No. 26-1855

United States Court of Appeals for the First Circuit

ADILSON JOAO-CONGO,

Petitioner,

v.

TODD BLANCHE,
Attorney General,

Respondent.

Petition for Review of an Order of the Board of Immigration Appeals.

BRIEF *AMICI CURIAE* OF POLITICAL ASYLUM/IMMIGRATION REPRESENTATION PROJECT, IMMIGRANT LEGAL ADVOCACY PROJECT, CENTRAL WEST JUSTICE CENTER, JUSTICE CENTER OF SOUTHEAST MASSACHUSETTS, METROWEST WORKER CENTER-CASA, MASSACHUSETTS LAW REFORM INSTITUTE, GREATER BOSTON LEGAL SERVICES, NORTHEAST JUSTICE CENTER, SARA CRESSEY, AND ANNA WELCH IN SUPPORT OF PETITIONER AND VACATUR

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(A), each corporate *amicus* certifies that no publicly held corporation owns 10% or more of its stock. Each corporate *amicus* further certifies that it has no parent corporation, except as follows:

(a) Central West Justice Center is a subsidiary of Community Legal Aid, Inc., a non-profit corporation;

(b) The Justice Center of Southeast Massachusetts, LLC, is a subsidiary of South Coastal Counties Legal Services, Inc., a non-profit corporation; and

(c) The Northeast Justice Center, LLC, is a subsidiary of Northeast Legal Aid, Inc., a non-profit corporation.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i
TABLE OF AUTHORITIES iii
INTERESTS OF *AMICI CURIAE* 1
INTRODUCTION AND SUMMARY OF ARGUMENT 3
LEGAL FRAMEWORK 6
ARGUMENT 8
I. FEDERAL LAW GUARANTEES A NONCITIZEN A "REASONABLE OPPORTUNITY" TO OPPOSE A MOTION TO PRETERMIT 8
II. FOUR BUSINESS DAYS DOES NOT PROVIDE A "REASONABLE OPPORTUNITY" FOR AN ASYLUM APPLICANT TO RESPOND TO A MOTION TO PRETERMIT 11
A. Under The Board's Reading Of The ACA Rule, A Noncitizen Must Be Prepared To Carry The Burden Of Proof On Every Question The Immigration Judge May Decide 12
B. Four Business Days Is Not A Reasonable Amount Of Time For A Noncitizen To Prepare A Meaningful Response 15
1. Just Reaching The Client May Consume The Entire Four-Day Response Period 15
2. Determining Whether An ACA Applies Requires Legal Analysis And Records That Counsel May Not Control 16
3. Building An Adequate Documentary Record Requires Evidence That Can Take Weeks To Assemble 18
4. Preparing The Opposition And The Client's Testimony Cannot Be Compressed Into Four Days 20
III. THAT REMOVAL WOULD BE TO A THIRD COUNTRY DOES NOT JUSTIFY A COMPRESSED RESPONSE PERIOD 22
A. Removals To Third Countries Are Not Inherently More "Straightforward" 23
B. Compressed Response Periods Are Applied Unequally And Waste Judicial Resources 26
CONCLUSION 27

TABLE OF AUTHORITIES

Page

Cases

Matter of A-C-M-,
29 I. & N. Dec. 703 (BIA 2026) 25

Armstrong v. Manzo,
380 U.S. 545 (1965) 10

Matter of C-B-,
25 I. & N. Dec. 888 (BIA 2012) 15

Matter of C-I-G-M- & L-V-S-G-,
29 I. & N. Dec. 291 (BIA 2025) 4, 5, 6, 7, 8, 12, 13, 14, 17, 21, 23, 24, 25

Califano v. Yamasaki,
442 U.S. 682 (1979) 15

D.V.D. v. U.S. Dep't of Homeland Sec.,
No. 26-1212 (1st Cir. Sept. 18, 2026) 9, 10, 14

Dep't of Homeland Sec. v. D.V.D.,
No. 26-426 (U.S. Sept. 29, 2026) 9

Matter of E-A-R-M-,
29 I. & N. Dec. 746 (BIA 2026) 25

Matter of H-A-A-V-,
29 I. & N. Dec. 233 (BIA 2025) 9, 12, 26

Hernandez Lara v. Barr,
962 F.3d 45 (1st Cir. 2020) 15, 19

Matter of J-Y-C-,
24 I. & N. Dec. 260 (BIA 2007) 20

Jama v. Immigr. & Customs Enf't,
543 U.S. 335 (2005) 7

Mathews v. Eldridge,
424 U.S. 319 (1976) 10, 15

Morrissey v. Brewer,
408 U.S. 471 (1972).....10

Mullane v. Cent. Hanover Bank & Tr. Co.,
339 U.S. 306 (1950).....10

Matter of N-E-R-S-,
29 I. & N. Dec. 753 (BIA 2026).....16, 25

United States v. Perez,
89 F.4th 247 (1st Cir. 2023).....9

United States v. Stephens,
689 F. App'x 251 (5th Cir. 2017).....9

Statutes

8 U.S.C. § 1158.....6, 13, 23, 25

8 U.S.C. § 1229a.....8, 11, 12, 15

8 U.S.C. § 1231.....7

8 U.S.C. § 1252.....20, 25

8 U.S.C. § 1362.....15

Other Authorities

8 C.F.R. § 1003.29.....21

8 C.F.R. § 1003.31.....12

8 C.F.R. § 1003.33.....19

8 C.F.R. § 1208.16.....7

8 C.F.R. § 1208.17.....7

8 C.F.R. § 1240.8.....13

8 C.F.R. § 1240.10.....8

8 C.F.R. § 1240.11..... 4, 6, 7, 8, 12, 13, 16, 18, 23, 24, 25

Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63,994 (Nov. 19, 2019) 6, 12, 13, 23, 24

U.S. Immigr. & Customs Enf't, *Strafford County Corrections*, https://www.ice.gov/detain/detention-facilities/strafford-county-corrections (last visited Nov. 17, 2026).....16

INTERESTS OF *AMICI CURIAE*[1]

Amici are non-profit organizations and practitioners who provide legal services to immigrants and asylum seekers in New England. *Amici* have extensive experience litigating motions to pretermit pursuant to Asylum Cooperative Agreements ("ACAs") and seek to provide the Court with practical, on-the-ground reasons why four business days is insufficient time for an applicant's counsel to challenge such a motion.

The Political Asylum/Immigration Representation Project ("PAIR") is a Boston-based non-profit organization dedicated to providing justice to asylum seekers and detained immigrants throughout New England. Through its work, PAIR has faced numerous motions to pretermit pursuant to ACAs and is acutely aware of the impractical timeline imposed upon asylum seekers, lawyers, and the immigration system when faced with mere days to prepare for such motions.

The Immigrant Legal Advocacy Project ("ILAP") is Maine's only statewide immigration legal services organization. ILAP advances justice for immigrants and asylum seekers in Maine through free immigration legal services, community outreach, and advocacy.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparation or submission of this brief, and no other person contributed money intended to fund preparation or submission of this brief. The parties have consented to the filing of this brief.

Central West Justice Center is a legal services organization dedicated to assisting immigrants in central and western Massachusetts. Central West Justice Center focuses on cases involving humanitarian-based immigration law.

The Justice Center of Southeast Massachusetts, LLC ("Justice Center") is a non-profit organization providing free legal assistance to low-income residents of Barnstable, Bristol, Dukes, Nantucket, Plymouth, and Norfolk Counties. Justice Center represents individuals in family-based immigration cases, removal proceedings, and other immigration matters.

MetroWest Worker Center-Casa is an immigrant worker-led organization based in MetroWest Boston, working to defend and expand the labor, civil, and human rights of all workers.

The Massachusetts Law Reform Institute ("MLRI") provides statewide advocacy and leadership to advance laws and policies that support low-income people and communities. MLRI provides direct support to pro bono legal service organizations on issues affecting immigrant communities.

Greater Boston Legal Services provides free civil legal help in Greater Boston, including representation and advocacy for immigrants seeking asylum and related protection, in removal proceedings, and in other immigration matters.

The Northeast Justice Center ("NJC") is a civil legal aid program that provides free assistance to vulnerable low-income individuals or elders in

northeastern Massachusetts, to help them meet their basic needs, protect their legal rights, and advocate for fairer systems. NJC routinely represents immigrant clients in proceedings before the Executive Office for Immigration Review to seek humanitarian-based relief from removal.

Sara Cressey and **Anna Welch** are Professors at the University of Maine School of Law. Professor Cressey is a Visiting Professor, and Professor Welch is a Professor of Law and the Founding Director of the Refugee and Human Rights Clinic. Professors Cressey and Welch supervise student attorneys in their representation of immigrants in removal defense proceedings and directly represent immigrants in removal defense proceedings when students are unavailable.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Department of Homeland Security ("DHS") has adopted a new, aggressive policy of moving to pretermit a noncitizen's application for asylum in the United States in favor of removal to a third country with which the United States has entered into an Asylum Cooperative Agreement ("ACA"). These motions, filed with little to no advance notice, ask immigration judges to summarily order noncitizens removed to countries to which they may have no prior connection and where they may have a genuine fear of going. While in some cases, the third country may be in the same geographic region as the asylum applicant's home country, in other cases, the third country may be on a different continent.

When DHS moves to pretermit a noncitizen's application for asylum, federal law first guarantees him a "reasonable opportunity" to contest the motion. In practice, however, that right to a "reasonable opportunity" has been run roughshod over by an immigration court system that forces noncitizens to assess and present their response—and any fear-based claim concerning the newly announced third country of removal—within mere days, and sometimes within hours. This effectively collapses what is normally months of careful collection and assembly of facts and evidence into an overnight cram session with no meaningful notice. Whatever this is, it is not a "reasonable opportunity."

Amici are legal practitioners who have witnessed this firsthand. DHS now routinely files motions to pretermit based on ACAs at the eleventh hour, often only days before a scheduled hearing, or sometimes orally at the hearing itself, including at the prompting of the immigration judge. Mr. Joao-Congo's case is a paradigmatic example of the impossible timelines that *amici* labor under to counter DHS's legal maneuvers that, if successful, result in grave and often irreversible consequences.

These motions to pretermit rest on a 2019 regulation (the "ACA Rule") that purports to expand the Immigration and Nationality Act's safe-third-country exception, which by statute reaches only asylum, to also bar claims for withholding of removal and protection under the Convention Against Torture ("CAT"). 8 C.F.R. § 1240.11(h) (2026); *Matter of C-I-G-M- & L-V-S-G-*, 29 I. & N. Dec. 291,

293–94 (BIA 2025). These motions thus force noncitizens to make a high-stakes, fact-intensive showing in response to a threshold motion that imperils not only their asylum claims but also their last line of defense against persecution and torture.

A central question posed by Mr. Joao-Congo's case is whether ***four business days*** constitutes a "reasonable opportunity" to oppose a motion to pretermit. Due process requires that noncitizens' response time be commensurate with the substantial burden placed on them by the ACA Rule's procedure. Indeed, the Board of Immigration Appeals (the "Board") recognizes that noncitizens must be given a "reasonable opportunity" to respond, *C-I-G-M-*, 29 I. & N. Dec. at 295, although it has never clarified what that opportunity requires. As *amici*'s experiences show, the four business days provided to Mr. Joao-Congo was not a "reasonable opportunity." Here, reaching a detained client, assessing whether a valid ACA applies, evaluating risk in the third country, and, if appropriate, mounting a fear-based claim would have taken far longer than four business days.

Amici offer their perspective as practitioners routinely contending with sudden, short-fuse timelines to illustrate in practical terms: (1) how to determine what constitutes a "reasonable opportunity" to oppose a motion to pretermit; (2) why, in cases such as Mr. Joao-Congo's, four business days does not provide a "reasonable opportunity"; and (3) why removal to a third country does not justify an

artificially compressed timeline, let alone deprivation of a noncitizen's due process right to oppose. The Court should vacate the Board's decision.

LEGAL FRAMEWORK

Under the Immigration and Nationality Act, any noncitizen either physically in or arriving in the United States may apply for asylum, 8 U.S.C. § 1158(a)(1), subject to certain exceptions. One exception is the safe-third-country exception, which bars an application for asylum in the United States if the Attorney General determines that the noncitizen "may be removed, pursuant to a bilateral or multilateral agreement," to a third country in which his "life or freedom would not be threatened" on a protected ground and where he "would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection," unless the Attorney General nonetheless finds that the public interest favors asylum. *Id.* § 1158(a)(2)(A).

The statutory provision establishing the safe-third-country exception addresses only asylum. But the ACA Rule, which implements that exception, purports to widen it to also cover applications for withholding of removal and for protection under CAT.[2] As a result, a noncitizen subject to an agreement "is

[2] 8 C.F.R. § 1240.11(h); Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63,994, 63,998, 64,010–11 (Nov. 19, 2019); *see C-I-G-M-*, 29 I. & N. Dec. at 293–94.

ineligible to apply for asylum … or for withholding of removal or CAT protection in the United States" unless the immigration judge makes one of three findings, discussed *infra* in Part II.A. 8 C.F.R. § 1240.11(h)(2).[3]

DHS now regularly moves to pretermit a noncitizen's applications for asylum, withholding of removal, and/or CAT protection by invoking the safe-third-country exception through the ACA Rule. *See C-I-G-M-*, 29 I. & N. Dec. at 291–92. The Board has instructed that immigration judges "should determine whether the safe third country bar applies prior to and separate from considering a respondent's eligibility for asylum." *Id.* at 296. Thus, if an immigration judge determines that the bar applies, "there is no basis for the Immigration Judge to further consider asylum," *id.*, and the noncitizen "shall be ordered removed to the relevant third country," 8 C.F.R. § 1240.11(h)(4).[4]

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[3] The ACA Rule purports to bar these claims even though their protections are mandatory: the Attorney General "may not remove an alien to a country" where his life or freedom would be threatened on a protected ground, 8 U.S.C. § 1231(b)(3)(A), and a noncitizen who shows he is likely to be tortured "is entitled to protection under [CAT]," 8 C.F.R. § 1208.16(c)(4); *see also id.* § 1208.17(a).

[4] The ACA Rule's direction to order removal to the agreement country, notwithstanding any designated countries of removal, or countries with which the noncitizen may have a "lesser connection," also disregards the sequencing requirements Congress prescribed for countries of removal. *See* 8 U.S.C. § 1231(b)(2)(A)–(E); *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 338–41 (2005).

ARGUMENT

I. FEDERAL LAW GUARANTEES A NONCITIZEN A "REASONABLE OPPORTUNITY" TO OPPOSE A MOTION TO PRETERMIT

Even under the Board's interpretation of the ACA Rule, a noncitizen has the right to a reasonable opportunity to respond to a motion to pretermit. And what is reasonable depends on the amount of work necessary to sufficiently respond.

Two independent sources require that opportunity. ***First***, the Immigration and Nationality Act and its implementing regulations guarantee that a noncitizen in removal proceedings "shall have the privilege of being represented" by counsel of his choosing and "shall have a reasonable opportunity to examine the evidence," "to present evidence," and to "cross-examine witnesses." 8 U.S.C. § 1229a(b)(4)(A)–(B). The immigration judge must advise the noncitizen of these rights at the outset of the hearing. 8 C.F.R. § 1240.10(a)(1), (4). A motion to pretermit is decided within that same proceeding, *see id.* § 1240.11(h)(1), and nothing in the ACA Rule purports to displace those guarantees. The Board has recognized as much: once DHS gives notice of its intent to remove a noncitizen to a third country, the noncitizen "must have a reasonable opportunity to satisfy his or her burden." *C-I-G-M-*, 29 I. & N. Dec. at 295; *see also id.* at 295–96 ("[S]tatutory and regulatory provisions ensure that the respondent has the opportunity to present evidence in support of any applications for relief and to respond to any evidence

presented by DHS" (alteration omitted) (quoting *Matter of H-A-A-V-*, 29 I. & N. Dec. 233, 234 (BIA 2025))).

Consistent with those guarantees, the statutes and regulations governing statutory withholding and CAT claims separately require "effective notice and a meaningful opportunity" to present such claims before removal to a third country. *D.V.D. v. U.S. Dep't of Homeland Sec.*, No. 26-1212, slip op. at 43, 45 (1st Cir. Sept. 18, 2026).[5] Indeed, these statutes and regulations "prescribe hearing-related procedures for [fear-based] claims with no exception for third-country removals." *D.V.D.*, slip op. at 43 (fear-of-persecution claims); *see id.* at 45–46, 48–49 (same as to fear-of-torture claims). In each context, "an individual's right to contest removal to a country based on a fear of persecution [or torture] in that country means little if

[5] The Supreme Court has since stayed the *D.V.D.* district court's judgment and granted certiorari. *Dep't of Homeland Sec. v. D.V.D.*, No. 26-426 (U.S. Sept. 29, 2026). But that does not undermine this Court's analysis of the relevant law. "Under the law of the circuit doctrine, newly constituted panels must follow the rulings of preceding panels," and the exceptions reach only "controlling authority, subsequently announced, such as an opinion of the Supreme Court," or later authority that "provides a clear and convincing basis" to conclude that the prior panel would have changed its mind. *United States v. Perez*, 89 F.4th 247, 250 (1st Cir. 2023) (citations and internal quotation marks omitted). A grant of certiorari is neither. *See United States v. Stephens*, 689 F. App'x 251, 252 (5th Cir. 2017) (per curiam). And two of the three specific questions the Supreme Court directed the parties to brief concern jurisdictional or remedial issues not relevant here. *See D.V.D.*, No. 26-426. A decision on any of those grounds would likely leave this Court free to adhere to its reading of the governing statutes and regulations. In any event, as explained above, *amici*'s argument does not depend on the interpretation of these statutes and regulations or, by extension, on *D.V.D.*'s outcome.

one does not receive prior notice of the intended removal destination and a meaningful opportunity to contest that destination." *Id.* at 39–40; *see also id.* at 46–47 (declining to treat noncitizens with final removal orders "less favorably than noncitizens," like Mr. Joao-Congo, "still in removal proceedings").

Second, the Due Process Clause independently requires, in "any proceeding which is to be accorded finality," *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950): (1) notice that "afford[s] a reasonable time for those interested to make their appearance," *id.*; and (2) "the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

None of these sources prescribes a fixed number of days that automatically satisfies a "reasonable opportunity" to oppose a motion to pretermit. Rather, reasonableness turns on the circumstances of each case, and especially on the amount of work the noncitizen must do to respond. Due process "is flexible and calls for such procedural protections as the particular situation demands," *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)), and whether notice affords enough time is judged "with due regard for the practicalities and peculiarities of the case," *Mullane*, 339 U.S. at 314.

II. FOUR BUSINESS DAYS DOES NOT PROVIDE A "REASONABLE OPPORTUNITY" FOR AN ASYLUM APPLICANT TO RESPOND TO A MOTION TO PRETERMIT

The amount of work needed to respond meaningfully to a motion to pretermit is substantial. The ACA Rule frontloads high-stakes, fact-intensive determinations into a threshold motion; the noncitizen is treated as bearing the burden on each of them; and his response is effectively his only chance to raise fear-based claims about the third country. *See infra* Part II.A. An immigration judge setting a deadline to respond, or ruling on a request for more time, must therefore account for the work a meaningful response requires, which at a minimum involves testing the ACA's application; researching risk in the third country; and, if appropriate, developing the fear-based showing.[6] As *amici*'s experience shows, four business days is nowhere near sufficient for that work. *See infra* Part II.B.

[6] *Amici* describe this work from the perspective of counsel because *amici* are legal services organizations and practitioners who represent noncitizens in these proceedings. But not every noncitizen has counsel, *see* 8 U.S.C. § 1229a(b)(4)(A) (providing the privilege of representation only "at no expense to the Government"), and a noncitizen without counsel must do all of this work himself. In *amici*'s experience, unrepresented noncitizens—including detained individuals appearing only by video—have been ordered removed to third countries at master calendar hearings with no advance notice, no opportunity to seek counsel to respond, and no understanding of how or why the order was entered.

A. Under The Board's Reading Of The ACA Rule, A Noncitizen Must Be Prepared To Carry The Burden Of Proof On Every Question The Immigration Judge May Decide

A grant of pretermission carries two serious consequences. First, the noncitizen's claims for asylum, withholding, and CAT protection against removal to his home country are never adjudicated. *See* 84 Fed. Reg. at 63,998–99. Second, his fear of the third country is decided only within the threshold inquiry under the ACA Rule, not as a separate withholding or CAT claim adjudicated "after an evidentiary hearing to resolve factual issues in dispute," 8 C.F.R. § 1240.11(c)(3). *See id.* § 1240.11(h)(2), (4).

Under the Board's interpretation of the ACA Rule, an evidentiary hearing is required only "to the extent it may be necessary to resolve disputed facts." *C-I-G-M-*, 29 I. & N. Dec. at 296. A noncitizen's response to the motion to pretermit is thus his one opportunity to demonstrate that material facts are in dispute and that an evidentiary hearing is required.[7] *See H-A-A-V-*, 29 I. & N. Dec. at 235 n.3, 238 (analogizing to motions to dismiss and for summary judgment).

[7] If the immigration judge orders an evidentiary hearing, the noncitizen presumably may testify and present witnesses at it. *See* 8 U.S.C. § 1229a(b)(4)(B); *cf.* 8 C.F.R. § 1240.11(c)(3)(iii) (at an evidentiary hearing on an asylum or withholding application, the applicant "shall be examined under oath" and "may present evidence and witnesses"). Neither the ACA Rule nor Board precedent addresses whether he would also have the opportunity to supplement the documentary record at that stage; that appears to be left to the immigration judge's authority. *See* 8 C.F.R. § 1003.31(h). Either way, the immigration judge reaches the question of what additional evidence, if any, should be part of the record only if the

To make matters worse, the Board requires noncitizens to carry the burden of proof on every question regarding the motion to pretermit. Under its interpretation of the ACA Rule, the safe-third-country exception applies by default "***unless*** the immigration judge determines, by a preponderance of the evidence," that one of three conditions is met: (1) the agreement "does not apply to the alien or does not preclude" his asylum application; (2) the noncitizen "qualifies for an exception" particular to that agreement; or (3) the noncitizen "has demonstrated that it is more likely than not that he or she would be persecuted on account of a protected ground or tortured in the third country." 8 C.F.R. § 1240.11(h)(2)(i)–(iii) (emphasis added). The noncitizen is routinely treated as bearing the burden on each showing. *See C-I-G-M-*, 29 I. & N. Dec. at 295, 297; 84 Fed. Reg. at 64,003; *see also* 8 C.F.R. § 1240.8(d).[8]

The fear-based showing (condition #3 above) is perhaps the most demanding.[9] To assess and, if appropriate, present a fear-based challenge to the third country,

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noncitizen's response first puts material facts in dispute. *See H-A-A-V-*, 29 I. & N. Dec. at 235–36 (noting that counsel "did not present any reasons why a full evidentiary hearing was necessary").

[8] This brief does not address the proper allocation of these burdens. By its express terms, the ACA Rule places the burden on noncitizens only as to the third showing. *See* 8 C.F.R. § 1240.11(h)(2)(iii). The point here is that a noncitizen must be prepared to carry these burdens, at least under the current system.

[9] *Amici* do not address immigration judges' authority to consider whether a noncitizen will receive a "full and fair procedure," 8 U.S.C. § 1158(a)(2)(A), or whether that determination must be individualized. As a practical matter, this issue

counsel must do in days what ordinarily precedes a merits hearing by months. The motion to pretermit may be the noncitizen's first notice that he could be sent to the third country, and it may come long after he applied for protection against removal to his own country. *See, e.g.*, *C-I-G-M-*, 29 I. & N. Dec. at 292 (motion to pretermit filed nearly two years after asylum application); *cf. D.V.D.*, slip op. at 30 (noting "considerable force" of district court's reasoning that noncitizens "cannot, as a practical matter, anticipatorily raise in their removal proceedings fear-based claims about removal to a country not identified in those proceedings"). The showing must address the third country as it bears on the client's profile and on the third country's relations with his home country, including risks distinctive to third-country removal—for example: (1) harm by rogue agents and non-state actors, who can be persecutors and torturers under the governing law, *see id.* at 38 n.15; and (2) "chain refoulement," in which the receiving country in turn sends the person to a country to which the United States itself could not remove him, *id.* at 7 n.2. And the showing must be strong enough to put material facts in dispute so that the immigration judge orders an evidentiary hearing. *See C-I-G-M-*, 29 I. & N. Dec. at 296.

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will often overlap with, but is not identical to, the fear-based showing, particularly where the absence of such a procedure would lead to chain refoulement to the home country. Regardless, counsel must likewise build a record on, and preserve, the lack-of-procedure issue. *See infra* Part III.A.

B. Four Business Days Is Not A Reasonable Amount Of Time For A Noncitizen To Prepare A Meaningful Response

Amici's experience helps answer the questions due process asks: "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. It bears equally on what "reasonable opportunity" means under the relevant statute and regulations, which courts read with solicitude for fair procedure. *See Califano v. Yamasaki*, 442 U.S. 682, 693 (1979). A meaningful response to a motion to pretermit proceeds in steps. Each takes time, and none can be skipped.

1. Just Reaching The Client May Consume The Entire Four-Day Response Period

Federal law guarantees a noncitizen in removal proceedings "the privilege of being represented" by counsel. 8 U.S.C. § 1362; *see id.* § 1229a(b)(4)(A). Indeed, the Board has recognized that immigration judges "must grant a reasonable and realistic period of time to provide a fair opportunity for [noncitizens] to … speak with … counsel." *Hernandez Lara v. Barr*, 962 F.3d 45, 53 (1st Cir. 2020) (quoting *Matter of C-B-*, 25 I. & N. Dec. 888, 889 (BIA 2012)).

It can take days or weeks for an immigration attorney to schedule even a modest amount of time with their detained clients, who may be contacted by counsel—or anyone else—only according to their detention center's specific rules. Practitioners often face restrictions imposed by detention centers on the date, length,

and frequency with which they can communicate with their clients—frequently no more than one hour-long phone call per day.

At one New England facility, for example, attorney video calls can only be scheduled from 6 p.m. to 8 p.m., Tuesday through Thursday.[10] Many facilities do not even permit same-day meetings. It is thus easy—despite an attorney's best efforts and a willing client—for days to pass before an attorney has a meaningful opportunity to speak with their client.

2. Determining Whether An ACA Applies Requires Legal Analysis And Records That Counsel May Not Control

Once counsel reaches their client, the next task is to establish whether the agreement applies at all. To do so, counsel must identify and analyze which agreements or authorities DHS is invoking. *See Matter of N-E-R-S-*, 29 I. & N. Dec. 753, 755 (BIA 2026) ("DHS is not required to provide an implementing 'instrument' … or a 'complete set of operative terms and criteria.'"). Each agreement and its exceptions are set out in a Federal Register notice, *see* 8 C.F.R. § 1240.11(h)(2)(ii), (h)(3), and an agreement may be amended after it is

[10] *See* U.S. Immigr. & Customs Enf't, *Strafford County Corrections*, https://www.ice.gov/detain/detention-facilities/strafford-county-corrections (last visited Nov. 17, 2026).

made.[11] Counsel must then test factual (and potentially contested) particulars such as the client's nationality, habitual residence, date of entry, age, and criminal history against the agreement's scope and exceptions and gather records that establish those facts, which counsel might not control.[12]

In *amici*'s experience, how long these records take is largely out of counsel's hands. A criminal history, for instance, generally must be requested from the courts that hold it, and the wait can range from same-day to six weeks. Requests to federal agencies run on their own schedules too: U.S. Citizenship and Immigration Services' May 2025 acknowledgment of a Freedom of Information Act request for information relating to Mr. Joao-Congo placed the request in the "complex track" and invoked a ten-business-day extension on top of a twenty-business-day response goal. *See* EOIR-000889–90.

And the applicability issue can arise with no warning at all. In one *amicus* practitioner's recent experience, a client's date of entry placed her outside the agreement, yet DHS moved to pretermit orally at the individual hearing, and counsel had to establish that point on the spot. For a detained client, *amici*'s experience is

[11] For example, the United States entered into the Honduras agreement in March 2025, amended it by an exchange of diplomatic notes in June 2025, and published it in July 2025. *C-I-G-M-*, 29 I. & N. Dec. at 295.

[12] For example, the Honduras agreement excludes unaccompanied minors, Honduran nationals and habitual residents, and persons involved in certain crimes or subject to Interpol notifications. *C-I-G-M-*, 29 I. & N. Dec. at 295.

that answering the applicability question alone takes about two weeks. If multiple agreements are invoked, the exercise repeats for each. *See* 8 C.F.R. § 1240.11(h)(1).

3. Building An Adequate Documentary Record Requires Evidence That Can Take Weeks To Assemble

Defending against a motion to pretermit requires counsel to build from scratch a second entire merits claim about a country that the client often has never visited. When the fear grows out of the home-country claim—for example, when a political dissident fears that the third country will return him to the country that he fled—counsel must develop the facts of the home-country claim to explain the third-country risk. *See* EOIR-000106–09. And when the third-country fear rests on a ground unrelated to the home-country claim, counsel starts from nothing: the client may never have even been asked about the facts that matter because they were irrelevant to the original home-country claim. For example, an individual might face harm in his home country as a result of political beliefs but harm in a third country because of religion, where religion was immaterial to the harm he faced in his home country.

Building a client declaration about future harm is time-consuming work. Survivors of torture or sexual violence, for example, cannot be expected to disclose their histories and fears in a single session; neither can counsel be expected to build the trust and rapport needed to elicit complicated and often painful testimony on such short notice. Even a single declaration ordinarily requires many hours of

interviews, and trauma often forces those conversations to be broken into short sessions. The grounds on which a client may fear removal, such as sexual orientation, political opinion, ethnicity, or gender, are often among the most difficult to discuss, and none can be developed in a matter of days. The threat of removal often compounds the client's distress and uncertainty, making it even more difficult to develop a factual record on a short timeline. Further, detention and language barriers, both present in Mr. Joao-Congo's case, typically "require more time." *Cf. Hernandez Lara*, 962 F.3d at 55 & n.13.

Country research comes next, and because the client often has no personal experience of the third country, an expert is frequently essential. Finding a qualified expert, briefing them, and receiving a report typically takes a month or more, and the pool of experts on narrow questions—*e.g.*, whether a particular group would be targeted in a particular country—is small. A psychological evaluation, often critical where the claim rests on trauma, commonly takes several weeks to schedule and complete. Corroborating documents must be collected, translated, and certified, 8 C.F.R. § 1003.33, and assembled as the immigration court requires, *see* EOIR-000204. Interpreters, evaluators, experts, and translators all work on their own schedules, and none can be expected to set aside other work on a few days' notice.

The record here illustrates the stark difference between a home-country record developed over time and a third-country record assembled in days. For the claim

Mr. Joao-Congo had pursued since September 2025—his fear of return to Angola—his evidence included his own declaration, an official release order, three witness declarations with certified translations, and medical records. EOIR-000003; 000155. His response on Uganda, on the other hand, had to be assembled in just four business days and so consisted of six news and advocacy reports. EOIR-000133. Because there simply was not enough time, it contained no declaration addressing Uganda, no witness statement, and no expert reports—precisely the kind of individualized evidence the Board found missing. *See* EOIR-000004; *see also* EOIR-000082 (relying on "general country condition evidence").

In short, compressing what usually consists of ***months*** of interviews and research into four business days to prepare the equivalent of an entire merits record about a country the noncitizen may never have been to (and had no reason to think was even at issue until the motion was presented) is anything but a "reasonable opportunity" to be heard.

4. Preparing The Opposition And The Client's Testimony Cannot Be Compressed Into Four Days

Finally, counsel must draft an opposition brief to the pretermission motion that addresses both the agreement's applicability and the fear-based showing, preserves objections, *see* 8 U.S.C. § 1252(b)(4)(A), (d)(1); *Matter of J-Y-C-*, 24 I. & N. Dec. 260, 261 n.1 (BIA 2007), and supports any request for a continuance

or an evidentiary hearing, *see* 8 C.F.R. § 1003.29; *C-I-G-M-*, 29 I. & N. Dec. at 296, and must prepare the client to testify.

The limited opportunity to develop a documentary record makes client testimony (and the preparations for it) pivotal. In *amici*'s experience, immigration judges tend to lead with brief, targeted questioning: whether the noncitizen has been to the country, whether he knows anyone there, and whether he is afraid to go. With adequate time, counsel can present evidence of risk through experts and documents, and the client need only testify to his own profile and fears. Without time, the client's testimony is the main evidence, and he is asked to supply analysis and background beyond his knowledge.

That is what happened in Mr. Joao-Congo's case. The immigration judge asked Mr. Joao-Congo why he believed Ugandan officials would send him back to Angola, and DHS asked whether he knew of any Angolan whom Uganda had turned over to the Angolan government. EOIR-000106; 000113. Mr. Joao-Congo answered that he had been detained for eight months and did not know. EOIR-000113. The Board dismissed his assertions as "speculative." EOIR-000004. In *amici*'s experience, successful fear-based showings in this posture are rare—not because noncitizens lack legitimate fears of these third countries but because they learn of the motion hours or days before the hearing and have no time to prove those fears. That is the risk of error a compressed response period creates.

As each step demonstrates, the response time must be measured against the work a meaningful response requires. In Mr. Joao-Congo's case, the immigration judge and the Board failed to do so. The Board reasoned that Mr. Joao-Congo received written notice, filed an opposition, and had a hearing. *Id.*[13] It did not mention that he was detained, that he needed an interpreter, that the only country designated for his removal before the motion was Angola, or that his opposition was filed, and the motion was decided, on the day of the hearing. *See* EOIR-000082–83; 000093; 000097; 000100; 000103. A response period that does not account for the work described above—here, four business days—does not accord with the "reasonable opportunity" that the statute, the regulations, and due process require.

III. THAT REMOVAL WOULD BE TO A THIRD COUNTRY DOES NOT JUSTIFY A COMPRESSED RESPONSE PERIOD

Removal to any country—whether a noncitizen's country of origin or not—requires significant factual development regarding that country and the risk of harm the noncitizen may face if removed there. But DHS routinely contends, and immigration judges routinely accept without justification, that third-country removals are more "straightforward" inquiries that consequently require less time

[13] The Board erred in stating that this hearing was "scheduled … to afford [Mr. Joao-Congo] with an opportunity to respond to the motion." EOIR-000004. Rather, the hearing was calendared, as a merits hearing, weeks before DHS filed its motion. *See* EOIR-000094; 000098; 000197.

and evidence to assess.[14] This understanding is false, and it subjects noncitizens to systematically unfair procedural burdens and wastes judicial resources by forcing courts to contend with surprise motions that render carefully developed records moot.

A. Removals To Third Countries Are Not Inherently More "Straightforward"

DHS has argued that a noncitizen's opportunity to respond to a motion to pretermit "should be commensurate with the straightforward nature of the analysis." EOIR-000195 n.3. That premise borrows the Board's contention that evaluating a fear of the third country "is more straightforward" than assessing a fear of the home country, and thus can usually be decided in an abbreviated hearing at the master calendar stage. *C-I-G-M-*, 29 I. & N. Dec. at 296 (quoting 84 Fed. Reg. at 64,004). The premise does not hold.

[14] *Amici* are aware of instances where immigration judges have gone further, ruling absolutely that a noncitizen cannot establish fear of harm in a third country to which he has never been. Such reasoning cannot be reconciled with either the asylum statute or the ACA Rule, which ask a forward-looking question: whether the noncitizen "would be persecuted on account of a protected ground or tortured in the third country." 8 C.F.R. § 1240.11(h)(2)(iii); *see* 8 U.S.C. § 1158(a)(2)(A); *see also C-I-G-M-*, 29 I. & N. Dec. at 296 (contemplating "consideration of any documentary evidence" despite "no substantial connection to that country"). Guidance from this Court that a lack of prior ties does not necessarily make the inquiry "more straightforward" would also have the benefit of confirming *a fortiori* that a lack of ties does not make the inquiry wholly unnecessary.

The Board's erroneous reasoning rests on the assumption that a noncitizen will generally have no substantial connection to the third country. *Id.* But a lack of ties to the third country does not make that showing simpler; to the contrary, it makes demonstrating a valid claim ***harder*** because the noncitizen then must prove, through research, experts, and corroboration rather than his own experience, a likelihood of harm in a country about which he may personally know nothing. *See supra* Parts II.A, II.B.3.

Likewise, the Board's limited view of an immigration judge's authority does not reduce a noncitizen's work. According to the Board, an immigration judge "is limited to determining whether any of the conditions discussed in 8 C.F.R. § 1240.11(h)(2) apply." *C-I-G-M-*, 29 I. & N. Dec. at 294. The Board has held that immigration judges "do not have authority" to decide whether the noncitizen "would have access to a full and fair procedure" in the third country, because the Attorney General and DHS supposedly make that determination, "separate and apart from the regulatory provisions" that govern the motion. *Id.* at 294, 298; 84 Fed. Reg. at 63,997, 64,002. Nor, the Board has held, may immigration judges decide whether the public interest favors asylum in the United States, because the ACA Rule reserves that question to the Secretary of Homeland Security.

8 C.F.R. § 1240.11(h)(3); *C-I-G-M-*, 29 I. & N. Dec. at 294–95, 298.[15] The Board has also rejected arguments based on an agreement's postdating a noncitizen's arrival, *C-I-G-M-*, 29 I. & N. Dec. at 297–98, and on whether DHS must show that the third country will accept him, *id.* at 295 n.4. Nevertheless, counsel is obligated to build an evidentiary record on those claims because any later judicial review may be confined to it. *See* 8 U.S.C. § 1252(b)(4)(A). And counsel must do so within an emerging body of law that has changed rapidly within a span of months. *C-I-G-M-*, 29 I. & N. Dec. at 293 n.3, 295; *see also Matter of A-C-M-*, 29 I. & N. Dec. 703, 707 (BIA 2026); *Matter of E-A-R-M-*, 29 I. & N. Dec. 746, 750–51 (BIA 2026); *N-E-R-S-*, 29 I. & N. Dec. at 755.

Even taking the Board's limitations at face value, the questions left to the immigration judge are demanding. Whether the agreement applies at all can turn on contested facts and on agreements between sovereigns with histories of amendment. *See supra* Part II.B.2. And whether the noncitizen is more likely than not to be persecuted or tortured in the third country requires the fear-based showing typically resolved through complete proceedings. *See supra* Part II.A.

[15] *But see* 8 U.S.C. § 1158(a)(2)(A) (safe-third-country exception may apply "unless the ***Attorney General*** finds that it is in the public interest for the alien to receive asylum in the United States" (emphasis added)).

And even if a particular case may ultimately prove straightforward, that cannot be known until the record is developed. An abbreviated hearing is appropriate, if ever, only where no material facts are in dispute. *H-A-A-V-*, 29 I. & N. Dec. at 234. But whether material facts are in dispute depends on what the noncitizen's response shows, and an immigration judge cannot know the answer until the noncitizen has had a reasonable opportunity to develop the facts. The prospect of an abbreviated hearing thus says nothing about how much work the response requires. That work must be done before any hearing—indeed, it is the only way the noncitizen can show that a fuller hearing is needed—and the noncitizen is treated as bearing the burden on all of it.

B. Compressed Response Periods Are Applied Unequally And Waste Judicial Resources

Motions to pretermit present unequal burdens for DHS and noncitizens in immigration courts. Noncitizens are held to filing and continuance deadlines, *see* EOIR-000204, whereas DHS is routinely permitted to move to pretermit orally or on days' notice, *see* EOIR-000193. In Mr. Joao-Congo's case, DHS used a form motion that still carried unfilled placeholders. *See* EOIR-000194 ("[he/she]"). By contrast, responding to it properly required the immense work described in Part II.B.

Compressed response periods waste the time and resources of immigration courts, practitioners, and noncitizens alike. A surprise motion moots preparations that may have been ongoing for months and inevitably produces a thin record,

making appellate review—at the Board or in this Court—more difficult and less effective. Immigration judges who receive new motions, third-country evidence, psychological evaluations, expert reports, and legal briefing on the same day or only days before a hearing have no meaningful opportunity to consider the evidence. Requiring an adequate response period, consistent with due process, would help immigration judges decide the threshold question once, on a complete record.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to grant the petition for review and vacate the Board's decision.

Dated: November 19, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel certifies that this document complies as follows:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,497 words (based on the Microsoft Word word count function), excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: November 19, 2026

Respectfully submitted,

/s/ Sean Drohan
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CERTIFICATE OF SERVICE

I hereby certify that, on November 19, 2026, I served the foregoing document on all parties of record via CM/ECF.

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