Matter of B-Z-R-, Respondent

Decided by Attorney General December 9, 2021

U.S. Department of Justice
Office of the Attorney General

BEFORE THE ATTORNEY GENERAL

Pursuant to 8 C.F.R. § 1003.1(h)(1)(i), I direct the Board of Immigration Appeals ("Board") to refer this case to me for review of its decision. The Board's decision in this matter is automatically stayed pending my review. *See Matter of Haddam*, A.G. Order No. 2380-2001 (Jan. 19, 2001). To assist me in my review, I invite the parties to these proceedings and interested amici to submit briefs on: Whether mental health may be considered when determining whether an individual was convicted of a "particularly serious crime" within the meaning of 8 U.S.C. §§ 1158(b)(2)(A)(ii) and 1231(b)(3)(B)(ii). *See Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014) (holding that "a person's mental health is not a factor to be considered in a particularly serious crime analysis and that adjudicators are constrained by how mental health issues were addressed as part of the criminal proceedings").

The parties' briefs shall not exceed 6,000 words and shall be filed on or before January 10, 2022. Interested amici may submit briefs not exceeding 4,500 words on or before January 17, 2022. The parties may submit reply briefs not exceeding 3,000 words on or before January 24, 2022. All filings shall be accompanied by proof of service and shall be submitted electronically to AGCertification@usdoj.gov, and in triplicate to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

All briefs must be both submitted electronically and postmarked on or before the pertinent deadlines. Requests for extensions are disfavored.

Matter of B-Z-R-, Respondent

Decided by Attorney General January 6, 2022

U.S. Department of Justice
Office of the Attorney General

BEFORE THE ATTORNEY GENERAL

On December 9, 2021, pursuant to 8 C.F.R. § 1003.1(h)(1)(i), I directed the Board of Immigration Appeals to refer this case to me for review of its decision. To assist me in my review, I directed that opening briefs from the parties be filed on or before January 10, 2022, that briefs from amici be filed on or before January 17, 2022, and that reply briefs from the parties be filed on or before January 24, 2022.

On December 20, 2021, counsel for respondent filed a request to extend the deadline for submitting respondent's opening brief by twenty-one days, to January 31, 2022. In response to that request, I set the following briefing schedule in this matter:

The parties' briefs shall not exceed 6,000 words and shall be filed on or before January 31, 2022. Interested amici may submit briefs not exceeding 4,500 words on or before February 7, 2022. The parties may submit reply briefs not exceeding 3,000 words on or before February 14, 2022. All filings shall be accompanied by proof of service and shall be submitted electronically to AGCertification@usdoj.gov, and in triplicate to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

All briefs must be both submitted electronically and postmarked on or before the pertinent deadlines. Requests for further extensions are disfavored.

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UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

In the Matter of:

B-Z-R-,

In Removal Proceedings

BRIEF OF AMICI CURIAE DISABILITY RIGHTS CALIFORNIA, CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, PANGEA LEGAL SERVICES, AL OTRO LADO, ARIZONA CENTER FOR DISABILITY LAW, BAZELON CENTER FOR MENTAL HEALTH LAW, DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS EDUCATION & DEFENSE FUND, DISABILITY RIGHTS OREGON, AND RAPID DEFENSE NETWORK (RDN) ON REFERRAL TO THE ATTORNEY GENERAL

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INTEREST OF AMICI CURIAE

Amici Curiae are ten disability rights and immigrants' rights organizations deeply concerned for noncitizens with mental and cognitive disabilities barred from critical relief from removal because of prior convictions.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici agree with the parties that the Attorney General should overrule *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014), which prohibits considering relevant mental health evidence when determining whether an individual was convicted of a "particularly serious crime" ("PSC") within the meaning of 8 U.S.C. §§ 1158(b)(2)(A)(ii) and 1231(b)(3)(B)(ii).

Amici respectfully submit this brief to emphasize that the Board's discretionary PSC analysis, with or without the prohibition in *Matter of G-G-S-*, violates Section 504 of the Rehabilitation Act and its implementing regulations.

Singling out mental health evidence as a factor that cannot be considered when determining whether an individual was convicted of a PSC—or worse, permitting mental health evidence to be used as an aggravating factor in that analysis (as the Department of Homeland Security ("DHS") seeks)—discriminates against individuals with mental disabilities.[1]

Consistent with the Board's prior interpretation of its regulations and Section 504, the Attorney General not only must reverse *Matter of G-G-S-*, but also must, at minimum, clarify that evidence of mental disabilities may be used only as a mitigating factor when determining whether an individual was convicted of a PSC. Any alternative—whether a facially-neutral consideration or, worse, treatment of mental disabilities as enhancing the dangerousness of a crime—would only strengthen and endorse structural biases and pervasive stereotypes that noncitizens with mental disabilities have faced at every stage leading to their removal proceeding, and would perpetuate disability discrimination.

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[1] The term "mental disabilities" is used inclusively throughout this brief to refer to the spectrum of mental illnesses and cognitive impairments treated as "mental illness" under *Matter of G-G-S-*.

BACKGROUND

Congress enacted Section 504 of the Rehabilitation Act ("Section 504" or the "Rehabilitation Act") and the Americans with Disabilities Act (the "ADA") to ensure that individuals with disabilities are afforded an equal opportunity to participate in government programs, benefits, and services. Yet, amici have observed firsthand the discrimination faced by individuals with mental disabilities, first, when assumed "dangerous" without cause and subjected to criminal prosecution rather than afforded treatment or support services, and second, when required to defend themselves in removal proceedings—including for the purported commission of a PSC.

When noncitizens with disabilities are prevented from introducing relevant mental health evidence in a PSC determination, they are deprived of an equal opportunity to demonstrate why they should be eligible for asylum or withholding of removal. When DHS presents mental health evidence as an aggravating factor, these noncitizens must defend against the continued effects of a lifetime of discrimination and stereotyping that has labeled them as "dangerous." The results could not be more dire, causing disabled and vulnerable individuals to be deported to countries where they will face persecution, torture, or death.

A. The Purpose of Section 504 of the Rehabilitation Act is to Protect People with Disabilities from Discrimination, Stereotypes, and Stigma and to Ensure Access to Equal Opportunities.

Congress enacted Section 504 and the ADA to address widespread inequities and pervasive discrimination against individuals with disabilities.[2] Section 504 and the ADA are

[2] For a summary of the pervasive societal mistreatment and exclusion of people with disabilities in the United States, *see* Christopher G. Bell & Robert L. Burgdorf, Jr., U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 17–45 (1983).

interpreted coextensively; there is no significant difference in the protection they provide. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

In enacting the Rehabilitation Act, Congress specifically found that "individuals with disabilities constitute one of the most disadvantaged groups in society" and that they "continually encounter various forms of discrimination in such critical areas as … institutionalization, health services, … and public services." 29 U.S.C. § 701. As Justice Marshall explained in *Alexander v. Choate*, Congress designed the Rehabilitation Act to address not only "invidious animus," but also, more commonly, "thoughtlessness and indifference—[ ] benign neglect." 469 U.S. 287, 295 (1985). Similarly, when enacting the ADA, Congress found that, "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to … pursue those opportunities for which our free society is justifiably famous," and, as a result, "the Nation's proper goals regarding individuals with disabilities" must include "equality of opportunity" and "full participation." 42 U.S.C. § 12101(a)(7–8).

Under the Rehabilitation Act and the ADA, a public entity like the Executive Office for Immigration Review ("EOIR") must provide a qualified individual with a disability an aid, benefit, or service that is equal to or as effective as that afforded to individuals without disabilities. 28 C.F.R. 39.130(b)(1); 35.130(b)(1)(iii).

Section 504 of the Rehabilitation Act applies directly to immigration removal proceedings. *See, e.g.*, *Franco-Gonzales v. Holder*, 767 F.Supp.2d 1034, 1051–52 (C.D. Cal. 2010); *Palamaryuk by & through Palamaryuk v. Duke*, 306 F.Supp.3d 1294, 1301 (W.D. Wash. 2018); *see also Lane v. Pena*, 518 U.S. 187, 189 (1996) (Section 504(a) "prohibits, among other things, discrimination on the basis of disability 'under any program or activity conducted by *any Executive agency*.'" (emphasis added) (quoting 29 U.S.C. § 794(a)); *cf. Cook Cty., Illinois v.*

Wolf, 962 F.3d 208, 227–28 (7th Cir. 2020) (finding DHS's rule interpreting the "public charge" ground of inadmissibility violated the Rehabilitation Act), *cert. dismissed sub nom. Mayorkas v. Cook Cty., Ill.*, 141 S. Ct. 1292 (2021).

B. The Misconception that People with Mental Disabilities are Dangerous is a Deep-seated Stereotype that Contributes to Ongoing Disability Discrimination.

Much work remains under Section 504 and the ADA to combat the discrimination, fear, and bias faced by people with mental disabilities, who are often assumed to be "dangerous" and criminalized instead of receiving treatment and supportive services.

Individuals with mental illness are frequently stereotyped as dangerous. *See* Angela M. Parcesepe & Leopoldo J. Cabassa, *Public Stigma of Mental Illness in the United States: A Systematic Literature Review*, 40 Admin. & Pol'y in Mental Health & Mental Health Servs. Rsch. 4–5 (2013);[3] Stacy L. Overton & Sondra L. Medina, *The Stigma of Mental Illness*, 86 J. of Counseling & Dev. 145 (2008).[4] Studies to understand these stigmatizing beliefs have found, for example, that adults with mental disabilities such as schizophrenia, depression or substance use disorders were viewed as "more likely to be violent to others, compared to a person with 'normal' troubles." Parcesepe & Cabassa, *supra* at 4. These beliefs remain entrenched in American society and its institutions, despite numerous studies showing that most people with mental disabilities are not dangerous and are more likely to themselves be victims of crimes. *See, e.g.,* Heather Stuart, *Violence and Mental Illness: An Overview*, 2 World Psychiatry 123 (2003)

[3] *Available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3835659/pdf/nihms524527.pdf.
[4] *Available at* https://www.fundacion-salto.org/wp-content/uploads/2018/11/The-Stigma-of-Mental-Illness.pdf.

(finding that "mental disorders are neither necessary, nor sufficient causes of violence" and that it is far more likely that people with serious mental illness will be victims of violence instead).[5]

The widespread misconception that individuals with mental health disabilities are dangerous leads to active discrimination and unnecessary institutionalization.

- Approximately 20% of inmates in jails and 15% of inmates in state prisons are now estimated to have a serious mental illness, despite only 4.6% of adults in the general population of the United States having a serious mental illness. State Justice Institute, *Mental Health and Criminal Justice: Improving the Justice System Response to Mental Illness A Fact Sheet* 2 (2020).[6]
- Individuals with serious mental illnesses are regularly processed through the criminal justice system instead of the mental health system. Ellen Ballard & Brent Teasdale, *Reconsidering the Criminalization Debate: An Examination of the Predictors of Arrest Among People With Major Mental Disorders*, 27 Crim. Just. Pol'y Rev. 22, 23 (2016).
- Persons with mental illness often receive long and unjust sentences from judges and juries who, based on discrimination and bias, may consider mental illness as an aggravating factor in criminal prosecution. *See Edwards v. Ayers*, 542 F.3d 759, 776 (9th Cir. 2008) ("[J]uries often view severe mental illness as more aggravating than mitigating.") (citations omitted).

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[5] *Available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1525086/pdf/wpa020121.pdf.
[6] *Available at* https://www.ncsc.org/__data/assets/pdf_file/0017/38024/MH_and_Criminal_Justice_Fact_Sheet.pdf.

These outcomes arise from the erroneous belief that people with mental illness are more dangerous than others, and a lack of information about accommodations and services that can help people with mental illnesses participate safely in society. *See* Robert Bernstein & Tammy Seltzer, *Criminalization of People with Mental Illnesses: The Role of Mental Health Courts in System Reform*, 7 UDC/DCSL L. Rev. 143 (2003).

C. Disability Discrimination Against Noncitizens with Mental Disabilities Regularly Occurs in Immigration Removal Proceedings.

Amici include organizations that work with clients with mental disabilities who experience pervasive discrimination in many spheres of life and face additional barriers as a result of their disabilities. In advocating on behalf of noncitizens with disabilities in immigration proceedings—and especially those without counsel—many *Amici* have observed firsthand the additional barriers they face when required to defend themselves in removal proceedings.

Until recently, U.S. immigration law focused on the literal "exclusion" of individuals who were (or were deemed to be) mentally ill. *See* Sarah Sherman-Stokes, *Sufficiently Safeguarded?: Competency Evaluations of Mentally Ill Respondents in Removal Proceedings*, 67 Hastings L.J. 1023, 1041–42 (2016). Given that start, today's immigration courts lag far behind other government institutions in providing structural mechanisms to ensure equal access to persons with mental disabilities. The INA and its enabling regulations provide no express standards or safeguards for noncitizens with mental disabilities. *Id.* at 1042-43; *see, e.g.*, Sarah Sherman-Stokes, *No Restoration, No Rehabilitation: Shadow Detention of Mentally Incompetent Noncitizens*, 62 Vill. L. Rev. 787, 823-25 (2017) (finding that the factors immigration judges consider in bond hearing determinations likely prejudice those with mental disabilities); *Fast-Track to Injustice: Rapidly Deporting the Mentally Ill*, 14 Cardozo Pub. L. Pol'y & Ethics J. 545, 562–65 (2016) (finding that people with mental health disabilities do not have an equal

opportunity under Section 504 to defend their cases during summary immigration proceedings due to nonexistent procedural safeguards).

"[I]mmigration courts are not designed or equipped to protect, recognize or accommodate the needs of vulnerable individuals in proceedings." Human Rights Watch, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System* 32 (2010).[7] Noncitizens with mental disabilities regularly face difficulty during the testimonial procedures that often trigger traumatic memories and provide only a limited opportunity for an immigration judge to identify and address mental disability during what may be a minutes-long videoconference that relies on language interpretation that is often deficient. *Id*. at 20–39. Specifically, they face difficulty understanding how to present evidence supporting their applications for relief (e.g., completing EOIR's application forms, preparing written declarations, and gathering corroborating evidence) and the evidentiary burdens, such as demonstrating credibility, indicia of moral character, or proof of continuous residence. *Id*.

D. Disability Discrimination Specifically Arises in Determinations About Whether a Person's Prior Conviction Constitutes a "Particularly Serious Crime."

Noncitizens with mental disabilities are uniquely precluded in removal proceedings from presenting their entitlement to asylum and withholding of removal because of a criminal record reflecting a purported PSC. Often this is a conviction arising from past misconceptions and discriminatory treatment, sometimes decades old.

A "particularly serious crime" is not defined by statute but is a legal term of art used in immigration law to determine, from an individual's conviction, whether he or she poses a danger to society. Certain crimes are designated as per se PSCs. *See* 8 USC § 1158(b)(2)(A)(ii); 8 USC

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[7] *Available at* https://www.aclu.org/sites/default/files/field_document/usdeportation0710_0.pdf

§ 1231(b)(3)(B)(iv). For all other crimes, the Agency must make a case-by-case adjudication, first looking to the nature of the conviction and then at "all reliable information," including the conviction records, sentencing information, and the circumstance and underlying facts of the conviction. *See Matter of N-A-M-*, 24 I&N Dec. 336, 338-341 (BIA 2007). Dangerousness is the "essential key" guiding the PSC inquiry. *Alphonsus v. Holder*, 705 F.3d 1031, 1041 (9th Cir. 2013).

The panel in *Matter of G-G-S-* erred when it "announced and applied a blanket rule against considering an individual's mental health as a factor." *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 992 (9th Cir. 2018) (as amended). This "blanket rule" denies noncitizens with mental disabilities the right to demonstrate, in the context of those disabilities and based on "all reliable evidence," why their prior convictions do not constitute PSCs. In contrast, non-disabled noncitizens may exercise in full their right to present "all reliable evidence."

ARGUMENT

The categorical exclusion of relevant mental health evidence in *Matter of G-G-*S violates Section 504 of the Rehabilitation Act. Noncitizens with disabilities are denied the opportunity to counter the particular stereotypes and mistreatment that may have resulted in their conviction; consequently, they are deprived protection from removal to a country where they may face persecution, severe harm, or death on account of a protected ground. This is disability discrimination. To address that discrimination, relevant evidence of mental health must be available for consideration—solely as a mitigating factor—when determining whether an individual was convicted of a PSC.

A. *Matter of G-G-S-* Violates Section 504 of the Rehabilitation Act.

The categorical exclusion of relevant mental health evidence in *Matter of G-G-*S violates Section 504 because it deprives individuals with mental disabilities of an equal opportunity to

present "all reliable information" to convince the immigration judge and the Board that their convictions were not for a PSC. This determination is especially significant because it then precludes them from asylum or withholding of removal, even when a noncitizen could otherwise demonstrate they would suffer persecution, severe harm, or death on account of a protected ground (which may include their mental disability).

Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency …" 29 U.S.C. § 794 (emphasis added).

The regulations implementing Section 504 prohibit the Department of Justice (and in turn, the Executive Office of Immigration Review and the Board, *see* 8 C.F.R. 1003.1) from discriminating against noncitizens with disabilities in several ways, including denying noncitizens with disabilities the opportunity to participate in a program or service, providing an unequal opportunity to participate in the program or service, or providing the Agency's program or service in a way that is not effective in affording the noncitizens with a disability an equal opportunity to obtain the same result as provided to others. *See* 28 C.F.R. 39.130(b)(1). Circuit courts nationwide have found that policies or actions that deprive individuals with disabilities of an equal opportunity to obtain a benefit or service constitutes clear discrimination under Section 504 of the Rehabilitation Act. *See, e.g., Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 505–07 (4th Cir. 2016); *Payan v. L.A. Comty. Coll. Dist.*, 11 F.4th 729, 739 (9th Cir. 2021).

To establish a violation of Section 504, an individual must establish that they (1) have a disability; (2) are "otherwise qualified for the benefit or services sought;" (3) were denied the

benefit or services solely by reason of their disability; and (4) "the program providing the benefit or services receives federal financial assistance." *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002).

These requirements are satisfied here. First, a "disability" includes "a physical or mental impairment" that "substantially limits one or more major life activities." 29 U.S.C. § 705(9); 28 C.F.R. 39.103(1); 42 U.S.C. 12102(1). Second, the "benefit" here is the full opportunity for a noncitizen facing removal to present "all reliable information" to convince the immigration judge and the Board that they are eligible for asylum and withholding of removal and that their convictions were not for a PSC barring that relief. *See Anaya-Ortiz v. Holder*, 594 F.3d 673, 678 (9th Cir. 2010). As to the fourth requirement, the benefit comes from a federal agency. *See* 28 C.F.R. 39.103 (Agency means the Department of Justice); *see also* 8 C.F.R. 1003.1 ("There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review (EOIR)").

Finally, as to requirement three, the immigration courts and Board deny noncitizens with mental disabilities the benefit of a full opportunity to present "all reliable information" regarding whether their convictions were for a PSC when they specifically single out consideration of mental health evidence when making a PSC determination. Other than for those crimes designated as *per se* PSCs, the immigration courts and Board normally look to "all reliable information," which includes "information outside the confines of a record of conviction." *Matter of N-A-M*, 24 I&N Dec. at 342. But for noncitizens with mental disabilities, the Board applies a *categorical* bar against presenting evidence of their mental health—a bar directed squarely (and only) at individuals with mental disabilities which denies them consideration of "all reliable information" for the PSC determination.

As one example, intent and motivation may be "reliable information" for any respondent in determining why a crime is not particularly serious. *See Gomez-Sanchez*, 892 F.3d at 996; *see also Birhanu v. Wilkinson*, 990 F.3d 1242, 1270 (10th Cir. 2021) (Bacharach, partial dissent); *see generally Shazi v. Wilkinson*, 988 F.3d 441 (8th Cir. 2021). Yet, people with mental disabilities are precluded from presenting evidence regarding their mental health, even where it directly mitigates a finding of, e.g., harmful intent. In *Gomez-Sanchez*, the Ninth Circuit recognized this possibility when it considered the example of a survivor of intimate partner violence with post-traumatic stress disorder convicted of assaulting their abuser, noting that whether "post-traumatic stress disorder had played a substantial motivating role in the assault" might "bear[] substantially on an IJ's determination of whether that individual poses a danger to the community" even if it "provide[d] no defense to criminal conviction." 892 F.3d at 996, n.10. Likewise, people with mental disabilities are precluded from presenting mental health evidence that may counter a misimpression of dangerousness, even though dangerousness is the "essential key" in the PSC inquiry. *Alphonsus*, 705 F.3d at 1041. Because of the deep-seated stereotypes about dangerousness faced by respondents with mental disabilities, they must have the opportunity to demonstrate that, notwithstanding a conviction, they do not pose a danger to the community. *See, e.g., Shazi*, 98 F.3d at 450.[8]

B. To Prevent Future Disability Discrimination, the Attorney General Should Clarify That Evidence of Mental Disabilities May Be Used Only as a Mitigating Factor.

Because the standard articulated by *Matter of G-G-S-* is facially discriminatory against those with mental disabilities, the Attorney General should order that available mental health

[8] Although present dangerousness historically has not been part of the PSC analysis, *see Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986), mental disabilities can vary temporally and warrant consideration of the full context of the individual's health and treatment history.

evidence must be considered when conducting any discretionary PSC determination. But in replacing the discriminatory analysis mandated by *Matter of G-G-S-*, the Board and Attorney General should clarify that such evidence may be considered solely as a mitigating factor. This approach follows the Rehabilitation Act and ADA, and the requirement at INA § 240(b) that immigration courts use structural safeguards to "protect the rights and privileges" of mentally incompetent respondents. Any alternative—whether a facially-neutral consideration or, worse, treatment of mental disabilities as enhancing the dangerousness of a crime—would only strengthen and endorse the very structural biases that noncitizens with mental disabilities have faced at every stage leading to their removal proceeding. Such a regime would not level the playing field as Section 504 requires.

The Rehabilitation Act and ADA are meant to ameliorate discriminatory practices like "overprotective rules and policies," "exclusionary qualification standards and criteria," and "relegation to lesser . . . benefits, jobs, or other opportunities." *See* 29 U.S.C. § 701(6)(B); 42 U.S.C. § 12101; *Felix v. N.Y. City Transit Auth.*, 324 F.3d 102, 107 (2d Cir. 2003). Both are meant to positively improve the opportunities for those with disabilities within systems (and even a society) recognized as historically discriminatory. *See* ADA: Joint Hearing Before the Subcomms. on Select Educ. and Emp. Opportunities, 101st Cong. 48 (1989) (Statement of Joseph Rauh, Leadership Conference on Civil Rights). Here, the Rehabilitation Act and ADA compel the prevention of unlawful discrimination within the removal process and provide an opportunity to counter the long-lasting and discriminatory effects of criminalization of mental illness and cognitive limitations, particularly on those vulnerable noncitizens who need the protection of asylum and withholding of removal to avoid removal to places where they could face persecution, severe harm, or death.

The INA places an affirmative obligation on the Attorney General to "prescribe safeguards to protect the rights and privileges of noncitizens with mental disabilities. 8 U.S.C. § 1229a(b)(3). As the Board itself has found in two precedential decisions in the asylum context, this statute imposes an obligation on immigration judges to tailor certain aspects of the immigration court hearing process to ameliorate their effect on mentally ill respondents. *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011); *Matter of J-R-R-A-*, 26 I&N Dec. 609, 611 (BIA 2015) (recognizing evidence of mental illness as a mitigation factor where "inconsistencies, implausibility, inaccuracy of details, inappropriate demeanor, and nonresponsiveness–may be reflective of a mental … disability, rather than an attempt to deceive the Immigration Judge."). Inherent to this obligation is a fair opportunity to present available mitigating evidence. Even the Department of Homeland Security, in its recent instructions to exercise prosecutorial discretion, has expressly recognized as a "*mitigating factor*" any "mental condition that may have contributed to the criminal conduct" for which a noncitizen's apprehension and removal might otherwise be warranted. *Guidelines for the Enforcement of Civil Immigration Law*, Memo at 3 (2021) (emphasis added).

DHS's own brief underscores the risk that vacatur of *Matter of G-G-S-* without guidance by the Attorney General will entrench the discrimination inherent in the PSC analysis. DHS alleges without specificity that "some mental health conditions may *heighten* the risk an individual poses to society" or "exacerbate[ ] a criminal act." DHS Br. at 12, 13 (emphasis added). This evinces the very assumptions and stereotypes about mental illness that the Rehabilitation Act and ADA are designed to prevent.

In *Gomez-Sanchez*, the Ninth Circuit recognized there are "reasons why [mental health] evidence might not be offered" in a criminal proceeding, such as "concerns of being stigmatized"

and discrimination by being subjected to disproportionately longer sentences on account of having a mental disability. *Gomez-Sanchez*, 892 F.3d at 994 & n.8. Without constraint, the same stigma and discrimination will find its way into the decisions of immigration judges, who would be free to find disabled individuals subject to the PSC bar, when the same crime committed by a person without a disability would not be considered particularly serious or suggest dangerousness. Section 504 and the ADA do not permit that. *Cf.* 42 U.S.C. §§ 12111(3), 12113(b), 12182(b)(3) (creating a "direct threat" defense under Title I and Title III of the ADA to ensure that individuals with disabilities are not assumed to be a danger based on fear and stereotypes). Rather, Section 504, the ADA, and the INA all counsel that mental disabilities should be considered during the PSC analysis *solely* as mitigating factors.

C. The PSC Analysis Must Accommodate the Unique Nature of Mental Illness.

It is beyond the scope of this brief to survey the many types of evidence that individuals with mental disabilities may be able to present in mitigation. But if the Attorney General elects to includes examples of such evidence in any opinion or guidance accompanying abrogation of *Matter of G-G-S-*, the nature of mental disabilities should inform his suggestions.

First, the Attorney General must recognize that many individuals with mental disabilities defending against a PSC allegation may be detained or *pro se*, and that their disabilities may prevent them from collecting records or securing evaluations. Immigration judges and the Board should be instructed to advise respondents adequately about the PSC standard adopted by the Attorney General, and to conduct an individualized, on-the-record assessment not only of the respondent's evidence regarding mental disabilities, but also the respondent's ability to collect and present that evidence. Evidence of any kind or weight should be considered when offered by the respondent to constitute a mitigating factor in the PSC analysis.

Second, the Attorney General must take a broad view of what types of mental health evidence may be considered under the analysis. As the Board recognized in *Matter of M-A-M*, "[m]ental competency is not a static condition." 25 I&N Dec. at 480. The same holds true for the broader course of mental disability. Consideration of a noncitizen's mental disability at the time of conviction may require consideration of available evidence of the individual's mental disabilities before and after conviction.[9]

Finally, this case presents a deeply important opportunity for the Attorney General to prevent further discriminatory conduct by the agency against countless people with mental disabilities, not only under Section 504 and the ADA, but also under due process principles. The current discretionary PSC analysis, even without the prohibition in *Matter of G-G-S-*, places high burdens on vulnerable, disabled individuals to raise evidence of their own disabilities in their defense. Often *pro se* and detained, these people must receive an opportunity equal to that of people without disabilities to avail themselves of vital, life-saving humanitarian protection against removal. Protections for people with mental health and/or cognitive disabilities can be strengthened by excluding them categorically altogether from application of the PSC bars, or placing evidentiary burdens on DHS—rather than on disabled respondents—to establish that the respondent's purported PSC presents "actual risks" not based on "mere speculation, stereotypes, or generalizations about individuals with disabilities." *Cf.* 28 C.F.R. 35.130(h). Categorical exclusions or burden shifting may better ensure that the PSC determination does not remain a

[9] DHS's reference to *United States v. S.A.*, 129 F.3d 995 (8th Cir. 1997), for the proposition that a person's "history of violent behavior coupled with reluctance to continue taking medication is sufficient to establish dangerousness," DHS Br. at 12 n.12. indicates that DHS also recognizes that a person's history of mental health and current treatment may be relevant to an assessment of dangerousness.

discriminatory bar to asylum and withholding of removal for disabled noncitizens—including individuals for whom those forms of relief were intended.

CONCLUSION

The Attorney General should end the unlawful discrimination that people with mental disabilities face under *Matter of G-G-S-* and hold that relevant evidence of mental health must be considered—solely as a mitigating factor—when determining whether an individual was convicted of a PSC.

Dated: February 7, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Matthew J. Moffa, hereby certify that, this brief complies with the Attorney General's requirements in that it contains 4,458 words, fewer than the 4,500 word limit.

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