FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDRES ARIZMENDI-MEDINA, *Petitioner*, v. MERRICK B. GARLAND, Attorney General, *Respondent*.	No. 21-298 Agency No. A215-674-741 OPINION

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

Submitted March 9, 2023[*]
Pasadena, California

Filed June 7, 2023

Before: Ronald Lee Gilman,[**] Danielle J. Forrest, and Holly A. Thomas, Circuit Judges.

Opinion by Judge Gilman;
Dissent by Judge Forrest

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[*] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[**] The Honorable Ronald Lee Gilman, United States Circuit Judge for the Court of Appeals, 6th Circuit, sitting by designation.

SUMMARY[***]

Immigration

The panel granted Andres Arizmendi-Medina's petition for review of the Board of Immigration Appeals' dismissal of his appeal of an immigration judge's determination that his asylum application had been abandoned because it was not timely filed, and remanded for consideration of his application for relief from removal.

After two continuances to secure legal representation, and a subsequent change of venue, Arizmendi-Medina appeared before an IJ who denied his request for an additional continuance to hire an attorney, found Arizmendi-Medina removable, provided him with an I-589 relief application, and set the next hearing date for December 18, 2018. The IJ explained to Arizmendi-Medina that if he returned to court on December 18 saying that he still needed more time to find an attorney, and that he was not able to fill out the asylum application, it was likely that the court would conclude that he had abandoned the opportunity to apply for asylum and related relief. The court provided Arizmendi-Medina a "Notice of Hearing," which marked the December 18 hearing as a "Master" hearing as opposed to an "Individual" hearing.

Arizmendi-Medina appeared for his hearing on December 18 with a recently-retained attorney who requested a brief continuance to file Arizmendi-Medina's

[***] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

relief application. The IJ informed Arizmendi-Medina's attorney that the relief application was due that day. The government argued that the application should be deemed abandoned and the IJ agreed. Arizmendi-Medina's attorney requested the opportunity to make a window filing, which would have allowed her to complete and submit the application before the court closed for the day. The IJ rejected the request, again stating that "the application was due today." Arizmendi-Medina's attorney then requested that the IJ allow her to submit the application while the IJ was still on the bench that day. This request was also rejected, with the IJ declaring that the application was due that morning. The IJ deemed Arizmendi-Medina's relief application abandoned pursuant to 8 C.F.R. § 1003.31(c) (now appearing at 8 C.F.R. § 1003.31(h)), and found that Arizmendi-Medina failed to establish good cause for a continuance given the previous continuances the prior IJ granted for him to locate an attorney.

The panel held that the IJ's rejection of the opportunity to file a relief application on December 18 deprived Arizendi-Medina of a full and fair opportunity to be heard. Recognizing that IJs can set and extend time limits for the filing of applications, and that under 8 C.F.R. § 1003.31(h) applications that are "not filed within the time set by the [IJ] . . . shall be deemed waived," the panel wrote that IJs in setting and enforcing deadlines cannot proceed in a manner that deprives a noncitizen of due process. The panel concluded that Arizmendi-Medina's immigration proceedings were fundamentally unfair because (1) the purported deadline to submit a relief application was ambiguous; (2) Arizmendi-Medina's counsel offered to submit the application on the day of the apparent deadline while the IJ was still on the bench, making any delay in the

proceeding practically nonexistent; and (3) the IJ's denial of a continuance so that Arizmendi-Medina's recently-retained counsel could submit the application was an abuse of discretion. The panel concluded that the IJ's rejection of Arizmendi-Medina's application clearly affected the outcome of the proceedings, and thus caused him prejudice, because the merits of his application were never considered by the agency at all. The panel remanded for the agency to consider Arizmendi-Medina's application in the first instance.

Dissenting, Judge Forrest wrote that IJ satisfied due process by giving Arizmendi-Medina sufficient notice of the application deadline and the consequences for failing to meet it, and the IJ did not abuse his discretion in deeming Arizmendi-Medina's application abandoned when Arizmendi-Medina failed to meet the filing deadline. Further, Judge Forrest would not have considered the alternative unexhausted claim raised by the court sua sponte related to the IJ's refusal to grant a further extension.

COUNSEL

Shannon Englert, Carlsbad, California, for Petitioner.

Edward C. Durant and Spencer Shucard, Trial Attorneys; Jessica E. Burns, Senior Litigation Counsel; Brian Boynton, Acting Assistant Attorney General, Civil Division; Office of Immigration Litigation, United States Department of Justice; Washington, D.C.; for Respondent.

OPINION

GILMAN, Circuit Judge:

Andres Arizmendi-Medina, a native and citizen of Mexico, was ordered by an immigration judge (IJ) to be removed from the United States after the IJ ruled that Arizmendi-Medina's application for relief from removal was untimely. The Board of Immigration Appeals (BIA) agreed with the IJ and dismissed Arizmendi-Medina's appeal. Arizmendi-Medina timely petitioned for review, arguing that the rejection of his relief application violated his due process rights. For the reasons set for below, we **GRANT** Arizmendi-Medina's petition and **REMAND** this case to the BIA for further proceedings.

I. BACKGROUND

A. Initiation of immigration proceedings

Arizmendi-Medina entered the United States in March 2006 near Tecate, California without inspection. The Department of Homeland Security (DHS) took Arizmendi-Medina into custody and served him with a Notice to Appear (NTA) on July 19, 2018. He was charged with being removable as an "alien present in the United States without being admitted or paroled," pursuant to 8 U.S.C. § 1182(a)(6)(A)(i).

Arizmendi-Medina had his first hearing before IJ Catherine Halliday-Roberts in Otay Mesa, California, on July 31, 2018. Arizmendi-Medina's most comfortable language is Spanish, so an interpreter was used for all of his immigration proceedings. The IJ briefly explained the nature of the removal proceedings and then reset the case for August 15, 2018 in order for Arizmendi-Medina to hire an

attorney. At that August 15 hearing, Arizmendi-Medina explained to the IJ that he had spoken with an attorney whom he planned to hire, but that he "hadn't gotten the money" yet, and that the attorney told him "it was too soon." Arizmendi-Medina therefore asked for a continuance to secure the attorney. DHS did not oppose the request, and the IJ granted a continuance until August 29, 2018.

The day before the next hearing, on August 28, 2018, Arizmendi-Medina posted a $25,000 bond and was released from DHS custody. He filed a pro se Motion to Change Venue that same day, seeking a transfer to the Immigration Court in downtown San Diego, California, which is closer to his home. Arizmendi-Medina did not appear at his hearing in Otay Mesa the following day, but the IJ acknowledged the Motion to Change Venue, which DHS did not oppose, and granted the motion. The next hearing was scheduled before a new IJ in the San Diego Immigration Court on October 24, 2018.

B. Hearing on October 24, 2018

The removal proceedings resumed on October 24, 2018 before IJ Jeffrey L. Romig. A Spanish interpreter was used. Arizmendi-Medina had not yet been able to hire an attorney, stating that his $25,000 bond was high for him and that he was still looking for funds to hire an attorney. The IJ rejected Arizmendi-Medina's request for another continuance because Arizmendi-Medina "had a reasonable opportunity to obtain an attorney." The proceeding therefore continued without the assistance of counsel for Arizmendi-Medina. After a brief inquiry, the IJ found that Arizmendi-Medina was unlawfully present in the United States. The IJ therefore sustained the charge of removability against him.

During the questioning, Arizmendi-Medina revealed that he was afraid to return to Mexico because he had been mugged and beaten in the streets when last there. The IJ then told Arizmendi-Medina that he might be eligible for asylum and that he had "the right to complete the application and file it with the Court [and to] explain in detail all the reasons that [he is] afraid or unwilling to return to Mexico." Arizmendi-Medina was then handed an I-589 relief application for the first time, with the IJ explaining that it needed to be completed in English.

The IJ then set the next hearing for December 18, 2018, specifically stating:

> The date for your next hearing will be December 8 --18, December 18 at 8:30. The Court Clerk will give you the hearing notice. Again, not too late to get an attorney involved in your case, but every time you come back to court without an attorney after today, you will be expected to represent yourself. If you return to court that day and you say, I still need more time to find an attorney, I wasn't able to fill out the asylum application, it is likely that the Court would conclude you have abandoned the opportunity to apply for Asylum and you would only be considered as an applicant for Voluntary Departure.

The IJ next asked whether Arizmendi-Medina understood what was explained to him that morning, to which Arizmendi-Medina said "yes." When Arizmendi-Medina was then asked if he had any further questions, he said "no." Arizmendi-Medina was also presented with a

"Notice of Hearing," which specifically marked the December 18, 2018 hearing as a "Master" hearing as opposed to an "Individual" hearing.

C. Hearing on December 18, 2018

Arizmendi-Medina was finally able to hire an attorney, Shannon Englert, who represented him at the December 18, 2018 hearing. Englert informed the IJ that she had been just retained by Arizmendi-Medina, and that "it took [Arizmendi-Medina] quite a significant time to retain [her] office for the preparation of a case" because Arizmendi-Medina's "bond was rather high." Because her office was only recently retained, Englert requested a "brief continuance" to file the relief application.

The IJ informed Englert that the relief application was due that day. DHS then argued that the application should be deemed abandoned, and the IJ agreed, noting that Arizmendi-Medina had "a reasonable opportunity to prepare an application for Asylum." Englert, apparently unsure that the application was actually due that day, stated: "Your honor, if today is the deadline, we would ask that you permit a window filing," which would have allowed Englert to complete and submit the application before the court closed for the day. The IJ rejected the request, again stating that "the application was due today." Englert next requested that the IJ allow her to submit the application while the IJ was still on the bench that day. This request was also rejected, with the IJ declaring that "it was due this morning."

The final issue addressed at the hearing was the possibility of post-conclusion voluntary departure. Arizmendi-Medina was questioned briefly by Englert and then by the IJ, after which the IJ was ready to render an oral decision. The IJ ultimately ruled that Arizmendi-Medina's

relief application was abandoned pursuant to 8 C.F.R. § 1003.31(c) (which now appears in 8 C.F.R. § 1003.31(h)) because he "did not have the asylum application ready to be filed today." Further, the IJ found that there was not good cause for a continuance, "considering especially the number of continuances previously granted to [Arizmendi-Medina] for the purpose of obtaining Counsel." The IJ also denied Arizmendi-Medina's request for post-conclusion voluntary departure. Arizmendi-Medina timely appealed the IJ's order to the BIA.

D. The BIA affirms the decision of the IJ

On appeal to the BIA, Arizmendi-Medina argued that he was denied the due process of law because the IJ rejected his relief application, even after Arizmendi-Medina's counsel offered to file it "while the judge was still on the bench and hearing cases" that day. The BIA issued a ruling on June 9, 2021 that agreed with the IJ and dismissed Arizmendi-Medina's appeal. In reaching its conclusion, the BIA noted that Arizmendi-Medina was given a "full and fair opportunity to submit his I-589" and that the IJ "permissibly adhered to the filing deadline." The BIA also noted the IJ's broad discretion in setting filing deadlines and controlling immigration proceedings. Arizmendi-Medina timely petitioned for our review of the BIA's final order of removal.

II. ANALYSIS

A. Standard of review

Our review is "limited to the BIA's decision, except to the extent that the IJ's opinion is expressly adopted." *Khudaverdyan v. Holder*, 778 F.3d 1101, 1105 (9th Cir. 2015) (quoting *Popova v. INS*, 273 F.3d 1251, 1257 (9th Cir. 2001)). A due process challenge in an immigration

proceeding is reviewed de novo. *Zetino v. Holder*, 622 F.3d 1007, 1011–12 (9th Cir. 2010) (citing *Padilla v. Ashcroft*, 334 F.3d 921, 923 (9th Cir. 2003)).

B. Due process requirements in immigration proceedings

Arizmendi-Medina was denied due process because the rejection of the opportunity to file a relief application on December 18, 2018 deprived him of a full and fair opportunity to be heard. True enough, IJs can "set and extend time limits for the filing of applications," and applications that are "not filed within the time set by the [IJ] . . . shall be deemed waived." 8 C.F.R. § 1003.31(h). IJs may not, however, when setting and enforcing deadlines, proceed in a manner that deprives a noncitizen of due process. *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620 (9th Cir. 2006) ("The Fifth Amendment guarantees due process in deportation proceedings." (quoting *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000))).

This means that a noncitizen facing deportation must receive "a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf." *Id.* at 620 (quoting *Colmenar*, 210 F.3d at 971). The requirements of due process have not been met if "(1) the proceeding was so fundamentally unfair that the [noncitizen] was prevented from reasonably presenting his case, and (2) the [noncitizen] demonstrates prejudice, which means that the outcome of the proceeding may have been affected by the alleged violation." *Zetino*, 622 F.3d at 1013 (quoting *Ibarra-Flores*, 439 F.3d at 620–21).

C. The IJ's ultimate ruling was fundamentally unfair

Arizmendi-Medina's immigration proceedings were fundamentally unfair because (1) the purported deadline to submit a relief application was ambiguous; (2) Arizmendi-Medina's counsel offered to submit the application on the day of the apparent deadline while the IJ was still on the bench, making any delay in the proceeding practically nonexistent; and (3) the IJ's denial of a continuance so that Arizmendi-Medina's recently-retained counsel could submit the application was an abuse of discretion. Each of these factors is addressed below.

a. The relief application deadline was ambiguous

IJs should clearly communicate deadlines. The IJ failed to do so here, contrary to the BIA's and the government's characterization. The BIA stated that the IJ "clearly instructed the respondent to 'file [the I-589] with the Court' at the subsequent hearing on December 18, 2018." But that is not an accurate characterization of what the IJ said. When the IJ's words are placed in their proper context, they reveal that the IJ was simply informing Arizmendi-Medina of his right to file an application for relief from removal: "You . . . nonetheless have the right to complete the application and file [the I-589] with the Court, explain[ing] in detail all the reasons you're afraid or unwilling to return to Mexico." The more relevant statement from the IJ about the subsequent hearing on December 18th is as follows:

> The date for your next hearing will be December 8 --18, December 18 at 8:30. The Court Clerk will give you the hearing notice. Again, not too late to get an attorney involved in your case, but every time you come back

> to court without an attorney after today, you will be expected to represent yourself. If you return to court that day and you say, I still need more time to find an attorney, I wasn't able to fill out the asylum application, it is likely that the Court would conclude you have abandoned the opportunity to apply for Asylum and you would only be considered as an applicant for Voluntary Departure.

The above language shows that the IJ was not entirely clear that the firm and final deadline for submitting a relief application would be December 18, 2018. His statements can just as easily be read as a deadline for Arizmendi-Medina *to find an attorney*. The bulk of the IJ's colloquy at the October 24, 2018 hearing was focused on the hiring of an attorney, not on the submission of a relief application (which Arizmendi-Medina had just received moments earlier). Arizmendi-Medina might well have understood the IJ as insisting only that Arizmendi-Medina would have to proceed pro se if he did not secure an attorney by December 18, 2018.

The dissent disputes this reading, referencing statements from the IJ granting a continuance to Arizmendi-Medina for the purpose of hiring an attorney, and clarifying that if Arizmendi-Medina did not find an attorney, he would have to fill out the asylum application himself. But these statements, rather than demonstrating that the IJ clearly instructed Arizmendi-Medina to file his asylum application on December 18, only further suggest that the IJ's focus was not on the application submission deadline, but rather on the deadline for Arizmendi-Medina to retain an attorney.

The one thing that Arizmendi-Medina was clearly prohibited from doing was appearing at the next hearing and using the lack of an attorney as an excuse for not completing the relief application. What was not clearly conveyed is that no additional time would be given for a newly-retained attorney to assist Arizmendi-Medina in completing the application.

Even if the IJ expected the relief application to be completed on December 18, 2018, the IJ did not clearly state the dire consequences of failing to abide by such a deadline. The IJ simply said that Arizmendi-Medina's application was "likely" to be deemed abandoned, not that such a consequence would automatically or certainly occur. Arizmendi-Medina could have reasonably understood the deadline to have some flexibility, especially given the IJ's focus on Arizmendi-Medina securing counsel by December 18, 2018.

Concerns with the IJ's unclear language become more apparent when contrasted with the language used by the IJ in *Matter of R-C-R-*, 28 I & N Dec. 74, 76 n.4 (BIA 2020), in which the BIA found that the IJ's rejection of a late-filed application did not violate due process. There, the IJ said:

> I'm going to reset your case to another date to give you time to prepare that application and submit it to the Court. My next date is going to be January 14th, 2020 at 10:00 a.m. I'm going to require that you submit the asylum application to the Court on or before December 6th, 2019. If the Court does not and has not received your application on or before that date, I am going to find that you have abandoned your request for relief. So,

> it's very, very important that you submit the asylum application to the Court as well as a copy to the Government no later than December 6th, 2019.

Id.

There is no doubt that the IJ in *Matter of R-C-R-* unambiguously communicated the deadline (twice, in fact) for filing a relief application, unlike the IJ for Arizmendi-Medina, who primarily focused on the fact that Arizmendi-Medina did not have an attorney. Further, the IJ in *Matter of R-C-R-* firmly announced the consequences of missing the deadline, leaving no doubt that the IJ would find the application for relief abandoned should the respondent not submit it by the specified date. That cannot be said of the IJ in this case, who simply said that a finding of abandonment would be a "likely" consequence of a failure to file the application.

The IJ's explicit language and clear warning in *Matter of R-C-R-* was key to the BIA's determination that the petitioner's due process rights were not violated. *Id.* at 77–78 ("The [IJ] gave the respondent explicit instructions regarding the filing date and clearly warned him that his application for relief would be deemed waived if it was not timely filed."). At bottom, the IJ's language in this case lacked the same critical clarity.

b. Arizmendi-Medina attempted to submit his relief application to the IJ while the IJ was still on the bench

Arizmendi-Medina's relief application was rejected even though his counsel offered to submit it to the IJ before the IJ left the bench that day. As noted above, the IJ claimed to

have set the deadline as December 18, 2018. Arizmendi-Medina offered to submit his application on that very date, so his application would have been timely even under the IJ's characterization of the deadline. When Arizmendi-Medina's counsel offered to get the application to the IJ that day, however, the IJ claimed—for the first time—that it was not just due that day, but that *morning.*

In *Jerezano v. INS*, 169 F.3d 613 (9th Cir. 1999), we made clear the due process implications of ordering a noncitizen deported because of lateness to court. Jerezano arrived at court only "15 or 20 minutes" after his scheduled hearing time, but the IJ had already conducted the hearing in absentia and ordered Jerezano deported. *Id.* at 614. The IJ, while still on the bench, refused to reopen the case. *Id.* at 615. On appeal, we held that arriving "15 to 20 minutes late, but . . . while the IJ was still on the bench[,] . . . do[es] not constitute a failure to appear," and that the failure to reopen or continue proceedings after Jerezano arrived "unreasonably deprived Jerezano of his due process right to a full and fair hearing." *Id.*

Although *Jerezano* dealt with a slightly different issue (a failure to appear at the time the case was called) than the issue before us (a failure to submit a relief application at the time the case was called), our reasoning in *Jerezano* applies here. As we explained in *Jerezano*, "[i]t is accepted practice for courts to give tardy litigants a second chance by putting them at the end of the calendar" and that "so long as [the IJ] is there on other business and the delay is short[,] . . . it is an abuse of discretion to treat a slightly late appearance as a nonappearance." *Id.* The same is true here. Arizmendi-Medina explicitly offered to submit his application to the IJ while the IJ was still on the bench that day, making any delay practically nonexistent. As a consequence of the IJ's refusal

to accept that application, Arizmendi-Medina, like Jerezano, was never given "[his] day in court to present [his] claim[] for asylum." *See id.* (alteration in original) (quoting *Romani v. INS*, 146 F.3d 737, 739 (9th Cir. 1998)).

Also undermining the reasonableness of the IJ's decision is the fact that the December 18, 2018 hearing was scheduled as a Master Calendar hearing, which is not meant to be an adjudication of the merits. *See Immigration Court Practice Manual* § 4.15, Exec. Off. for Immigr. Rev. (last visited May 15, 2023), https://www.justice.gov/eoir/reference-materials/ic/chapter-4/15 (Master Calendar Hearing). The individual merits hearing in Arizmendi-Medina's case would have had to be scheduled for a later date. After all, neither the IJ nor DHS would have had the opportunity to review Arizmendi-Medina's application if it had been filed that day. Thus, no delay *at all* would have occurred in the adjudication of the merits if Arizmendi-Medina had been allowed to submit his relief application to the IJ at any time on December 18, 2018, let alone while the IJ was still on the bench.

Given the harsh consequences of deportation, the IJ's actions in this case constituted a denial of a full and fair hearing for Arizmendi-Medina. "We have repeatedly warned that 'a myopic insistence upon expeditiousness' will not justify the denial of a meritorious request for delay, especially where the [denial] impairs the petitioner's statutory rights." *Ahmed v. Holder*, 569 F.3d 1009, 1013 (9th Cir. 2009) (quoting *Cui v. Mukasey,* 538 F.3d 1289, 1292 (9th Cir. 2009) (alterations in original, internal citations omitted)). Although we are cognizant of the significant demands upon the immigration courts, and mindful that it is not our role "to substitute our judgment as a court of appeals" for that of the IJ, Dissent at 30–31 n.1, "[a]n

immigrant's right to have [his or] her case heard should not be sacrificed because of the [immigration judge's] heavy caseload." *Id.* at 1013–14 (quoting *Cui,* 538 F.3d at 1292 (alterations in original, internal citations omitted)).

c. The IJ abused his discretion by denying Arizmendi-Medina's request for a continuance

Although Arizmendi-Medina has not directly challenged the IJ's denial of his request as an abuse of discretion (instead asserting only a due process claim), we have in the past identified abuses of discretion so severe as to deny the petitioner a full and fair hearing. *See, e.g.*, *Jerezano*, 169 F.3d at 615 (noting that the IJ's abuse of discretion deprived Jerezano of his due process rights); *Cruz Rendon v. Holder*, 603 F.3d 1104, 1109 (9th Cir. 2010) (finding that the IJ's abuse of discretion in denying a continuance contributed to the court's holding that the petitioner was denied a full and fair hearing). An IJ's abuse of discretion therefore sheds light on whether a noncitizen was deprived of his due process rights. The dissent's contention that we have sua sponte addressed this question is therefore unfounded—our analysis is part of the due process challenge that Arizmendi-Medina explicitly made, and we engage in it only as further evidence of the IJ's denial of a full and fair hearing.

Nor do administrative-exhaustion requirements bar us from considering the IJ's abuse of discretion in order to fully evaluate Arizmendi-Medina's due process claim. *See* 8 U.S.C. § 1252(d)(1). A noncitizen need not raise a "precise argument" before the BIA in order to exhaust it, so long as the noncitizen gives the BIA "an adequate opportunity to pass on the issue." *Diaz-Jimenez v. Sessions*, 902 F.3d 955, 960 (9th Cir. 2018). Here, Arizmendi-Medina's brief before the BIA challenged the IJ's refusal to accept his asylum

application while still on the bench, quoting language from *Jerezano*, 169 F.3d at 615, that described a similar practice as an "abuse of discretion" and a due process violation. Arizmendi-Medina therefore exhausted the issue of whether the IJ's abuse of discretion was so severe as to violate due process.

To determine if an IJ abused his discretion in denying a continuance, this court looks at "(1) the nature of the evidence excluded as a result of the denial of the continuance, (2) the reasonableness of the immigrant's conduct, (3) the inconvenience to the court, and (4) the number of continuances previously granted." *Ahmed*, 569 F.3d at 1012 (citing *Karapetyan v. Mukasey*, 543 F.3d 1118, 1129 (9th Cir. 2008), *superseded by statute on other grounds as stated in Owino v. Holder*, 575 F.3d 956, 958 (9th Cir. 2009)).

Regarding the first factor, the IJ rejected Arizmendi-Medina's entire relief application, thus excluding all evidence as a result of the denial of the continuance. This factor favors Arizmendi-Medina.

Second, as described above, Arizmendi-Medina's conduct was reasonable given the ambiguous deadline and the lack of clear warning as to the consequences of not submitting a relief application on the morning of December 18, 2018. There is no evidence that Arizmendi-Medina's request for a continuance was a surreptitious attempt to delay the proceedings; it was simply an effort give his recently-retained attorney the time necessary to complete the application. *See id.* at 1013 (noting that the petitioner's conduct was not an attempt to delay the proceedings). This factor also weighs in favor of Arizmendi-Medina.

Third, the IJ was hardly inconvenienced at all. Arizmendi-Medina's counsel offered to submit the application while the IJ was still on the bench. Although this might have required the IJ to recall Arizmendi-Medina's case at the end of the IJ's docket, this inconvenience was truly minimal. *Cf. Jerezano*, 169 F.3d at 615 ("While an IJ need not linger in the courtroom awaiting tardy litigants, so long as he is there on other business and the delay is short[,] . . . it is an abuse of discretion to treat a slightly late appearance as a nonappearance."). Further, as discussed above, the December 18, 2018 hearing was a Master Calendar hearing, not a merits hearing. This means that the proceedings were ultimately not delayed at all.

And fourth, we consider the total number of continuances previously granted to Arizmendi-Medina. He received two very short continuances (only two weeks each) to find an attorney at the beginning of his immigration proceedings on July 31, 2018 and August 15, 2018. *See Cruz Rendon*, 603 F.3d at 1106–07, 1110 (finding that two one-month continuances were both "exceedingly short"). The proceedings were then reset at the hearing on August 29, 2018 because Arizmendi-Medina requested, and the IJ granted, a change of venue. The next hearing was scheduled for October 24, 2018 before a new IJ. Although this certainly gave Arizmendi-Medina more time to find an attorney, this delay was primarily due to the change of venue and getting the case calendared in a new court.

Finally, after Arizmendi-Medina was required to proceed pro se and was found removable at the hearing on October 24, 2018, the IJ granted another continuance so that Arizmendi-Medina could continue to look for an attorney and work on his relief application (which was presented to him for the first time at the October 24, 2018 hearing).

Arizmendi-Medina thus received only one continuance after he was found removable and presented with a relief application, and he received *zero* continuances after he finally secured an attorney. From start to finish, the proceedings against Arizmendi-Medina were delayed for less than five months, with nearly two months of that delay due to the change of venue.

Ultimately, all of the *Ahmed* factors weigh in favor of finding that the IJ abused his discretion in not granting a continuance so that Arizmendi-Medina's recently-retained counsel could complete and submit the relief application on December 18, 2018. The abuse is especially apparent given the offer of Arizmendi-Medina's counsel to submit the application later that same day. Such an abuse by the IJ counsels in favor of finding that Arizmendi-Medina was denied fundamental fairness. *See id.* at 1110 (finding that the IJ abused her discretion in part because the merits hearing was "*less than one month* after Cruz Rendon first appeared with counsel," which contributed to the noncitizen's difficulty in marshalling evidence in such a short time frame (emphasis in original)). This "prevented [Arizmendi-Medina] from reasonably presenting his case." *See Zetino*, 622 F.3d at 1013 (quoting *Ibarra-Flores*, 439 F.3d at 620-21).

D. Arizmendi-Medina was prejudiced

Prejudice is established where "the IJ's conduct 'potentially [affected] the outcome of the proceedings.'" *Colmenar v. INS*, 210 F.3d 967, 972 (9th Cir. 2000) (quoting *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999), *superseded by statute on other grounds as stated in Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 165 (2d Cir. 2008) (per curiam)). The IJ's rejection of Arizmendi-Medina's

application clearly "[affected] the outcome of the proceedings" because the merits of his application were never considered by the agency at all. *See id.*

A similar issue arises in due process claims based on the ineffective assistance of counsel where the petitioner's counsel fails to file the relief application on time, resulting in the agency deeming the application abandoned. For example, in *Correa-Rivera v. Holder*, 706 F.3d 1128, 1133 (9th Cir. 2013), we held that the petitioner was prejudiced because "[his] counsel's failure to file [his] applications . . . unquestionably affected the outcome of the proceedings" by preventing Correa-Rivera from presenting his case and depriving him of the opportunity to apply for cancellation of removal. *Id.* (quoting *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1226 (9th Cir. 2002)). This court remanded to the BIA with instructions that the BIA should allow Correa-Rivera to submit his application. *Id.*; *see also Colmenar*, 210 F.3d at 972 (noting that a showing of prejudice does not require an explanation of "exactly what evidence [the petitioner] would have presented to support [his] assertions"); *Zolotukhin v. Gonzales*, 417 F.3d 1073, 1077 (9th Cir. 2005) ("We may infer prejudice even absent any allegations as to what the petitioner or his witnesses might have said if the IJ had not cut off or refused to permit their testimony.").

These same concerns are present here. Arizmendi-Medina was prejudiced by the IJ's complete rejection of his application because the rejection deprived him of the opportunity to apply for relief from removal, which potentially altered the outcome of the proceedings. If that were not deemed prejudicial, we would have to consider the merits of Arizmendi-Medina's application without the benefit of any factual findings or analysis by the IJ. A

remand for the IJ to consider the application in the first instance is therefore appropriate.

III. CONCLUSION

For all of the reasons set forth above, we **GRANT** Arizmendi-Medina's petition and **REMAND** this case to the BIA for further proceedings.

FORREST, Circuit Judge, dissenting:

After Petitioner Andres Arizmendi-Medina received multiple continuances, the Immigration Judge (IJ) gave him a deadline to file an application for relief from removal and warned him that if he did not file a timely application, his asylum application would be deemed abandoned. The court concludes that the IJ violated due process and abused his discretion by doing exactly what he said he would do. The court also sua sponte raises the question of whether the IJ abused his discretion by denying a further continuance and concludes that he did. I respectfully dissent. The IJ satisfied due process by giving Arizmendi-Medina sufficient notice of the application deadline and the consequences for failing to meet it, and the IJ did not abuse his discretion in deeming Arizmendi-Medina's application abandoned when Arizmendi-Medina failed to meet the filing deadline. Further, I would not consider the alternative unexhausted claim raised by the court sua sponte related to the IJ's refusal to grant a further extension.

I. Background

Twelve years after Arizmendi-Medina entered the United States without inspection, he was detained and served with a Notice to Appear (NTA) for removal proceedings. Arizmendi-Medina appeared at an initial hearing before an IJ about a week later—without counsel. He requested a continuance because he did not have the money to hire the attorney that he found. The IJ explained the purpose of the proceedings and that Arizmendi-Medina had the right (1) to an attorney; (2) to "examine and object to any evidence offered against [him];" (3) to present his own evidence; and (4) to apply for relief from removal. Arizmendi-Medina affirmed that he understood his rights, and the IJ continued Arizmendi-Medina's case for approximately two weeks to allow for him to retain an attorney.

At his next hearing, Arizmendi-Medina requested a second extension because even though he had the money to hire his attorney—the same attorney handling his bond hearing—he had only contacted the attorney the prior day and the attorney was unable to attend his hearing because "[i]t was too soon." The IJ granted Arizmendi-Medina another two-week continuance and warned him that "this [wa]s going to be [his] last continuance for an attorney." The day before his second reset hearing, Arizmendi-Medina was released from custody after posting a $25,000 bond, and he filed a pro se motion to change venue to an immigration court closer to his residence. Arizmendi-Medina did not appear at his hearing scheduled the next day, but the Government declined to proceed in absentia and the IJ granted Arizmendi-Medina's motion for change of venue.

Two months later, Arizmendi-Medina had his first hearing before a different IJ, and he again appeared without

counsel. He explained that he could not hire an attorney because of his high bond payment. The new IJ declined to grant Arizmendi-Medina another continuance, reviewed the factual allegations in the NTA with Arizmendi-Medina, and sustained the charge of removability. The IJ asked Arizmendi-Medina if he feared returning to Mexico, and, after some questioning, determined that Arizmendi-Medina might be eligible for asylum. The IJ informed Arizmendi-Medina about the one-year deadline for applying for asylum as well as some other limitations on this relief and had the clerk give Arizmendi-Medina an application form. The IJ then instructed Arizmendi-Medina as follows:

> You want to be thinking in terms of three copies. If you have an attorney, the attorney will be able to complete the application for you. If you don't have the -- an attorney, you will have to fill it out, uh, making sure that the application is turned in in English, that you have, uh, the original to present to the Court, one copy for the attorney representative of the Department of Homeland Security, one copy for your own records. The date for your next hearing will be . . . December 18 at 8:30. The Court Clerk will give you the hearing notice. Again, not too late to get an attorney involved in your case, but every time you come back to court without an attorney after today, you will be expected to represent yourself. If you return to court that day and you say, I still need more time to find an attorney, I wasn't able to fill out the asylum application, it is likely that the Court would conclude you have abandoned

> the opportunity to apply for Asylum and you would only be considered as an applicant for Voluntary Departure.

Arizmendi-Medina stated that he understood the IJ's instructions and had no questions. He never requested any extensions of the filing deadline before December 18.

On December 18, Arizmendi-Medina appeared with counsel, who requested a brief continuance to prepare and file Arizmendi-Medina's asylum application. The IJ denied a continuance, explaining that the application was due that morning, that Arizmendi-Medina was informed that he needed to get his application filed with or without counsel's assistance, and that there was not good cause for granting a further continuance. Arizmendi-Medina's counsel then requested that the IJ permit a window filing or that he trail Arizmendi-Medina's case to the end of the docket so that an application could be prepared and filed while the IJ was still on the bench. The IJ denied both requests and deemed Arizmendi-Medina's asylum application abandoned. The IJ also advised counsel that Arizmendi-Medina could present a completed application to the BIA and challenge the IJ's decision to deem the application abandoned on appeal.

Arizmendi-Medina appealed to the BIA, but he did not submit a completed asylum application. Instead, in his notice of appeal he contended that the IJ erred by deeming his application abandoned and "denied hi[m] due process" where he "requested to trail to go and print out the I-589." In his counseled brief to the BIA, Arizmendi-Medina further argued that the IJ denied him due process by not allowing him to file his asylum application while the IJ was still on the bench and by departing from "accepted court practices in order to deny [him] the chance to file his asylum

application." Arizmendi-Medina did not argue that the IJ abused his discretion in denying a continuance in either his notice of appeal or brief to the BIA.

The BIA rejected Arizmendi-Medina's due-process claim because the IJ "clearly instructed" him to file his application at his December 18, 8:30 a.m. hearing, Arizmendi-Medina confirmed that he understood the IJ's directions, and the IJ has broad discretion to conduct proceedings and set deadlines.

II. Discussion

A. Deemed Abandonment

Arizmendi-Medina argues that the IJ's decision to deem his asylum application abandoned and not allow him to prepare and file his asylum application while the IJ was still on the bench on December 18 was a denial of due process. Immigration proceedings are "not subject to the full range of constitutional protections," but they "must conform to the Fifth Amendment's requirement of due process." *Salgado-Diaz v. Ashcroft*, 395 F.3d 1158, 1162 (9th Cir. 2005). We review due process claims de novo, *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620 (9th Cir. 2006), but we review an IJ's decision to deem an application for relief abandoned for abuse of discretion. *Gonzalez-Veliz v. Garland*, 996 F.3d 942, 948 (9th Cir. 2021).

The touchstone of due process is notice and an opportunity to be heard. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (citation omitted)). The BIA errs in denying a due process claim only where "(1) the proceeding

was so fundamentally unfair that the alien was prevented from reasonably presenting his case, . . . and (2) the alien demonstrates prejudice." *Ibarra-Flores*, 439 F.3d at 620–21 (cleaned up).

IJs "set and extend time limits for the filing of applications and related documents." 8 C.F.R. § 1003.31(h). The regulation further instructs that "[i]f an application or document is not filed within the time set by the [IJ], the opportunity to file that application or document shall be deemed waived." *Id.* Deeming a petitioner's application abandoned does not violate due process if it is authorized by the governing regulations. *See Gonzalez-Veliz*, 996 F.3d at 948–49 (rejecting due process challenge because regulatory requirements were met and citing *Juarez v. Holder*, 599 F.3d 560, 566 (7th Cir. 2010) ("The petitioners also assert a rather vague due-process challenge to the . . . IJ's decision to deem their applications for relief abandoned. But immigration proceedings satisfy due process so long as they conform to the applicable statutory and regulatory standards, as these did.")); *see also Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000) (holding that a petitioner must show *error* and substantial prejudice to prevail on a due process challenge to deportation proceedings).

Here, Arizmendi-Medina was given ample notice of his rights throughout his proceedings. He also received multiple continuances and was warned that if he did not file his asylum application by his December 18 hearing, it would be deemed abandoned. Despite not filing an application by the IJ's deadline, Arizmendi-Medina argues that he was denied due process because he was not allowed to file his application *after* his case was heard on December 18, and the court agrees. The court's explanation for excusing Arizmendi-Medina's failure to comply with the immigration

court's deadline is that the IJ's instructions were ambiguous, and Arizmendi-Medina could have thought that he was required only to find an attorney by his December 18 hearing. Maj. Op. at 11–14. The record belies this conclusion.

When the first IJ granted Arizmendi-Medina a second continuance, the IJ stated it would be the "last continuance for [getting] an attorney." Then when Arizmendi-Medina appeared before the second IJ—without an attorney—that IJ denied a further continuance and gave Arizmendi-Medina the asylum application form, advising: "If you have an attorney, the attorney will be able to complete the application for you. If you don't have the -- an attorney, *you will have to fill it out*." The second IJ then set a hearing for December 18 at 8:30 a.m. and explained that if Arizmendi-Medina appeared at that time and said he "still need[ed] more time to find an attorney, *[he] wasn't able to fill out the asylum application*," his application would likely be deemed abandoned.

The IJ's words and the context in which they were said make clear that Arizmendi-Medina was required to file his application *before* his hearing began on December 18. There is no indication that Arizmendi-Medina was confused about that. Instead, the record shows that he appeared on December 18 unprepared to proceed because "it took him quite a significant time to retain [counsel] for the preparation of [the] case." This is essentially the same reason he had given in obtaining his prior continuances, and the IJ expressly warned him that he needed to have his application completed—with or without the help of an attorney—or it would be deemed abandoned. On this record, I cannot conclude that the IJ violated due process or that the agency abused its discretion in deeming Arizmendi-Medina's application abandoned. *See Gonzalez-Veliz*, 996 F.3d at

948–49 (concluding an IJ did not abuse his discretion in deeming application abandoned where petitioner was on notice of this potential consequence); *see also Taggar v. Holder*, 736 F.3d 886, 889 (9th Cir. 2013) ("Neither the IJ nor the Board abused their discretion in holding that [petitioner] had waived her application for relief and protection. [Petitioner] did not file her application for relief by [the deadline] for her applications set by the IJ.").

The court relies on *Jerezano v. INS*, 169 F.3d 613 (9th Cir. 1999), in concluding that the IJ violated Arizmendi-Medina's due process right. In that case, Jerezano conceded removability and stated that he would apply for asylum. *Id.* at 614. But, because he arrived "15 or 20 minutes" after the time set for his asylum hearing, the IJ conducted his hearing in absentia, ordered Jerezano deported, and ultimately instructed him to file a motion to reopen after his late arrival. *Id.* at 614–15. Jerezano filed two pro se motions to reopen, which were rejected by the IJ and the BIA. *Id.* at 615. We reversed because it was an abuse of discretion to "treat a slightly late appearance as a nonappearance." *Id.* We explained that "[t]he IJ should have either reopened or continued the proceeding after Jerezano arrived" because failing to do so denied him the "right to a full and fair hearing" in violation of due process. *Id.*

Unlike in *Jerezano*, here Arizmendi-Medina was not deprived of his right to participate in his hearing. There is no indication Jerezano's case, unlike Arizmendi-Medina's, had already been continued several times. *See id.* at 614–15. And while Jerezano's error was merely minor tardiness—for which he offered a compelling excuse—Arizmendi-Medina was present but unprepared to go forward because he failed to file an application for relief. Further, Jerezano sought to preserve his rights to participate in his hearing by filing two

motions to reopen, *id.*, but Arizmendi-Medina ignored the IJ's direction to submit a completed asylum application on appeal to the BIA or move to reopen. Even at this point, there is still no indication that Arizmendi-Medina has completed an application for relief.

This case is also distinguishable from *Ahmed v. Holder*, 569 F.3d 1009 (9th Cir. 2009). There, Ahmed sought to continue his removal proceedings while he appealed the denial of his I-140 petition. *Id.* at 1011. Even though his request was unopposed, the IJ denied a continuance because he was "not keeping this on [his] calendar." *Id.* at 1011. We held the IJ "effectively pretermitted Ahmed's I-140 appeal" and that the relevant factors for evaluating a denial of continuance supported granting the continuance. *Id.* at 1012–14. Specifically, we stated that the IJ's "myopic insistence upon expeditiousness" did not justify his decision. *Id.* at 1013–14.

As discussed below, Arizmendi-Medina did not argue to the BIA or to this court that the IJ erred by denying a continuance, nor did he reference the relevant factors in assessing a denial of a continuance. Moreover, Arizmendi-Medina received multiple continuances to secure counsel, was granted a change of venue to a location closer to his residence, and was notified about his right to apply for asylum and the filing requirements. The IJ's refusal to excuse Arizmendi-Medina's untimeliness does not suggest that the IJ was so myopically focused on expediency to render his decision arbitrary, irrational, or contrary to law. *See Cui v. Garland*, 13 F.4th 991, 996 (9th Cir. 2021).[1] Nor

[1] The court characterizes the IJ's decision as unreasonable under the circumstances, Maj. Op. at 16, but that is not the abuse of discretion

was the IJ's decision "so fundamentally unfair that [Arizmendi-Medina] was prevented from reasonably presenting his case." *Ibarra-Flores*, 439 F.3d at 620 (citation omitted). Undoubtedly, the IJ could have chosen to give Arizmendi-Medina more time to file his application, including by trailing his case to the end of the hearing docket on December 18. But that does not mean his refusal to do so was a constitutional violation. Immigration courts have notoriously high caseloads and significant backlogs. *See E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 754 (9th Cir. 2018) (discussing the "staggering increase in asylum applications," with "nearly 800,000 removal cases" in the immigration courts' backlog). And as the request to trail to the end of the docket itself indicates, IJs also conduct hearings on multiple cases in quick succession, which poses unique time-management challenges—particularly where immigration hearings typically require foreign-language translation. *See United States v. Calles-Pineda*, 627 F.2d 976, 977 (9th Cir. 1980) (describing mass deportation hearings at issue in that case involving 25–29 respondents); *United States v. Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir. 1998) (same, regarding 22 potential deportees). Where an IJ has given a petitioner a reasonable opportunity to apply for relief and informed the petitioner of the deadline for

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standard we must apply. *See Cui*, 13 F.4th at 996. Even if another judge reasonably would have made a different decision, that does not make the IJ's decision "arbitrary, irrational, or contrary to law." *Id.*; *see also United States v. Rivera*, 527 F.3d 891, 903–04 (9th Cir. 2008) (explaining that a district court does not abuse its discretion even where this court may have reached a different conclusion). To substitute our judgment as a court of appeals far removed from the actual circumstances of the facts on the ground—absent an actual showing of abuse of discretion—flies in the face of our limited role.

applying for relief and the consequences for not meeting the deadline, it is not for us to second guess the IJ's management of his docket. *See Gonzalez-Veliz*, 996 F.3d at 948–49; *cf. INS v. Abudu*, 485 U.S. 94, 107–08 (1988) (discussing the importance of agency discretion in managing immigration cases and bringing deportation proceedings to a prompt close).

B. Denial of a Continuance

Separately, the court concludes that the IJ abused his discretion in denying Arizmendi-Medina a further continuance on December 18. Maj. Op. at 17–20. This was error because Arizmendi-Medina did not challenge the IJ's refusal to grant a further continuance either to the BIA or this court. His only challenge was to the IJ's decision to deem his asylum application abandoned.

Under 8 U.S.C. § 1252(d)(1), a petitioner must exhaust his administrative remedies. To do so, a petitioner must put the BIA "sufficiently on notice so that it 'had an opportunity to pass on th[e] issue.'" *Bare v. Barr*, 975 F.3d 952, 960 (9th Cir. 2020) (citation omitted). A petitioner fails to exhaust a procedural due process claim where he argues on appeal that such right was violated in ways not articulated to the BIA. *See Tall v. Mukasey*, 517 F.3d 1115, 1120 (9th Cir. 2008). Moreover, a petitioner can forfeit an exhausted claim by not raising it "specifically and distinctly" in his opening brief in this court. *See Hernandez v. Garland*, 47 F.4th 908, 916 (9th Cir. 2022).

Arizmendi-Medina did not exhaust a challenge to the IJ's refusal to grant a further continuance. His notice of appeal to the BIA argued that he "was denied a full and fair hearing" because the IJ erred by "deeming all petitions for relief abandoned." He also argued, citing *Jerezano*, that he was

denied his "due process right to apply for asylum." Likewise, his brief to the BIA argued only that he was denied due process and that his case is analogous to *Jerezano* because the IJ "appeared to have decided to forgo accepted court practices." The BIA's failure to address the IJ's refusal to grant a further continuance demonstrates that it did not understand Arizmendi-Medina to be making this separate challenge. *See Alvarado v. Holder*, 759 F.3d 1121, 1128 (9th Cir. 2014) (concluding argument was not exhausted and finding it relevant that the BIA did not address it). The BIA addressed the only argument that Arizmendi-Medina presented and concluded that the IJ did not violate due process in setting the application deadline and adhering to that deadline. Where the Government raised Arizmendi-Medina's failure to exhaust, we should not decide a claim based on an error that was not articulated to the BIA.[2] *See Tall*, 517 F.3d at 1120 ("Procedural errors that can be remedied by the BIA are not exempted from the exhaustion requirement.").

The Supreme Court recently clarified that exhaustion in this context is not jurisdictional and therefore can be waived or forfeited. *See Santos-Zacaria v. Garland*, No. 21–1436, slip op. at 5–11 (U.S. May 11, 2023) (construing exhaustion as a claims-processing rule). But the Government did not forfeit or waive exhaustion where it specifically argued that

[2] As explained, I disagree with the court that the BIA was given the "opportunity to pass on" whether the IJ erred by denying a further continuance. Maj. Op. at 17. But even assuming, arguendo, that Arizmendi-Medina did raise this argument to the BIA and the BIA failed to address it, the court improperly addresses the issue "without giving the BIA the opportunity to address the matter in the first instance in light of its own expertise." *INS v. Orlando Ventura*, 537 U.S. 12, 17 (2002) (per curiam).

Arizmendi-Medina failed to challenge the IJ's denial of a continuance to the agency. *See Fort Bend County v. Davis*, 139 S. Ct. 1843, 1849 (2019) (explaining that a court must enforce a claims-processing rule "if a party 'properly raise[s]' it" (alteration in original) (citing *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam)).

Finally, even if Arizmendi-Medina had exhausted a challenge to the IJ's refusal to grant a further continuance, he forfeited this claim because he did not specifically or distinctly raise it in his opening brief in this court, an issue which the Government also raised. *See Hernandez*, 47 F.4th at 916. The court tiptoes around Arizmendi-Medina's forfeiture by noting that on occasion we have relied on an IJ's abuse of discretion in deciding due process claims and that the IJ's denial of a further continuance is thus part of its due process analysis. Maj. Op. at 17. But in such cases, the petitioner at least raised the argument to the BIA and to us. *See Cruz Rendon v. Holder*, 603 F.3d 1104, 1108–09 (9th Cir. 2010) (explaining the petitioner asserted to the BIA "that the IJ's . . . denial of her request for an additional continuance deprived her of the opportunity to present her case" and argued on appeal "that the IJ denied her a full and fair hearing by . . . denying her request for a continuance."); *Jerezano*, 169 F.3d at 615 (concluding that treating a slightly late appearance as a nonappearance was an abuse of discretion where petitioner argued "his tardiness d[id] not rise to the level of a failure to appear"). By sua sponte raising and considering Arizmendi-Medina's unexhausted and forfeited claim, the court ignores that our role is to decide claims, not make them. *United States v. Sineneng-Smith,* 140 S. Ct. 1575, 1579 (2020) (explaining that we should "rely on the parties to frame the issues for decision" (citation omitted)).

Because the IJ did not violate due process or abuse his discretion by deeming Arizmendi-Medina's application for relief from removal abandoned, and because we should not consider the unexhausted and, in any event, forfeited assertion that the IJ abused his discretion in denying Arizmendi-Medina a further continuance, I respectfully dissent.