Case No. 24-5108

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSE HERMINI PACHECO,

Petitioner,

v.

MERRICK GARLAND, Attorney General,

Respondent.

BRIEF OF AMICI CURIAE IMMIGRATION AND DISABILITY-LAW PRACTITIONERS

On Petition for Review from an Order of the Board of Immigration Appeals A034-283-175 (**Detained**)

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INTEREST OF AMICI CURIAE[1]

Amici Curiae are disability rights and immigrant rights professors, legal practitioners, and organizations who share a commitment to the full participation and effective representation of people with disabilities in immigration proceedings. Amici represent and provide services to people with disabilities, including noncitizens facing removal proceedings in the U.S. immigration system. Amici have expertise in the interpretation and application of not only the Immigration and Naturalization Act of 1965 (the "INA"), but also Section 504 of the Rehabilitation Act of 1973 (the "Rehabilitation Act"), which guarantees people with disabilities "meaningful access" to immigration proceedings and prohibits federal agencies from discriminating against them.

Amici submit this brief in support of Mr. Pacheco's Petition for Review ("PFR") of the Board of Immigration Appeals' ("BIA's") August 8, 2024 Order upholding the Immigration Judge's ("IJ's") decision to

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[1] All parties consent to the filing of this Amicus Brief.

No party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person other than the amici contributed money that was intended to fund preparing and submitting this brief.

order Mr. Pacheco removed from the United States. Remand is necessary because the IJ and the BIA (collectively, "the Agency") denied Mr. Pacheco meaningful access to his removal proceedings and due process of law, as is, unfortunately, too common in amici's experience.

Brooklyn Defender Services (BDS) is a public defender organization that represents low-income people in nearly 22,000 criminal, family, civil, and immigration proceedings each year. Since 2009, BDS has counseled more than 16,000 clients in immigration matters, including deportation defense, affirmative applications, and criminal court advisals. Since 2013, BDS has provided removal defense services through the New York Immigrant Family Unity Project, New York's first-in-the-nation assigned counsel program for detained New Yorkers facing deportation. BDS also serves as appointed counsel through the National Qualified Representative Program ("NQRP"). BDS staff have significant experience and expertise regarding competency and the application of safeguards and reasonable accommodations in removal proceedings.

Disability Law United is a national non-profit membership organization whose mission is to defend human and civil rights secured

by law, including laws prohibiting discrimination on the basis of disability. DLU's efforts to defend human and civil rights extend to all walks of life, including ensuring that people with disabilities have access to all programs, services, and benefits of public entities, especially programs related to the exercise of such individuals' fundamental rights under the law, and the accommodations necessary to sustain them. DLU lawyers have extensive experience in the enforcement of Section 504 of the Rehabilitation Act and believe the arguments in this brief are relevant and essential to realize the full promise of that statute.

Elizabeth Jordan is a law professor whose scholarship and legal practice intersect with disability law, immigration enforcement, and criminal punishment. She has expertise in the interpretation and application of the U.S. Constitution, the INA, the Rehabilitation Act, the Americans with Disabilities Act of 1990, and applicable amendments and implementing regulations. She also has expertise in interpreting and applying federal and state criminal laws.

Robert F. Kennedy Human Rights ("RFK Human Rights") is a nonpartisan, not-for-profit organization that has worked to realize

Robert F. Kennedy's dream of a more just and peaceful world since 1968. Months after Senator Robert F. Kennedy's death, his widow Ethel Kennedy founded the organization as a living memorial to carry forth his unfinished work as a civil rights activist and human rights defender. In partnership with local activists, RFK Human Rights advocates for key human rights issues, championing change makers and pursuing strategic litigation at home and around the world. To ensure change that lasts, RFK Human Rights fosters a social-good approach to business and investment and educates millions of students about human rights and social justice. The U.S. Advocacy and Litigation Program at RFK Human Rights partners with grassroots community organizations to seek accountability for human rights abuses in the U.S. criminal legal and immigration systems and to promote fairness, equity, and dignity for all people whose lives are touched by those systems.

Rights Behind Bars ("RBB") is a nonprofit organization based in Washington, D.C. that litigates nationally. RBB legally advocates for people in prison, jail, and immigration detention and contributes to a legal ecosystem in which such advocacy is more effective. RBB seeks to

create a world in which people in prison, jail, and immigration detention do not face large structural obstacles to effectively advocating for themselves in the courts. RBB helps incarcerated people advocate for their own interests more effectively and through such advocacy push towards a world in which people in prison, jail, and immigration detention are treated humanely.

The **Rocky Mountain Immigrant Advocacy Network ("RMIAN")** is a 501(c)(3) organization based in Westminster, Colorado. RMIAN promotes knowledge of legal rights; provides free legal representation to people in removal proceedings; endorses the importance of universal representation; and advocates for a humane, functional, and efficient immigration system. RMIAN represents people with disabilities, including those with diagnoses that implicate their physical, cognitive, and psychiatric functioning. For almost a decade, RMIAN has served as court-appointed counsel through NQRP. RMIAN has extensive expertise concerning competency, the application of safeguards, reasonable accommodations, and related legal and policy frameworks. RMIAN centers and uplifts the experiences of people with disabilities and advocates for systemic reforms given the pervasive

disability discrimination that occurs within the U.S. immigration system.

SUMMARY OF ARGUMENT

In the proceedings below, the Agency denied Mr. Pacheco, who lives with a communications disability (Deafness) and several mental-health disabilities (including schizophrenia), meaningful access to his removal proceedings.

This Court has jurisdiction over the questions raised in Mr. Pacheco's appeal because they are questions of law related to the application of Section 504 of the Rehabilitation Act. Section 504 does apply in immigration court proceedings—and its application is critical to ensure against unlawful discrimination on the basis of disability. As this Court held in cases involving Deaf people's participation in state-court legal proceedings, disability law creates an "affirmative obligation" to provide people with disabilities "reasonable accommodations," so that they have an "equal opportunity" to access justice. Clarifying that Section 504's requirements apply to the immigration courts does not conflict with any statutory scheme or agency precedent, but is necessary to ensure that people with

disabilities receive full and fair immigration hearings, consistent with the INA and Agency precedent.

In the proceedings below, the Agency failed to meet its affirmative Section 504 obligations because it failed to provide Mr. Pacheco a Certified Deaf Interpreter ("CDI"), even though it agreed that one was necessary. That failure made it impossible for Mr. Pacheco to adequately communicate with the court and his counsel, and so contributed to the additional violation of Mr. Pacheco's rights under *Matter of M-A-M-*, the seminal Agency precedent that interprets the INA and due process for people with "mental incompetency." Those failures necessitate remand.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER MR. PACHECO'S SECTION 504 CLAIMS.

First, there is no serious question that this Court has jurisdiction over the issues presented by Mr. Pacheco's PFR, including his arguments under Section 504 of the Rehabilitation Act. The INA expressly provides that the appropriate procedural mechanism to seek judicial review of immigration proceedings is through a PFR with the

"court of appeals for the judicial circuit in which the immigration judge completed the proceedings." 8 U.S.C. § 1252(b)(2).

A. Mr. Pacheco's Claim Raises a Question of Law

Although that same section contains a jurisdiction-stripping provision, that provision does not limit this Court's jurisdiction here. The jurisdiction-stripping provision of the INA expressly allows circuit courts to review "questions of law." 8 U.S.C. § 1252(a)(2)(D). Both this Court and the Supreme Court recognize that critical piece of this Court's jurisdiction. *See Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 227 (2020); *Martinez–Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005).

Mr. Pacheco raises just such "question[s] of law" here. The statutory term "question of law" encompasses all "application of law to undisputed facts"—including, as here, the "application of [Section 504] to [the] undisputed facts" of Mr. Pacheco's removal proceedings. *Guerrero-Lasprilla*, 589 U.S. at 229. Whether the accommodations Mr. Pacheco received comport with disability law is a question of law—one this Court has addressed in parallel contexts. *See, e.g.*, *Updike v. Multnomah Cnty.*, 870 F.3d 939, 949 (9th Cir. 2017) (considering whether accommodations offered in state criminal proceedings

comported with disability law); *Duvall v. Cnty. of Kitsap,* 260 F.3d 1124, 1135 (9th Cir. 2001) (considering whether the plaintiff's Section 504 claim should survive summary judgement); *see also* Elizabeth Jordan, *Accommodating Incompetency in Immigration Court*, 119 Nw. U. L. Rev. 513, 560, n. 237 (2024) ("Whether a safeguard comported with disability law is a question of law."). Thus, Mr. Pacheco's colorable claim under Section 504 raises a pure legal question through the PFR process that this Court has jurisdiction resolve.[2]

B. Mr. Pacheco Exhausted his Remedies

Importantly, two Circuits have declined to consider petitioners' Section 504 claims, not for lack of jurisdiction, but for failure to exhaust remedies.[3] *Birhanu v. Wilkinson*, 990 F.3d 1242, 1253–54 (10th Cir. 2021); *Alba-Gutierrez v. Holder*, 585 F. App'x 652 (9th Cir. 2014). In

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[2] Reviewing the application of Section 504 is also consistent with this Court's suggestion, in *J.E.F.M. v. Lynch*, that claims that "arise from" removal proceedings are best "channeled through the PFR process." 837 F.3d 1026, 1032 (9th Cir. 2016); *see also Guerrero Lasprilla*, 589 U.S. at 230 (explaining that Congress intended section 1252(b)(9) to consolidate judicial review of immigration proceedings).

[3] Section 1252(d)(1), which requires exhaustion of administrative remedies, is not a jurisdictional rule but rather a non-jurisdictional claim-processing rule. *Santos-Zacaria v. Garland*, 598 U.S. 411, 418 (2023).

Alba, this Court held the petitioner did not exhaust his claim because he did not cite Section 504 in his arguments to the BIA. 585 F. App'x at 652. In *Birhanu*, the Tenth Circuit held that a footnote referencing Section 504 did not preserve the petitioner's claim. 990 F.3d at 1253–54. Had those courts lacked jurisdiction to consider the Section 504 arguments, they could have stated as much—but they did not. And, unlike those petitioners, Mr. Pacheco exhausted his Section 504 claim before the Agency, so this Court has jurisdiction to review.

Because he exhausted his Section 504 remedies, the PFR process is an appropriate vehicle for judicial review of Mr. Pacheco's legal claims—including his Section 504 claims. *See* 8 U.S.C. § 1252. To decline to consider those claims would deny Mr. Pacheco a meaningful opportunity for relief from the immigration court's failure to follow its obligations under disability law.

II. UNDER THE REHABILITATION ACT, IMMIGRATION COURTS HAVE AN "AFFIRMATIVE OBLIGATION" TO ENSURE "MEANINGFUL ACCESS" TO REMOVAL PROCEEDINGS.

Having established that this Court can review Mr. Pacheco's Section 504 claims, the next consideration is what Section 504 would

have required in his immigration proceedings. First, amici provide context on Section 504's history and requirements.

Congress passed the Rehabilitation Act in 1973, to protect people with disabilities from "discrimination stemming not only from simple prejudice, but also from 'archaic attitudes and laws'" and the public's lack of familiarity with the "difficulties confront[ing]" them. *School Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 279 (1987) (quoting S. Rep. No. 93-1297, at 50 (1974)) (alteration in original). In addition to providing federal funding for vocational support for people with disabilities, the Rehabilitation Act included a groundbreaking anti-discrimination provision in Section 504. *See* 29 U.S.C. § 794.

Section 504 states,

> No otherwise qualified individual with a disability . . . shall, solely by reason of her . . . 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.

Id. This Court has divided that statutory language into four elements: "A plaintiff bringing suit under § 504 must show (1) he is an individual with a disability; (2) he is otherwise qualified to receive the benefit; (3)

he was denied the benefits of the program solely by reason of his disability; and (4) the program receives federal financial assistance." *Duvall*, 260 F.3d at 1135. Recognizing that Section 504 is the federal counterpart of Title II of the Americans with Disabilities Act ("ADA"), this Court often interprets the two in tandem. *Id.* at 1135–36.

A. Section 504 Applies to the Immigration Courts.

As Mr. Pacheco aptly describes in his opening brief, Section 504 of the Rehabilitation Act applies not only to him (because his Deafness is recognized as a "disability") but also the nation's immigration courts. Pet'r's Br. 21–22. The Department of Justice, which oversees both the immigration courts and the BIA, is an executive agency as described in the Act. *See* 29 U.S.C. § 794; 28 C.F.R. § 39.103 ("Agency means the Department of Justice."); 28 C.F.R. § 39.130 (implementing the Rehabilitation Act within the Department of Justice). And, as the Department of Justice recognized in its Rehabilitation Act regulations, "a federally conducted program or activity is, in simple terms, anything a Federal agency does," including "immigration activities." 49 Fed. Reg. 35,725 (Sept. 11, 1984) ("Section-by-Section Analysis" of 28 C.F.R. § 39.102); 28 C.F.R. § 39.102 (providing that the regulations

implementing the Rehabilitation Act "appl[y] to all programs or activities conducted by the agency"). Under that broad definition, removal proceedings are a "program" subject to Section 504. *See Franco-Gonzalez v. Holder*, No. CV 10–02211 DMG (DTBx), 2013 WL 3674492, at *4 (C.D. Cal. Apr. 23, 2013) (federal government "[did] not contest" that removal proceedings constitute a program).[4] To argue otherwise is to suggest that a significant portion of the federal government's work is exempt from the anti-discrimination statute specifically intended to cover the federal government.[5]

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[4] Recognizing the same, the BIA itself has entertained Section 504 claims. *See In Re: Nely Yohana Pena-Garcia & Gavi Suleyma Galvez-Pena*, No. AXXX XX0 919, AXXX XX0 920 2016 WL 4120561, at *1 (B.I.A. July 13, 2016) (addressing the respondent's Section 504 claims, but concluding that the "respondents have not demonstrated any specific disabilities applicable to them"). This makes sense, because nothing in the INA or its implementing regulations foreclose the Agency from considering the Rehabilitation Act—instead, the regulations expressly empower IJs to "take any action" that is "necessary or appropriate for the disposition" of their cases. 8 C.F.R. § 1003.10(b).

[5] Any dicta in *Fraihat v. U.S. Immigration & Customs Enforcement* that could be read to suggest otherwise is inapposite. 16 F.4th 613 (9th Cir. 2021). In *Fraihat*, the court never considered whether removal proceedings are a federal "program" under Section 504. Instead, it presumed removal proceedings "could fit within the statutory term 'benefit,'" but found plaintiffs had not shown they were denied access to those proceedings. *Id.* at 650. And as this Circuit has made clear for decades, "the ADA and the R[ehabilitation] A[ct] do not merely protect disabled individuals from denial of benefits. They also

B. Section 504 Imposes an "Affirmative Obligation" to Provide "Meaningful Access" to Legal Proceedings.

The critical question here is what Section 504 requires of the Agency when it interacts with people with disabilities like Mr. Pacheco. The Supreme Court provided a foundational answer in *Alexander v. Choate*, when it clarified Section 504's keystone requirement is that federal agencies provide people with disabilities with "meaningful access" to agency programs and services. 469 U.S. 287, 301 (1985). "Meaningful access" means that people with disabilities have an "equal opportunity to obtain the same result" as their peers without disabilities, even if they do not achieve the same result in fact. *Id.* at 305 () (quotation omitted).

This Court further clarified Section 504's requirements in two cases involving Deaf individuals like Mr. Pacheco. First, in *Duvall v. County of Kitsap*, this Court found that, to ensure meaningful access,

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prevent disabled individuals from being 'excluded from participation in' or 'subjected to discrimination under' any . . . program or activity and they prohibit 'discrimination by' any public entity." *Armstrong v. Wilson*, 124 F.3d 1019, 1024 (9th Cir. 1997) (citing 29 U.S.C. § 794(a); 42 U.S.C. § 12132). In other words, whether people "benefit from" federal programs is separate from the question of whether covered actors can exclude those individuals from federal programs or discriminate against them. *Id.*

state actors must "consider the particular individual's needs" and provide "reasonable accommodation[s]" to meet those needs. 260 F.3d 1124, 1139 (9th Cir. 2001) . In *Duvall*, a severely hearing-impaired party to family law proceedings argued that state courts had denied him meaningful access to those proceedings. *Id.* at 1135–37. The state-court administrators had given Duvall "accommodations" like audio amplification technology and permission to move around the courtroom to read lips. *Id.* at 1137. On appeal, Duvall argued neither accommodation was sufficient because the amplification technology did not accommodate his existing hearing aids, and he was unable to simultaneously follow the complex testimony of multiple parties and take notes while lipreading. *Id.* This Court held that Duvall presented sufficient evidence he had been prevented from "participating equally in the hearings at issue." *Id.* at 1138. As some of the undersigned have written elsewhere, this Court's reasoning in *Duvall* highlights that whether an accommodation is reasonable in any given circumstance is "a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question." Jordan, *supra*, at 566 (quoting *Celano v.*

Marriott Int'l, Inc., No. C 05-4004 PJH, 2008 WL 239306, at *3 (N.D. Cal. Jan. 28, 2008)).

More recently, in *Updike v. Multnomah County*, this Court clarified that Section 504 and the ADA impose on governments an "affirmative obligation" to ensure meaningful access to their programs. 870 F.3d 939, 949 (9th Cir. 2017). Updike, who is Deaf, was denied an ASL interpreter during his booking process, recognizance interview, and pretrial services. *Id.* at 944–46. The county that denied Updike the interpreter insisted he could communicate well enough through writing and had not shown that his interactions "would have been different in any material respect" with the accommodation. *Id.* at 955. But this Court concluded that summary judgment for the county was not appropriate. *Id.* at 956–57. The relevant question under disability law, it explained, is not whether the denial of an accommodation "actually caused [the hearing-impaired individual] harm," but instead whether the individual could "communicate as effectively as non-hearing-impaired individuals." *Id.* at 956. In other words, an individual with a disability does not need to show prejudice to demonstrate that a government actor violated anti-discrimination law in those proceedings.

The government violates the law simply by forcing him to proceed in a way that is not equal to the experiences of his peers who do not have a disability. *Id.*

Read together, *Duvall* and *Updike* establish that the Agency has an affirmative obligation to provide reasonable, tailored accommodations to ensure that people with disabilities have the ability to "participat[e] equally" in government programs, regardless of whether those accommodations impact the ultimate outcome. 260 F.3d at 1138; 870 F.3d at 956–57. As this Court articulated in the public-accommodations context, analogizing to *Tennessee v. Lane*, anti-discrimination law promises not simply access, but *equal* access: that "a paraplegic [person] *can* enter a courthouse by dragging himself up the front steps" or that "disabled individuals could be carried in litters on the backs of their friends" does not render lifts, ramps, and wheelchair-accessible doors or bathrooms unnecessary. *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1134–35 (9th Cir. 2012) (discussing the facts of *Tennessee v. Lane*, 541 US. 509, 513–14 (2004)). Instead, anti-discrimination law ensures that people with disabilities are able to

enjoy experiences that are "comparable to [the experiences] of able-bodied [peers]." *Id.* at 1135.

With this context established, the following section discusses what Section 504 would have required in Mr. Pacheco's immigration proceedings and shows how the Agency's failures to provide a reasonable accommodation violated Section 504.

III. BY DENYING MR. PACHECO A CERTIFIED DEAF INTERPRETER, THE AGENCY FAILED TO MEET ITS AFFIRMATIVE OBLIGATIONS.

As this Court's caselaw makes clear, when faced with a Deaf individual, the Agency is obligated to ensure that individual can meaningfully participate in his removal proceedings—including by "effective[ly] communicat[ing]" with his counsel and the court through an appropriate interpreter. *See Updike*, 870 F.3d at 955.

To have an "equal opportunity" to his non-disabled peers, Mr. Pacheco needs to be able to communicate. *Alexander*, 469 U.S. at 301; *cf. Updike*, 870 F.3d at 955, 956. In immigration court, Mr. Pacheco's hearing peers are entitled to the opportunities to engage counsel of their choosing, to present evidence on their behalf, to examine the evidence against them, and to cross-examine witnesses. 8 U.S.C. §

1229a (b)(4). Without competent interpretation, Mr. Pacheco had none of those opportunities.

To have such opportunities, Mr. Pacheco needed a CDI. As he aptly explains in his opening brief, Mr. Pacheco requested a CDI because he experienced extreme language deprivation during his childhood, is not fluent in ASL, and cannot communicate fluidly with only an ASL interpreter. Pet'r's Br. 4, 12, 23–25, 29. In other words, a CDI—and not simply any sign-language interpreter—was the only accommodation that would meet Mr. Pacheco's "particular . . . needs." *Duvall*, 260 F.3d at 1139. Without that accommodation, and with only an ASL interpreter instead, Mr. Pacheco could not present testimony, engage with the judge, or be present for the testimony of his expert. Pet'r's Br. 15 (citing AR 115–116, 143, 145, 149–50, 154–55, 160). Just as amplification technology that did not suit the appellant was insufficient in *Duvall*, and just as requiring the appellant to communicate in writing was insufficient in *Updike,* so an ASL

interpreter that could not fully interpret for Mr. Pacheco was insufficient here. *Cf.* 260 F.3d at 1137; 870 F.3d at 956–57.[6]

The Agency cannot justify this violation of Section 504, as the government tried in *Duvall*, by arguing that Mr. Pacheco's requested accommodation was not "reasonable" as contemplated in ADA and Section 504 caselaw. *See* 260 F.3d at 1136–37. Here, the IJ agreed, at least tacitly, that a CDI was a "reasonable accommodation," when he granted Mr. Pacheco's request for one. Pet'r's Br. 25 (citing AR 1023). Accommodations are "reasonable" if they do not "require an organization to make a 'fundamental' or 'substantial' alteration to its programs." *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1056 (C.D. Cal. 2010) (quoting *Alexander*, 469 U.S. at 300–01). Interpretation, including for rare languages, is par for the course in immigration court. *See 40 Languages Spoken Among Asylum Seekers with Pending MPP*

[6] Other cases may necessitate different individualized accommodations. As this Court recognized in *Duvall*, the work of "determining what type of [accommodation] is necessary" is fact-specific. 260 F.3d at 1137, 1139. Although a CDI was needed here, in other cases, IJs should determine which specific accommodations—up to and including termination of proceedings—will enable those particular respondents to "participate[] equally in the hearings at issue." *Id.* at 1138.

Cases, Syracuse TRAC Immigration (Apr. 26, 2021), https://trac.syr.edu/immigration/reports/644/. Because appropriate interpretation would not have been a "fundamental" or "substantial" alteration to Mr. Pacheco's removal proceedings, the IJ erred in denying that critical and reasonable accommodation.

But the errors here did not end with the IJ. On appeal, the BIA declined to remand based on Mr. Pacheco's challenges to the ASL interpreter, concluding Mr. Pacheco had not "adequately explained how any deficient interpretation prevented him from presenting his claim." AR 4–5. That analysis parallels the district court's reasoning in *Updike*, rejected by this Court, which "focused on whether . . . [Updike's] interactions [with law enforcement] 'actually caused him harm'." 870 F.3d at 956. In rejecting the district court's reasoning, this Court instructed that the lower court "should have instead focused on whether Updike could effectively communicate . . . and whether the County gave Updike reasonable accommodations." *Id.* An approach that focuses only on prejudice, as this Court explained in *Updike*, "disregards the [Agency's] affirmative obligations to provide reasonable

accommodations." *Id.* at 955. Because the BIA took that approach here, it too failed to satisfy its Section 504 obligations.

In sum, the Agency's actions directly contravene this Court's instructions in *Duvall* and *Updike*. Like the government actors in those cases, the Agency denied Mr. Pacheco the tailored and reasonable accommodation he requested. Also like the government actors in those cases, the Agency attempted to justify its actions by reasoning that it had done enough, and that it was Mr. Pacheco's responsibility to "explain[] how any deficient interpretation prevented him from presenting his claim." AR 4–5; *cf. Updike* at 955–956. But as this Court explained in *Duvall* and *Updike*, that is insufficient. Instead, Section 504 imposes an "affirmative obligation" on immigration courts—just as it imposes an "affirmative obligation" on state courts—to provide "reasonable accommodations" that ensure Deaf people can "effectively communicate" and "participat[e] equally in the hearings at issue." *Updike*, 870 F.3d at 956; *Duvall*, 260 F.3d at 1138. By denying Mr. Pacheco that accommodation, the Agency violated Section 504.

IV. THE AGENCY ALSO FAILED TO FOLLOW ITS OWN PRECEDENT IN *MATTER OF M-A-M-*.

The Agency's failure to accommodate Mr. Pacheco's Deafness also prevented the Agency from providing meaningful safeguards for Mr. Pacheco's mental-health disabilities, as required by Agency precedent.

In addition to Section 504, due process and the INA provide further protections for people in removal proceedings. It is "well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993). That due process guarantee includes the right to a full and fair hearing. *Landon v. Plasencia*, 459 U.S. 21, 32–33 (1982). Congress also added specific protections into the INA. *See generally* 8 U.S.C. § 1229a(b)(4). For example, as mentioned briefly above, noncitizens in removal proceedings must have the opportunity to present and examine evidence cross-examine witnesses, and they have the privilege of being represented by counsel of their choosing. *Id.*

The INA also provides additional protections for noncitizens with "mental incompetency." 8 U.S.C. § 1229a(b)(3) . Specifically, it provides that the Agency should institute "safeguards" to protect those

individuals' "rights and privileges." *Id.* ; *see also Calderon-Rodriguez v. Sessions*, 878 F.3d 1179, 1182 (9th Cir. 2018).

The Agency interpreted the phrases "mental incompetency" and "safeguards" in its seminal decision in *Matter of M-A-M-,* 25 I. & N. Dec. 474, 479 (B.I.A. 2011). *M-A-M-* creates a "rigorous" procedural analysis that IJs must follow to ensure noncitizens deemed "incompetent" are afforded their due-process rights. *Mejia v. Sessions*, 868 F.3d 1118, 1122 (9th Cir. 2017); *Calderon-Rodriguez*, 878 F.3d at 1182. Specifically, when there are "indicia" that an immigration-court respondent may be "incompeten[t]," an IJ must (1) "determine . . . whether the noncitizen is sufficiently competent to proceed with the hearing without safeguards," (2) "evaluate and apply appropriate safeguards," and (3) "articulate the rationale for . . . her decision." *Matter of M-A-M-*, 25 I. & N. Dec. at 481, 484.

Critically, as the Second Circuit recently held in *Reid v. Garland*, the safeguards imposed must "address the character, scope, and severity of the noncitizen's incompetency." *Reid v. Garland*, 120 F.4th 1127, 1133 (2d Cir. 2024). Safeguards that do nothing to "protect [individuals] from the disadvantages of [their] incompetency"—like in

Reid, the "safeguard" of removing the judicial robe in an attempt to address the paranoia of an individual who suffered from severe schizophrenia—are insufficient to afford a full and fair hearing. *Id.* at 1147. And proceedings that do not afford "a full and fair hearing" are "tainted on a threshold basis." *Id.* at 1150.

Under *M-A-M-*, the Agency is only obligated to provide "safeguards" when it determines that the individual is "incompetent." 25 I. & N. Dec. at 484. An individual meets *M-A-M-*'s definition of "incompetent" if he or she lacks "a rational and factual understanding of the nature and object of the proceedings," has difficulty "consult[ing] with the attorney," or cannot "examine and present evidence and cross-examine witnesses." *Id.* at 479.

But not all disabilities requiring accommodation meet that definition. An individual who cannot walk, for example, may be entirely "competent" under *M-A-M-* but still need accommodations to access the courtroom. *See id.* [7]

[7] The undersigned organizations have taken different approaches to try to assist individuals in such circumstances. In some cases, they have succeeded in forcing physical disabilities or communications disabilities like Mr. Pacheco's Deafness into *M-A-M-*'s framework. In other cases, amici have tried to seek meaningful access under the

Here, the Agency, applying *M-A-M-*, determined that Mr. Pacheco was not "sufficiently competent to proceed without safeguards." *Id.* ; *see* Pet'r's Br. 12–13. To protect his rights and privileges, as the INA requires, the Agency ordered that Mr. Pacheco be provided with the "safeguard" of appointed counsel. Pet'r's Br. 12–13.[8] That "safeguard" should have functioned to "protect [Mr. Pacheco] from the disadvantages of his incompetency." *Reid*, 120 F. 4th at 1147.

But it could not because the Agency failed to accommodate Mr. Pacheco's Deafness. Without adequate interpretation through a CDI, Mr. Pacheco could not meaningfully communicate with counsel at his merits hearing. And so counsel could not effectively understand Mr. Pacheco's position or ask for his input on his litigation strategy. Counsel could not, as the Second Circuit required in *Reid*, fully "protect" Mr. Pacheco from the "disadvantages" of his mental-health disabilities,

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applicable Section 504 framework, but to no avail. In amici's experience, the Agency has all but ignored Section 504, and, in the process, denied accommodations to individuals who do not fit neatly within the Agency's definition of "incompetent."

[8] That "safeguard," as defined in *Matter of M-A-M-*, is also an "accommodation" required by the injunction in *Franco-Gonzales*. *See Franco-Gonzalez*, , 2013 WL 3674492 at *3–5.

because counsel could not meaningfully communicate with Mr. Pacheco. *Id.* The "safeguard" of counsel was thus meaningless. *Cf. id.* at 1146 (where the respondent's mental illness prevented him from trusting, and thus forming a relationship with counsel, counsel was an insufficient safeguard). And a proceeding that requires a respondent to continue with only meaningless safeguards is, under *M-A-M-*, legally "invalid." *Id.* at 1147.

Mr. Pacheco's case presented unique challenges to the Agency. Not only was Mr. Pacheco legally "incompetent," as defined in *M-A-M-*, but he also had a communications disability, Deafness, that is difficult to address under *M-A-M-*'s framework. The Agency treated those disabilities in silos, appointing counsel to ease the harms of the former and agreeing that a CDI was necessary to accommodate the latter. It failed to recognize the intersectional nature of Mr. Pacheco's disabilities, and of his needs. And so, when the Agency failed to provide an accommodation for Mr. Pacheco's Deafness, it did not recognize that it was <u>also</u> impacting the "safeguard" it had ordered for Mr. Pacheco's "mental incompetency." 8 U.S.C. § 1229a(b)(3). In this way, the

Agency's violation of Section 504 prevented it from meaningfully addressing Mr. Pacheco's needs under *Matter of M-A-M-*.

CONCLUSION

Mr. Pacheco has numerous disabilities, including Deafness and mental-health disabilities, that must be addressed for him to have meaningful access to his removal proceedings. The Agency failed to accommodate those disabilities, as it was required to do under Section 504, its own and this Court's precedent interpreting the same. The Court should exercise the jurisdiction it has under the INA to review Mr. Pacheco's PFR and remand to the IJ for a new hearing consistent with the Agency's statutory and constitutional obligations.

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Respectfully submitted,

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RULE 32(G)(1) CERTIFICATE OF COMPLIANCE

The undersigned, as counsel for amici curiae, submits this certificate of compliance with Rules 29 and 32(g)(1). This brief contains 5,259 words, excluding the items exempted by Fed. R. App. P. 32(f). I certify that this brief complies with the limit set forth in Rules 5 and 29 because the word count does not exceed 6,500 words, or one-half the maximum length authorized by this Circuit's rules for a party's principal brief.

The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6), as the brief has been prepared in a proportional typeface in 14-point Century Schoolbook font.

/s/ Iva Velickovic

CERTIFICATE OF SERVICE CM/ECF

I hereby certify that on December 27, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Iva Velickovic