a change in circumstances for purposes of 8 C.F.R. § 239.2(a)(7)).

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.

3. 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." 8 C.F.R. § 239.2(a)(7). DHS's motion fails to consider key factors necessary to determining the government's best interest in an individual case, including 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 the ICPM, prior to filing for dismissal in order to understand the respondent's viewpoint and reasons why the respondent opposes dismissal. An individual's interest in having their claim for permanent immigration relief adjudicated on the merits 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 circumstances⁵ 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. In this case, Respondent wishes to pursue relief before the Court, [including relief that only the immigration court has authority to grant].

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. 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 and Respondent is placed in expedited removal, Respondent will pursue asylum through the Credible Fear process, requiring the use of more government resources to adjudicate the claim in another forum, which will ultimately result in the case returning to this Court for an asylum adjudication.] This process would result in a much

⁵ [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].]

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.

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.#
FIRM/ORGANIZATION
ADDRESS
TELEPHONE
EMAIL

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

In the matter of:

[NAME]

File No. A [###-###-###]

In Removal Proceedings

INDEX OF EXHIBITS

<u>Tab</u>	<u>Description</u>	<u>Pages</u>
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-XXX-XXX-178-BIA-May-15-2017?secret_password=efbkWt821i8qbdPgsDR]	1
B	R-G-H-M-, AXXX XXX 972 (BIA Aug. 9, 2017) (unpublished) [attach the decision, which is available here: https://www.scribd.com/document/357071637/R-G-H-M-XXX-XXX-972-BIA-Aug-9-2017]	4
C	AXXX XXX XXX (BIA Jan. 8, 2024) (unpublished) [attach the decision, which is available here: https://www.scribd.com/document/825204771/Appeal-ID-5391396-BIA-Jan-8-2024?secret_password=rsJ2P7Red3ernacKKfNM]	
D	AXXX XXX XXX (BIA Feb. 29, 2024) (unpublished) [attach the decision, which is available here: https://www.scribd.com/document/825204791/Appeal-ID-5390150-BIA-Feb-29-2024?secret_password=ErAdS8b9i2RpuOuiXXI]	

[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]**.

[NAME OF PERSON COMPLETING SERVICE]