
**UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL**

Matter of A-B-,
Respondent

Referred from:
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
A_____

BRIEF OF *AMICUS CURIAE* INNOVATION LAW LAB

Nadia H. Dahab, OSB No. 125630
Stoll Stoll Berne Lokting & Shlachter P.C.
209 SW Oak Street, Suite 500
Portland, OR 97204
(503) 227-1600
ndahab@stollberne.com

Stephen W. Manning, OSB No. 013373
Innovation Law Lab
P.O. Box 40103
Portland, OR 97204
(503) 241-0035
stephen@innovationlawlab.org

*Counsel for Amicus Curiae
Innovation Law Lab*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
INTEREST OF <i>AMICUS CURIAE</i>	4
ARGUMENT	5
I. The INA requires the Attorney General to fairly and impartially administer the immigration laws.	5
II. The Constitution guarantees noncitizens an impartial decision maker in immigration proceedings.	8
III. The Attorney General—personally and through his staff—promote racist and white nationalist viewpoints, have prejudged the issues presented in this case, and are therefore disqualified from exercising the refer and review authority.	10
A. The Attorney General and members of his staff have strong relationships with anti-immigrant, nativist, and white nationalist organizations, evidencing deep entrenchment in positions consistent only with anti-immigrant and racist agendas.	13
1. John Tanton-funded hate groups.....	14
2. Anti-Muslim hate groups	22
B. The Attorney General’s conduct and statements since assuming office evinced racial animus, anti-immigrant and anti-asylum bias, and therefore an inability to fairly administer the immigration laws.	25
CONCLUSION.....	33
CERTIFICATE OF COMPLIANCE.....	34
CERTIFICATE OF SERVICE	35

TABLE OF AUTHORITIES

Cases

<i>Abdulrahman v. Ashcroft</i> , 330 F.3d 587 (3d Cir. 2003)	8
<i>Aguilar-Solis v. INS</i> , 168 F.3d 565 (1st Cir. 1999).....	8
<i>Caperton v. A.T. Massey Coal Co.</i> , 556 U.S. 868 (2009).....	14, 24
<i>Castro-Cortez v. INS</i> , 239 F.3d 1037 (9th Cir. 2001)	8
<i>Cinderella Career & Finishing Sch., Inc. v. FTC</i> , 425 F.2d 583 (D.C. Cir. 1970).....	<i>passim</i>
<i>Collins v. City of Harker Heights</i> , 503 U.S. 115 (1992).....	4
<i>Crespin-Valladares v. Holder</i> , 632 F.3d 117 (4th Cir. 2011)	26
<i>DeShaney v. Winnebago Cnty. Dep’t of Social Servs.</i> , 489 U.S. 189 (1989).....	10
<i>Gilligan, Will & Co. v. SEC</i> , 267 F.2d 461 (2d Cir. 1959)	3, 12
<i>Hawkins v. Freeman</i> , 195 F.3d 732 (4th Cir. 1999)	4
<i>In re Murchison</i> , 349 U.S. 133 (1955).....	13
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987).....	28
<i>INS v. Elias-Zacarias</i> , 502 U.S. 478 (1992).....	26

<i>INS v. St. Cyr</i> , 533 U.S. 289 (2001).....	9
<i>Islam v. Gonzales</i> , 469 F.3d 53 (2d Cir. 2006)	6
<i>Kerry v. Din</i> , 135 S. Ct. 2128 (2015).....	1, 10
<i>Matter of A-B-</i> , 27 I&N Dec. 227 (A.G. 2018)	2
<i>Matter of A-H-</i> , 23 I&N Dec. 774 (A.G. 2005)	2, 7
<i>Matter of A-R-C-G-</i> , 26 I&N Dec. 388 (BIA 2014)	26
<i>Matter of Exame</i> , 18 I&N Dec. 303 (BIA 1982)	7, 24
<i>Offutt v. United States</i> , 348 U.S. 11 (1954).....	13
<i>Parcham v. INS</i> , 769 F.2d 1001 (4th Cir. 1985)	7
<i>Parr v. United States</i> , 225 F.2d 329 (5th Cir. 1955)	7
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982).....	8
<i>Proctor v. Warden</i> , 435 U.S. 559 (1978).....	13
<i>Schweiker v. McClure</i> , 456 U.S. 188 (1982).....	8
<i>Wang v. Att’y Gen.</i> , 423 F.3d 260 (3d Cir. 2005)	8

Withrow v. Larkin,
421 U.S. 35 (1975).....14

Zadvyas v. Davis,
533 U.S. 678 (2001).....8

Statutes

INA § 101.....6, 26

INA § 103..... 1, 2, 5

INA § 208..... 25, 26, 31

INA § 240.....1, 5

Regulations

8 C.F.R. § 1003.1 *passim*

8 C.F.R. § 1003.105, 7

Other Authorities

158 Cong. Rec. S2919-02 (daily ed. May 7, 2012)22

Adam Serwer, *Jeff Sessions’s Unqualified Praise for a 1924 Immigration Law*, *The Atlantic* (Jan. 10, 2017),
<https://www.theatlantic.com/politics/archive/2017/01/jeff-sessions-1924-immigration/512591/>.....18

Amy Sherman, *Is the Center for Immigrations Studies a Hate Group, as the Southern Poverty Law Center Says?*, *PolitiFact Florida* (Mar. 22, 2017, 10:57 AM),
<http://www.politifact.com/florida/article/2017/mar/22/center-immigration-studies-hate-group-southern-pov/> 18, 19

Bijal Shah, *The Attorney General’s Disruptive Immigration Power*, 102 *Iowa L. Rev. Online* 129, 132–33 (2017)9

Center for Immigration Studies, *Hello, I Love You, Won't You Tell Me Your Name: Inside the Green Card Marriage Phenomenon* (Dec. 2, 2008),
<https://cis.org>Hello-I-Love-You-Wont-You-Tell-Me-Your-Name-Inside-Green-Card-Marriage-Phenomenon-0>19

Convention Relating to the Status of Refugees, art. 33(1), July 28, 1951, 189 U.N.T.S. 137, 19 U.S.T. 6223 28, 31

DailyKos, *Gene Hamilton: The Ghost in the DOJ/DHS Machine* (Jan. 24, 2018, 3:23 PM),
<https://www.dailykos.com/stories/2018/1/24/1735669/-Gene-Hamilton-the-Ghost-in-the-DOJ-DHS-Machine>.....24

Dan Simon, *ICE Spokesman in SF Resigns and Slams Trump Administration Officials*, CNN Politics (Mar. 13, 2018, 7:35 AM),
<https://www.cnn.com/2018/03/12/politics/ice-spokesman-resigns-san-francisco/index.html>.....21

Daniel Halper, *Sessions: 'Lax Enforcement' Driving Illegal Immigration 'Surge,'* The Weekly Standard (June 14, 2014, 6:51 PM),
<https://www.weeklystandard.com/sessions-lax-enforcement-driving-illegal-immigration-surge/article/795699>21

Dep't of Justice Press Release No. 17-889, *Return to rule of law in Trump administration Marked By Increase in Key Immigration Statistics* (Aug. 8, 2017),
<https://www.justice.gov/opa/pr/return-rule-law-trump-administration-marked-increase-key-immigration-statistics>28

Department of Homeland Security, Fact Sheet: To Secure the Border and Make America Safe Again, We Need to Deploy the National Guard (Apr. 4, 2018),
<https://www.dhs.gov/news/2018/04/04/secure-border-and-make-america-safe-again-we-need-deploy-national-guard>30

Federation for American Immigration Reform, *FAIR Congratulates Senator Jeff Sessions for Nomination as Attorney General* (Nov. 18, 2016),
<https://fairus.org/press-releases/fair-congratulates-senator-jeff-sessions-nomination-attorney-general>.....17

Federation for American Immigration Reform, *Immigration Report, FAIR Thanks Senator Jeff Sessions for His Leadership in Defeating the Bush-Kennedy Amnesty* (Nov. 2007),
http://www.fairus.org/sites/default/files/2017-08/Nov07_NL.pdf?docID=6021.17

Frank J. Gaffney, Jr., *Anti-American Activities*, *The Washington Times* (July 18, 2011),
<https://www.washingtontimes.com/news/2011/jul/18/anti-american-activities/> .23

Frank J. Gaffney, Jr., *Hillary Clinton’s Ticking Tim Bomb: Huma Abedin*, *The Washington Times* (Aug. 3, 2015),
<https://www.washingtontimes.com/news/2015/aug/3/frank-gaffney-hillary-clintons-ticking-time-bomb-h/>23

Hearing on the Nomination of Sen. Sessions to Be Attorney General Before the Senate Comm. on the Judiciary (Jan. 10, 2017)23

Imagine 2050, *Janice Kephart Serves as Special Counsel to the Senate Judiciary Committee* (May 16, 2013),
<http://imagine2050.newcomm.org/2013/05/16/janice-kephart-serves-as-special-counsel-to-senate-judiciary-committee/>20

Imagine 2050, *Jeff Sessions Fails to Disclose Award from Anti-Immigrant FAIR to Congress* (Dec. 14, 2016),
<http://imagine2050.newcomm.org/2016/12/14/jeff-sessions-fails-disclose-award-from-anti-immigrant-group-fair-congress/>17

Jason DeParle, *The Anti-Immigration Crusader*, *The New York Times* (Apr. 17, 2011),
<https://www.nytimes.com/2011/04/17/us/17immig.html> 14, 15

Jay Michaelson, *Jeff Sessions Said “Secularists” Are Unfit for Government*, *Daily Beast* (Jan. 12, 2017, 1:00 AM),
<https://www.thedailybeast.com/fbi-texts-catastrophuck-trump-nearly-drove-agents-to-quit?ref=scroll>22

Jefferson B. Sessions III, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, U.S. Dep’t of Justice (Oct. 12, 2017),
<https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review> 12, 27, 29

Jefferson B. Sessions III, *Attorney General Jeff Sessions Statement on Central American “Caravan,”* U.S. Dep’t of Justice (Apr. 23, 2018), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-statement-central-american-caravan>31

Jefferson B. Sessions III, *Attorney General Sessions Delivers Remarks on the Administration’s Efforts to Combat MS-13 and Carry Out Its Immigration Priorities,* U.S. Dep’t of Justice (Dec. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-administrations-efforts-combat-ms-13-and-carry> 11, 29

Jefferson B. Sessions III, U.S. Senator Alabama, *Immigration Handbook for the New Republican Majority [“Immigration Handbook”]* (Jan. 2015), http://images.politico.com/global/2015/01/12/immigration_primer_for_the_114th_congress.pdf20

Jose Villasana, *Attorney General: Constitution Doesn’t Outside States. We Don’t Have to Apologize,* KVIA (Apr. 11, 2018, 11:21 AM), <http://www.kvia.com/news/new-mexico/attorney-general-constitution-doesnt-apply-outside-states-we-dont-have-to-apologize/728159275>31

Marge Baker, *Jeff Sessions’ Relationship with Breitbart, “The Platform” for the White Nationalist Alt-Right, Should Be Disqualifying,* HuffPost (Jan. 3, 2017, 5:13 PM), https://www.huffingtonpost.com/marge-baker/jeff-sessions-relationships_b_13941372.html18

Mark Krikorian, *What to Do About Haiti?,* National Review (Jan. 21, 2010, 3:51 PM), [https://www.nationalreview.com/corner/what-do-about-haiti-mark-krikorian/...19](https://www.nationalreview.com/corner/what-do-about-haiti-mark-krikorian/)

Marwa Eltagouri, *Jeff Sessions Spoke of the ‘Anglo-American Heritage of Law Enforcement.’ Here’s What That Means,* The Washington Post (Feb. 12, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/02/12/jeff-sessions-spoke-of-the-anglo-american-heritage-of-law-enforcement-heres-what-that-means/?utm_term=.d54f63903a6e.....30

Matt Apuzzo & Rebecca R. Ruiz, *Trump Chooses Sessions, Longtime Foe of DACA, to Announce Its Demise,* The New York Times (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/jeff-sessions-daca-immigration.html>21

Matt Shuham, *Sessions Downplayed Relationship with Breitbart News in Senate Questionnaire*, TPM (Dec. 22, 2016, 5:58 PM), <https://talkingpointsmemo.com/livewire/jeff-sessions-downplays-breitbart-news-senate-questionnaire>.....18

Michelle Ye Hee Lee, *President Trump’s Claim that MS-13 Gang Members Are Being Deported ‘By the Thousands,’* The Washington Post (June 26, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/06/26/president-trumps-claim-that-ms-13-gang-members-are-being-deported-by-the-thousands/?utm_term=.a93f93501999.....11

Michelle Ye Hee Lee, *What You Need to Know About Former Arizona Sheriff Joe Arpaio’s Record on Illegal Immigration*, The Washington Post (Aug. 23, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/08/23/what-you-need-to-know-about-former-arizona-sheriff-joe-arpaio-s-record-on-illegal-immigration/?utm_term=.bf645854da6f28

NumbersUSA, *Sen. Jeff Sessions Recognizes Numbers USA in the Congressional Record* (May 8, 2012, 1:02 PM), <https://www.numbersusa.com/content/news/may-8-2012/sen-jeff-sessions-recognizes-numbersusa-congressional-record.html>.....22

Office & Duties of Att’y Gen., 6 Op. Att’y Gen. 326, 334 (1854)7

Philip Bump, *Meet Frank Gaffney, the Anti-Muslim Gadfly Reportedly Advising Trump’s Transition Team*, Chicago Tribune (Nov. 15, 2016, 11:28 PM), <http://www.chicagotribune.com/news/nationworld/politics/ct-anti-muslim-frank-gaffney-trump-transition-team-20161115-story.html/>23

President Trump Meeting with Cabinet (June 12, 2017), C-SPAN, <https://www.cspan.org/video/?429863-1/president-touts-accomplishments-cabinet-meeting>.....29

ProEnglish, *Longtime English Supporter Jeff Sessions, Tapped to Be Attorney General* (Dec. 16, 2016), <https://proenglish.org/2016/12/16/longtime-official-english-supporter-senator-jeff-sessions-tapped-to-be-attorney-general/>30

Pueblos Sin Fronteras (@puebloSF), Twitter (Apr. 25, 2018), <https://twitter.com/pueblosf?lang=en>31

Rafael Alberto Madan, <i>The Sign & Seal of Justice</i> , 7 Ave Maria L. Rev. 123 (2008).....	7
Sam Levine, <i>Conservative Scholar Disciplined for Suggesting Obama Be ‘Hung, Drawn, and Quartered,’</i> HuffPost (July 23, 2014, 5:29 PM), https://www.huffingtonpost.com/2014/07/23/stephen-steinlight-obama_n_5613541.html	19
Southern Poverty Law Center, <i>Center for Immigration Studies Debunked</i> (Oct. 2, 2017), https://www.splcenter.org/hatewatch/2017/10/02/center-immigration-studies-debunked	21
Southern Poverty Law Center, <i>Dan Stein</i> , https://www.splcenter.org/fighting-hate/extremist-files/individual/dan-stein	16
Southern Poverty Law Center, <i>Federation for American Immigration Reform</i> , https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform	15
Southern Poverty Law Center, <i>Hate Map</i> , https://www.splcenter.org/hate-map	14
Southern Poverty Law Center, <i>John Tanton</i> , https://www.splcenter.org/fighting-hate/extremist-files/individual/john-tanton ..	15
Southern Poverty Law Center, <i>John Tanton’s Network</i> , https://www.splcenter.org/fighting-hate/intelligence-report/2015/john-tantons-network	14
<i>Stephen Guschov, ProEnglish Has 2nd White House Meeting to Discuss Official English Legislation</i> , ProEnglish (Feb. 13, 2018), https://proenglish.org/2018/02/13/proenglish-has-2nd-white-house-meeting-to-discuss-official-english-legislation/	29
Stephen H. Legomsky, <i>Fear & Loathing in Congress & the Courts: Immigration and Judicial Review</i> , 78 Tex. L. Rev. 1615, 1626 (2000)	9
<i>Structural Due Process in Immigration Detention</i> , 21 CUNY L. Rev. 35, 47 (Winter 2017)	9

Transcript: Donald Trump’s Full Immigration Speech, Annotated, LA Times (Aug. 31, 2016, 9:35 PM),
<http://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htlstory.html>29

U.S. Dep’t of Justice, DOJ Seal History & Motto,
<https://www.justice.gov/about/history/doj-seal-history-and-motto>.....7

INTRODUCTION

This case presents the question whether the Attorney General—whose relationships, conduct, and statements evince strident anti-immigrant bias and racial animus—is bound by the rule of law. If he is, then *this* Attorney General—Jefferson B. Sessions—must be disqualified pursuant to the Immigration & Nationality Act (INA) and its implementing regulations, *see* INA §§ 103, 240; 8 C.F.R. § 1003.1(d)(1), our constitutional principles of due process, and a reasoned application of the rule of law, *see Kerry v. Din*, 135 S. Ct. 2128, 2144 (2015), from exercising his authority to refer and review questions of law arising in immigration proceedings. *See* 8 C.F.R. § 1003.1(h) (conferring that authority). Because the relationships, conduct, and statements of the Attorney General and members of his staff so deeply have entrenched them in positions aligned with anti-immigrant and racist views, they effectively have prejudged the questions of law presented in this case. *See generally Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (finding disqualification required where the decision maker is unable fairly and neutrally to adjudicate in administrative proceedings). The Constitution, the INA, its implementing regulations, and principles underlying the rule of law do not and cannot permit those racist views to infect this proceeding.

The Board of Immigration Appeals (“the Board”) is the administrative review body with appellate jurisdiction over the decisions of the immigration judges. 8 C.F.R. § 1003.1(b). Under the immigration regulations, decisions of the Board generally are “binding on all . . . immigration judges in the administration of the immigration laws.” 8 C.F.R. § 1003.1(g). But notwithstanding the Board’s authority to issue binding decisions on review, the regulations further provide the Attorney General with the authority to direct the Board to refer a case to him for a de novo review of the facts and law. 8 C.F.R. § 1003.1(h)(1); *see Matter of A-H-*, 23 I&N Dec. 774, 779 n.4 (A.G. 2005) (noting that the Attorney General’s review is de novo). Where the Attorney General exercises that so-called “refer and review” authority, the “determination and ruling by the Attorney General with respect to . . . questions of law [is] controlling.” INA § 103(a)(1).

On March 7, 2018, U.S. Attorney General Jefferson B. Sessions directed the Board to refer to him this case “for review of its decision.” *Matter of A-B-*, 27 I&N Dec. 227, 227 (A.G. 2018). In his referral order, the Attorney General invited briefing from the parties and *amici curiae* on issues “relevant to the disposition of this case, including [w]hether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable ‘particular social group’ for purposes of an application for asylum or withholding of removal.” *Id.*

But neither Attorney General Sessions, nor any member of the Attorney General’s staff, may fairly adjudicate the issues presented in this case. They therefore are disqualified entirely from doing so. *See Cinderella Career & Finishing Sch., Inc.*, 425 F.2d at 591. The Attorney General, personally and through staff members in the Office of the Attorney General, maintain ongoing personal and professional relationships with anti-immigrant activists, nativists, and white nationalists. Through those relationships, and through their related conduct and statements, the Attorney General and his staff members have prejudged all of the issues that this case presents. *See id.* (holding that “[t]he test for disqualification [is] whether ‘a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it’” (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959))). Their relationships, their conduct, and their statements are so clearly motivated by anti-immigrant bias and racial animus as to have the effect of “entrenching [them in those positions], making it difficult, if not impossible” for them to reach a conclusion other than one that is aligned with those anti-immigrant and racist views. *See id.* at 590 (explaining that disqualification may constitutionally be required where an agency decision maker has made statements having the effect of “entrenching [the decision maker] in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different

conclusion in the event he deems it necessary to do so after consideration of the record”).

Because that is so, the law requires that this case be referred back to the Board for reinstatement of its earlier decision. To proceed otherwise would be to permit arbitrary and flagrant abuses of executive power at the expense of the rule of law. *Hawkins v. Freeman*, 195 F.3d 732, 742 (4th Cir. 1999) (explaining that “‘abusing executive power, or employing it as an instrument of oppression’,” is the kind of conduct that fairly can be said to “shock the conscience” and violate constitutional due process guarantees (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992))).

INTEREST OF AMICUS CURIAE

The Innovation Law Lab (“the Law Lab”) is a nonprofit organization established to promote and improve due process in immigration proceedings. The Law Lab uses empirical analysis, technology, and litigation to ensure the fair and just administration of our immigration laws. The Law Lab has a direct interest in promoting rule-of-law principles in immigration adjudications and protecting immigration adjudications from political influence.

ARGUMENT

I. The INA requires the Attorney General to fairly and impartially administer the immigration laws.

The Immigration & Nationality Act (INA), together with its implementing regulations, sets forth procedures for the “timely, impartial, and consistent” resolution of immigration proceedings. *See* INA §§ 103, 240; 8 C.F.R. § 1003.1(d)(1) (charging the Board with appellate review authority to “resolve the questions before it in a manner that is timely, impartial, and consistent with the [INA] and regulations”); 8 C.F.R. § 1003.10(b) (similarly requiring “immigration judges . . . to resolve the questions before them in a timely and impartial manner”). Those procedures—and the requirement that they be fairly and impartially administered—extends not only to the Board and the immigration courts, but also to the Attorney General in the exercise of his refer and review authority under 8 C.F.R. § 1003.1(h).

Generally speaking, the Board of Immigration Appeals acts as the administrative review body within the Executive Office for Immigration Review (EOIR) of the U.S. Department of Justice. *See* 8 C.F.R. § 1003.1(a)(1). In that role, the Board is vested with appellate jurisdiction over the decisions of the immigration judges. *Id.* § 1003.1(b). It is charged with “resolv[ing] the questions before it in a manner that is timely, impartial, and consistent with the [INA] and regulations.” *Id.* § 1003.1(d)(1); *see also Islam v. Gonzales*, 469 F.3d 53, 57 (2d

Cir. 2006) (noting that the Board is “charged with stewardship over the conduct of judicial proceedings”). To that end, members of the Board must “exercise their independent judgment and discretion in considering and determining the cases coming before the Board.” *Id.* § 1003.1(d)(ii).

When the Board issues a removal order, that order generally becomes final and subject either to execution or to appellate review in the U.S. Courts of Appeal. *See* INA § 101(47) (defining “order of deportation” and setting forth the point at which such an order becomes final). One exception to the finality of a Board decision exists, however: “in those cases reviewed by the Attorney General in accordance with [his refer and review authority],” the Attorney General’s decision, not the Board’s decision, becomes the agency’s final order. 8 C.F.R. § 1003.1(d)(7). The Attorney General may exercise his “refer and review” authority in any case simply by “direct[ing] the Board to refer to him” a case “for review of its decision.” 8 C.F.R. § 1003.1(h).¹

The Attorney General is the head of the U.S. Department of Justice, and in that capacity “is not a counsel giving advice to the Government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation.” *Office & Duties of Att’y Gen.*, 6 Op. Att’y Gen. 326, 334

¹ As set forth in Respondent’s Opening Brief, compelling reasons exist to conclude that the Attorney General’s decision to exercise his refer and review authority in this particular matter was unlawful. *See* Respondent’s Opening Br. at 16–21.

(1854); *see also Parr v. United States*, 225 F.2d 329, 338 n.12 (5th Cir. 1955) (Cameron, J., dissenting) (noting that the Attorney General’s role, by design, is to advocate on behalf of justice itself).² In that capacity, and especially so in the exercise of his “refer and review” authority, the Attorney General acts much like an immigration judge—that is, as the ultimate finder of fact in the immigration proceeding. *See* 8 C.F.R. § 1003.1(h); *Matter of A-H-*, 23 I&N Dec. at 779 n.4 (noting that the Attorney General’s review under § 1003.1(h) is *de novo*). He therefore must also “resolve the questions before [him] in a timely and impartial manner.” 8 C.F.R. § 1003.10(b) (governing judicial officers acting as the triers of fact in immigration proceedings); *see also Parcham v. INS*, 769 F.2d 1001, 1008 (4th Cir. 1985) (explaining that decisions in immigration proceedings “must be rendered by an impartial decision-maker”). If he cannot, his decision is invalid. *See Matter of Exame*, 18 I&N Dec. 303, 306 (BIA 1982) (holding that bias by the decision maker with respect to the immigration laws may deprive an individual of a fair proceeding).

² The motto of the U.S. Department of Justice, “Qui Pro Domina Justitia Sequitur,” is believed to refer to the Attorney General, acting on behalf of the U.S. Department of Justice, “who prosecutes on behalf of justice.” U.S. Dep’t of Justice, DOJ Seal History & Motto, <https://www.justice.gov/about/history/doj-seal-history-and-motto>; *see also generally* Rafael Alberto Madan, *The Sign & Seal of Justice*, 7 Ave Maria L. Rev. 123 (2008) (explaining the motto’s history and meaning).

II. The Constitution guarantees noncitizens an impartial decision maker in immigration proceedings.

Perhaps more fundamentally, “[a] neutral judge is one of the most basic due process protections.” *Castro-Cortez v. INS*, 239 F.3d 1037, 1049 (9th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006). “[T]he Due Process Clause applies to all ‘persons’ within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvyas v. Davis*, 533 U.S. 678, 693 (2001); *see also Plyler v. Doe*, 457 U.S. 202, 210 (1982) (noting that immigration proceedings, including proceedings before an immigration judge and on review before the Board, are subject to the due process protections afforded under the Fifth and Fourteenth Amendments). “[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities,” *Schweiker v. McClure*, 456 U.S. 188, 195 (1982), including judicial officers in immigration proceedings, *Abdulrahman v. Ashcroft*, 330 F.3d 587, 596 (3d Cir. 2003); *see also Aguilar-Solis v. INS*, 168 F.3d 565, 569 (1st Cir. 1999) (noting the obligation of immigration judges “to function as neutral and impartial arbiters [and to] assiduously refrain from becoming advocates for either party”). Where, as here, the decision of the finder of fact is “subjected to particularly narrow appellate scrutiny,” the need for impartiality is at its highest. *Wang v. Att’y Gen.*, 423 F.3d 260, 268 (3d Cir. 2005) (internal quotation marks omitted).

Concerns for due process in immigration proceedings are particularly acute given the subordinate role of the EOIR as a component within the Department of Justice, which creates a “lack [of] structural protections [to] promote decisional independence from DOJ’s immigration enforcement objectives.” Note, *Structural Due Process in Immigration Detention*, 21 CUNY L. Rev. 35, 47 (Winter 2017). The Attorney General’s refer and review authority is where rule-of-law principles easily are undermined—exercising that authority, the Attorney General plays a dual role as both adjudicator of the government’s enforcement decisions and an agent of law enforcement itself, and he may exercise the authority as a means to seek his own ideological ends. See Bijal Shah, *The Attorney General’s Disruptive Immigration Power*, 102 Iowa L. Rev. Online 129, 132–33 (2017) (describing that dual role and observing that exercising the “refer and review” authority “constitutes the use of the administrative adjudication of an individual case as a means [to achieve] political ends”). That fact, compounded by the particularly vulnerable group to which the Attorney General’s conduct is directed, see *INS v. St. Cyr*, 533 U.S. 289, 315 n.39 (2001) (citing Stephen H. Legomsky, *Fear & Loathing in Congress & the Courts: Immigration and Judicial Review*, 78 Tex. L. Rev. 1615, 1626 (2000)), means “prevent[ing the] government ‘from abusing [its] power, or employing it as an instrument of oppression’ is critical, *DeShaney v.*

Winnebago Cnty. Dep't of Social Servs., 489 U.S. 189, 196 (1989) (internal quotation marks omitted) (second alteration in original).

At bottom, “fairness [in administrative review must be] the controlling factor in practice that it seems in metaphor.” *Cinderella Career and Finishing Sch., Inc.*, 425 F.2d at 589. Any absence of decisional independence in immigration proceedings defies the very archetype of fairness, resulting in “abandoning the merit in hearings of the power of persuasion for the persuasion of power.” *Id.* It is that persuasion of power against which the Constitution protects—“help[ing] to guarantee that government will not make a decision directly affecting an individual arbitrarily but will do so through the reasoned application of a rule of law.” *Kerry*, 135 S. Ct. at 2144 (“It is that rule of law . . . which in major part the Due Process Clause seeks to protect.”). Because, here, neither the Attorney General nor members of his staff are capable of preserving *any* element of fairness in this proceeding, they must be disqualified entirely from exercising their authority to review it.

III. The Attorney General—personally and through his staff—promote racist and white nationalist viewpoints, have prejudged the issues presented in this case, and are therefore disqualified from exercising the refer and review authority.

Neither the Attorney General, nor any member of the Attorney General’s staff, can fairly or impartially adjudicate the issues presented in this case. Since assuming office, the Attorney General and members of his staff have maintained

and developed strong relationships with individuals and organizations advocating anti-immigrant, nativist, and white nationalist causes, many of whom advocate positions in favor of removing all noncitizens, at all costs, from the United States. In speeches and public statements, the Attorney General has adopted and adhered to the views of those anti-immigrant, nativist, and white nationalist groups, relying on their work to develop and implement his own immigration enforcement strategies. He and his staff members have made clear, through public statements, their intent to implement those enforcement strategies in a manner resulting in removals “in record numbers and rapidly,” regardless whether a noncitizen has meritorious claims for relief.³ And, they have stated publicly that asylum claims grounded on any basis other than “fundamental things like . . . religion or nationality”—such as the asylum claim at issue in this case—constitute “fake

³ Michelle Ye Hee Lee, *President Trump’s Claim that MS-13 Gang Members Are Being Deported ‘By the Thousands,’* The Washington Post (June 26, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/06/26/president-trumps-claim-that-ms-13-gang-members-are-being-deported-by-the-thousands/?utm_term=.a93f93501999; Jefferson B. Sessions III, *Attorney General Sessions Delivers Remarks on the Administration’s Efforts to Combat MS-13 and Carry Out Its Immigration Priorities*, U.S. Dep’t of Justice (Dec. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-administrations-efforts-combat-ms-13-and-carry> (informing a Department of Justice audience that the Attorney General is “looking forward to working with you to protect the American people and implement the President’s ambitious agenda”).

claims” that overload the immigration system and amount to “rampant abuse and fraud.”⁴

Because neither the Attorney General nor any member of his staff may fairly or impartially adjudicate this case, they are disqualified entirely from doing so.

“The test for disqualification [of an agency decision maker is] whether ‘a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.’”

Cinderella Career & Finishing Sch., Inc., 425 F.2d at 591 (quoting *Gilligan, Will & Co.*, 267 F.2d at 469). Agency adjudications “must be attended, not only with every element of fairness but with the very appearance of complete fairness.” *Id.* (internal quotation marks omitted). Public statements of the kind the Attorney General and his staff have made here “have the effect of entrenching [the agency decision maker] in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record.” *Id.* at 590.

⁴ Jefferson B. Sessions III, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, U.S. Dep’t of Justice (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>.

A. The Attorney General and members of his staff have strong relationships with anti-immigrant, nativist, and white nationalist organizations, evidencing deep entrenchment in positions consistent only with anti-immigrant and racist agendas.

“[T]o perform its high function in the best way ‘justice must satisfy the appearance of justice.’” *Proctor v. Warden*, 435 U.S. 559, 560 (1978) (per curiam) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)) (alteration in original). Justice demands, as a “basic requirement,” fairness, and “[f]airness of course requires an absence of actual bias in the trial of cases. . . . To this end no man . . . is permitted to try cases where he has an interest in the outcome.” *In re Murchison*, 349 U.S. 133, 136 (1955). Although “interest[s] cannot be defined with precision,” “[c]ircumstances and relationships must be considered.” *Id.*

Since assuming office, and for decades before, the Attorney General has developed, maintained, and cultivated relationships with anti-immigrant, nativist, and white nationalist individuals and organizations. Through and within those relationships, he has applauded—and in many circumstance adopted—the strident anti-immigrant agendas and nativist views of those groups. In doing so, he has been one of the most aggressive voices in the United States against immigrants, particularly immigrants from communities of color, developing an egregious record of public statements evidencing racial animus and anti-immigrant bias. Through his conduct and those statements, the Attorney General has deeply entrenched himself in positions consistent only with anti-immigrant and racist

agendas, placing his anti-immigrant and racist allies in positions of influence over his office. Under any standard of fairness, but certainly by a “disinterested observer” upon a “realistic appraisal of psychological tendencies and human weakness,” the circumstances and relationships surrounding the Attorney General’s office “poses such a risk of actual bias or prejudice” that he cannot constitutionally decide this case. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883–84 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)); *Cinderella Career & Finishing Sch., Inc.*, 425 F.2d at 591 (applying a similar standard to an administrative decision maker).

1. John Tanton-funded hate groups⁵

Perhaps the most significant evidence of the Attorney General’s anti-immigrant and white nationalist positions are his extensive and historic ties to white nationalist Dr. John Tanton’s network of anti-immigrant organizations like the Federation for American Immigration Reform (FAIR), the Center for Immigration Studies (CIS), and NumbersUSA.⁶ Tanton, in many respects,

⁵ The Southern Poverty Law Center (SPLC) defines a “hate group” as “an organization that—based on its official statements or principles, the statements of its leaders, or its activities—has beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics.” Southern Poverty Law Center, *Hate Map*, <https://www.splcenter.org/hate-map>.

⁶ Southern Poverty Law Center, *John Tanton’s Network*, <https://www.splcenter.org/fighting-hate/intelligence-report/2015/john-tantons-network>; see also Jason DeParle, *The Anti-Immigration Crusader*, The New York Times (Apr. 17, 2011), <https://www.nytimes.com/2011/04/17/us/17immig.html>

legitimately may call himself the founder of the modern-day nativist and anti-immigration movements.⁷ The Attorney General, now and throughout his tenure as a Senator, repeatedly has relied on work developed through those movements to assist in his agendas and enforcement strategies to undermine the rights of noncitizens.

Currently, and throughout his political career, the Attorney General regularly has attended events hosted by the Federation for American Immigration Reform (FAIR), an organization that in 2007 was designated as a hate group by the SPLC because of its ties to white supremacist groups and eugenicists.⁸ Bespeaking the views of the organization more generally, FAIR's founder, Tanton, explained in 1993 that he had "come to the point of view that for European-American society and culture to persist requires a European-American majority, and a clear one at that."⁹

(describing Tanton's network and providing historical chronology of efforts to restrict immigration).

⁷ Jason DeParle, *The Anti-Immigration Crusader*, The New York Times (Apr. 17, 2011), <https://www.nytimes.com/2011/04/17/us/17immig.html> ("Tanton helped start all three major national groups fighting to reduce immigration, legal and illegal, and molded one of the most powerful grass-roots forces in politics.").

⁸ Southern Poverty Law Center, *Federation for American Immigration Reform*, <https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform>.

⁹ Southern Poverty Law Center, *John Tanton*, <https://www.splcenter.org/fighting-hate/extremist-files/individual/john-tanton> (quoting letter from John Tanton to Garrett Hardin, eugenicist and ecology professor (Dec. 10, 1993)).

Since its founding in 1979, FAIR essentially has had one mission: to limit immigration, with a focus on ending immigration from non-white-majority countries, into the United States. FAIR's current president, Dan Stein, explained in an oral history of the organization that he

blame[s] ninety-eight percent of responsibility for this country's immigration crisis on Ted Kennedy and his political allies, who decided some time back in 1958, earlier perhaps, that immigration was a great way to retaliate against Anglo-Saxon dominance and hubris, and the immigration laws from the 1920s were just this symbol of that, and it's a form of revengism, or revenge, that these forces continue to push the immigration policy that they know full well are creating chaos and will continue to create chaos down the line.¹⁰

A few years later, Stein remarked, "Immigrants don't come all church-loving, freedom-loving, God-fearing. . . . Many of them hate America; hate everything that the United States stands for. Talk to some of these Central Americans."¹¹

The Attorney General regularly attends FAIR's annual "Hold Their Feet to the Fire" event, which convenes radical anti-immigrant activists for a talk-radio and media blitz. In 2007, the Attorney General delivered a keynote speech at FAIR's advisory board meeting and accepted FAIR's "Franklin Society Award," which "honor[s] rare individuals who have made a real difference" in advancing an

¹⁰ Southern Poverty Law Center, *Dan Stein*, <https://www.splcenter.org/fighting-hate/extremist-files/individual/dan-stein> (quoting interview of Dan Stein by John Tanton (Aug. 1994)).

¹¹ *Id.* (quoting interview of Dan Stein by Tucker Carlson (Oct. 2, 1997)).

agenda aligned with FAIR's extreme anti-immigrant and nativist positions.¹² In his keynote speech, the Attorney General publicly thanked FAIR for "the important role that [it plays] in educating the American public" about immigration reform.¹³ In 2016, when the Attorney General was nominated for his current post, FAIR issued a public statement congratulating the Attorney General and lauding him as the "leading voice for immigration policies that serve the national interest,"¹⁴ with "national interest" being understood, by the views of FAIR's leadership and members, to mean the preservation of a white majority.

By and large, the Attorney General has demonstrated overwhelming support for and loyalty toward FAIR and its ongoing anti-immigrant and white nationalist mission. Indeed, in a 2015 radio interview with Stephen Bannon of Breitbart,¹⁵ the

¹² Federation for American Immigration Reform, Immigration Report, *FAIR Thanks Senator Jeff Sessions for His Leadership in Defeating the Bush-Kennedy Amnesty* (Nov. 2007), http://www.fairus.org/sites/default/files/2017-08/Nov07_NL.pdf?docID=6021.

¹³ Notably, however, the Attorney General failed to disclose the fact that he received the award in a questionnaire submitted to the Senate Judiciary Committee upon his nomination for his current post. *See Imagine 2050, Jeff Sessions Fails to Disclose Award from Anti-Immigrant FAIR to Congress* (Dec. 14, 2016), <http://imagine2050.newcomm.org/2016/12/14/jeff-sessions-fails-disclose-award-from-anti-immigrant-group-fair-congress/>.

¹⁴ Federation for American Immigration Reform, *FAIR Congratulates Senator Jeff Sessions for Nomination as Attorney General* (Nov. 18, 2016), <https://fairus.org/press-releases/fair-congratulates-senator-jeff-sessions-nomination-attorney-general>.

¹⁵ The Attorney General has also aligned himself with the views of Breitbart News, which itself is a platform known for its white nationalist and racist agenda. *See generally* Marge Baker, *Jeff Sessions' Relationship with Breitbart*, "The

Attorney General made clear that he shared Stein's views of post-civil-era immigration laws, praising an earlier, racially discriminatory version of those laws:

In seven years we'll have the highest percentage of Americans, non-native born, since the founding of the Republic. Some people think that we've always had these numbers, and it's not so, it's very unusual, it's a radical change. When the numbers reached about this high in 1924, the president and congress changed the policy, and it slowed down immigration significantly, we then assimilated through . . . 1965 and created really the solid middle class of America, with assimilated immigrants, and it was good for America. We passed a law that went far beyond what anybody realized in 1965, and we're on a path to surge far past what the situation was in 1924.¹⁶

The Center for Immigration Studies (CIS), also an organization founded and funded by Tanton, serves as the think-tank for the anti-immigrant movement. Like FAIR, CIS has a well-documented history of demonizing and disparaging immigrants and affiliating itself with white nationalist and nativist hate groups.¹⁷

Platform" for the White Nationalist Alt-Right, Should Be Disqualifying, HuffPost (Jan. 3, 2017, 5:13 PM), https://www.huffingtonpost.com/marge-baker/jeff-sessions-relationships_b_13941372.html (chronicling that relationship); Matt Shuham, *Sessions Downplayed Relationship with Breitbart News in Senate Questionnaire*, TPM (Dec. 22, 2016, 5:58 PM), <https://talkingpointsmemo.com/livewire/jeff-sessions-downplays-breitbart-news-senate-questionnaire>.

¹⁶ Adam Serwer, *Jeff Sessions's Unqualified Praise for a 1924 Immigration Law*, The Atlantic (Jan. 10, 2017), <https://www.theatlantic.com/politics/archive/2017/01/jeff-sessions-1924-immigration/512591/>.

¹⁷ See generally Amy Sherman, *Is the Center for Immigrations Studies a Hate Group, as the Southern Poverty Law Center Says?*, PolitiFact Florida (Mar. 22, 2017, 10:57 AM), <http://www.politifact.com/florida/article/2017/mar/22/center-immigration-studies-hate-group-southern-pov/>.

CIS frequently circulates articles to its supporters penned by white nationalists,¹⁸ and in relatively recent years has referred to immigrants as “Third-World gold-diggers.”¹⁹ Its Executive Director, Mark Krikorian, in response to the devastating earthquake in Haiti in 2010, remarked, “My guess is that Haiti’s so screwed up because it wasn’t colonized *long enough*.”²⁰ In 2014, CIS staff member Stephen Steinlight publicly denounced President Barack Obama’s immigration reform policies and remarked that impeachment for President Obama wasn’t enough: “I would think being hung, drawn, and quartered is probably too good for [the President].”²¹ And, in the most recent call for comprehensive immigration reform led by the Attorney General himself, CIS’s Janice Kephart left her position at CIS to serve as Special Counsel to the Senate Judiciary Committee and, in particular, to then-Senator Sessions.²²

¹⁸ See, e.g., *id.*

¹⁹ Center for Immigration Studies, *Hello, I Love You, Won’t You Tell Me Your Name: Inside the Green Card Marriage Phenomenon* (Dec. 2, 2008), <https://cis.org/Hello-I-Love-You-Wont-You-Tell-Me-Your-Name-Inside-Green-Card-Marriage-Phenomenon-0>.

²⁰ Mark Krikorian, *What to Do About Haiti?*, National Review (Jan. 21, 2010, 3:51 PM), <https://www.nationalreview.com/corner/what-do-about-haiti-mark-krikorian/>.

²¹ Sam Levine, *Conservative Scholar Disciplined for Suggesting Obama Be ‘Hung, Drawn, and Quartered,’* HuffPost (July 23, 2014, 5:29 PM), https://www.huffingtonpost.com/2014/07/23/stephen-steinlight-obama_n_5613541.html.

²² Imagine 2050, *Janice Kephart Serves as Special Counsel to the Senate Judiciary Committee* (May 16, 2013),

The Attorney General continues to espouse the views of the Center for Immigration Studies (CIS), going so far as to incorporate the organization's dubious and widely criticized research into the handbook on immigration that he drafted and circulated to Congress to outline his plan for reform.²³ In his current position, he repeatedly has relied on the work of Jessica Vaughan, CIS's Director

<http://imagine2050.newcomm.org/2013/05/16/janice-kephart-serves-as-special-counsel-to-senate-judiciary-committee/>.

²³ See Jefferson B. Sessions III, U.S. Senator Alabama, Immigration Handbook for the New Republican Majority ["Immigration Handbook"] (Jan. 2015), available at http://images.politico.com/global/2015/01/12/immigration_primer_for_the_114th_congress.pdf. In the Immigration Handbook, Sessions explains,

Consider the illegal immigration surge from Central America. Approximately 99 percent of those who arrived in that surge—whether minors or adults in family units—are still in the United States, according to DHS data. Instead of removing illegal immigrants, the President has expended enormous time, energy, and resources into resettling newly arrived illegal immigrants throughout the United States. Any border security plan that leaves this resettlement operation intact is doomed to failure. Jessica Vaughan at the Center for Immigration Studies estimates that more than 100,000 illegal immigrants who showed up at the border this year have been freed into the United States.

Increasing the budget for DHS in the form of additional Border Patrol agents, vehicles, etc., will not stem the tide of illegal immigration as long as catch-and-release continues and as long as interior enforcement remains gutted. No amount of additional resources will work if our law enforcement officers cannot carry out their duties. Absent such reform, we are just using those resources to facilitate the transfer of illegal immigrants from south of the border to north of the border.

Id. at 6; see also *id.* at 9 n.18, 11, 13.

of Policy Studies,²⁴ whose studies and reporting have been debunked on numerous accounts, including on the basis of factual inaccuracies and manipulated data.²⁵

NumbersUSA is a third Tanton-financed organization aimed at achieving anti-immigrant reform in manners similar to FAIR and CIS. Its founder, Roy Beck, consistently has advocated for radically restricting immigration, and considers the Attorney General as “a man whom he has counted as an ally for decades.”²⁶ In 2008, NumbersUSA awarded then-Senator Sessions the organization’s “Defender of the Rule of Law” award for Sessions’ work to obstruct and restrict immigration reform. In 2012, Sessions put into the congressional record a congratulatory mention to NumbersUSA for its fifteenth anniversary,

²⁴ See, e.g., Daniel Halper, *Sessions: ‘Lax Enforcement’ Driving Illegal Immigration ‘Surge,’* The Weekly Standard (June 14, 2014, 6:51 PM), <https://www.weeklystandard.com/sessions-lax-enforcement-driving-illegal-immigration-surge/article/795699> (reporting on then-Senator Sessions’ remarks on the Senate floor, in which he relied on finding from studies performed and reported by CIS’s Vaughan).

²⁵ Southern Poverty Law Center, *Center for Immigration Studies Debunked* (Oct. 2, 2017), <https://www.splcenter.org/hatewatch/2017/10/02/center-immigration-studies-debunked>. As recently as last month, an ICE spokesman in San Francisco resigned citing “falsehoods being spread by . . . Attorney General Jeff Sessions” and referring to the Attorney General as a “purveyo[r] of misleading and inaccurate information.” Dan Simon, *ICE Spokesman in SF Resigns and Slams Trump Administration Officials*, CNN Politics (Mar. 13, 2018, 7:35 AM), <https://www.cnn.com/2018/03/12/politics/ice-spokesman-resigns-san-francisco/index.html>.

²⁶ Matt Apuzzo & Rebecca R. Ruiz, *Trump Chooses Sessions, Longtime Foe of DACA, to Announce Its Demise*, The New York Times (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/jeff-sessions-daca-immigration.html>.

“commend[ed] NumbersUSA for speaking out effectively on . . . important issues for America,” and wished the organization “even greater success over its next 15 years.”²⁷

2. Anti-Muslim hate groups

In addition to Tanton’s network of hate groups, the Attorney General has courted several anti-Muslim groups from which he has received extensive and effusive accolades. As recently as 2014, the Attorney General received the “Daring the Odds: The Annie Taylor Award” from the David Horowitz Freedom Center, an organization led by anti-Muslim extremist David Horowitz. Horowitz’s organization exists primarily to promote fear of Muslims in the United States. In his acceptance speech for the award, the Attorney General remarked, “I’ve seen some great people receive this [award],”²⁸ but it was “a special treat and pleasure for me [to receive it, Mr. Horowitz] because you know how much I admire you.”²⁹

²⁷ 158 Cong. Rec. S2919-02 (daily ed. May 7, 2012) (statement of Sen. Sessions); NumbersUSA, *Sen. Jeff Sessions Recognizes Numbers USA in the Congressional Record* (May 8, 2012, 1:02 PM), <https://www.numbersusa.com/content/news/may-8-2012/sen-jeff-sessions-recognizes-numbersusa-congressional-record.html>.

²⁸ Among others, past recipients include Pamela Gellar, one of the most extreme anti-Muslim activists in the United States.

²⁹ Jay Michaelson, *Jeff Sessions Said “Secularists” Are Unfit for Government*, Daily Beast (Jan. 12, 2017, 1:00 AM), <https://www.thedailybeast.com/fbi-texts-catastrophuck-trump-nearly-drove-agents-to-quit?ref=scroll>.

In his 2017 Senate confirmation hearing, faced with criticism for his ties to Horowitz, the Attorney General praised Horowitz as “a most brilliant individual.”³⁰

And, in 2015, the Attorney General accepted the “Keeper of the Flame” award from another anti-Muslim hate group, the Center for Security Policy (CSP). CSP is operated by Frank Gaffney, who has a long history of promoting fear in and for Muslims, historically having claimed that the Muslim Brotherhood has infiltrated the U.S. government,³¹ called for the reestablishment of the House Un-American Activities Committee,³² and claimed that Hillary Clinton staff member Huma Abedin was a part of the “Muslim Brotherhood conspiracy.”³³ The Attorney General, together with President Donald Trump, repeatedly have relied on the work of CSP and Gaffney to justify policies favoring categorical bans on Muslim immigration.³⁴

³⁰ *Hearing on the Nomination of Sen. Sessions to Be Attorney General Before the Senate Comm. on the Judiciary* (Jan. 10, 2017) (statement of Jefferson B. Sessions).

³¹ Frank J. Gaffney, Jr., *Anti-American Activities*, *The Washington Times* (July 18, 2011), <https://www.washingtontimes.com/news/2011/jul/18/anti-american-activities/>.

³² *Id.*

³³ Frank J. Gaffney, Jr., *Hillary Clinton’s Ticking Tim Bomb: Huma Abedin*, *The Washington Times* (Aug. 3, 2015), <https://www.washingtontimes.com/news/2015/aug/3/frank-gaffney-hillary-clintons-ticking-time-bomb-h/>.

³⁴ Philip Bump, *Meet Frank Gaffney, the Anti-Muslim Gadfly Reportedly Advising Trump’s Transition Team*, *Chicago Tribune* (Nov. 15, 2016, 11:28 PM), <http://www.chicagotribune.com/news/nationworld/politics/ct-anti-muslim-frank-gaffney-trump-transition-team-20161115-story.html/>.

The Attorney General has placed anti-immigrant and hate groups in positions of influence over his immigration strategies and enforcement agenda. Through his relationships with those organizations, he has both commended and adopted radical anti-immigrant and nativist views that, given the circumstances and relationships out of which those views arose, pose a substantial risk to the administration of justice in these proceedings.³⁵ *See Matter of Exame*, 18 I&N Dec. at 306 (requiring disqualification where the judge has a “personal, rather than judicial, bias stemming from an extrajudicial source” (internal quotation marks omitted)); *see also Caperton*, 556 U.S. at 883–84; *Cinderella Career & Finishing Sch., Inc.*, 425 F.2d at 591. As a result, neither the Attorney General, nor any member of the Attorney General’s staff, constitutionally may issue a decision in this case.³⁶

³⁵ For an interactive chart showing the Attorney General’s network of anti-immigrant and racist connections, *see* <https://innovationlawlab.org/sessions-connections>.

³⁶ The Attorney General’s staff members harbor similar anti-immigrant and racist views as does the Attorney General, and assist the Attorney General to formulate and enforce his immigration agenda. *See, e.g.*, DailyKos, *Gene Hamilton: The Ghost in the DOJ/DHS Machine* (Jan. 24, 2018, 3:23 PM), <https://www.dailykos.com/stories/2018/1/24/1735669/-Gene-Hamilton-the-Ghost-in-the-DOJ-DHS-Machine>.

B. The Attorney General’s conduct and statements since assuming office evince racial animus, anti-immigrant and anti-asylum bias, and therefore an inability to fairly administer the immigration laws.

The Attorney General’s deeply seated ties to anti-immigrant and nativist groups provide relevant context for—and potentially explain—more recent statements and conduct of the Attorney General and his staff since he assumed office in early 2017. The statements demonstrate, without serious doubt, that the Attorney General deeply has entrenched himself in anti-immigrant—and, specifically, anti-asylum—positions, “making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record” in this case. *Cinderella Career & Finishing Sch., Inc.*, 425 F.2d at 591. Because he has prejudged the issues presented here in all respects, he cannot decide this case.

The INA, by its text, provides all noncitizens physically present in the United States with the right to apply for asylum. INA § 208(a)(1). To establish eligibility for asylum, the noncitizen must show that he or she is a “refugee,” which the INA defines as

any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

INA § 101(42)(A). Thus, in an immigration proceeding in which the noncitizen has applied for asylum, the noncitizen “must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.” INA § 208(b)(1)(B)(i); *see also INS v. Elias-Zacarias*, 502 U.S. 478, 481–82 (1992) (recognizing those five protected grounds); *Crespin-Valladares v. Holder*, 632 F.3d 117, 126 (4th Cir. 2011) (same). The INA’s five protected grounds—and asylum as a form of relief for persecution on those grounds—have been part of our country’s immigration laws since 1980.

This case involves the scope of the asylum protections—in particular, whether a “particular social group” within the meaning of INA § 101(42)(A) may include victims of private criminal acts. The Board, in a series of precedential decisions, has already held that whether a “particular social group” exists depends on the circumstances of the country in question, and has already concluded that a “particular social group” may include victims of private criminal conduct. *See generally Matter of A-R-C-G-*, 26 I&N Dec. 388, 392–94 (BIA 2014) (citing cases).

The Attorney General has stated, however, that, in his opinion, the asylum system “is meant to protect those who [face] persecution based on fundamental things like their religion or nationality,” not bases such as race, political opinion, or

membership in a particular social group.³⁷ To the Attorney General, those other bases for asylum—about which Congress, through the INA, has otherwise been explicit—amount to “rampant abuse and fraud” that plague our “overloaded [immigration] system.”³⁸ That view—of course consistent with the Attorney General’s established anti-immigrant and xenophobic views—is unprecedented in our legal system and directly contravenes our country’s immigration laws. But the Attorney General has made himself abundantly clear, and as a result, has prejudged the legal issues presented in this case.

Unsurprisingly, the Attorney General has made other public statements evincing his anti-immigrant and nativist views and his intent to implement immigration enforcement strategies that comport with those views. Each of the statements below further demonstrates that the Attorney General has prejudged the issues that this case presents—specifically, issues relating to asylum eligibility on bases other than “fundamental things like . . . religion or nationality”³⁹—and therefore cannot exercise his refer and review authority.

- In August 2017, the Department of Justice, under the leadership of the Attorney General, issued a press release equating a substantial uptick

³⁷ Jefferson B. Sessions III, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, U.S. Dep’t of Justice (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>.

³⁸ *Id.*

³⁹ *Id.*

in deportations with a “return to rule of law.”⁴⁰ That, of course, is a concerning conflation, given that the mission of the immigration courts should be the fair adjudication of cases, whether they result in removal or a grant of relief. The statement likewise evidences either a misunderstanding of, or an outright disregard for, the nonrefoulement principle that makes essential to our immigration laws the protection of individuals against returning to a country where they fear persecution.⁴¹

- Between September and December 2017, the U.S. Department of Justice, under the leadership of the Attorney General, twice requested vacatur of former Maricopa County Sheriff Joe Arpaio’s criminal contempt conviction. Sheriff Arpaio is notorious for his aggressive anti-immigrant positions and for “employ[ing] systemic racism in the name of immigration enforcement.”⁴²
- In October 2017, the Attorney General delivered remarks to EOIR staff outlining his positions with respect to closing “loopholes” in the immigration system and radically restricting the number of legal and illegal immigrants who may remain in the United States. It was here that the Attorney General stated, as noted above, that the asylum system “is meant to protect those who [face] persecution based on fundamental things like their religion or nationality.” According to the Attorney General, applicants alleging persecution on some other ground—even those contemplated by the INA and international law—

⁴⁰ See Dep’t of Justice Press Release No. 17-889, *Return to rule of law in Trump administration Marked By Increase in Key Immigration Statistics* (Aug. 8, 2017), <https://www.justice.gov/opa/pr/return-rule-law-trump-administration-marked-increase-key-immigration-statistics>.

⁴¹ Convention Relating to the Status of Refugees, art. 33(1), July 28, 1951, 189 U.N.T.S. 137, 19 U.S.T. 6223. In 1968, the United States agreed to comply with the substantive provisions of Articles 2 through 34. See *id.*; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987).

⁴² Michelle Ye Hee Lee, *What You Need to Know About Former Arizona Sheriff Joe Arpaio’s Record on Illegal Immigration*, *The Washington Post* (Aug. 23, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/08/23/what-you-need-to-know-about-former-arizona-sheriff-joe-arpaio-s-record-on-illegal-immigration/?utm_term=.bf645854da6f.

present “fake claims,” resulting in an “overloaded” immigration system plagued by “rampant abuse and fraud.”⁴³

- In December 2017, the Attorney General remarked that he “look[s] forward to working with [President Trump] to protect the President’s ambitious [immigration] agenda.”⁴⁴ President Trump has made explicit his immigration agenda, which is “[f]or those here illegally today, who are seeking legal status, the will have one route and one route only. To return home”⁴⁵
- In February 2018, White House staff held their second meeting with ProEnglish, a nativist group also founded and financed by John Tanton and designated by the SPLC as an anti-immigrant hate group. According to a press release issued by ProEnglish, the purpose of the meeting was to discuss with White House staff the potential for English-language-only legislation.⁴⁶ The Attorney General, through

⁴³ Jefferson B. Sessions III, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, U.S. Dep’t of Justice (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>.

⁴⁴ Jefferson B. Sessions III, *Attorney General Sessions Delivers Remarks on the Administration’s Efforts to Combat MS-13 and Carry Out Its Immigration Priorities*, U.S. Dep’t of Justice (Dec. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-administrations-efforts-combat-ms-13-and-carry>.

⁴⁵ Transcript: Donald Trump’s Full Immigration Speech, Annotated, LA Times (Aug. 31, 2016, 9:35 PM), <http://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htlstory.html>; *see also* *President Trump Meeting with Cabinet* (June 12, 2017), C-SPAN, <https://www.cspan.org/video/?429863-1/president-touts-accomplishments-cabinet-meeting> (“Great success They’re being thrown out in record numbers and rapidly. And, uh, they’re being depleted. They’ll all be gone pretty soon. So, you’re right, Jeff. Thank you very much.”).

⁴⁶ Stephen Guschov, *ProEnglish Has 2nd White House Meeting to Discuss Official English Legislation*, ProEnglish (Feb. 13, 2018), <https://proenglish.org/2018/02/13/proenglish-has-2nd-white-house-meeting-to-discuss-official-english-legislation/>.

his ties with other Tanton hate groups, is a longtime supporter of ProEnglish and its mission.⁴⁷

- Also in February 2018, the Attorney General demonstrated, in a nationally televised press conference, bias in his praise of the nation’s sheriffs and their “Anglo-American heritage.”⁴⁸
- On April 4, 2018, the Department of Homeland Security, under the leadership of the Attorney General, issued a “Fact Sheet” identifying “the problem” with the existing immigration system as “legal loopholes” and “asylum fraud” connected with marked increases in the number of women and children arriving in the United States.⁴⁹
- On April 11, 2018, the Attorney General reaffirmed his commitment to vigorously prosecute immigration cases in a manner consistent with the President’s unprecedented and xenophobic immigration enforcement agenda. In a speech to the Southwestern Border Sheriff’s Coalition in Las Cruces, New Mexico, the Attorney General emphasized that “[t]he president expects us to not just play around with this problem [of illegal immigration], but to fix it and that is my goal.” He went on to proclaim, “We are determined to end catch and release—zero tolerance! Our goal is to prosecute every case that is brought to us. There must be consequences to breaking the law *If you break into this country, we will prosecute you.*”⁵⁰ The Attorney

⁴⁷ ProEnglish, *Longtime English Supporter Jeff Sessions, Tapped to Be Attorney General* (Dec. 16, 2016), <https://proenglish.org/2016/12/16/longtime-official-english-supporter-senator-jeff-sessions-tapped-to-be-attorney-general/>.

⁴⁸ Marwa Eltagouri, *Jeff Sessions Spoke of the ‘Anglo-American Heritage of Law Enforcement.’ Here’s What That Means*, *The Washington Post* (Feb. 12, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/02/12/jeff-sessions-spoke-of-the-anglo-american-heritage-of-law-enforcement-heres-what-that-means/?utm_term=.d54f63903a6e.

⁴⁹ Department of Homeland Security, *Fact Sheet: To Secure the Border and Make America Safe Again, We Need to Deploy the National Guard* (Apr. 4, 2018), <https://www.dhs.gov/news/2018/04/04/secure-border-and-make-america-safe-again-we-need-deploy-national-guard>.

⁵⁰ Jose Villasana, *Attorney General: Constitution Doesn’t Outside States. We Don’t Have to Apologize*, *KVIA* (Apr. 11, 2018, 11:21 AM),

General's statements evidence his flagrant disregard for our country's commitment to the U.N. Convention Relating to the Status of Refugees, in which the United States agreed "not [to] impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."⁵¹

- Finally, just this week, the Attorney General suggested in a press release issued by the Department of Justice that a group of individuals, largely women and children seeking to escape violence in Central America, were "deliberate[ly] attempt[ing] to undermine our laws and overwhelm our [immigration] system. . . . Smugglers and traffickers and those who lie or commit fraud will be prosecuted to the fullest extent of the law."⁵² The Attorney General's statements on

<http://www.kvia.com/news/new-mexico/attorney-general-constitution-doesnt-apply-outside-states-we-dont-have-to-apologize/728159275> (emphasis added).

⁵¹ Convention Relating to the Status of Refugees, art. 31(1), July 28, 1951, 189 U.N.T.S. 137, 19 U.S.T. 6223.

⁵² Jefferson B. Sessions III, *Attorney General Jeff Sessions Statement on Central American "Caravan,"* U.S. Dep't of Justice (Apr. 23, 2018), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-statement-central-american-caravan>. The Attorney General's statement is another example of his anti-rule-of-law approach to immigration adjudication. It is absolutely true—and completely contrary to his statement—that the only way an individual can apply for asylum is to be physically present in the United States. INA § 208(a). To state that individuals who are complying with the law are seeking to undermine it suggests that the Attorney General views some laws—like that of deportation—as more valuable than others—like that of asylum. But both are laws of this country and the Attorney General is charged with administering both fairly. The rule of law requires that all laws apply; not only those laws that the Attorney General prefers to enforce—after all, that would be arbitrary and capricious.

Importantly, the caravan here was organized as a means to subvert the trafficking and smuggling networks and provide a safe, lawful mechanism for individuals to comply with § 208(a). See Pueblos Sin Fronteras (@puebloSF), Twitter (Apr. 25, 2018), <https://twitter.com/pueblosf?lang=en> (providing that "[o]ur mission is to provide shelter and safety to migrants and refugees in transit.") The Attorney General's distortion in his statement threatening prosecution does his office no credit.

Monday evince either a blatant intent not to afford the protections that our immigration laws provide or, at the very least, prejudice of the meritorious asylum claims that these individuals might have.

As is clear from his relationships, conduct, and statements, the Attorney General continues to be one of the most aggressive voices in the United States against immigrants, particularly those from communities of color. Through his relationships, he has both lauded and adopted radical anti-immigrant and nativist views that, given the circumstances and relationships out of which those views arose, pose a substantial risk to the administration of justice in these proceedings. By his conduct and statements—both on his own and through members of his staff, he has made abundantly clear that his immigration agenda and enforcement strategies are motivated by his anti-immigrant bias and racial animus. Indeed, his conduct and his statements evince an intent to disregard entirely the powerful protections that our immigration laws provide to individuals with meritorious claims for relief from removal.

Because the Attorney General and his staff have prejudged the asylum issues presented in this case, they cannot—by the standards of either the INA or the Due Process Clause—permissibly exercise their refer and review authority this case. To permit them to do so would be to allow flagrant abuses of executive power as an instrument of oppression and at the expense of individual liberties and the rule

of law. That is not, and should never be, the function of the U.S. Department of Justice.

CONCLUSION

For the foregoing reasons, the Attorney General is disqualified for rendering a decision on the merits in this proceeding. The matter should therefore be returned to the Board for reinstatement of its earlier decision.

DATED: April 27, 2018

Respectfully submitted,



Nadia H. Dahab, OSB No. 125630
Stoll Stoll Berne Lokting & Shlachter P.C.
209 SW Oak Street, Suite 500
Portland, OR 97204
(503) 227-1600
ndahab@stollberne.com

*Counsel for Amicus Curiae
Innovation Law Lab*

CERTIFICATE OF COMPLIANCE

This brief complies with the instructions in the Attorney General's referral orders dated March 7, 2018 and March 30, 2018, because the brief contains 7844 words, excluding the cover page, Table of Contents, Table of Authorities, signature block, Certificate of Compliance, and Certificate of Service.

DATED: April 27, 2018



Nadia H. Dahab, OSB No. 125630

CERTIFICATE OF SERVICE

I, Nadia H. Dahab, hereby certify that on April 27, 2018, the foregoing brief was submitted electronically to AGCertification@usdoj.gov and in triplicate via FedEx to:

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

DATED: April 27, 2018



Nadia H. Dahab, OSB No. 125630