United States Senate
WASHINGTON, DC 20510

September 13, 2018

The Honorable Kirstjen Nielsen
Secretary
Department of Homeland Security
Washington, D.C. 20528

The Honorable Jeff Sessions
Attorney General
Department of Justice
Washington, D.C. 20530

Dear Secretary Nielsen and Attorney General Sessions:

We write today to express our concerns about recent reports that Immigration & Customs Enforcement (ICE) intends to request the recalendaring of thousands of deportation cases that are currently administratively closed.[1] We are troubled by this initiative, following a decision by Attorney General Jeff Sessions that stripped immigration judges and the Board of Immigration Appeals (BIA) of their general authority to administratively close cases[2], and its potential to further inundate the immigration court backlog.

On May 17th, Attorney General Sessions affirmed the BIA's decision in the *Matter of Castro-Tum* after instructing the BIA to refer the case for his review.[3] In the decision, Attorney General Sessions used his authority to unilaterally overrule decades of precedent by determining that immigration judges and the BIA "do not have the general authority to suspend indefinitely immigration proceedings by administrative closure."[4] Additionally, Attorney General Sessions refused to delegate to judges and the BIA the general authority of administrative closure, and spoke of the "need" for currently administratively closed cases to be returned to an active docket.[5]

In the past, immigration judges and the BIA have used administrative closure for a number of reasons. Administrative closure helped overburdened immigration judges control their caseloads by allowing them to temporarily take a case off of their docket and prioritize cases that were

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[1] AILA, *ICE Provides Guidance to OPLA Attorneys on Administrative Closure Following Matter of Castro-Tum* (June 15, 2018), https://www.aila.org/infonet/ice-guidance-admin-closure-matter-of-castro-tum; Hamed Aleaziz, *The Trump Administration is Seeking to Restart Thousands of Closed Deportation* Cases, BUZZFEED NEWS (August 15, 2018), https://www.buzzfeednews.com/article/hamedaleaziz/trump-deportations-immigration-ice-dhs-courts; Dara Lind, *Jeff Sessions just reopened the door to deporting 350,000 immigrants whose cases had been* closed, VOX (May 21, 2018), https://www.vox.com/2018/5/21/17376398/jeff-sessions-immigration-ruling-courts.
[2] *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).
[3] *Id.*
[4] *Id.*
[5] *Id.*

ready for adjudication.[6] Many respondents whose cases are administratively closed have pending applications for some type of relief, such as a pending application with USCIS.[7] These cases include those of unaccompanied children that judges have found to have been abused, abandoned, or neglected; and whose deportation would be against their best interest. These cases also include victims of trafficking in persons who have pending applications for T visas. DACA beneficiaries, and vulnerable populations of immigrants who are too young or mentally incompetent to understand the proceedings against them.

Despite acknowledgement that requiring the entirety of administratively closed cases be reopened would likely overwhelm the immigration court system and undercut the efficient administration of immigration law, the Attorney General left ICE with the exclusive authority to decide when and how to recalendar the cases, stating that he expected the process would move forward in a "measured but deliberate fashion."[8] According to recent reports, internal communications at ICE reveal a plan to restart the deportation cases of thousands of individuals whose cases are currently administratively closed.[9] These cases may include those in which ICE itself sought administrative closure under the 2011 memoranda, which established enforcement priorities and prosecutorial discretion criteria, but have now been superseded.[10] For cases that were administratively closed under these criteria, the individuals who will be placed back into proceedings have no serious criminal history and have demonstrated extensive connections and contributions to the United States.

Any plan to reopen and recalendar all of the currently administratively closed cases will undeniably overwhelm the already flooded immigration court backlog. Currently, there are over 730,000 pending cases in the courts.[11] The addition of all administratively closed cases – currently estimated at over 355,000 – would increase the backlog by nearly fifty percent, to over one million cases, which would presumably create a corresponding increase in the waiting times for immigration court hearings. Given the population of individuals whose cases were subject to administrative closure, this waste of resources cannot be justified.

Accordingly, we urge the administration to take heed of the recommendations made by an independent evaluator that the Department of Justice commissioned to study how to resolve the immense case backlog in the immigration court system. Those recommendations specifically included the continued use of practices like administrative closure, along with other measures that would emphasize fair process, judicial independence, and better access to legal

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[6] Lind, *supra* note 1.
[7] American Immigration Council, *Administrative Closure Post- Castro-Tum: Practice Advisory* (June 14, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post-castro-tum.pdf.
[8] *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).
[9] AILA, *supra* note 1.
[10] John Morton, Director, U.S. Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, June 17, 2011. https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.
[11] Immigration Court Backlog Tool, http://trac.syr.edu/phptools/immigration/court_backlog/.

representation programs.[12] To date, the administration has blatantly ignored its own evaluator's recommendation of the continued use of administrative closure by immigration judges and the BIA.[13]

To aid our understanding on how EOIR and ICE will be handling administratively closed cases, we request that you respond to the following questions in writing before September 27th:

1. Does ICE plan to seek recalendaring of all currently administratively closed cases? If not, how many cases will ICE seek to recalendar?

2. Is ICE planning to prioritize particular cases for recalendaring ahead of others? If so, please describe in detail how ICE will prioritize cases and what criteria will be considered.

3. How quickly does ICE plan to seek recalendaring of administratively closed cases? What is ICE's timeline for moving to recalendar administratively closed cases?

4. What is the average age of the cases that ICE is seeking to recalendar? Specifically, how long ago, on average, was the most recent administrative closure order in the cases that ICE is seeking to recalendar?

5. Please provide all documents regarding ICE and EOIR plans to recalendar administratively closed cases, including but not limited to email communications, draft policy guidance, implementation directives, and instructions.

6. Does EOIR plan to recalendar all cases that are administratively closed cases in which ICE files a motion to recalendar? If so, how quickly will those cases be recalendared and scheduled for a hearing? If not, what criteria will EOIR use to decide which motions to recalendar will be granted?

7. Has EOIR begun recalendaring administratively closed cases? If so, when and how many?

8. How will ICE and EOIR efforts to recalendar administratively closed cases assist in clearing the immigration court backlog?

9. What efforts will ICE and EOIR make to ensure that the recalendaring of cases does not increase the wait times for hearings on removability and applications for relief from removal?

10. How will individuals be notified that their case has been recalendared? Will attorneys of record be notified of recalendaring?

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[12] Emily Creighton, *Department of Justice Ignores Its Own Evaluator's Recommendations on Immigration Courts*, AMERICAN IMMIGRATION COUNCIL (April 23, 2018), https://immigrationimpact.com/2018/04/23/department-justice-recommendations-immigration-courts/.

[13] Booz Allen Hamilton, *Legal Case Study: Summary Report* (April 6, 2017).

a. In the case of vulnerable individuals whose cases were closed as an incompetency safeguard under *Matter of M-A-M-*, 25 I. & N. Dec. 474 (BIA 2011), what safeguards will ICE and EOIR put in place to ensure that these individuals understand the nature of the recalendared proceedings, along with any resulting requirements that they appear in immigration court?
b. Will ICE and EOIR communicate with these individuals regarding recalendaring through the Nationally Qualified Representative Program?

11. What safeguards will ICE and EOIR put in place to ensure that unaccompanied children understand the nature of the recalendared proceedings, along with any resulting requirements that they appear in immigration court?

12. Does EOIR agree with independent evaluator's recommendation to administratively close cases awaiting adjudication in other agencies or courts?

13. What policies is EOIR developing to ensure efficiency and fairness in each recalendared case?

14. How does EOIR intend to handle cases in which ICE moves to recalendar where the individual received a grant of immigration relief – such as a T or U visa – from USCIS after the individual's case was administratively closed?

15. How does EOIR intend to ensure that qualified applicants are not deprived of the opportunity to obtain immigration relief before USCIS, given that administrative closure is no longer available for pending benefits applications, and continuances of removal proceedings for such applications have been similarly restricted by *Matter of L-A-B-R-*, 27 I. & N. Dec. 405 (A.G. 2018)?

Thank you in advance for your cooperation with this request. We look forward to your responses to our questions.

Sincerely,

Catherine Cortez Masto
United States Senator

Edward J. Markey
United States Senator

Patty Murray
United States Senator

Dianne Feinstein
United States Senator

Kirsten Gillibrand
United States Senator

Tammy Duckworth
United States Senator

Bernard Sanders
United States Senator

Kamala D. Harris
United States Senator

Richard Blumenthal
United States Senator

Cory A. Booker
United States Senator

Robert Menendez
United States Senator

Ron Wyden
United States Senator

Chris Van Hollen
United States Senator

Brian Schatz
United States Senator

Mazie K. Hirono
United States Senator

Tom Udall
United States Senator

Elizabeth Warren
United States Senator

Michael F. Bennet
United States Senator