**No. 23-26**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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HUGO ROLANDO GARCIA ALVAREZ,
*Petitioner*,

v.

MERRICK GARLAND, U.S. ATTORNEY GENERAL,
*Respondent*.

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On Petition for Review of a Decision of the Immigration Judge

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# BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION ("ACLU") OF NORTHERN CALIFORNIA, ACLU OF SAN DIEGO AND IMPERIAL COUNTIES, ACLU OF SOUTHERN CALIFORNIA, AND DISABILITY RIGHTS CALIFORNIA IN SUPPORT OF PETITIONER HUGO ROLANDO GARCIA ALVAREZ

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## CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case.

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Statutes**



**Other Authorities**

## RULE 29 STATEMENT

Petitioner and the government have consented to the filing of this brief. Neither party nor their counsel authored this brief in whole or in part. Neither the parties, their counsel, nor any other individual (other than Amici and their counsel) contributed money that was intended to fund the preparation or submission of this brief.

## INTERESTS OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") of Northern California, ACLU of San Diego and Imperial Counties, and ACLU of Southern California are nonprofit organizations whose immigrants' rights teams advance the constitutional and civil rights of noncitizens through litigation, advocacy, and public education.

Disability Rights California is a nonprofit organization that defends, advances, and strengthens the rights and opportunities of people with disabilities through advocacy, litigation, policy, and public education.

All Amici share an interest and expertise in ensuring that all individuals with mental health disabilities are afforded their constitutional, statutory, and regulatory rights in immigration proceedings and before the federal courts.

Amici also have a particular interest in this case because it involves a violation of the permanent injunction in *Franco-Gonzalez v. Napolitano* ("*Franco*"), No. 2:10-cv-02211-DMG (C.D. Cal.), a certified class action in the Central District of California of which Amici are or were class counsel. As class counsel, Amici

represent or represented all pro se immigrants detained in California, Arizona, and Washington who have a serious mental disorder that may render them incompetent to represent themselves in their immigration proceedings.

The district court's permanent injunction in *Franco* requires the government to screen all individuals detained in those states to determine if they may have a serious mental disorder or condition, evaluate their competency to represent themselves, and provide them with legal representation if they are found not competent to represent themselves. *See Franco-Gonzalez v. Holder*, No. CV 10–02211 DMG (DTBx), 2013 WL 8115423 (C.D. Cal. Apr. 23, 2013) (Permanent Injunction); *Franco-Gonzalez v. Holder*, No. CV–10–02211 DMG (DTBx), 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) (Implementation Plan Order) ("IPO" or, together with the Permanent Injunction, "the *Franco* Injunction").

Because the government failed to properly identify Petitioner Hugo Rolando Garcia Alvarez ("Mr. Garcia") as a *Franco* class member and afford him the injunction's protections, Amici have a strong interest in safeguarding Mr. Garcia's procedural rights as he litigates his removal proceedings. Amici agree with Mr. Garcia that his case should be remanded to the Immigration Judge to provide him a new hearing as well as a Judicial Competency Inquiry.

## INTRODUCTION

Amici respectfully submit this brief to highlight salient aspects of the *Franco*

Injunction, the government's violations of the injunction in Mr. Garcia's case, and why it is uniquely critical that the government comply with the injunction in "streamlined" proceedings where individuals with mental health disabilities face compounding barriers.

Amici agree with Mr. Garcia that his case should be remanded to the Immigration Judge ("IJ") because both Immigration and Customs Enforcement ("ICE") and the IJ violated the *Franco* Injunction at multiple junctures. Despite being aware that Mr. Garcia was diagnosed with Major Depressive Disorder and anxiety, he was experiencing active psychiatric symptoms, and ICE providers were prescribing him psychiatric medication frequently used to treat bipolar disorder, ICE failed to file a notice of class membership and to submit relevant medical records in its possession. *See Franco-Gonzalez v. Holder*, No. CV–10–02211 DMG (DTBx), 2014 WL 5475097, *2–5 (C.D. Cal. Oct. 29, 2014). The IJ, for his part, was similarly on notice of Mr. Garcia's mental health conditions but failed to conduct a Judicial Competency Inquiry. *See id.* at *6.

The premise of the *Franco* Injunction is that additional procedures are necessary to ensure individuals with a mental health disability are able to meaningfully participate in their immigration proceedings. And yet, the overwhelming majority of noncitizens are deported through "streamlined" proceedings that curtail even basic procedures. To avoid the unlawful deportations of countless *Franco* class

members, like Mr. Garcia, it is particularly imperative that this Court enforce compliance with the *Franco* Injunction in such proceedings.

## BACKGROUND

### I. The *Franco* Litigation and Permanent Injunction

In 2010, the named Plaintiffs in the *Franco* litigation filed a class action complaint in the District Court for the Central District of California alleging that the government had legal obligations to (a) create a competency determination system to assess whether pro se individuals detained for immigration proceedings had serious mental disabilities that rendered them incompetent to represent themselves; and (b) provide legal representation to those who were not competent by reason of those mental disabilities. The Plaintiffs sought certification of a class of individuals detained in Arizona, California, and Washington who have serious mental disorders, and asserted claims under Section 504 of the Rehabilitation Act ("Rehabilitation Act"), the Immigration and Nationality Act, and the Due Process Clause.[1]

In December of 2010 and May of 2011, the district court issued preliminary injunctions ordering that the government provide several of the named Plaintiffs with legal representation in their immigration proceedings as a reasonable accommodation under the Rehabilitation Act. *See Franco-Gonzales v. Holder*, 828 F. Supp. 2d 1133 (C.D. Cal. 2011); *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010).

[1] Plaintiffs also raised claims challenging their prolonged detention without a bond hearing. Those are not pertinent here.

In November of 2011, the district court certified a Main Class of individuals "who are or will be" in Department of Homeland Security ("DHS") custody in Arizona, California, and Washington "who have been identified by or to medical personnel, DHS, or an IJ, as having a serious mental disorder or defect that may render them incompetent to represent themselves in detention or removal proceedings, and who presently lack counsel in their detention or removal proceedings." *Franco-Gonzales v. Napolitano*, No. CV 10–02211 DMG (DTBx), 2011 WL 11705815, *16 (C.D. Cal. Nov. 21, 2011). The district court also certified two subclasses, the first of which ("Subclass One") was comprised of Main Class members "who have a serious mental disorder or defect that renders them incompetent to represent themselves in immigration proceedings." *Id.* In other words, the Main Class includes all individuals with serious mental disorders that *might* render them incompetent to litigate their removal proceedings pro se, while Subclass One encompasses individuals who *are* found incompetent to represent themselves. Plaintiffs asserted that all Main Class members were entitled to competency determinations, and that all Subclass One members were entitled to legal representation at the government's expense.[2]

In April 2013, the district court granted partial summary judgment for Plaintiffs and entered a permanent injunction. Consistent with its preliminary injunction rulings, the district court found for Plaintiffs on their claim that the Rehabilitation Act required

[2] Subclass Two includes Main Class members who have been detained longer than six months who sought bond hearings. *See id.*

the government to provide free legal representation to all Subclass One members (i.e., individuals who are not competent to represent themselves in their immigration proceedings). *See Franco-Gonzalez v. Holder*, No. CV 10–02211 DMG (DTBx), 2013 WL 3674492, *4–9, *20 (C.D. Cal. Apr. 23, 2013); *Franco-Gonzalez v. Holder*, No. CV 10–02211 DMG (DTBx), 2013 WL 8115423, *1–2 (C.D. Cal. Apr. 23, 2013). The district court subsequently ordered the parties to design a competency determination system to identify class members eligible for legal representation under the permanent injunction and appointed a Special Master to facilitate that process.

On October 29, 2014, the district court entered a further injunctive order, the "Implementation Plan Order," setting forth a comprehensive process for screening individuals detained in DHS custody in Arizona, California, and Washington for serious mental disorders, as well as rigorous procedures for determining the competency of such individuals to represent themselves. *Franco-Gonzalez v. Holder*, No. CV–10–02211 DMG (DTBx), 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) ("IPO" or, together with the Permanent Injunction, "the *Franco* Injunction").

During litigation on the Implementation Plan Order, the government proposed or agreed to many of the provisions that the court ultimately adopted. *See* Joint Statement in Response to the Special Master's Second Report, *Franco-Gonzalez v. Holder*, No. CV–10–02211 DMG (DTBx) (C.D. Cal. Aug. 29, 2014), Dkt. 775. As relevant here, the government agreed that the *Franco* Injunction was not limited to

removal proceedings under 8 U.S.C. § 1229(a), and extended to other forms of removal proceedings, including administrative removal under 8 U.S.C. § 1228(b). *See* Defendants' Briefing to the Special Master Regarding Post-Order Bond Hearings at 1 n.1, *Franco-Gonzalez v. Holder*, No. CV–10–02211 DMG (DTBx) (C.D. Cal. Feb. 7, 2014), Dkt. 701; *Franco*, 2014 WL 5475097 at *2 n.2, *12. The government also declined to appeal the district court's orders, including orders on the preliminary injunctions, class certification, summary judgment, the permanent injunction, and the Implementation Plan Order.

Beyond the *Franco* Injunction, the government also voluntarily adopted nationwide policies to implement portions of the *Franco* Injunction. *See* Response to Special Master's First Directive at 5–6, *Franco-Gonzalez v. Napolitano*, No. 2:10-cv-02211 (C.D. Cal. Nov. 4, 2013), Dkt. 663; U.S. Dep't of Justice, Executive Office for Immigration Review, National Qualified Representative Program, https://www.justice.gov/eoir/national-qualified-representative-program-nqrp.[3]

[3] *See also* U.S. Dep't of Justice, Executive Office for Immigration Review Policy Memorandum, Chief Immigration Judge Brian O'Leary, "Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained [Noncitizens] with Serious Mental Disorders or Conditions," (Apr. 22, 2013), https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/2013-OLeary-Memo.pdf; U.S. Dep't of Homeland Security, ICE Policy Directive 11063.1, Director John Morton, "Civil Immigration Detention: Guidance for New Identification and Information-Sharing Procedures Related to Unrepresented [Detained Persons] With Serious Mental Disorders or Conditions," (April 22, 2013), https://www.ice.gov/doclib/detentionreform/pdf/11063.1_current_id_and_infosharing_detainess_mental_disorders.pdf; U.S. Dep't of Homeland Security, ICE Policy

Both this Court and the Board of Immigration Appeals ("BIA") have since recognized their authority to enforce compliance with the *Franco* Injunction. *See Calderon-Rodriguez v. Sessions*, 878 F.3d 1179, 1184 n.2 (9th Cir. 2018); *Guillen-Ortiz v. Barr*, 801 F. App'x 578, 580 (9th Cir. 2020); *Matter of M-J-K-*, 26 I. & N. Dec. 773, 774 n.2 (BIA 2016).

## II. The *Franco* Screening and Competency Determination Procedures

### A. The *Franco* Class Criteria

Pursuant to the *Franco* Injunction, a pro se individual in detention qualifies as a *Franco* class member if a "qualified mental health provider"[4] determines that: (1) the individual has a mental disorder that is "causing serious limitations in communication, memory or general mental and/or intellectual functioning (e.g., communicating, reasoning, conducting activities of daily living, social skills)"; or a severe medical condition that is significantly impairing mental function (e.g., traumatic brain injury or dementia); (2) the individual exhibits one or more of the following "active psychiatric symptoms or behavior: severe disorganization, active hallucinations or delusions,

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Directive 11063.2, Director Tae D. Johnson, "Identification, Communication, Recordkeeping, and Safe Release Planning for Detained Individuals with Serious Mental Disorders and/or Who Are Determined to Be Incompetent by an Immigration Judge" (April 5, 2022), https://www.ice.gov/doclib/news/releases/2022/11063-2.pdf.

[4] Qualified mental health providers are defined as "currently and appropriately licensed psychiatrists, physicians, physician assistants, psychologists, clinical social workers, licensed nurse practitioners, and registered nurses. Providers who are general practitioners must also have appropriate training in mental health assessments." *Franco*, 2014 WL 5475097 at *3.

mania, catatonia, severe depressive symptoms, suicidal ideation and/or behavior, marked anxiety or impulsivity"; or (3) the individual demonstrates significant symptoms of one of the following: psychosis or psychotic disorder, bipolar disorder, schizophrenia or schizoaffective disorder, major depressive disorder with psychotic features, dementia and/or neurocognitive disorder, intellectual development disorder (moderate, severe or profound). *Franco*, 2014 WL 5475097 at *3.

Even if a qualified mental health provider has not made such determinations, an individual can also become a *Franco* class member if the IJ finds a "bona fide doubt" about the individual's competency to represent themselves. *Id.* A "bona fide doubt" is equivalent to a "reasonable cause to believe" and "less onerous than a probable cause standard." *Id.* at *8 n.12.

**B. The ICE Screening Process**

ICE must perform the following procedures to identify detained individuals who meet *Franco* class criteria. First, all individuals are initially screened for evidence of a "serious mental disorder or condition" upon admission into ICE custody at an immigration detention facility, in accordance with the applicable ICE national detention standards. *Id.* at *2. Second, all individuals are screened by a qualified mental health provider within fourteen days of their detention. *Id.* Third, individuals identified by these screenings as "exhibiting evidence of a serious mental disorder or

condition" must receive a mental health assessment from a qualified mental health provider within another fourteen days. *Id.* at *2–3.

Based on the mental health assessment and any other available information, the qualified mental health provider then determines if the individual meets the *Franco* class criteria. *Id.* at *3–4. If so, the ICE Office of Chief Counsel ("OCC") must be notified within seven days. *Id.* at *3. ICE and detention facility personnel must also continue to notify the OCC of additional relevant information. *Id.* at *5.

### C. Information Sharing Between ICE and EOIR

Within twenty-one days after being notified that an individual meets *Franco* class criteria, the OCC must: (1) gather any documents or information in ICE or detention facility personnel's possession that is relevant to the individual's competency; and (2) file a notice with the IJ presiding over the individual's case that the individual is a *Franco* class member, which must also include the relevant documents and information. *Id.* at *5. The OCC must also submit any additional information and documents received after filing the notice. *Id.*

### D. The IJ Evaluation System

Once the IJ receives a notice of *Franco* class membership *or* if any "documentary, medical or other evidence that comes to ICE's or EOIR's attention indicates that the [individual] is a member of the [*Franco*] Class," the IJ must hold a "Judicial Competency Inquiry" ("JCI") within twenty-one days to determine whether

the *Franco* class member is "competent to represent [themselves] in immigration proceedings." *Id.* at *6. The JCI must conform to additional standards and procedures outlined in the IPO. *Id.* at *6–8.

At the JCI, "[t]here is no presumption of competence or incompetence" and "no burden of production or persuasion." *Id.* at *7. Rather, such hearings "shall serve as information-gathering hearings" to inform the IJ's competency determination. *Id.* The IJ must accordingly consider "additional mental health information" or information relevant to the individual's competency submitted by the OCC, the individual, or third parties. *Id.* at *9.

The IJ must apply the "Pro Se Competency Standard," where the IJ "must consider ***both*** the individual's ability to meaningfully participate in the proceeding as set forth in *Matter of M–A–M–*, 25 I. & N. Dec. 474 (BIA 2011), ***and*** the individual's ability to perform additional functions necessary for self[-]representation." *Id.* at *6 (emphases in original). The IJ must consider whether the individual has a rational and factual understanding of several enumerated factors as necessary to meaningfully participate in the proceedings. *See id.* The IJ must also consider whether the individual is able to perform several enumerated functions as necessary for self-representation. *See id.* If the individual "is unable to satisfy any of the [enumerated] provisions" "because of a mental disorder," the individual is "incompetent to represent

[themselves] in an immigration proceeding." *Id.* The IJ must state on the record the reasoning supporting the competency finding. *Id.* at *9.

At the JCI, the IJ "shall advise and question the Class member based on the Competency Proceeding Advisal" appended to the IPO. *Id.* at *7. The advisal "should begin by explaining to the respondent the purpose and process for conducting the judicial inquiry." *Id.* at *14. The questions must assess the individual's understanding and abilities as enumerated in the IPO. *Id.* at *15. A non-exhaustive list of suggested questions is also provided. *Id.*

Following the JCI, the IJ may make one of three findings "based on all available evidence and any testimony presented." *Id.* First, if "[t]here is no reasonable cause to believe that the Class member is suffering from a mental disorder that impairs [their] ability to perform the functions listed in the definition of competence to represent [oneself]," the IJ may find them competent. *Id* at *8. Second, if a "preponderance of the evidence establishes that the Class member is not competent to represent [themselves] in the proceedings," the IJ should find them incompetent and order that they be provided a "Qualified Representative" for legal representation.[5] *Id.* Third, if there is "insufficient evidence to determine if the Class member is competent," the IJ must promptly order a "Forensic Competency Evaluation" ("FCE")

[5] If a class member who is appointed counsel is subsequently released from detention, they remain entitled to representation by a Qualified Representative "until the conclusion of their immigration proceedings." *Id.* at *12.

and subsequently make a competency determination. *Id.* at *8–9 (discussing requirements for FCE).[6]

## III. Systemic Failures to Comply with the *Franco* Injunction

In 2015, the district court appointed a Monitor for an initial term of twenty-five months to oversee the implementation of the *Franco* requirements "[b]ecause of the complexities of the Injunction and the Implementation Plan Order and because of the importance of Defendants' compliance with them." Order Appointing Monitor at 1, *Franco-Gonzalez v. Holder*, No. 2:10-cv-02211 (C.D. Cal. Mar. 2, 2015), Dkt. 810.

Throughout the monitoring term, the Monitor repeatedly identified compliance failures with the *Franco* Injunction, although the government disputed the extent and egregiousness of these failures. *See, e.g.*, Monitor's Second Report at 37–40, *Franco-Gonzalez v. Napolitano*, No. 2:10-cv-02211 (C.D. Cal. Apr. 21, 2016), Dkt. 884 (describing IJs' failure to conduct JCIs, inadequate JCIs, and improper reliance on ICE to file class notice even when the IJ is aware of class membership criteria). Because of the ongoing compliance concerns, the district court extended the monitoring term for another year through April 2018. Order Extending Monitoring Term, *Franco-Gonzalez v. Napolitano*, No. 2:10-cv-02211 (C.D. Cal. June 16, 2017), Dkt. 951.

[6] If a Main Class member is released from detention after an IJ has ordered an FCE, he or she "continues to be entitled to the procedural protections set forth in the Permanent Injunction and [the IPO]." *Id.* at *11.

Following the conclusion of the extended monitoring term, Plaintiffs' Class Counsel have received a significant number of reports concerning violations of the *Franco* Injunction. Of relevance here, Class Counsel have become aware of dozens of individuals who clearly met the *Franco* class criteria or where evidence strongly "indicate[d]" the same, but for whom ICE and EOIR failed to meet their Injunction obligations. *Cf. Franco*, 2014 WL 5475097 at *4, *6. These failures include providers observing individuals' symptoms but ignoring that they fall within the class criteria, refusing to acknowledge symptoms unless they occurred *in the provider's presence*, and substituting the provider's or ICE's own judgment about an individual's competency for the process outlined in the IPO. *See Franco-Gonzalez v. Wolf*, No. 2:10-cv-02211 (C.D. Cal.), Dkt. 1042-1 (Plaintiffs' Motion to Reopen Limited Discovery to Establish Non-Compliance with Court Orders) at 3–8; *id.*, Dkt. 1057 (Opposition) at 2–4, 11, 12; *id.*, Dkt. 1063 (Reply) at 10–11, 14; *id.*, Dkt. 1070 (Surreply) at 4–13.

Plaintiffs moved to reopen discovery to determine the full extent of the compliance issues. The district court agreed that the evidence of violations was "more than adequate to raise serious questions about potential ongoing noncompliance with the mandatory procedures" of the IPO and ordered that discovery be reopened. Order Granting Reopening of Limited Discovery at 3, *Franco-Gonzalez v. Napolitano*, No. 2:10-cv-02211 (C.D. Cal. Jan. 10, 2020), Dkt. 1072. The district court also reiterated

that an individual exhibiting "'marked anxiety,' or suicidal ideation and/or behavior'" qualifies as a Main Class member and "triggers" the *Franco* Injunction's requirements. *Id.* at 4. The parties remain in discovery efforts related to assessing the scope of deficiencies as of this filing.

## ARGUMENT

Although ICE and the IJ have longstanding obligations established by the *Franco* Injunction and their own policies, they deprived Mr. Garcia of his rights as a *Franco* class member at multiple points in his immigration proceedings. First, ICE violated the *Franco* Injunction by failing to file a notice of class membership and to provide relevant records that were in its possession as Mr. Garcia's psychiatric provider. Second, the IJ likewise failed to acknowledge that the evidence of Mr. Garcia's mental health conditions triggered his duty to conduct a JCI. Because these failures rendered the entire proceedings invalid, this Court should grant the petition and order a remand. This Court's enforcement of the *Franco* protections is especially critical to protect the rights of immigrants with disabilities in "streamlined" proceedings like Mr. Garcia's.

### I. ICE Violated the *Franco* Injunction by Failing to File a Notice of Class Membership and to Submit Relevant Records.

As described in Mr. Garcia's Opening Brief, ICE was on ample notice that he was a *Franco* class member because he was experiencing "active psychiatric symptoms," including "severe depressive symptoms" and "marked anxiety." *Franco*,

2014 WL 5475097 at *3; Dkt. 42 (Opening Brief ("Op. Br.")) at 7, 10–11, 38–40, 50–52. Mr. Garcia's case is illustrative of why ICE bears significant responsibility in identifying *Franco* class members. ICE was aware of his mental health concerns not only because Mr. Garcia discussed his mental health several times during his administrative proceedings, but because ICE was providing psychiatric care to Mr. Garcia. ICE had the most information, but nonetheless failed to file a notice of class membership with the IJ and failed to submit relevant records of Mr. Garcia's ongoing psychiatric care. *See Franco*, 2014 WL 5475097 at *5–6; *Calderon-Rodriguez*, 878 F.3d at 1183 (holding that where ICE was "providing ongoing medical care" to a petitioner, but did not submit records of that care, ICE "necessarily possessed additional relevant, but not introduced, medical records"); *see also supra* at 9–10 (discussing ICE's obligations).

During his reasonable fear interview, Mr. Garcia reported a long history of mental health treatment and that he continued to receive treatment in detention, including being prescribed medication to "control [his] depression and stress." AR38, 46. Alarmingly, the interviewing officer did nothing when Mr. Garcia complained that he was not given his medication on the morning of the interview. AR38. The medication Mr. Garcia was taking, as with many psychiatric medications, had well-known warnings that suddenly stopping the medication can lead to "new or worsening

mental health problems."[7] Instead of acknowledging these risks, the officer simply continued the interview and incorrectly reported that he did not have any mental health condition. AR32.

A DHS attorney was also present at Mr. Garcia's hearings where, as detailed below, Mr. Garcia raised his mental health multiple times. *See* AR5–9, 21–22; *infra* at 18–20. In addition to discussing his diagnoses, symptoms, and treatment, he specified that ICE was prescribing him Lamictal—a "mood stabilizer." AR7–9, 21–22. Lamictal is commonly used to treat bipolar disorder, which also falls within the *Franco* class criteria.[8] *See Franco*, 2014 WL 5475097 at *3. This additional information triggered the DHS attorney's obligation to submit relevant mental health information in ICE's possession. *See Franco*, 2014 WL 5475097 at *5–6; *see also id.* at *2 & n.6 (explaining relevant evidence includes "whether the individual has a history of mental illness, has previously taken medication for mental illness or received mental health services").

The record evidence before ICE plainly showed that Mr. Garcia was experiencing "active psychiatric symptoms or behavior" that warranted filing a notice

[7] Federal Drug Administration, *FDA warns of serious immune system reaction with seizure and mental health medicine lamotrigine (Lamictal)* at 1, (Apr. 25, 2018), https://www.fda.gov/media/112401/download; National Alliance on Mental Illness, *Medication Fact Sheet: Lamotrigine*, at 2, https://www.nami.org/NAMI/media/NAMI-Media/Research/Lamotrigine.pdf.

[8] *See supra* n.7. Lamictal is also used to treat epilepsy but there is no indication Mr. Garcia has epilepsy and the record demonstrates the medication was for psychiatric care.

of class membership. *See Franco*, 2014 WL 5475097 at *3. At a minimum, the evidence strongly "indicate[d] that [he] [wa]s a member of the Class," which likewise triggered the *Franco* Injunction's protections, *id.* at *6; *see, e.g.*, *Corona Chavez v. Barr*, 786 F. App'x 123, 123 (9th Cir. 2019) (noting DHS "notified the BIA of her diagnosis for adjustment disorder with anxiety and her possible [*Franco*] class membership"); *In re Manzano-Ruiz*, AXXX XX7 386, 2015 WL 799764, *1 (BIA Jan. 20, 2015) (unpublished) (similar).

## II. The IJ's Failure to Conduct a Judicial Competency Inquiry Also Violated the *Franco* Injunction.

ICE's failures do not excuse the IJ's failure to comply with the *Franco* Injunction. The IJ was likewise confronted with ample evidence that Mr. Garcia was a *Franco* class member but failed to conduct a Judicial Competency Inquiry to ensure Mr. Garcia was able to participate in his proceedings. *See Franco*, 2014 WL 5475097 at *6, *10; *supra* at 10–13; *see also* Op. Br. at 38–40, 51–52.

As discussed, Mr. Garcia credibly testified about his mental health at his reasonable fear interview and the IJ had a duty to review that information. *See* 8 C.F.R. § 208.31(g) (discussing the IJ's duties in reasonable fear proceedings). Moreover, Mr. Garcia directly explained to the IJ that he had depression and anxiety, he received mental health treatment for a decade, he was receiving psychiatric treatment in detention, and he was taking a "mood stabilizer" Lamictal—which, as noted, is used to treat bipolar disorder. AR 7–9, 21–22; *supra* at 17. Mr. Garcia also

showed difficulty understanding and responding to the IJ's questions, which was further evidence of *Franco* class membership. *See* AR7–8; *Matter of M-A-M-*, 25 I. & N. Dec. at 479 (explaining that difficulty answering or understanding questions constitutes indicia of incompetency to proceed pro se).

Nonetheless, the IJ did not conduct a JCI. The few questions the IJ asked Mr. Garcia about his medication in no way resemble the thorough and specific JCI procedures in the *Franco* Injunction. *Compare* AR7–8, 21–22, with *Franco*, 2014 WL 5475097 at *6–10. And at no point did the IJ state on the record, as required, a competency determination or the reasons supporting the determination. *See Franco*, 2014 WL 5475097 at *6, *9; *see also Matter of M-A-M-*, 25 I. & N. Dec. at 481 (same).

Moreover, an IJ cannot rely solely on an individual's statements to develop the record as to their mental health. The purpose of the affirmative and automatic obligations in the *Franco* Injunction is to account for individuals with mental disabilities who are often unable to independently provide that evidence. *See, e.g.*, *Franco*, 2014 WL 5475097 at *1–6, *7, *10; *Franco*, 2013 WL 3674492 at *5 ("Plaintiffs' ability to exercise these rights is hindered by their mental incompetency, and the provision of competent representation able to navigate the proceedings is the only means by which they may invoke those rights."); *see also Matter of J-S-S-*, 26 I. & N. Dec. 679, 682 (BIA 2015) (Neither "[t]he statutory structure" nor "the governing

regulations . . . place a burden to raise the issue of competency on the respondent in removal proceedings."); *Matter of M-A-M-*, 25 I. & N. Dec. at 479–81 (explaining that IJs must consider external sources of evidence when considering competency).

For various reasons, an individual with a mental health disability may not be in a position to explain the details of their disability. Individuals with mental disabilities are often stigmatized or criminalized, and therefore may be reluctant to discuss their mental health for fear that it will lead to stigma or negatively impact their proceedings. *See Gomez-Sanchez v. Sessions*, 892 F.3d 985, 994 & n.8 (9th Cir. 2018) (explaining that mental health evidence may not be presented in court "due to concerns of being stigmatized" (citations omitted)); *Edwards v. Ayers*, 542 F.3d 759, 776 (9th Cir. 2008) (similar); Sarah Sherman-Stokes, *No Restoration, No Rehabilitation: Shadow Detention of Mentally Incompetent Noncitizens*, 62 Vill. L. Rev. 787, 823–25 (2017) (finding that immigration bond hearing factors likely prejudice those with mental disabilities); *cf. Mousa v. Mukasey*, 530 F.3d 1025, 1027 (9th Cir. 2008) (recognizing applicants may not disclose sexual assault due to shame and victimization).

Individuals with mental disabilities may also have limited insight or awareness of their symptoms or diagnoses. *See, e.g.*, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, 5th Ed., American Psychiatric Association, (2013), at 101, 107, 129, 607, 615, 822 (describing various instances where individuals may lack

insight or awareness of their disorder or symptoms); *Franco*, 2014 WL 5475097 at *2 (explaining that screening questions "must not rely solely on a self-reported history of mental illness" and must ask questions to "gauge [the individual's] understanding of [their] current situation"). Even if an individual is aware of their symptoms, they may not have the level of information that is necessary to assess the severity or impact of their disability. Mr. Garcia, for example, was able to explain that he experienced depression. However, depression may refer to a symptom and/or several different diagnoses (e.g., Major Depressive Disorder ("MDD"), MDD with psychotic features, bipolar depression).

In short, the IJ violated the *Franco* Injunction by ignoring evidence that Mr. Garcia was a *Franco* class member and failing to conduct a competency inquiry. *Franco*, 2014 WL 5475097 at *6–8.

## III. A Summary of the Medical Records ICE Failed to Submit Raises Further Concerns Over the Government's Misapplication of the *Franco* Injunction.

The agencies' procedural errors impeded the development of evidence and, by consequence, the government's interest "in the law being observed." *Franco*, 2014 WL 5475097 at *7 (quoting *Reid v. INS*, 949 F.2d 287, 288 (9th Cir. 1991)). Although this Court does not have the benefit of assessing Mr. Garcia's medical records, the discussion of those records in his Supplemental Motion for Stay of Removal, Dkt. 27 at 4–6, heighten Amici's concerns over the government's abdication of the *Franco* Injunction.

The psychological evaluator's summary of ICE's medical records reveals that at the same time Mr. Garcia was representing himself in fast-tracked removal proceedings, *see infra* at 27–30, ICE providers diagnosed him with recurrent Major Depressive Disorder and increased his medication dose. Just two days after his final hearing, a provider increased his Lamictal dose again. Dkt. 27 at 4; *see also id.* at 4–5 (reporting providers continued to increase Lamictal dosage and prescribe additional medications to treat depression and anxiety symptoms).

The DSM-5 criteria for Major Depressive Disorder requires, among other factors, that the patient have present depression symptoms and "clinically significant distress or impairment in social, occupational, or other important areas of functioning." *See Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, 5th Ed., American Psychiatric Association, (2013), at 160–61. Symptoms must also be present nearly every day. *See id.* at 162. And like this Court explained in *Calderon-Rodriguez*, "[t]he change in medication could have reflected a change in [his] mental state, or the change could have itself affected [his] mental state due to potential side effects." 878 F.3d at 1183. At a minimum, ICE's records corroborate that Mr. Garcia was a *Franco* class member experiencing "active psychiatric symptoms or behavior," in addition to "serious limitations in communication, memory or general mental and/or intellectual functioning (e.g., communicating, reasoning, conducting activities of daily living, social skills)." *Franco*, 2014 WL 5475097 at *3.

## IV. ICE and the IJ's Failures Invalidated Mr. Garcia's Proceedings and Require a Remand.

It is undisputed that immigration proceedings must provide certain procedures to protect the rights of individuals with serious mental health disabilities. The government reaffirmed the same when it adopted and implemented relevant portions of the *Franco* Injunction nationwide. *See supra* at 6–7 & n.3. Because ICE and EOIR's violations rendered Mr. Garcia's proceedings invalid, this Court should grant the petition and remand for a new hearing.

This Court has already remanded several cases where the agency violated the *Franco* Injunction or similar procedures meant to protect the rights of immigrants with mental health disabilities. *See Calderon-Rodriguez*, 878 F.3d at 1184 & n.2 (holding the agency failed to adhere to procedures set by *Matter of M-A-M-*, and noting remand may also have been proper based on a violation of the *Franco* Injunction); *Mejia v. Sessions*, 868 F.3d 1118, 1122 (9th Cir. 2017) (similar); *Guillen-Ortiz v. Barr*, 801 F. App'x 578, 580 (9th Cir. 2020) (explaining the IJ's "dut[ies] under both *Matter of M-A-M-* and *Franco-Gonzale[z]*" and remanding for a new hearing); *Jasso Bernal v. Barr*, 789 F. App'x 71, 72 (9th Cir. 2020) (similar).[9] The BIA has similarly enforced compliance with the *Franco* Injunction. *See, e.g.*, *Matter of M-J-K-*, 26 I. & N. Dec. 773, 774 & n.2 (BIA 2016) ("On remand, the Immigration Judge

[9] As Mr. Garcia's Opening Brief discusses, the proceedings were also in violation of *Matter of M-A-M-*'s rigorous procedures. *See* Op. Br. at 25–41.

should ensure compliance with the applicable standards required by *Franco-Gonzalez v. Holder*."); *In re Manzano-Ruiz*, 2015 WL 799764 at *1 (similar).

A remand is necessary because ICE and EOIR's violations resulted in disability discrimination that tainted Mr. Garcia's proceedings. The premise of the *Franco* Injunction is to enforce the agencies' obligations under Section 504 of the Rehabilitation Act. Specifically, the procedures necessary to prevent individuals from being "unable to meaningfully access the benefit offered—in this case, full participation in their removal and detention proceedings—because of their disability." *Franco*, 2013 WL 3674492 at *4 (citing *Alexander v. Choate*, 469 U.S. 287, 299 (1985) (reiterating that policies or practices which *result* in denying individuals with disabilities "meaningful access" to the benefit or program also constitute discrimination under the Rehabilitation Act)). Consequently, ICE and EOIR's failures to meet their obligations deprived Mr. Garcia of his right to fully and meaningfully participate in his proceedings on account of his disability. *See id.* at *4, *20 (explaining that, without relief, class members would face an "inability to fairly participate in removal proceedings"); *Franco*, 767 F. Supp. 2d 1034 at 1055 (similar); *Armstrong v. Davis*, 275 F.3d 849, 863–64 (9th Cir. 2001) (explaining that failure to accommodate individuals with disabilities during Board of Parole hearings constituted

discrimination and "the impairment or loss of services or programs provided by the Board"), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005).[10]

Remand is also proper based on the well-settled principle that an agency must comply with its own standards. *See, e.g.*, *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (vacating a removal order because the agency failed to follow its own procedures); *Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004) (discussing *Accardi* doctrine and related principles). Particularly when the rule at issue "confer[s] important procedural benefits upon individuals," *Montes-Lopez v. Holder*, 694 F.3d 1085, 1091 (9th Cir. 2012) (citation omitted), or the procedures are "mandated by the Constitution or federal law," courts demand strict compliance and remand without further inquiry, *United States v. Caceres*, 440 U.S. 741, 749 (1979); *see also Montilla v. INS*, 926 F.2d 162, 170 (2d Cir. 1991) (similar); *Cruz-Manturano v. Garland*, 854 F. App'x 890, 892 & n.2 (9th Cir. 2021) (noting "*M-A-M-* challenges" as "departure from agency standards claims" do not require a showing of prejudice" (citations omitted)).

There can hardly be a more emblematic example of those principles than the procedural protections required by *Franco* and adopted by ICE and EOIR as

[10] Mr. Garcia's claim that the asylum officer conducting his reasonable fear interview also violated the Rehabilitation Act, Op. Br. 41–49, follows directly from the principles established by *Franco* and the government's policies. *See supra* at 5–7. As such, Mr. Garcia's reasonable fear interview would likewise be tainted by unlawful discrimination and procedural defects that must be vacated.

nationwide policies. As discussed, the procedures are, in fact, accommodations mandated by the Rehabilitation Act to ensure individuals with disabilities can meaningfully participate in their proceedings at all.

Lastly, although the evidence demonstrates Mr. Garcia was, in fact, a *Franco* class member, the Court need not make this determination to order a remand. It is sufficient that the record evidence *indicated* as much and likewise triggered the IJ and ICE's *Franco* obligations. *Franco*, 2014 WL 5475097 at *6. Indeed, whether the IJ had found Mr. Garcia incompetent or competent to proceed pro se, the IJ had an obligation to provide appropriate safeguards to Mr. Garcia. *See Matter of J-R-R-A-*, 26 I. & N. Dec. 609, 611–12 (BIA 2015) (explaining that IJs must provide safeguards even where an individual with a mental health condition is competent to proceed without counsel (citing *Matter of M-A-M-*, 25 I. & N. Dec. at 480)). Because he was deprived of the procedures meant to ensure his proceedings were fair, a remand is necessary for the agency to make such determinations in the first instance. *See Accardi*, 347 U.S. at 268 (explaining that regardless of whether Accardi would be successful on remand, "at least he will have been afforded that due process required by the regulations in such proceedings"); *Yellin v. United States*, 374 U.S. 109, 121 (1963) (similar); *Azanor v. Ashcroft*, 364 F.3d 1013, 1020 (9th Cir. 2004) (declining to

consider whether the Board's errors could change the outcome as outside the court's scope of review) (citing *INS v. Ventura*, 537 U.S. 12, 16 (2002)).[11]

## V. The Court's Enforcement Is Particularly Critical to Protect *Franco* Class Members in Streamlined Removal Proceedings.

"[B]esides being the proper legal course," a remand would also further "important policy concerns." *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 788 (9th Cir. 2004) (remanding based on policy concerns to encourage agency compliance with statute). Mr. Garcia's case is but one example of the government's systemic failure to comply with the *Franco* Injunction. *See supra* at 18–20. Such "[c]areless observance by an agency of its own administrative processes weakens its effectiveness in the eyes of the public because it exposes the possibility of favoritism and of inconsistent application of the law." *Reyes-Reyes*, 384 F.3d at 788 (quoting *Montilla*, 926 F.2d at 170).

The government's malfeasance is particularly egregious because it not only "undermines public confidence in the immigration process," and stands "at odds with Congress's intent," *id.*; it constitutes unlawful discrimination. By repeatedly disregarding their obligations to accommodate individuals with mental health

[11] Mr. Garcia's release does not change his entitlement to remand as a remedy. The violations that "took place *during* [his] hearing" are what "rendered the hearing itself invalid." *Sanchez v. Sessions*, 904 F.3d 643, 654 (9th Cir. 2018) (citation omitted) (explaining the rationale for remanding for a new hearing for similar agency violations). Regardless of his present custody status, he remains entitled to "a new hearing devoid of any of the regulatory infirmities" in his prior proceedings. *Id.*

disabilities, ICE and EOIR continue to treat this vulnerable group with the discriminatory "thoughtlessness," "indifference," and "apathetic attitudes" that Congress specifically prohibited in enacting the Rehabilitation Act. *See Alexander*, 469 U.S. at 295–96.

Mr. Garcia's case also highlights the critical need for enforcing compliance with *Franco* in "speed deportations." *See* Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 Colum. J. Race & L. 1, 2 (2014). As opposed to full-scope proceedings before an IJ, *see* 8 U.S.C. § 1229(a), the vast majority (over 83%) of noncitizens are removed through "streamlined" proceedings termed expedited removal, administrative removal, and reinstatement of removal orders.[12] *See* Sean Long, U.S. Dep't of Homeland Sec., Office of Immigration Statistics, Annual Report, Immigration Enforcement Actions: 2022, at 16 (Nov. 14, 2023), https://www.dhs.gov/sites/default/files/2023-11/2023_0818_plcy_enforcement_actions_fy2022.pdf.

In these fast-tracked proceedings, a noncitizen cannot even *apply* for relief from removal unless they first show a "reasonable fear" of persecution or torture. *See, e.g.*, *Zuniga v. Barr*, 946 F.3d 464, 467 (9th Cir. 2019). Yet, individuals with serious mental disabilities are often unable to prepare their claims without the assistance of counsel, *e.g.*, *Franco*, 2013 WL 3674492, *4–9, *20; much less on the truncated timelines in

[12] *See* 8 U.S.C. § 1228(b) (administrative removal); 8 U.S.C. § 1225(b) (expedited removal); 8 U.S.C. § 1231(a)(5) (reinstatement).

these proceedings, *see* Aimee L. Mayer-Salins, *Fast-Track to Injustice: Rapidly Deporting the Mentally Ill*, 14 Cardozo Pub. L. Pol'y & Ethics J. 545, 563–65 ("An individual's inability to effectively present her case due to a mental illness-related disability is only compounded in fast-track removal proceedings."). While individuals in full-scope proceedings have the right to a remand from the BIA if they are not timely identified as a *Franco* class member, *Franco*, 2014 WL 5475097 at *10, individuals in streamlined proceedings do not have access to BIA review at all, 8 C.F.R. § 208.31(g), removing yet another layer of protections that have an outsized impact on individuals with a mental disability.

This Court has aptly explained that "[t]he high stakes of deportation and the labyrinthine nature of immigration laws amplify the importance of procedural protections in removal proceedings." *Usubakunov v. Garland*, 16 F.4th 1299, 1303 (9th Cir. 2021) (citation omitted). The stakes are impossibly amplified for *Franco* class members in "streamlined" proceedings where they have "comparatively fewer procedural safeguards," Wadhia, *supra*, 5 Colum. J. Race & L. at 2, despite the fact that they face heightened risks of harm in their home country, *see, e.g.*, *Acevedo Granados v. Garland*, 992 F.3d 755, 762 (9th Cir. 2021); *Temu v. Holder*, 740 F.3d 887, 893 (4th Cir. 2014), and unique disadvantages in their ability to prepare such claims, *see Franco*, 2013 WL 3674492 at *4–9. To protect against the unlawful and erroneous deportations of "one of the most disadvantaged groups in society," 29

U.S.C. § 701, the Court should repudiate the government's abdication of the procedures mandated by *Franco*.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for review. The Court should remand Mr. Garcia's case for the IJ to conduct a competency inquiry and for de novo proceedings.

Respectfully submitted,

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

Dated: March 1, 2024

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## CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), that the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5), and Ninth Circuit Rule 32-1(a), is proportionally spaced, has a typeface of 14 points, and contains 6,931 words.

Dated: March 1, 2024

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