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Expansion of the National Qualified Representative Program to Dedicated Docket Proceedings

I. Introduction

Since the Department of Justice ("DOJ") and Department of Homeland Security ("DHS") announced the creation of the "Dedicated Docket" in May 2021, thousands of individuals and families have been placed in removal proceedings on an expedited timeline. Many of these individuals have mental disabilities that may render them not competent to represent themselves in their removal proceedings. One such individual is a K'iche woman who appeared before the Boston Immigration Court in November 2021. At the woman's first Master Calendar Hearing, Immigration Judge Mario Sturla recognized this woman had cognitive difficulties, and if she were detained in the custody of U.S. Immigration and Customs Enforcement ("ICE"), he would have been able to appoint counsel for her through the National Qualified Representative Program ("NQRP"). However, because the NQRP is currently restricted to detained individuals, Judge Sturla was unable to do so. Because the woman cannot afford an attorney and pro bono legal services in the Boston area are almost at capacity, she may have to proceed in her removal proceedings without counsel despite her mental health issues.

The NQRP was designed precisely to ensure pro se individuals with mental disabilities who are not competent to represent themselves are not deported without access to counsel. The program was created in the aftermath of the *Franco-Gonzalez v. Holder* lawsuit, where a federal district court held that "Section 504 of the Rehabilitation Act … require[s] the appointment of a Qualified Representative as a reasonable accommodation" "for individuals who are not competent to represent themselves [in their removal proceedings] by virtue of their mental disabilities." *Franco-Gonzalez v. Holder*, No. CV 10–02211 DMG (DTBx), 2013 WL 3674492, at *3 (C.D. Cal. Apr. 23, 2013). Although *Franco* and the NQRP currently only apply to individuals who are detained in ICE custody at the commencement of their removal proceedings, the legal basis for providing counsel to individuals with mental disabilities applies equally to individuals who are not detained. Regardless of an individual's detention status, the Rehabilitation Act requires that individuals with mental disabilities receive "reasonable accommodations" to remedy their unequal access to the procedures guaranteed to them in Immigration Court. 29 U.S.C. § 794; *see Tennessee v. Lane*, 541 U.S. 509, 527–29 (2004) (applying Section 504's analogue in the Americans with Disabilities Act ("ADA") to "the fundamental right of access to the courts"). And, even if the Rehabilitation Act were not applicable, *Matter of M–A–M–*, 25 I. & N. Dec. 474 (BIA 2011), requires Immigration Judges

("IJs") "to assess the competency of an alien appearing in Immigration Court" and provide them "appropriate safeguards" depending upon the "particular circumstances" of the case. *Id.* at 478, 481–83. Because of the complexity of removal proceedings and the stakes involved, the only reasonable accommodation under the Rehabilitation Act and safeguard under *Matter of M–A–M–* for individuals who are not competent to represent themselves—besides terminating their removal proceedings—is to appoint counsel to represent them.

Individuals in Dedicated Docket proceedings who have mental disabilities are particularly in need of counsel. Dedicated dockets of previous administrations confirm that there will not be enough pro bono legal services to provide adequate representation to all of those who need it. The significant majority of families in previous dedicated dockets were unrepresented, and those who were unrepresented were ten times more likely to fail to attend their hearings and be issued *in absentia* orders, and those who showed up to their hearings were also ten times more likely to lose their cases than those who had counsel. *See infra* Section IV(a). Moreover, expanding access to counsel for individuals in Dedicated Docket proceedings will likely have a net positive effect on the economy due to significant savings caused by reduced spending on public health insurance programs and foster care services, increased tax revenues, and lower turnover-related costs because of reduced detentions and deportations as a result of increased legal representation. *See infra* Section IV(d).

Therefore, one cost-effective and straightforward measure the Government can take to ensure at least some of the neediest individuals in Dedicated Docket proceedings—those who are not competent to represent themselves—receive counsel is by expanding the NQRP to individuals in Dedicated Docket proceedings. As explained further below, doing so would be in accordance with federal law, and the NQRP already provides a mechanism where individuals with mental disabilities may be appointed counsel without any additional burden to the Government.

II. *Franco-Gonzalez v. Holder* Established the Right to Appointed Counsel in Removal Proceedings for Individuals with Mental Disabilities

a. *Franco* Held that the Rehabilitation Act Requires Counsel for Individuals with Mental Disabilities to Meaningfully Participate in Their Removal Proceedings

In 2010, the named plaintiffs in the *Franco* litigation filed a class action complaint in the Central District of California alleging DHS, ICE, DOJ, and EOIR had legal obligations to (a) create a competency determination system to assess whether pro se individuals detained for immigration proceedings had mental disabilities that rendered them not competent to represent themselves; and (b) provide legal representation to those who were not competent by reason of those mental disabilities. On December 27, 2010, and May 4, 2011, the district court issued preliminary injunctions ordering those agencies to provide several of the named plaintiffs with legal representation in their immigration proceedings as a reasonable accommodation under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (the "Rehabilitation Act"). *See Franco-Gonzalez v. Holder*, 828 F. Supp. 2d 1133 (C.D. Cal. 2011); *Franco-Gonzalez v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010). The court held that that the agencies violated the Rehabilitation

Act by not providing adequate representation to individuals who could not "meaningfully participate in [their] removal proceedings as a result of [their] mental illness." *Id.* at 1053, 1055.

After certifying a class of immigrants detained in California, Arizona, and Washington, the court granted partial summary judgment for the certified class and entered a permanent injunction on April 23, 2013. Consistent with its preliminary injunction rulings, the court found for the plaintiffs on their claim that the Rehabilitation Act required the Government to provide free legal representation to all individuals who are not competent to represent themselves in their immigration proceedings because of a mental disability. *See Franco-Gonzalez v. Holder*, No. CV 10–02211 DMG (DTBx), 2013 WL 3674492, at *3 (C.D. Cal. Apr. 23, 2013) (summary judgment) (holding that "Section 504 of the Rehabilitation Act does require the appointment of a Qualified Representative as a reasonable accommodation" "for individuals who are not competent to represent themselves by virtue of their mental disabilities"); *Franco-Gonzalez v. Holder*, No. CV 10–02211 DMG (DTBx), 2013 WL 8115423 (C.D. Cal. Apr. 23, 2013) (permanent injunction).

b. *Franco* Created a Competency Determination System to Identify Detained Individuals in Removal Proceedings with Mental Disabilities

After issuing the permanent injunction, the *Franco* court subsequently ordered the parties to design a competency determination system to identify individuals eligible for legal representation. On October 29, 2014, the district court entered a further injunctive order known as the "Implementation Plan Order." *Franco-Gonzalez v. Holder*, No. CV–10–02211 DMG (DTBx), 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014). That order sets forth a comprehensive process for screening immigration detainees in Arizona, California, and Washington for mental disabilities, as well as rigorous procedures for determining the competency of such individuals to represent themselves.

The Implementation Plan Order requires ICE to screen all immigration detainees in California, Arizona, and Washington for mental disabilities, including "initial mental health screening of detainees upon arrival at detention facilities, mental health assessments, and gathering of documents and information relevant to detainees' mental health." *Id.* at *1. If an individual has a mental disability, ICE must "provide relevant documents and information regarding detainees' mental health to Immigration Judges." *Id.*

The Implementation Plan Order then requires IJs to hold competency hearings for the these individuals where the IJ "must consider *both* the individual's ability to meaningfully participate in the proceeding as set forth in *Matter of M–A–M–*, 25 I. & N. Dec. 474 (BIA 2011), *and* the individual's ability to perform additional functions necessary for self[-]representation." *Id.* at *6 (emphases in original). If the IJ finds that the individual is "incompetent to represent him-or herself in an immigration proceeding," the IJ must order that they be provided legal representation by a Qualified Representative. *Id.*[1]

Finally, even if an individual is not screened by ICE, an IJ can still hold a competency hearing if it "finds that the evidence of record results in a bona fide doubt about the detainee's

[1] A Qualified Representative is "(1) an attorney, (2) a law student or law graduate directly supervised by a retained attorney, or (3) an accredited representative, all as defined in 8 C.F.R. § 1292.1." *Franco-Gonzalez*, 2013 WL 3674492, at *5.

competency to represent him-or herself." *Id.* at *3. The evidence in the record can include evidence from "third parties (including family members, social service providers, and others) [who] may submit to the [IJ], and the [IJ] shall consider, additional mental health information or other information relevant to a detainee's mental competency or incompetency to represent him- or herself in immigration proceedings." *Id.* at *9.

During litigation on the Implementation Plan Order, the Government proposed or agreed to many of the provisions that the *Franco* court ultimately adopted. *See* Joint Statement in Response to the Special Master's Second Report, *Franco-Gonzalez v. Holder*, No. CV–10–02211 DMG (DTBx) (C.D. Cal. Aug. 29, 2014), Dkt. 775. The Government also declined to appeal any of the orders in *Franco*, including the district court's preliminary injunction orders, the class certification order, the summary judgment and permanent injunction, and the Implementation Plan Order.

III. The NQRP Expanded *Franco's* Protections Nationwide

Consistent with the *Franco* court's permanent injunction, in April 2013, the Government created the NQRP to provide "enhanced procedural protections, including competency inquiries, mental health examinations, and bond hearings to certain unrepresented and detained respondents with serious mental disorders or conditions that may render them incompetent to represent themselves in immigration proceedings,"[2] and "Qualified Representatives ('QRs') to certain unrepresented and detained respondents who are found by an Immigration Judge or the BIA [(Board of Immigration Appeals)] to be mentally incompetent to represent themselves in immigration proceedings."[3] In essence, the NQRP expanded the *Franco* protections nationwide.

On August 15, 2013, EOIR began Phase I of the NQRP "in order to test aspects of the plan," and subsequently issued its final guidance for Phase I.[4] The Phase I guidance "sets forth principles by which Immigration Judges should assess competency within the context of EOIR's nationwide plan to provide enhanced procedural protections to unrepresented, detained respondents with mental disorders."[5]

The Phase I guidance requires IJs take the following steps:

1. Detecting indicia – "The judge remains attentive to any behaviors or other indicators that the respondent may have a mental disorder limiting his or her ability to represent him- or herself. Where there is a 'bona fide doubt' about respondent's competence to represent him- or herself, the judge should move to stage 2 and conduct a judicial inquiry."[6]
2. Conducting a judicial inquiry – "The judge asks a series of questions to determine whether there is 'reasonable cause' to believe that the respondent may be incompetent to represent him- or herself. At the conclusion of the judicial inquiry, the judge may find

[2] U.S. DEP'T JUST., NATIONAL QUALIFIED REPRESENTATIVE PROGRAM (Feb. 18, 2020), https://www.justice.gov/eoir/national-qualified-representative-program-nqrp.
[3] *Id*.
[4] EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ("EOIR"), PHASE I OF PLAN TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDERS (2013), https://immigrationreports.files.wordpress.com/2014/01/eoir-phase-i-guidance.pdf.
[5] *Id.* at 1 n.2.
[6] *Id.* at 3.

that the respondent is competent or incompetent to represent him- or herself. Alternatively, if there is reasonable cause to believe the respondent may be incompetent to represent him- or herself, but the evidence is not sufficient to rebut the presumption of competence, the judge should … conduct a more in-depth hearing on the issue of competence."[7]

If the IJ finds that the individual is not competent to represent themselves at either a judicial inquiry or a competency review, the IJ must order that they be provided a Qualified Representative.[8]

The NQRP also expands upon the indicia of incompetency used to determine whether to hold a judicial inquiry. The Phase I guidance states that such indicia include, but are not limited to:

- Outpatient mental health treatment
- Psychiatric hospitalization
- Interventions for self-injurious behavior or suicide attempts
- Limited academic achievement
- Currently receiving mental health treatment
- Poor memory
- Poor attention/concentration
- Confused or disorganized thinking
- Paranoid thinking (unreasonable fears)
- Grandiose thinking (overestimating own ability)
- Seeing or hearing things not present
- Serious depression or anxiety
- Poor intellectual functioning
- Irrational behavior or speech in court
- Lack of responsiveness in court[9]

On May 7, 2014, then-ICE Executive Associate Director Thomas Homan issued a memorandum that sets forth procedures that ICE must use pursuant to the NQRP.[10] Consistent with the *Franco* procedures, ICE must conduct initial mental health evaluations and follow-up mental health assessments, and provide all relevant information to an IJ if an individual has been identified as having a mental disability so the IJ can hold a competency hearing to determine whether the individual should be provided a Qualified Representative.[11]

Therefore, since at least 2014, pursuant to either *Franco* or the NQRP, all detained individuals in removal proceedings should have been screened for mental health issues and have been provided a Qualified Representative paid for by the Government if they have been found

[7] *Id.*
[8] *Id.* at 15.
[9] *Id.* at 4.
[10] THOMAS HOMAN, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, POLICY NO. 11067.1, IDENTIFICATION OF DETAINEES WITH SERIOUS MENTAL DISORDERS OR CONDITIONS (May 7, 2014).
[11] *Id.*

not competent to represent themselves by an IJ—although advocates have raised serious concerns about whether *Franco* and the NQRP have been properly implemented.

IV. The NQRP Should Be Expanded to Individuals in Dedicated Docket Proceedings

Given the significant need for counsel in Dedicated Docket proceedings, as well as the importance that individuals with mental disabilities receive counsel to ensure their removal proceedings are fundamentally fair and comport with federal law, the NQRP can and should be expanded to Dedicated Docket proceedings.

a. There is a Heightened Need for Counsel in Dedicated Docket Proceedings

On May 28, 2021, DHS and DOJ announced the creation of a new "Dedicated Docket" in Immigration Court consisting of families who arrived on or after that date between ports of entry at the southern border, who are put into removal proceedings, and are released on an Alternatives to Detention ("ATD") program.[12] The goal of the Dedicated Docket is for IJs to issue a decision in these cases within 300 days of the initial Master Calendar Hearing.[13] As of August 31, 2021, 16,713 individuals—approximately 6,000 families—were assigned to the Dedicated Docket nationwide.[14]

The Dedicated Docket has created a significant need for counsel to adequately represent these thousands of individuals on an expedited timeline. In establishing the Dedicated Docket, government officials recognized the importance of ensuring that "fairness will not be compromised"[15] and stated that IJs will issue decisions "with full consideration for a respondent's statutory right to counsel and consistent with due process and fundamental fairness."[16] EOIR Acting Director Jean C. King also stated that "Respondents whose cases are placed on these dockets will be provided with a number of services, including access to information services and possible referral services to facilitate legal representation."[17] Yet, despite these statements and efforts, it appears that a significant majority of individuals in Dedicated Docket proceedings will have to represent themselves without counsel because the availability of pro bono legal services is significantly smaller than the drastic need to represent thousands of individuals on an expedited timeline.

Dedicated dockets of previous administrations confirm that there will not be enough pro bono legal services to adequately represent the individuals in the Dedicated Docket that need representation. For example, under the Obama Administration's dedicated docket, 70% of families were unrepresented and only 6.5% of unrepresented families managed to file the

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[12] DOJ, DHS AND DOJ ANNOUNCE DEDICATED DOCKET PROCESS FOR MORE EFFICIENT IMMIGRATION HEARINGS (May 28, 2021), https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings.
[13] *Id.*
[14] TRAC IMMIGRATION, IMMIGRATION COURT STRUGGLING TO MANAGE ITS EXPANDING DEDICATED DOCKET OF ASYLUM-SEEKING FAMILIES (Sept. 13, 2021), https://trac.syr.edu/immigration/reports/660/.
[15] DOJ, *supra* note 12.
[16] JEAN C. KING, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, PM 21-23, POLICY MEMO THAT ESTABLISHES A DEDICATED DOCKET FOR CERTAIN INDIVIDUALS IN REMOVAL PROCEEDINGS 2 (May 28, 2021), https://www.justice.gov/eoir/book/file/1399361/download.
[17] *Id.*

appropriate asylum-seeking papers in court despite initiatives to provide additional legal resources to these families.[18] Furthermore, representation is crucially important for families to have a chance to win their cases. In 2016, only 3.8% of families without representation won their cases while 40% of represented families were awarded asylum or granted other forms of relief.[19] Finally, approximately 81% of families without counsel under the Obama Administration's dedicated docket failed to attend their hearings and were issued *in absentia* orders, as opposed to just 8% of families with counsel.[20] This is despite the fact that the Obama Administration also provided certain services to families to help them with their cases, including a Legal Orientation Program and an Immigration Court Helpdesk.[21]

Although the current Dedicated Docket is in its early stages, the limited available evidence suggests that the vast majority of individuals in these proceedings will also not have counsel. For example, advocates have reported that in Dedicated Docket proceedings before the Boston Immigration Court on November 10 and 12, 2021, 261 individuals were listed and only two had representation.[22]

b. Federal Law Requires Individuals with Mental Disabilities to Receive Counsel if They Are Not Competent to Represent Themselves

i. The Rehabilitation Act Requires Counsel for Individuals in Removal Proceedings Who Are Not Competent to Represent Themselves Even If They Are Not Detained

Although *Franco* and the NQRP only provide counsel to detained individuals in removal proceedings who are not competent to represent themselves, the Rehabilitation Act—the legal basis underlying *Franco* and the NQRP—applies equally to individuals who are not detained. The Rehabilitation Act bars the federal government, including both DOJ and DHS, from discriminating against any individual on the basis of a disability. "No qualified individual with a disability in the United States, shall, by reason of his or her disability, be excluded from the participation in, be denied benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Department." 6 C.F.R. 15.30(a); 28 C.F.R. § 39.130 (same). *See also Franco-Gonzalez*, 767 F. Supp. 2d at 1051 ("An organization that receives federal funds violates Section 504 if it denies a qualified individual with a disability a reasonable accommodation that the individual needs in order to enjoy meaningful access to the benefits of

[18] TRAC IMMIGRATION, WITH THE IMMIGRATION COURT'S ROCKET DOCKET MANY UNREPRESENTED FAMILIES QUICKLY ORDERED DEPORTED (Oct. 18, 2016), https://trac.syr.edu/immigration/reports/441/.
[19] *Id.*
[20] Sarah Pierce, *As the Trump Administration Seeks to Remove Families, Due-Process Questions Over Rocket Dockets Abound*, MIGRATION POLICY INSTITUTE (July 2019), https://www.migrationpolicy.org/news/due-process-questions-rocket-dockets-family-migrants.
[21] Ryan D. Brunsink & Christina L. Powers, *The Limits of Pro Se Assistance in Immigration Proceedings*: *Discussion of NWIRP v. Sessions*, 122 Dick. L. Rev. 847, 848–49 (2018).
[22] *See also* Claudia Torrens et al., *New Fast-Track Docket for Migrants Faces Familiar Challenges*, ASSOCIATED PRESS (Nov. 11, 2021), https://apnews.com/article/immigration-boston-new-york-united-states-texas-260e83005d8fd46456ac0500b84383d9 (noting that few immigrants in the Dedicated Docket have attorneys).

public services.") (citing 28 C.F.R. § 35.130(b)(7); *Alexander v. Choate,* 469 U.S. 287, 300–01 n. 21 (1985); *Mark H. v. Hamamoto,* 620 F.3d 1090, 1098 (9th Cir. 2010)).

Individuals in Dedicated Docket proceedings with mental disabilities are "qualified individuals with a disability" for purposes of the Rehabilitation Act because their mental impairments significantly limit their ability to participate in their removal proceedings, and because they are subject to immigration proceedings pursuant to DOJ and DHS authority. 28 C.F.R. 39.103; 6 C.F.R. 15.30; *see also Franco-Gonzalez*, 767 F. Supp. 2d at 1056 n.17 (noting that the Government "concede[d] that the Rehabilitation Act does apply to immigration removal proceedings"). Without any reasonable accommodations, these individuals are denied full and fair access to the immigration procedures guaranteed to them. The Supreme Court has held that the Americans with Disabilities Act (the "ADA"), which is the Rehabilitation Act's analogue for state and non-governmental entities, "applie[s] to cases implicating the fundamental right of access to the courts." *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004). In fact, exclusion from court proceedings was one of the primary motivations for the enactment of the ADA. *Id.* at 526–27 ("In the deliberations that led up to the enactment of the ADA . . . Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities.").

To remedy DOJ's and DHS's discrimination against individuals in Dedicated Docket proceedings with mental disabilities, the Rehabilitation Act requires they be afforded legal assistance as a reasonable accommodation. DOJ and DHS regulations recognize that they "may comply with the requirements of . . . [Section 504] through such means as . . . assignment of aides to beneficiaries." 28 C.F.R. 39.150 (DOJ); 6 C.F.R. 15.50 (DHS). In this case, the appointment of counsel—a legal aide to the beneficiary—would ensure that the procedural rights guaranteed to these individuals are, in fact, "accessible and usable" to them. *See Franco-Gonzalez*, 767 F. Supp. 2d at 1055 (holding that noncitizen is "entitled under the Rehabilitation Act to a reasonable accommodation that would provide him with adequate representation"); *Franco-Gonzalez*, 2013 WL 3674492, at *3 ("Section 504 of the Rehabilitation Act does require the appointment of a Qualified Representative as a reasonable accommodation" "for individuals who are not competent to represent themselves by virtue of their mental disabilities[.]").

Although individuals in Dedicated Docket proceedings are not detained, the *Franco* court's Rehabilitation Act analysis applies equally to them. Just as with *Franco* class members, their "ability to exercise their rights" in their removal proceedings "is hindered by their mental incompetency, and the provision of competent representation able to navigate the proceedings is the only means by which they may invoke those rights." *Franco-Gonzalez*, 2013 WL 3674492, at *5.

ii. *Matter of M–A–M–* Requires Counsel for Individuals in Removal Proceedings Who Are Not Competent to Represent Themselves

Alternatively, individuals in Dedicated Docket proceedings with mental disabilities who are not competent to represent themselves should either have their proceedings terminated or be provided counsel pursuant to *Matter of M–A–M–,* 25 I. & N. Dec. 474 (BIA 2011). *Matter of*

M–A–M– "set[s] forth the process that an [IJ] should use to assess the competency of an alien appearing in Immigration Court." *Id.* at 478. Although *Matter of M–A–M–* provides "[e]xamples of appropriate safeguards," it expressly holds that potential safeguards "are not limited" to the list provided, because the right safeguard depends upon the "particular circumstances" of the case. *Id.* at 481–83.

Under *Matter of M–A–M–*, an IJ must "ensure that an incompetent alien is afforded an adequate opportunity to present his or her case during a hearing." *Id.* at 478. Where there are "indicia of incompetency," an IJ "must take measures to determine whether a respondent is competent to participate in proceedings. The approach taken in any particular case will vary based on the circumstances of the case." *Id.* at 480. If an IJ determines an individual "lacks sufficient competency to proceed with the hearing," the IJ should "evaluate which available measures would result in a fair hearing" and "'shall prescribe safeguards to protect the rights and privileges of the alien.'" *Id.* at 478 (quoting 8 U.S.C. §1229a(b)(3)). IJs "have discretion to determine which safeguards are appropriate, given the particular circumstances in a case before them." *Id.* at 481–82; *see also id.* at 483 ("The Immigration Judge will consider the facts and circumstances of an alien's case to decide which of these or other relevant safeguards to utilize.").

Unrepresented individuals in Dedicated Docket proceedings who have mental disabilities that make them incompetent to represent themselves have no ability to have a fair hearing without the appointment of counsel. Therefore, under *Matter of M–A–M–*, the only appropriate safeguard—apart from termination of their removal proceedings—to remedy these individuals' incompetency would be to appoint them counsel in their removal proceedings to assist them in analyzing all potential defenses to removal and presenting any viable claim they may have.

c. PTSD Should Be Explicitly Listed as an Indicia of Incompetency Used to Determine Whether Individuals in Removal Proceedings Require Counsel

Current NQRP guidance fails to explicitly list Post Traumatic Stress Disorder ("PTSD") as an indicia of incompetency. However, regardless of the legal basis for appointed counsel in removal proceedings, PTSD clearly qualifies both as a "disability" under the Rehabilitation Act and as a "indicia of incompetency" under *Matter of M–A–M–*. Therefore, NQRP guidance should be updated to clarify that a PTSD diagnosis should require an IJ to hold a competency hearing to determine whether an unrepresented individual in removal proceedings requires counsel.

i. PTSD May Be a Disability Under the Rehabilitation Act

A disability under the Rehabilitation Act is a physical or mental impairment that "substantially limits one or more major life activity." 42 U.S.C. § 12102. The symptoms of PTSD make clear that it is "severe enough to interfere with aspects of daily life."[23] The

[23] NATIONAL INSTITUTE OF MENTAL HEALTH, POST-TRAUMATIC STRESS DISORDER 2 (2020), https://www.nimh.nih.gov/sites/default/files/documents/health/publications/post-traumatic-stress-disorder-ptsd/20-mh-8124-ptsd.pdf; *see also PTSD Basics*, U.S. DEPARTMENT OF VETERANS AFFAIRS, https://www.ptsd.va.gov/understand/what/ptsd_basics.asp (last visited Nov. 19, 2021).

Diagnostic and Statistical Manual of Mental Disorders ("DSM-5") lists several "intrusion symptoms" of PTSD, such as "recurrent, involuntary, and intrusive distressing memories of the traumatic event(s)," "recurrent distressing dreams," "intense or prolonged psychological distress at exposure" to reminders of the traumatic event(s), and "marked physiological reactions."[24]

For these reasons, courts have repeatedly held that PTSD may be considered a disability under the Rehabilitation Act and its analogue in the ADA. *See, e.g.*, *Trahan v. Wayfair Maine, LLC*, 957 F.3d 54, 64 (1st Cir. 2020) (noting that plaintiff with PTSD was disabled within the meaning of the ADA); *Kailikole v. Palomar Cmty. Coll. Dist.*, 384 F. Supp. 3d 1185, 1193 (S.D. Cal. 2019) (holding that PTSD symptoms can "meet the definition of mental disability under the 'substantial limitation' standard of the ADA"); *Johnson v. JPMorgan Chase & Co.*, No. 16-cv-1632, 2017 WL 1237979, at *7 (W.D. La. Feb. 16, 2017) (holding that PTSD "plausibly affects the major life activities of thinking, concentrating, communicating, and working"); *Lewis v. Mossbrooks*, No. 15-cv-08756-JFW (EX), 2017 WL 11558282, at *4 (C.D. Cal. Oct. 25, 2017), *rev'd on other grounds*, 788 F. App'x 455 (9th Cir. 2019) (holding that plaintiff with PTSD "raised a genuine issue of material fact as to whether he is disabled for purposes of the Rehabilitation Act"); *Riley v. Bd. of Commissioners of Tippecanoe Cty.*, No. 4:14-CV-063-JD, 2017 WL 4181143, at *5 (N.D. Ind. Sept. 21, 2017) ("[W]hen considering the breadth afforded to PTSD as a disability, a reasonable factfinder could determine that Plaintiff's PTSD impacts his major life activities."); *cf. Mukamusoni v. Ashcroft*, 390 F.3d 110, 117 (1st Cir. 2004) (recognizing that PTSD diagnosis "constituted 'extraordinary circumstances' justifying the late filing" of asylum application); USCIS, ASYLUM DIVISION OFFICER TRAINING COURSE: ONE-YEAR FILING DEADLINE 31 (May 6, 2013), https://www.uscis.gov/sites/default/files/document/lesson-plans/One_Year_Filing_Deadline_Asylum_Lesson_Plan.pdf (noting that "PTSD can be seen as an extraordinary circumstance related to the delay in filing" an asylum application).

ii. PTSD is an Indicia of Incompetency Under the NQRP and *Matter of M–A–M–*.

While *Matter of M–A–M–* does not explicitly define what conditions should be included as "indicia of incompetency," in *Indiana v. Edwards*, 554 U.S. 164 (2008), the Supreme Court recognized that "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair [an individual's] ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented [individual]." *Id.* at 176. Consistent with this understanding, the NQRP Phase I guidance recognizes that indicia of incompetency to represent oneself can include a broad range of issues affecting an individual's mental health, including "limited academic achievement," "poor memory," "poor attention/concentration," confused or disorganized thinking," "serious depression or anxiety," "paranoid thinking," "poor intellectual functioning," and "lack of responsiveness in court."[25]

[24] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271–272 (American Psychiatric Association, 5th ed. 2013).
[25] EOIR, *supra* note 4.

Many of these conditions are either less severe than PTSD or can be caused by it. For example, the DSM-5 lists "avoidance of or efforts to avoid distressing memories, thoughts, or feelings about or closely associated with" traumatic events as a symptom of PTSD.[26] Moreover, PTSD is often comorbid with depression and other anxiety disorders; about half of people with PTSD also suffer from Major Depressive Disorder.[27] PTSD is actually predictive of future severe depression.[28] Similar to major depression, the DSM-5 notes that common symptoms of PTSD include unrelenting negative emotions and beliefs about the world and oneself.[29]

Therefore, the effect that PTSD has on memory, the disorienting flashbacks, the difficulty concentrating, and the depression and anxiety—all of which are disproportionately likely to occur when prompted with remembrances of trauma during removal proceedings[30]—confirms that PTSD should explicitly be included in NQRP guidance as an indicia of incompetency requiring an IJ to hold a competency hearing to determine whether individuals require the appointment of counsel.

d. Expanding the NQRP to Individuals in Dedicated Docket Proceedings Will Not Burden the Government

If the NQRP is expanded to individuals in Dedicated Docket proceedings, it will not create a significant burden for the Government. To the contrary, expanding access to counsel, especially for individuals with mental health issues, will likely have a net positive effect on immigration proceedings and the economy more generally.

First, the Government will not need to create a new program to provide counsel to individuals with mental disabilities in Dedicated Docket proceedings. Through the NQRP, after an IJ issues an order that an individual is entitled to obtain a Qualified Representative, the Immigration Court coordinates with the Vera Institute of Justice to identify and appoint counsel for that individual. Through its NQRP contract, the Vera Institute has a list of trained Qualified Representatives across the United States who are able to take these cases.[31]

Second, studies have shown that expanding access to counsel for individuals in removal proceedings can lead to significant economic savings. For example, the Center for Popular Democracy found that a program to provide free counsel to individuals in removal proceedings

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[26] AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 24.

[27] Janine D. Flory & Rachel Yehuda, *Comorbidity Between Post-Traumatic Stress Disorder and Major Depressive Disorder: Alternative Explanations and Treatment Considerations,* 17 DIALOGUES IN CLINICAL NEUROSCIENCE 141, 141–150 (2015).

[28] Yuchang Jin et al., *The Relationship Between PTSD, Depression and Negative Life Events: Ya'an Earthquake Three Years Later*, 259 PSYCHIATRY RESEARCH 358–359 (2018).

[29] AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 24.

[30] It is for these reasons why USCIS itself recognizes that PTSD can be considered an "extraordinary circumstance" to justify the late filing of an asylum application. USCIS, ASYLUM DIVISION OFFICER TRAINING COURSE: ONE-YEAR FILING DEADLINE 31 (May 6, 2013), https://www.uscis.gov/sites/default/files/document/lesson-plans/One_Year_Filing_ Deadline_Asylum_Lesson_Plan.pdf. *See also Mukamusoni v. Ashcroft*, 390 F.3d 110, 117 (1st Cir. 2004) (recognizing that PTSD diagnosis "constituted 'extraordinary circumstances' justifying the late filing" of asylum application).

[31] *See National Qualified Representative Program*, VERA INSTITUTE OF JUSTICE, https://www.vera.org/projects/national-qualified-representative-program/learn-more (last visited Nov. 19, 2021).

in New York State would "generate nearly $1.9 million in annual savings . . . by reducing spending on public health insurance programs and foster care services and capturing tax revenues that would otherwise be lost."[32] In addition, such a program "would produce $4 million in savings for [New York] employers each year, by preventing turnover-related costs stemming from detentions and deportations" that may not have occurred if the individuals were represented by counsel in their immigration proceedings.[33] When applied on a nationwide basis, a NERA Economic Consulting study found that a program funded by the federal government to provide counsel to every indigent individual in removal proceedings would generate between approximately $204 and $208 million and would pay for most, if not all, of the entire cost of the proposal.[34]

Third, these cost-saving measures are especially important in Dedicated Docket proceedings. In dedicated docket proceedings under the Obama Administration, approximately 81% of families without counsel were issued *in absentia* orders because they did not show up to their hearings (as opposed to just 8% of families with counsel).[35] Therefore, the lack of counsel expanded the undocumented population in the United States without the ability to live and work lawfully, while access to counsel led other families to show up to court, obtain relief if eligible, or be removed from the United States if not. Other studies have similarly shown that providing counsel to individuals in removal proceedings will significantly increase the efficiency of the immigration court system, which is one of the goals of the Dedicated Docket itself.[36]

Finally, the cost of expanding NQRP to Dedicated Docket proceedings is relatively minimal. The NQRP is currently funded by the DOJ in the amount of $12 million per year.[37] Because the NQRP currently includes appointment of counsel for all individuals detained across the United States who are not competent to represent themselves, expanding the NQRP to individuals in Dedicated Docket proceedings likely would only need to modestly increase the current NQRP budget.

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[32] THE CENTER FOR POPULAR DEMOCRACY ET AL., THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: GOOD FOR FAMILIES, GOOD FOR EMPLOYERS, AND GOOD FOR ALL NEW YORKERS 5, https://www.populardemocracy.org/sites/default/files/immgrant_family_unity_project_print_layout.pdf (last visited Nov. 19, 2021).

[33] *Id.*

[34] JOHN D. MONTGOMERY, NERA ECONOMIC CONSULTING, COST OF COUNSEL IN IMMIGRATION: ECONOMIC ANALYSIS OF PROPOSAL PROVIDING PUBLIC COUNSEL TO INDIGENT PERSONS SUBJECT TO IMMIGRATION REMOVAL PROCEEDINGS 3 (May 28, 2014), https://www.nera.com/content/dam/nera/publications/archive2/NERA_Immigration_Report_5.28.2014.pdf; *see also* Kathryn M. Doan, *Access to Justice: Government Funded Counsel Promotes Justice, Saves Money*, CAPITAL AREA IMMIGRANTS' RIGHTS COALITION (Nov. 24, 2014), https://www.caircoalition.org/2014/11/24/access-to-justice-government-funded-counsel-promotes-justice-saves-money.

[35] Pierce, *supra* note 20.

[36] Jorge Loweree & Gregory Chen, *The Biden Administration and Congress Must Guarantee Legal Representation for People Facing Removal*, AMERICAN IMMIGRATION COUNCIL 2 (Jan. 15, 2021), https://www.americanimmigrationcouncil.org/research/biden-administration-and-congress-must-guarantee-legal-representation-people-facing-removal.

[37] *Id.* at 6.

e. Screenings Procedures by CBP, ICE, and EOIR Could Be Modified to Screen Individuals in Dedicated Docket Proceedings for the NQRP

If the NQRP is expanded to individuals in Dedicated Docket proceedings, the procedures used to identify individuals with mental disabilities will need to be modified to take into account that individuals in Dedicated Docket proceedings are not detained in ICE custody at the commencement of their removal proceedings. Currently as part of the NQRP, ICE is required to conduct initial mental health evaluations and mental health assessments for detained individuals, and then provides all relevant information to an IJ to determine whether individuals with mental disabilities are entitled to a Qualified Representative.[38] Although individuals in Dedicated Docket proceedings would not receive those ICE screenings, they could receive similar mental health screenings by U.S. Customs and Border Protection ("CBP") and ICE as part of ATD programs that could be provided to an IJ to determine whether the individuals should receive competency hearings and Qualified Representatives.

First, all individuals in Dedicated Docket proceedings are initially detained and processed by CBP when they arrive between ports of entry at the southern border and then put into removal proceedings. According to CBP's National Standards on Transport, Escort, Detention, and Search ("TEDS"), these individuals should already be screened by CBP for mental disabilities both prior to when they are transported or escorted by CBP and upon their entry into any CBP holding facility. *See* TEDS § 2.4 (stating that prior to a detainee's transport or escort, CBP is required to conduct a detainee transport assessment to evaluate factors including "known or reported medical or mental health issues"); TEDS § 4.2 (stating that upon a detainee's entry into any CBP hold room or before being placed with other detainees together in a holding facility, CBP is required to assess such detainees for "mental health concerns" and "observed or reported serious physical mental injury or illness"). The TEDS already require CBP to maintain procedures to include the results of such mental health assessments in "appropriate electronic system[s] of record," TEDS § 4.3, which could be shared with ICE counsel and IJs in subsequent removal proceedings.

Second, all individuals in Dedicated Docket proceedings are released on an ATD program overseen by ICE. As part of ICE's ATD services provided by Wraparound Stabilization Services ("WSS"), ICE offers mental health screenings and evaluations for individuals in ATD programs.[39] Therefore, ICE may also utilize these mental health screenings and evaluations to determine whether individuals in Dedicated Docket proceedings have indicia of incompetency and share that mental health information with ICE counsel and IJs in those individuals' removal proceedings.

Finally, just as with the current NQRP, even if individuals in Dedicated Docket proceedings are not screened for mental disabilities by CBP and/or ICE prior to or during their

[38] HOMAN, *supra* note 10.
[39] DHS, ICE BUDGET OVERVIEW: FISCAL YEAR 2022 CONGRESSIONAL JUSTIFICATION, ICE – O&S – 152 (2021), https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement.pdf; *ICE Resource Management and Operational Priorities: Hearing Before the Subcomm. On Homeland Security of the H. Comm. on Appropriations*, 117th Cong. 7 (2021), https://www.ice.gov/doclib/news/library/speeches/210513johnson.pdf.

removal proceedings, IJs themselves may still hold competency hearings for such individuals if the IJs have a "bona find doubt" about their competency based on observing the individual themselves and other evidence in the record, including submissions from third parties.[40]

Therefore, there are numerous ways individuals in Dedicated Docket proceedings can be screened for mental disabilities and be appointed counsel pursuant to the NQRP.

V. Conclusion

In establishing the Dedicated Docket, Government officials recognized the importance of ensuring that "fairness will not be compromised"[41] and stated that IJs will issue decisions "with full consideration for a respondent's statutory right to counsel and consistent with due process and fundamental fairness."[42] One important step the Government can take is to ensure individuals in Dedicated Docket proceedings with mental disabilities who are not competent to represent themselves are appointed counsel. Doing so would be in accordance with federal law, and the NQRP already provides a mechanism to do so in an efficient and effective manner.

[40] *See Franco-Gonzalez v. Holder*, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) at *9 ("[T]hird parties (including family members, social service providers, and others) may submit to the Immigration Judge, and the Immigration Judge shall consider, additional mental health information or other information relevant to a detainee's mental competency or incompetency to represent him- or herself in immigration proceedings").
[41] DOJ, *supra* note 12.
[42] King, *supra* note 16.