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RE: RIN 1125–AA96 or EOIR Docket No. 19–0022; A.G. Order No. 4800–2020, Public Comment Opposing Proposed Rules to Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure

I. INTRODUCTION

The Catholic Legal Immigration Network, Inc. (CLINIC)[1] submits these comments in strong opposition to the proposed rules, which purport to be simple procedural changes, yet would actually enact significant substantive changes to proceedings before the Executive Office for Immigration Review (EOIR) while sidestepping Congress. This Notice of Proposed Rule Making (NPRM) purports to increase efficiency and finality, however, those supposed gains are meaningless because the rule fails to meet the test of basic fairness, as it curtails due process rights for noncitizens and would result in the wrongful removal of individuals with legitimate claims for relief. These proposed rules would actually render immigration courts less efficient while allowing the Department of Homeland Security (DHS) to pursue any resolved removal case at will, thereby upending finality principles to which EOIR supposedly adheres. Ultimately, these rules would further politicize EOIR, reduce its credibility, and distance it from its mission of independently administering the Nation's immigration laws fairly and independently.[2]

Embracing the Gospel value of welcoming the stranger, CLINIC has promoted the dignity and protected the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs since its founding in 1988. CLINIC's network, originally comprised of 17 programs, has now increased to close to 400 diocesan and community-based programs in 48 states and the District of Columbia. CLINIC is the largest nationwide network of nonprofit immigration programs. Through its affiliates, CLINIC advocates for the just and humane treatment of noncitizens through direct representation, pro bono referrals, and engagement with

[1] Rachel Naggar, Defending Vulnerable Populations (DVP) Program's Board of Immigration Appeals Pro Bono Project Manager, Victoria Neilson, DVP Managing Attorney, Rebecca Scholtz, DVP Senior Attorney, and Michelle Mendez, DVP Director, authored these comments. The authors would like to thank Aimee Mayer-Salins, DVP Staff Attorney, and Katy Lewis, DVP Consulting Attorney, for their contributions to this comment.
[2] Executive Office for Immigration Review, *About the Office* (Aug. 2018), https://www.justice.gov/eoir/about-office.

policy makers. CLINIC provides direct representation and *pro bono* referrals through several projects: 1) the Board of Immigration Appeals (BIA) Pro Bono Project, 2) the Formerly Separated Families Project, 3) the Remote Motions to Reopen Project, and 4) Religious Immigrant Services.

CLINIC was a founding partner of the BIA Pro Bono Project, a collaboration between the Office of Legal Access Programs, the BIA Clerk's office, and several non-governmental organizations.[3] The aim of the BIA Pro Bono Project is to increase the quality and level of representation before the BIA, thereby reducing procedural errors and enabling the BIA to review cases more efficiently. Since the project's founding in 2001, CLINIC has been the primary non-governmental organization (NGO) responsible for coordinating the review of case files, recruiting volunteer attorneys and accredited representatives, and mentoring *pro bono* counsel to ensure high quality representation. The project has placed over 1600 appeals with *pro bono* attorneys in its nearly 20 years in operation. As a result, CLINIC has unique insight into the negative impact these rules would have on noncitizens pursuing relief before the BIA.

CLINIC's Formerly Separated Families Project began in response to the Trump administration "Zero-Tolerance" policy through which it detained asylum-seeking parents and separated them from their children. In response to this crisis, CLINIC seeks to secure full representation with competent counsel for every family. Thus far, the project has placed over 100 asylum-seekers with long-term legal representation, mentored *pro bono* counsel through 76 cases, assisted a dozen families in moving their immigration cases to the court near their destination cities, and, in collaboration with CLINIC's Remote Motions to Reopen Project, described below, filed 64 motions to reopen the cases of families already ordered removed by a court. In addition, CLINC has hosted webinars and published practice advisories, guides, and templates to assist practitioners who represent or wish to represent formerly separated families.

CLINIC has recently started a Remote Motions to Reopen Project, which provides representation to formerly separated families, families released from family detention, asylum-seekers, and other vulnerable people around the country in filing motions to reopen before the immigration courts and the BIA. Through this project, CLINIC partners with *pro bono* counsel to provide high quality representation on motions to reopen, and once the case is successfully reopened, CLINIC places the case with competent local counsel and provides mentorship assistance as needed.

CLINIC submits this comment urging the Department of Justice (DOJ or the agency) to withdraw these proposed rules in their entirety. CLINIC believes that U.S. policies on immigration should reflect the country's core moral values and historical practice of welcoming immigrants and refugees. Immigration policies should ensure justice, offer protection, and treat immigrants fairly. People of faith have consistently stood by the principle that all immigrants, especially the most vulnerable among us, including asylum-seekers and indigent persons, deserve an immigration system that is fair and humane.

[3] Executive Office for Immigration Review, *BIA Pro Bono Project* (Nov. 2016), https://www.justice.gov/eoir/bia-pro-bono-project.

If enacted, the proposed rules would unfairly harm noncitizens and their families by unduly burdening them further as they navigate an already complicated immigration maze.[4] The NPRM justifies its proposed changes with statistics showing an increase in both initial immigration court filings and BIA appeals in the last approximately five years. Yet it ignores the underlying factors that contributed to these increases, many of which are government-created. These factors include DHS's elimination of prosecutorial discretion and enforcement priorities, the disproportionate spending on apprehension of noncitizens without comparably increasing funding for EOIR through the appropriations process,[5] and the frequent shuffling of immigration judges (IJs) and dockets based on shifting EOIR priorities, which resulted in unnecessary case delays and adjournments.

Decisions from the BIA and the attorneys general have also slowed down adjudications, by depriving, or greatly limiting, the ability of IJs to manage their dockets through administrative closure, terminating proceedings, or granting continuances.[6] In fact, a 2018 attorney general decision that ended the authority of IJs to administratively close cases includes an admission that the move "would likely overwhelm the immigration courts and undercut the efficient administration of immigration law."[7] Moreover, this NPRM fails to recognize that unprecedented levels of violence, "comparable to the experience in war zones," have forced tens of thousands of people, including an increasing number of women and children, to flee Central America for safety in the United States.[8]

While the NPRM claims these rules will increase efficiency, the rules will instead add to the government-created growing backlog of cases in immigration court and greatly prejudice noncitizens in removal proceedings. Despite creating the backlog, DOJ now uses that backlog as a justification to eliminate critical procedural protections for noncitizens. These proposed rules place the burden of resolving the backlog of pending cases on respondents by, among other things, limiting their ability to reopen or remand proceedings when they are eligible for relief from removal and reducing the time they have to seek counsel and prepare briefs on appeal.[9] To excuse

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[4] *See, e.g.,* Joshua Daley Paulin, *Immigration Law 101*, AMERICAN BAR ASSOCIATION GPSOLO MAGAZINE (Sept. 1, 2013) https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2013/september_october/immigration_law_101/ ("Immigration law is widely regarded as second only to tax law in its statutory complexity.").

[5] While EOIR attempts to increase revenue by passing the burden to noncitizens through an increase in fees, that process is inappropriate as detailed by CLINIC in our comment to that proposed rule. CLINIC, Comments in Opposition to Proposed Rulemaking: Fee Review (EOIR Docket No. 18-0101) (Mar. 30, 2020), https://beta.regulations.gov/comment/EOIR-2020-0001-0207.

[6] *See, e.g., Matter of L-Y-N-*, 27 I&N Dec. 755 (BIA 2020); *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018).

[7] *Matter of Castro-Tum*, 27 I&N Dec. 271, 293 (A.G. 2018); Migration Policy Institute, *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?* (Oct. 3, 2019), https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point.

[8] Doctors Without Borders, *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis* (May 2017), https://www.msf.org/sites/msf.org/files/msf_forced-to-flee-central-americas-northern-triangle_e.pdf; United States Conference of Catholic Bishops, *Mission to Central America: The Flight of Unaccompanied Children to the United States* (Nov. 2013), https://www.usccb.org/about/migration-policy/upload/Mission-To-Central-America-FINAL-2.pdf.

[9] USCIS similarly created a budgetary crisis by narrowing the opportunities for noncitizens to seek legal status and benefits, which led to a decline in applications and a decrease in fee-collection. In response, USCIS increased fees and sought to furlough employees thereby shifting the burden of a self-created crisis to noncitizen applicants and employees, respectively. Muzaffar Chishti, Sarah Pierce, and Kira Olsen-Medina, Migration Policy Institute, *Impending USCIS Furloughs Will Contribute to a Historic Drop in U.S. Immigration Levels* (July 28, 2020).

this burden-shifting to noncitizens, the NPRM improperly relies on baseless accusations made by former Attorney General Sessions that immigration court filings have increased because of individuals falsely claiming a fear of return to their home country and "dirty immigration lawyers" helping noncitizens commit fraud.[10] Therefore, not only does this NPRM fail to explain how these proposed rules would improve efficiency or resolve the tremendous backlog of pending cases, the proposed rules would instead lead to further inefficiency and backlogs.

As Pope Francis has said, "thousands of persons are led to travel [here] in search of a better life for themselves and for their loved ones, in search of greater opportunities . . . We must not be taken aback by their numbers, but rather view them as persons, seeing their faces and listening to their stories, trying to respond as best we can to their situation. To respond in a way which is always humane, just and fraternal."[11] CLINIC likewise believes that the most vulnerable among us deserve compassion, fairness and due process in the adjudication of their claims for relief. In this vein, CLINIC submits the following comments in opposition to the proposed changes.

II. CLINIC STRONGLY OBJECTS TO THE NPRM PROCESS, WHICH ONLY ALOWED 30 DAYS FOR COMMENTS IN THE MIDST OF A PANDEMIC

The Administrative Procedures Act (APA) § 553 requires that "interested persons" from the public have "an opportunity to participate in the rule making." In general, the agencies, must afford "interested persons a reasonable and meaningful opportunity to participate in the rulemaking process."[12] Courts have found that for agencies to comply with this participation requirement the comment period must be "adequate" to provide a "meaningful opportunity"[13] for public participation. DOJ acknowledges that this rule is a "significant regulatory action" under section 30(f) of Executive Order 12866, yet it contradictorily concludes that "any changes contemplated by the rule would have no apparent impact on the public but would substantially improve both the quality and efficiency of BIA appellate adjudications."[14] As explained below, CLINIC strongly disagrees. The changes contemplated by the rule would substantially impact attorneys, accredited representatives, respondents, and respondents' family members. Given the importance of the public's participation in the rule-making process, Executive Order 12866 specifies that "in most cases [rulemaking] should include a comment period of not less than 60 days."[15] Executive Order 13563 explicitly states, "To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should **generally be at least 60 days."**[16]

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https://www.migrationpolicy.org/article/impending-uscis-furloughs-will-contribute-historic-drop-us-immigration-levels.

[10] Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.

[11] *Transcript: Read the Speech Pope Francis Gave to Congress*, TIME, Sept. 24, 2015, https://time.com/4048176/pope-francis-us-visit-congress-transcript/.

[12] *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977).

[13] *N.C. Growers' Ass'n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012).

[14] 85 Fed. Reg. 52491, 52509 (Proposed Aug. 26, 2020).

[15] *See* Exec. Order No. 12866 – Regulatory Planning and Review, § 6(a), 58 Fed. Reg. 51735 (Oct. 4, 1993).

[16] *See* Exec. Order No. 13563 – Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 18, 2011) (emphasis added).

Under any circumstances, the government should not provide such a short time period to comment on these extensive changes, but the ongoing COVID-19 pandemic and numerous other immigration rule changes that the government has proposed in the last six months, including a 160 page proposed regulation that would essentially obliterate asylum, magnify the challenges to the public posed by this short time period to timely respond to the NPRM.[17] For this procedural reason alone, we urge the administration to rescind the proposed rule. If it wishes to reissue the proposed regulations, it should grant the public at least 60 days to have adequate time to provide comprehensive comments.[18]

Despite this inadequate and unfair 30-day timeframe, CLINIC submits this comment because we must object to the proposed regulations. CLINIC must object because the proposed rules would practically eliminate the rights of noncitizens appearing before EOIR and result in increased removals of noncitizens with meritorious claims for relief. CLINIC condemns the consequences of this NPRM: unjust and permanent family separations and the potential death of asylum-seekers who would be unfairly removed to the countries they fled.

III. CLINIC STRONGLY OBJECTS TO THE SUBSTANCE OF THE PROPOSED RULES, WHICH WOULD DRAMATICALLY LIMIT THE ABILITY OF NONCITIZENS TO PURSUE RELIEF FROM REMOVAL.

A. CLINIC opposes the proposed limitations on briefing extensions, the implementation of simultaneous briefing in non-detained appeals, and the imposition of stricter timelines for adjudication, because these limitations hinder respondents' due process rights while doing nothing to improve efficiency.

The BIA has been "unable to adjudicate immigration appeals in removal proceedings effectively and efficiently" for over 20 years.[19] DOJ's previous attempts to improve efficiency, including adding additional Board Members and reducing the initial time to file briefs in non-detained cases, have failed. In 2016, EOIR hired Booze Allen Hamilton[20] to conduct a yearlong study to identify factors contributing to the growing number of pending cases and to make recommendations about how to improve the agency and efficiently address the backlog.[21] The study concluded that the biggest contributors to inefficiency were understaffing of EOIR, poor

[17] RIN 1125-AA94 or EOIR Docket No. 18-0002; *see also* RIN 1615–AC57 or Docket No. USCIS 2020–0013; RIN 1125-AB08 or A.G. Order No. 4747–2020; OMB No. 1125-0012; OMB No. 1125-0013; HHS Docket No. CDC-2020-0033; 85 FR 16559.

[18] In other contexts, the administration has extended existing 60-day regulatory comment periods by an additional 60 days or more citing COVID-19 as the reason for additional time. *See* 85 Fed. Reg. 30890 (May 21, 2020).

[19] *See* 67 Fed. Reg. 54877, Board of Immigration Appeals: Procedural Reforms To Improve Case Management (Published Aug. 26, 2002).

[20] Booz Allen Hamilton provides management and technology consulting and engineering services to leading *Fortune* 500 corporations, governments, and not-for-profits across the globe. *Fortune* magazine has included Booz Allen Hamilton in its list of "World's Most Admired Companies" for many years. *World's Most Admired Companies, Booz Allen Hamilton Holding*, FORTUNE, https://fortune.com/worlds-most-admired-companies/2020/booz-allen-hamilton-holding/ (last reviewed Sept. 19, 2020).

[21] Department of Justice, Executive Office for Immigration Review, *Legal Case Study Summary Report*, Booze Allen Hamilton (Apr. 6, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/immigration_judge_performance_metrics_foia_request_booz_allen_hamilton_case_study.pdf [hereinafter "Booze Allen EOIR Study"].

hiring practices and lack of training, lack of electronic case management and document filing systems, technological and quality issues with interpretation, and IJs not having the time or training to issue thorough written decisions.[22] Since that time, the agency has largely ignored the recommendations in the report and instead made changes that, according to the report, would actually decrease efficiency. For example, the report found that faulty Video Teleconferencing (VTC) equipment, "especially issues associated with poor video and sound quality, can disrupt cases to the point that due process issues may arise. Twenty-nine percent of [EOIR] staff reported that VTC caused a meaningful delay in their ability to proceed with their daily responsibilities."[23] Yet since the issuance of the report, which recommended limiting the use of VTC to procedural matters, EOIR has increased the use of VTC, including creating two immigration adjudication centers where hearings are conducted exclusively through VTC and the IJ, DHS attorney, respondent, and interpreter are all in different locations.[24]

Unsurprisingly then, the number of cases completed by the BIA each year remains stagnant, while the backlog has grown dramatically since 2017.[25] This NPRM continues to ignore the factors identified in the report as contributing to inefficiencies in case processing, and instead proposes changes that would exacerbate the problem while harming respondents. The NPRM's proposals to further limit the time allotted to file a brief, force simultaneous briefing in non-detained cases, impose stricter timelines on Board Members to issue decisions, and transfer long-pending appeals to the EOIR Director would not bring different results. The proposed rules would only serve to decrease efficiency and reduce representation rates before the BIA.[26]

1. DOJ should withdraw the proposed regulation reducing the length and number of briefing extensions.

CLINIC strongly opposes the proposed reduction in maximum allowable time for briefing extensions and the proposal to allow each party to request only one briefing extension. The proposal would do nothing to expedite case processing, and would likely decrease efficiency due to the resulting reduction in representation rates and diminished quality of briefs before the BIA.[27] The proposed rule misunderstands the realities of immigration law practice and, without any evidence, accuses immigration practitioners of filing extension requests frivolously or in an attempt to gain an unfair advantage. It also disproportionately harms *pro se* and detained respondents.

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[22] *Id*.
[23] *Id.*
[24] Katie Shepard, *Immigration Courts' Growing Reliance on Videoconference Hearings Is Being Challenged*, IMMIGRATION IMPACT, Feb. 25, 2019, https://immigrationimpact.com/2019/02/25/immigration-courts-videoconference-hearing-challenged/#.X2AmC3lKjIU.
[25] Executive Office for Immigration Review Adjudication Statistics, *Case Appeals Filed, Completed, and Pending* (July 14, 2020), https://www.justice.gov/eoir/page/file/1248501/download.
[26] Booze Allen EOIR Study, *supra* note 20, (finding that time constraints prevent immigration judges from fully deliberating complicated issues, and thereby making it difficult for the BIA and circuit courts to examine their decisions.)
[27] *A Ten Year Review of the BIA Pro Bono Project: 2002-2011*, https://www.justice.gov/sites/default/files/pages/attachments/2015/11/17/bia_pbp_eval_2012-1-13-14.pdf. (concluding that the submission of high quality briefs in otherwise pro se cases helps adjudicators identify dispositive issues and promotes "the effective and efficient administration of justice.")

The NPRM states that under the proposed framework, a party would have at least one month and potentially up to three months from the time the Notice of Appeal is filed until the brief is due. This assertion is based on several faulty presumptions.

First, the NPRM assumes that the brief can be written without the transcript of proceedings, which is not available at the time the Notice of Appeal is filed. Not only is the transcript a key piece of evidence cited in an appeal, but it is often the only memorandum of the IJ's reasons for their decision. Respondents rarely receive written decisions from IJs, most decisions are issued orally at the hearing. There is no mechanism to receive a copy of the audio recording of the hearing in a timely manner.[28] Immigration courts are also supposed to provide copies of audio hearings to respondents upon request, but some courts are too busy to process these requests and detained respondents often cannot receive or listen to these recordings, based on CLINIC's Defending Vulnerable Population Program's experience. It is impossible to draft a meaningful appeal brief without the transcript of testimony and the decision of the IJ.

Second, the NPRM assumes the same person who represented the respondent in immigration court is representing the respondent before the BIA, and therefore is already familiar with the record and the testimony. The NPRM makes no allowance for sufficient time for a legal representative who is new to the case to review the transcript and IJ decision. It is already extremely difficult for respondents to switch counsel on appeal, because, at a minimum, the prospective attorney or accredited representative needs to review the IJ's decision to evaluate the case for possible representation. Currently, including the discretionary 21-day briefing extension, a respondent has fewer than six weeks from the time they receive the transcripts and IJ decision to consult with and retain new counsel, and for counsel to write the brief. As a practical matter, the proposed rule to limit extensions would prevent respondents from exercising their right to switch counsel or seek counsel for the first time on appeal.

Third, the NPRM assumes that counsel can adequately plan to dedicate sufficient time to writing the brief as soon as the transcript and decision arrives. This is not true. Unlike in other appellate courts, there is no predictable timeline for the issuance of a BIA briefing schedule after a party files a Notice of Appeal. The briefing schedule typically cannot be issued until a transcript of the audio hearing is produced by a contracted transcription company. In many cases, because the IJ has only issued an oral decision, the transcription of that decision is then sent to the IJ for review. Only after the oral decision has been edited and approved by the IJ, does the BIA send the respondent a copy of the transcript and a date by which the brief must be submitted. Currently when the respondent is detained, the briefing schedule is typically issued within 5-10 weeks of the filing of the Notice of Appeal. When the respondent is not detained, it can be up to two years or

[28] EOIR, *How to Submit a FOIA or Privacy Act Request*, https://www.justice.gov/eoir/foia-submit%20a%20request#How%20long%20does%20it%20take%20to%20process%20requests (noting that the period for determining whether to respond to a FOIA request is about 4 weeks); Section 552(a)(6)(A) of the Freedom of Information Act (requiring an agency to respond to FOIA requests within 20 business days, and granting the agency an extension of only 10 days where there are unusual circumstances); Aaron Reichlin-Melnick, *The Federal Agency Running the Immigration Courts Keeps Deleting Asylum Records*, American Immigration Counsel, (Jun. 9, 2020), https://immigrationimpact.com/2020/06/09/immigration-court-deleting-records/#.X2gGqmhKh3g; Nola Rappaport, *Is the Executive Office for Immigration Review incompetent — or is Trump hiding something?*, The Hill, (Jun. 6, 2020), https://thehill.com/opinion/immigration/501807-is-the-executive-office-for-immigration-review-incompetent-or-is-trump.

more before the briefing schedule is issued. When the respondent is released from custody after filing the Notice of Appeal, it is unpredictable whether their case will follow the detained or non-detained timeline.

This unpredictability makes it difficult for immigration practitioners to manage their time and calendars. According to a 2016 survey by the American Immigration Lawyers Association, nearly fifty percent of immigration attorneys were solo practitioners, meaning they do not have associates to share the workload.[29] Similarly, CLINIC conducted a survey of its network in 2019 and the results showed that approximately 40% of its non-profit members have either only one attorney or fully accredited representative. A legal representative may have several individual merits hearings scheduled in immigration court or planned medical or personal leave, when suddenly the BIA issues a briefing schedule for an appeal filed more than 18 months prior. Furthermore, it is not uncommon for a legal representative to receive two or three briefing schedules in the mail on the same day, which they must immediately address along with their other pending matters. In these situations, an extension of the time to file the brief is necessary to competently represent a client on appeal; it is not, as alleged in the NPRM, a strategy to delay the case or get a preview of DHS' arguments, especially since DHS typically files nothing more than a cursory motion for summary affirmance—or no brief at all—in respondent appeals. In fact, DHS routinely files template briefs that present arguments via "checkboxes."

Fourth, unlike in the federal courts of appeals, cases before the BIA are not filed electronically. There is no automatic notification when a briefing schedule has been set and no electronic transcript.[30] Briefing schedules and transcripts are sent together through the U.S. Postal Service, often referred to as "snail mail" because of its slow pace.[31] Even before the recent uptick in delays at the postal service, it took at the very least four days to receive the transcript from the date it is placed in the mail by the BIA.[32] For a respondent in detention, who must wait for the detention facility to process and distribute the mail, it could easily take one week to receive the transcript. Similarly, the brief cannot be filed electronically, it must be mailed to the BIA in Falls Church, Virginia.[33] For a represented respondent with the means to pay a fee of $50-100, the brief can be sent one day before the deadline via an overnight delivery service or using a same-day filing service.[34] However, for respondents who cannot afford that fee or who are representing themselves from detention, they must mail their brief to the BIA at least 3-5 days in advance of the deadline, to avoid it arriving late. This means that the initial, already short time-frame of 21 days to review

[29] American Immigration Lawyers Association, The 2016 AILA Marketplace Study, (Sept. 8, 2016), AILA Doc. No. 16040816, https://www.aila.org/infonet (Available only to AILA members; on file with CLINIC and available by request) [hereinafter "AILA Study"].

[30] The respondent or their counsel can check the EOIR online portal (https://portal.eoir.justice.gov/) or call the automated Immigration Court Information System (1-800-898-7180) to find out when a briefing schedule has been issued, but this must be done manually each day; there is no automatic notification.

[31] Merriam Webster Online Dictionary, https://www.merriam-webster.com/dictionary/snail%20mail.

[32] Jacob Bogage et al., *Postmaster General Eyes Aggressive Changes At Postal Service After Election*, WASHINGTON POST, Aug. 20, 2020, https://www.washingtonpost.com/business/2020/08/20/us-postal-service-louis-dejoy/.

[33] As a result of the COVID-19 pandemic, the BIA was temporarily allowing briefs to be filed by email (https://www.justice.gov/eoir/filing-email-board-immigration-appeals), however that option was not available to detained respondents who do not have access to email service, and the BIA ceased allowing these filings on September 18, 2020.

[34] *See, e.g.*, Immigrant and Refugee Appellate Center, *BIA Same Day Filing*, https://www.irac.net/bia-same-day-filing/.

the transcript and write the brief is in reality fewer than two weeks for many respondents and their representatives. Moreover, COVID-19 has made it even more difficult for representatives to meet deadlines, as many offices remain closed, and public transportation is not running on full schedules. Many practitioners work from home and only visit their offices on occasion to pick up mail. At the same time, there is growing evidence that the government has taken steps to slow down mail delivery by the U.S. postal system.[35] Given these circumstances, reducing the time to submit a brief would make it nearly impossible for representatives to provide competent representation before the BIA and for *pro se* respondents to meet their filing deadline at all. As EOIR knows given its Recognition and Accreditation (R&A) operation and coordination, for non-profit agencies serving the most vulnerable noncitizens, this is an impossible timeframe that would lead to quicker burnout and the closure of removal defense programs.

The NPRM does not specify what factors the BIA would use to determine whether "good cause" has been established to grant a motion for an extension. The BIA has always required counsel to demonstrate good cause, but has generally favored granting a first request for an extension. This unofficial policy likely improved efficiency because it relieved adjudicators of the burden of conducting an extensive good cause analysis in each case, expanded the ability of representatives to take cases, and increased the quality of briefs before the BIA.

Since 2001 the BIA has acknowledged that "only through a fully electronic case management and filing system would the agency be able to accomplish its goals" of, among other things, "adjudicating all cases in a timely manner while ensuring due process and fair treatment for all parties."[36] Nearly 20 years later, EOIR has still not fully implemented an electronic filing system. Yet instead of focusing on fixing its own inefficient system, EOIR is proposing rules that unduly and unjustly burden respondents and their counsel, and deprive respondents of their due process rights, all for the potential to shorten adjudication times by up to 21 days, when the median adjudication time for a BIA appeal is over 200 days.[37] The proposed rule would lead to fewer respondents being able to obtain counsel or submit timely, thorough briefs. If that is the result, federal courts of appeals would recognize these issues as due process violations and would remand cases back to the BIA thereby continuing to increase its docket. Indeed, in the past when the BIA sought to speed up its appellate process at the expense of due process, the U.S. courts of appeals were flooded with immigration appeals; by 2006 BIA appeals comprised nearly a fifth of the total federal appellate docket and 90 percent of all agency appeals were appeals of BIA decisions.[38] The NPRM does not account for the added costs to DOJ stemming from its attorneys devoting more

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[35] Zack Budryk, *Court Documents Show Postal Service Removed 711 Mail-Sorting Machines this Year*, THE HILL, Sept. 9, 2020, https://thehill.com/regulation/court-battles/515790-court-documents-show-postal-service-removed-711-mail-sorting.

[36] GAO Report, *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, United States Government Accountability Office, at 43 (June 2017), https://www.gao.gov/assets/690/685022.pdf.

[37] *Id.* at 32-33.

[38] Shruti Rana, "*Streamlining" the Rule of Law: How the Department of Justice Is Undermining Judicial Review of Agency Action*, 2009 U. ILL. L. REV. 829, 834 (Apr. 2009) ("As immigration appeals flooded their courts, federal courts in every circuit began issuing scathing critiques of the quality of the agency's decision making and its lack of adherence to basic principles of rule of law."); *id*. at 855 ("[D]espite the streamlining reforms' stated goal of increasing efficiency, the massive Board backlog has simply been shifted to the federal courts, which are now flooded with nearly twelve thousand immigration appeals a year.").

time to defending respondents' appeals alleging a deprivation of due process as well as prevailing petitions seeking Equal Access to Justice Act-based fees.

2. DOJ should withdraw the proposal to implement simultaneous briefing schedules in non-detained cases and strict timeframes for adjudicating appeals.

CLINIC disagrees with the NPRM's baseless assertion that implementing simultaneous briefing in non-detained cases[39] would improve efficiency. This assertion seems to be based on a faulty premise—that Board Members are not currently working at maximum capacity, and that valuable time is wasted while Board Members await the receipt of response briefs.[40] The BIA currently has over 90,000 appeals pending,[41] so it is hard to imagine that Board Members are idle or are rendered helpless by the current sequential briefing process. As noted above, it can take more than two years for a non-detained respondent to receive a briefing schedule, and after briefing, it can take months for the BIA to issue a decision. Instead of looking to the root causes of the increase in appeal filings and drop in Board Member productivity, the NPRM merely proposes strict, unrealistic timelines for Board Members to complete adjudications. Pressuring Board Members to complete cases faster would simply result in sloppy decisions and Board Member burnout, further slowing down the adjudication process.[42] Eliminating the additional three-week period necessary for sequential filing would have, at most, a negligible effect on case adjudications.

The elimination of sequential briefing and the accusation that counsel requests extensions merely to "game" the system is absurd, contrary to traditional principles of appellate procedure, and displays bias against the immigration bar and DOJ fully accredited representatives.[43] To aid the IJ in reaching a just and accurate result, the IJ should desire that each party has had an opportunity to thoroughly review and respond to the other's arguments. Moreover, the NPRM does not account for the added costs to both respondents' counsel and DHS attorneys who would have to brief every possible issue in the case,[44] even if the appealing party decides to waive some issues by only briefing one or two of the issues raised. Forcing DHS attorneys to respond to issues that are no longer before the BIA would take their time away from other cases, decreasing their

[39] The BIA has made an exception to this general principle for detained cases, in order to minimize the time that respondents are deprived of their liberty and detained at government expense. This practice should remain the exception and not become the rule.

[40] It is unclear why EOIR chose to create "Appellate" IJ positions, which are hybrid IJ/BIA positions located at immigration courts throughout the United States, if it is genuinely concerned about improving efficiency since these positions require that the BIA spend time sending the physical files from the BIA in Falls Church, VA and awaiting the file(s) arrival. CLINIC has had a FOIA on records regarding costs and adjudication delays related to allowing Appellate Immigration Judges to work remotely pending since January 31, 2020.

[41] Executive Office for Immigration Review Adjudication Statistics, *Case Appeals Filed, Completed, and Pending* (July 14, 2020), https://www.justice.gov/eoir/page/file/1248501/download.

[42] Hamed Aleaziz, *Being An Immigration Judge Was Their Dream. Under Trump, It Became Untenable*, BUZZFEED NEWS, Feb. 13, 2019, https://www.buzzfeednews.com/article/hamedaleaziz/immigration-policy-judge-resign-trump.

[43] Federal Rules of Appellate Procedure 15.1 (providing for sequential briefing in proceedings before the National Labor Relations Board); Federal Rules of Appellate Procedure 31(a)(1) (providing the appellant with 40 days to file the brief after the record is served, 30 day for the appellee to file their brief after the appellant's brief is served, and 21 days for the appellant to file a reply brief after the appellee's brief is served).

[44] While respondents and their representatives are supposed to state in detail the basis for the appeal, as discussed above, in the vast majority of cases, the IJ issues an oral decision, making it impossible to settle on the appellate strategy until the transcribed decision is made available, at the time the BIA issues the briefing schedule.

efficiency and adding to the immigration court backlog. At the same time attorneys would be forced to brief every possible issue in the case, they are required by the BIA Practice Manual to restrict their briefs to 25 pages or submit a motion to enlarge the page limit.[45] As a result, attorneys would have to file more motions to file briefs that exceed 25 pages because they would not be able to limit their briefs to the issues on which the appellant focuses. Thus, rather than increasing efficiency, the BIA would have to adjudicate more motions and read longer briefs.

B. DOJ should withdraw the proposal to require the BIA to deny relief to meritorious applicants who fail to comply with technical requirements due to inadequate notice.

CLINIC opposes the proposed rule allowing the BIA to deem an application abandoned and order removal in cases where the BIA concludes that relief is warranted but background checks are incomplete. The proposed rule contravenes due process because it lacks safeguards to ensure that an applicant received sufficient notice and a meaningful opportunity to comply with background check procedures before the BIA issues a final order of removal. Although the stated purpose behind the proposed change is to increase efficiency, there are no adverse consequences imposed on DHS for failure to comply with the BIA's order to timely complete background checks. While a respondent would immediately receive an order of removal for alleged failure to comply, if DHS fails to submit a report to the BIA within 180 days, the case is remanded to the IJ for an opportunity for DHS to correct or explain its failure. The fact that the proposed rule provides this protection to DHS and not respondents is especially egregious given that DHS is always represented by counsel and familiar with the background check procedures, yet many respondents are *pro se*, lack English proficiency, and have no experience with biometrics procedures.

Under the current regulations, if the BIA concludes that relief is warranted but background checks are not complete or current, the BIA has the authority to "determine the best means to facilitate the final disposition of the case" by either remanding to the IJ with instructions to allow DHS to complete background checks, or holding the case until background checks are completed.[46] The proposed rule "remove[s] the option to remand cases to the immigration court" for completion of biometrics. Instead, in situations where an update or completion of background checks is necessary, the BIA would send the respondent a written notice informing them that the case is being placed on hold, that DHS may contact them to complete biometrics, and of the consequences for failing to comply with biometrics. "May," however, does not require DHS to inform respondents if biometrics are in fact complete.[47] If a non-detained respondent "fails to comply with necessary procedures for collecting biometrics or other biographical information within 90 days of the Board's notice," the BIA "shall deem the application abandoned unless the alien shows good cause before the 90-day period has elapsed." Even where the respondent has shown good cause, no more than an additional 30 days would be given to comply with the background checks.

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[45] EOIR, *Board of Immigration Appeals Practice Manual*, § 3.3(c)(iii) (last revised June 10, 2020), https://www.justice.gov/eoir/page/file/1284741/download [hereinafter BIA Practice Manual].

[46] 8 CFR § 1003.1(d)(6)(ii).

[47] If DHS's unwillingness or inability to comply with the U.S. Supreme Court's ruling in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), which mandates that DHS issue Notices to Appear specifying the time and place of removal in order in compliance with INA § 239(a)(1), is any indication of DHS's willingness or ability to inform respondents of the status of their biometrics, then CLINIC cannot reasonably expect DHS to provide this notice.

This change wipes out existing due process protections for respondents. Section 1003.47(c) of the Regulations currently requires DHS to notify the respondent *in person at an immigration court hearing* of the biometrics requirements and provide instructions for compliance. Additionally, 8 CFR § 1003.47(d) requires the IJ, at a hearing, to "specify for the record when the respondent receives the biometrics notice and instructions and the consequences for failing to comply with the requirements of this section."[48] These procedures are necessary to ensure that the applicant (1) actually received the DHS biometrics instructions; and (2) received oral notice—through an interpreter if the applicant does not speak English—of the biometrics requirement and the consequences of failure to comply. The proposed rule would instead rely solely on DHS's reporting that the applicant failed to comply, with no neutral arbiter ensuring that the applicant actually received the notice and without an in-person forum where the applicant can establish good cause for any failure to timely comply. Under the proposed rule, for example, the BIA could deem an otherwise approvable application abandoned because DHS reports to the BIA that the applicant failed to timely comply with biometrics, but where DHS had inadvertently sent the biometrics instructions to the wrong address.

The rule gives no timeframe for DHS to contact the respondent with instructions for completing biometrics and no recourse for the respondent to contest their removal order if DHS waits until day 89 to give notice about the need to appear for biometrics. The rule provides no obligation for DHS to prove that the respondent properly received notice with sufficient time to complete the background checks. Even where an applicant does receive proper notice, but is unable to complete the background checks and wishes to show good cause to the BIA before the deadline passes, the rule does not provide a process for how an applicant—particularly one who does not speak English, is *pro se*, or is illiterate—can timely make this showing to the BIA in a paper-only process. The rule leaves respondents entirely at the mercy of DHS and encourages DHS to act in poor faith with no consequences to DHS if it does so.

In essence, this proposed rule creates another mechanism through which EOIR may issue removal orders despite a lack of notice in the process. Unlike with *in absentia* removal orders, there is no statutory provision allowing for reopening of such removal orders and, in fact, this NPRM also seeks to narrow reopening grounds significantly. This proposed rule would therefore lead to removal orders for noncitizens who lacked adequate notice while simultaneously eliminating the noncitizen's opportunity to remedy this deficiency through a motion to reopen. Furthermore, when coupling this NPRM with the "Collection and Use of Biometrics by U.S. Citizenship and Immigration Services" NPRM, the detrimental impact of this proposed rule becomes fully apparent. The "Collection and Use of Biometrics by U.S. Citizenship and Immigration Services" NPRM seeks to remove the age restrictions for biometrics collection for those seeking relief from removal meaning that children under 14 would be subject to a biometrics requirement for the first time ever.[49] Vulnerable children who have already completed their removal proceedings and won their appeals before the BIA would rely solely on a mailed notice for information on this new requirement and, failure to abide by the new requirement, would lead

[48] S*ee also* 70 Fed. Reg. 4743, 4752-54 (Jan. 31, 2005) ("The DHS fingerprint notice will be hand-delivered to the alien by DHS.").

[49] Collection and Use of Biometrics by U.S. Citizenship and Immigration Services, 85 Fed. Reg. 56338 (proposed Sept. 11, 2020).

to a removal order.[50] Therefore, this proposed rule creates a procedural hurdle that would lead to removal orders for noncitizens, including children, who qualify for relief from removal and met their burden of proof.

CLINIC opposes the proposed rule change because it requires the BIA to deny relief rather than remand to ensure that the respondents receive adequate notice of their obligations to complete biometrics and have a meaningful opportunity to comply. Additionally, the rule applies a double-standard to DHS. Where DHS fails to comply with the BIA's order, DHS is not deemed to have abandoned prosecution of the case or waived its right to contest the grant of relief. In criminal proceedings, the defendant has a right to a speedy trial and a case must be dismissed if the prosecutor fails to comply with deadlines imposed by the court,[51] yet under this proposed rule, if DHS fails to act, the BIA would do exactly what the proposed rule attempts to avoid—delay the case by remanding to the IJ.

In sum, CLINIC agrees that the BIA should hold cases while DHS completes background checks rather than unnecessarily remanding them to the IJ for that sole purpose. But CLINIC opposes the proposed rule's grant of authority to the BIA to deem an application abandoned when DHS alleges that the applicant failed to comply with biometrics instructions. Instead, the BIA should remand in this situation for a hearing whereby an IJ can ensure that the applicant has received adequate notice of the biometrics requirements and has an opportunity to establish good cause for any failure to timely complete biometrics. While EOIR claims to be focused on "maximiz[ing] the prompt adjudication of cases,"[52] it ignores due process principles and thwarts Congress's intent to provide immigration relief to noncitizens with meritorious claims.

C. DOJ should withdraw the proposal to eliminate the BIA's authority to remand for voluntary departure.

CLINIC opposes the proposed extension of the BIA's voluntary departure authority and prohibition on remands to the IJ solely to consider a request for voluntary departure because these proposed rules present significant due process and fairness concerns.

Under the current regulations, only the IJ may grant voluntary departure either under INA § 240B(a) (prior to completion of removal proceedings) or 240B(b) (at the conclusion of removal proceedings).[53] Under proposed regulation 8 CFR § 1240.26(k), the BIA would have express authority to grant voluntary departure both under INA § 240B(a) and 240B(b). In fact, under proposed rule 8 CFR § 1003.1(d)(7)(ii)(E), "[t]he Board shall not remand a case to an [IJ] solely

[50] While the "Collection and Use of Biometrics by U.S. Citizenship and Immigration Services" NPRM states that "[t]he removal of age restrictions and the proposal to collect on all NTAs under the age of 14 would assist DHS in its mission to combat human trafficking, child sex trafficking, forced labor exploitation, and alien smuggling," *id.* at 56346, that NPRM fails to recognize that the combination of these two NPRMs will lead to children receiving removal orders. Of course, children with removal orders face an increased risk of human trafficking, child sex trafficking, forced labor exploitation, and alien smuggling.

[51] *See, e.g.*, NY CLS CPL § 30.30 (providing that a defendant's motion to dismiss must be granted if the prosecutor is not ready for trial within certain timeframes).

[52] 85 Fed. Reg. 52499.

[53] 8 CFR § 1240.26.

to consider a request for voluntary departure nor solely due to the failure of the [IJ] to provide advisals following a grant of voluntary departure."[54]

The BIA's authority to remand for voluntary departure provides noncitizens with significant protections. Remand is critical to ensure that respondents receive meaningful consideration of their voluntary departure requests, and the opportunity to be provided with the proper advisals about voluntary departure, including how and when to post a voluntary departure bond, how and when to comply with voluntary departure, and the consequences of failing to comply. Voluntary departure is an important benefit to a respondent in removal proceedings, as it allows the noncitizen to avoid a removal order and preserve eligibility for some future benefits such as the possibility of lawful readmission.[55] But a grant of voluntary departure comes with certain obligations and potential, significant consequences. For example, an IJ may impose a voluntary departure bond or other conditions that he or she deems necessary to ensure the noncitizen's timely departure.[56] An applicant is required to present a copy of their passport and travel documents to DHS.[57] If the respondent files a post-order motion to reopen or reconsider during the voluntary departure period, then an alternate order of removal can take effect.[58] Failing to comply with voluntary departure results in a removal order, bars the individual for a period of ten years from being granted cancellation of removal, adjustment of status, change of status, registry, and voluntary departure, and may result in civil penalties.[59] Currently, an IJ is required to advise a respondent of these obligations and consequences. "Upon the conditions being set forth, the alien shall be provided the opportunity to accept the grant of voluntary departure or decline voluntary departure if he or she is unwilling to accept the amount of the bond or other conditions."[60]

The proposed rule change eliminates the BIA's authority to remand for voluntary departure. The NPRM states that:

> [b]ecause the Board may provide relevant advisals to a respondent regarding voluntary departure; because appeals raising the issue of voluntary departure will proffer a respondent's eligibility for that relief before the immigration court (or else the issue will be deemed waived); and because the record will otherwise contain evidence of such eligibility (or else the opportunity to present such evidence will be deemed waived), a remand solely to consider that issue is a waste of resources and places wholly unnecessary burdens on immigration courts.[61]

The NPRM further states that "there is no operational reason that the BIA cannot resolve a request for voluntary departure rather than remanding the case to an immigration judge."[62] The NPRM

[54] Proposed 8 CFR § 1003.1(d)(7)(ii)(E) (proposed Aug. 26, 2020).
[55] INA § 212(a)(9)(A) (inadmissibility ground for individuals ordered removed or who depart while under an order of removal).
[56] 8 CFR § 1240.26(b)(3)(i); 8 CFR § 1240.26(c)(3).
[57] 8 CFR § 1240.26(b)(3)(i).
[58] 8 CFR § 1240.26(c)(3)(iii).
[59] INA § 240B(b); 8 CFR § 1240.26(j).
[60] 8 CFR § 1240.26(c)(3).
[61] 85 Fed. Reg. 52500.
[62] *Id.*

fails to account for the many due process and practical issues that arise from its proposed rule allowing the BIA to grant voluntary departure.

Myriad reasons exist for why a voluntary departure record before the IJ may be incomplete. Allowing the BIA to rely on an evidentiary defect to constitute a waiver of the opportunity to present such evidence raises significant due process concerns. For example, an applicant might provide a temporary travel document or a passport during the course of the proceedings before the IJ, but the validity of that document may expire during the course of an appeal before the BIA. If, while the case is pending on appeal, the travel document expires, it would be unfair for the BIA to deny a voluntary departure request because the evidence of record was stale due to the passage of time. Likewise, an IJ may find the applicant ineligible for voluntary departure prior to the applicant presenting all of the evidence that supports voluntary departure. It would be wholly unfair to the applicant if the BIA were to find the IJ committed error in finding the applicant ineligible for voluntary departure, but then deny the voluntary departure request because the record was incomplete based on the IJ's failure to permit the applicant to present all of the evidence or testimony to support the request.

Moreover, if an applicant wanted to challenge the BIA's denial of voluntary departure under these new proposed regulations for any reason, including a denial due to insufficient or stale evidence in the record, there are no avenues to present such a challenge or present additional evidence. Under proposed 8 CFR § 1240.26(k)(4), voluntary departure is terminated if an applicant files a motion to reopen or reconsider or files a petition for review with the circuit court. The statute also prohibits judicial review of voluntary departure decisions.[63] Thus, there is no mechanism for an applicant to challenge the BIA's denial of voluntary departure or offer new evidence even when such result is not fair. The most logical solution and current practice is for the BIA to remand the record to the IJ for a more complete voluntary departure proceeding, but such an outcome is now expressly prohibited under the proposed regulations.[64]

Proposed 8 CFR § 1240.26(k)(4) states that if the BIA were to grant a request for voluntary departure, "the Board shall advise the alien in writing of the conditions set by the Board, consistent with the conditions set forth in paragraphs (c), (d), (e), (h), and (i) (other than paragraph (c)(3)(ii)) of this section.[)]." The applicant "may accept or decline the grant of voluntary departure and may manifest his or her declination either by written notice to the Board within five days of receipt of its decision, by failing to timely post any required bond, or by otherwise failing to comply with the Board's order." *Id.* This proposed rule would result in unfair and unnecessary removal orders and raises significant due process concerns.

Under proposed 8 CFR § 1240.26(k)(4), the BIA "may impose such conditions as it deems necessary to ensure the alien's timely departure from the United States, if supported by the record on appeal and within the scope of the Board's authority on appeal." However, what conditions would ensure a particular applicant's timely departure is inherently fact-based. If an IJ found the applicant did not merit voluntary departure, the IJ may not have elicited testimony or evidence with respect to this issue. In these circumstances, the BIA would not be able to make the factual

[63] INA §§ 240B(f); 242(a)(2)(B)(i); *see also Dada v. Mukasey*, 554 U.S. 1, 11 (2008).
[64] Proposed 8 CFR § 1003.1(d)(7)(ii)(E).

determination about what conditions should be imposed, and the case would be more appropriate for remand to the IJ.[65]

The proposed rules would result in removal orders even for those individuals who qualify and in fact are granted voluntary departure. Under the current regulations, the voluntary departure bond must be posted within five business days of the IJ order granting voluntary departure.[66] Under proposed 8 CFR § 1240.26(k)(4), the bond must still be posted within five days of the order. However, it is very likely that many applicants would not receive the BIA order granting voluntary departure within five days or with sufficient time to post the bond. BIA decisions are sent by regular mail and are deemed effective as of the date of issuance.[67] As noted above, it takes at least 2-3 business days to receive mail from the BIA even without factoring in the current USPS delays and the COVID-19 pandemic preventing attorneys from accessing their business mail in a timely manner. Under the proposed rule, an applicant could easily be deemed to have declined the grant of voluntary departure, even if that was not the individual's intent. This procedure does not comport with due process.

Under the proposed regulations, where the BIA grants voluntary departure, it would provide the respondent a complicated legal order written only in English outlining numerous legal consequences and requirements of voluntary departure.[68] This means of communication is particularly problematic for the many *pro se* and non-English literate applicants, especially given the strict time limitations for taking action to preserve their right to accept voluntary departure.[69] Under the current regulations, there is a proceeding before the IJ where there is an interpreter provided to ensure the information about voluntary departure has been communicated in the applicant's best language, in addition to a written order informing the applicant of the penalties of failing to comply with voluntary departure. The IJ is required to provide certain information to the applicant *prior* to granting voluntary departure, including the amount of the bond and conditions, and then the applicant is given the opportunity to accept or decline voluntary departure.[70] As the U.S. Supreme Court recognized in *Dada v. Mukasey*, 554 U.S. 1, 19 (2008), "[v]oluntary departure is an agreed-upon exchange of benefits, much like a settlement agreement." The procedures currently in place in a voluntary departure hearing before an IJ are critical to ensuring that the applicant understands the agreement before they enter into it.

Moreover, if the BIA mails the order granting voluntary departure to the wrong address or if the postal service fails to properly deliver the BIA order, the individual would receive no notice of the voluntary departure grant, required information for posting the voluntary departure bond

[65] 8 CFR §1003.1(d)(3)(iv) ("the Board will not engage in factfinding in the course of deciding appeals… If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge").
[66] 8 CFR § 1240.26(c)(3)(i).
[67] *See* BIA Practice Manual § 1.4(d).
[68] Proposed 8 CFR § 1240.26(k)(4) (proposed Aug. 26, 2020)
[69] *See, e.g., Lugo-Resendez v. Lynch*, 831 F.3d 337, 345 (5th Cir. 2016) (directing the BIA to "give due consideration to the reality that many departed aliens are poor, uneducated, unskilled in the English language, and effectively unable to follow developments in the American legal system – much less read and digest complicated legal decisions."); *Contreras v. Attorney Gen. of U.S.*, 665 F.3d 578, 587 (3d Cir. 2012) ("[n]avigating the legal complexities and administrative quagmires of our immigration system is difficult enough even with the benefit of the most zealous advocacy.").
[70] 8 CFR § 1240.26(c)(3).

and any other orders, or the consequences of failing to comply with the BIA orders. Such an individual would, through no fault of their own, have a removal order.

There is no adequate mechanism to challenge late notice or lack of notice.[71] In a related context, the BIA has recognized that due process requires that a respondent be provided with notice of proceedings, and where an *in absentia* removal order is entered without proper notice, a motion to rescind and reopen may be filed at any time.[72] The effect of an *in absentia* order and not receiving a grant of voluntary departure order is the same—a removal order. Yet, while there is a clear mechanism to remedy an *in absentia* order where proper notice was lacking, there is no such mechanism provided in these proposed regulations for a voluntary departure grant from the BIA that is not properly delivered.[73] The absence of a clear mechanism to remedy notice problems raises serious due process concerns.

The overbroad language under proposed 8 CFR § 1003.1(d)(7)(ii)(E) that prohibits the BIA from remanding "a case to an IJ solely to consider a request for voluntary departure" is problematic. While perhaps not the intent, this language suggests that even in a case where the IJ granted relief from removal and thus did not reach the merits of the request for voluntary departure, if the BIA reverses the grant of relief, the BIA cannot remand "solely to consider a request for voluntary departure," which is plainly not fair. The applicant must have an opportunity to have full consideration of their request for voluntary departure and opportunity to fully present evidence related to that request, and the IJ is the only one with authority to consider these facts in the first instance. Thus, there are necessarily circumstances where a case may need to be remanded to the IJ solely to consider a request for voluntary departure, but the plain language of these proposed regulations prohibits such a remand.

D. The proposed changes to the regulations regarding remands, factfinding by the BIA, and the consideration of new evidence on appeal demonstrate DOJ's bias against respondents, particularly those without counsel.

Pro se respondents comprise nearly 40% of individuals in removal proceedings[74] and it is well-known that *pro se* respondents face challenges in preparing and presenting their cases to the IJ.[75] For example, CLINIC and the Asylum Seeker Advocacy Project's (ASAP) 2019 report, *Denied a Day in Court*, outlines the challenges that *pro se* respondents encounter in filing motions and

[71] An applicant could conceivably ask the BIA to re-issue the decision, but there is no formal process or regulation regarding reissuance of BIA decisions. *Pro se* respondents (and many attorneys), would not know that this mechanism may be available. Further, there is no guarantee that the BIA would agree to reissue the decision.

[72] *Matter of G-Y-R*, 23 I&N Dec. 181, 186 (BIA 2001) (citing *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982)); INA § 240(b)(5)(C)(ii).

[73] In fact, proposed 8 CFR § 1240.26(k)(4) expressly deems voluntary departure terminated if a respondent files a motion to reopen or reconsider or files a Petition for Review with the court of appeals.

[74] Executive Office for Immigration Review Adjudication Statistics (Apr. 2020), https://www.justice.gov/eoir/page/file/1062991/download.

[75] *See, e.g.*, Eagly, Ingrid V. and Shafer, Steven, *Measuring In Absentia Removal in Immigration Court*, 168 University of Pennsylvania Law Review 817 (2020), https://www.pennlawreview.com/wp-content/uploads/2020/06/Eagly-Shafer_Final.pdf.

changing their address with the immigration court, let alone presenting the merits of their case.[76] Yet this NPRM proposes changes that seem to ignore or disregard the already complicated immigration process and how these proposed changes would further burden *pro se* respondents navigating the removal process.

1. DOJ should withdraw proposed 8 CFR § 1003.1(d)(7)(v).

Proposed 8 CFR § 1003.1(d)(7)(v), drastically limiting the BIA's ability to remand a case back to the IJ when new evidence is available, would only serve to decrease judicial efficiency and would result in the wrongful and unjust removal of noncitizens.[77] Material evidence frequently arises after the conclusion of immigration court proceedings, including evidence of new threats or possibility of harm to an asylum-seeker, new hardship to a qualifying relative for purposes of cancellation of removal for non-lawful permanent residents, eligibility for a new form of relief, or the grant of an application or petition by United States Citizenship and Immigration Services (USCIS). Currently, if new evidence becomes available while an appeal is pending before the BIA, either party can file a motion to remand.[78] Motions to remand are subject to the same substantive requirements as motions to reopen, meaning the evidence must have been previously unavailable and it must be material to the case.[79] But unlike a motion to reopen, a motion to remand can be filed while the appeal is pending; the party need not wait until the BIA has rendered a decision on the appeal.[80] Additionally, once a Notice of Appeal has been filed with the BIA by either party, jurisdiction is divested from the IJ.[81]

The NPRM appears to propose that, by eliminating 8 CFR § 1003.2(c)(4), IJs now would have jurisdiction to consider a motion to reopen while an appeal is pending before the BIA.[82] This proposed change is an utter waste of judicial resources and would foreclose individuals with meritorious claims from having their new evidence heard. Although it may "ensure the BIA is able to move forward independently with as many appeals as possible,"[83] moving forward with these appeals serves no purpose if an IJ's decision to reopen a case would ultimately render the appeal moot. CLINIC is concerned that this process would confuse *pro se* respondents, who would reasonably presume that if new evidence arises while their case is on appeal, it should be sent to the BIA. If the BIA no longer construes this submission as a motion to remand, and instead merely refuses to consider the evidence, *pro se* respondents with new, material evidence and legitimate claims for relief from removal would be denied a fair opportunity to present their cases.

More significantly, 8 CFR § 1003.23(b)(1) still provides that a respondent's departure from the United States, including being removed, constitutes a withdrawal of their motion to reopen. So a noncitizen with a pending BIA appeal could file a motion to reopen with the IJ based

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[76] CLINIC and ASAP, *Denied a Day in Court: The Government's Use of In Absentia Removal Orders Against Families Seeking Asylum*, (Mar. 24, 2019), https://cliniclegal.org/resources/removal-proceedings/denied-day-court-governments-use-absentia-removal-orders-against.

[77]

[78] 8 CFR § 1003.1(d)(3)(iv); BIA Practice Manual § 4.8(b).

[79] *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992); 8 CFR § 1003.2(c).

[80] 8 CFR § 1003.2(a), (c)(4).

[81] BIA Practice Manual § 4.2(a)(ii).

[82] 85 Fed. Reg. 52501.

[83] *Id.*

on new, material evidence, then have their appeal dismissed by the BIA and be removed from the United States, and as a result their motion to reopen would be deemed abandoned before anyone would have reviewed their new evidence. Additionally, respondents are limited to filing just one motion to reopen within 90 days of the issuance of the IJ's decision.

The proposed change reeks of bias because it includes broad exceptions for DHS to present new evidence, without any requirement that the evidence have been previously unavailable and without any requirement that the evidence be material to the case.[84] Proposed 8 CFR § 1003.1(d)(7)(v) would allow the BIA to remand a case based on new evidence submitted by DHS as a result of identity, law enforcement, or security investigations,[85] or pertaining to inadmissibility or deportability. This carve-out for DHS to present new evidence further intensifies the bias already in the regulations that limit the timeframe and number of motions to reopen for respondents, but not DHS. Ironically, DOJ justifies this change by saying that the BIA currently gives inconsistent treatment to new evidence submitted on appeal; sometimes the BIA would consider the new evidence, sometimes it orders a remand, and sometimes it concludes that it cannot consider the new evidence. But the current regulations and case law clearly constrain the BIA from engaging in factfinding or remanding a case for the consideration of evidence that was previously available.[86] If the BIA consistently followed its own regulations, respondents could not "game the system," as the NPRM baselessly alleges, by submitting previously available evidence on appeal.

Similarly, restricting a respondent's ability to present new, material evidence on remand is manifestly unjust. The BIA should be "encourag[ing] remand on an open record" to "allow[ ] prior decision-makers to cure an error."[87] The proposed rule is especially unfair given that DHS is permitted to present new evidence that arises from background checks. DHS should be held to the same standards and restrictions as respondents, particularly if one of the main goals of the proposed rules, as explained in the NPRM, is finality.[88]

2. DOJ should withdraw proposed 8 CFR § 1003.1(d)(3)(iv).

Proposed 8 CFR § 1003.1(d)(3)(iv) would make it easier for the BIA to rely on facts that did not constitute part of the IJ's decision-making, including "current events," official documents outside the record and certain "undisputed" facts from government sources outside the record. Whether indisputable facts exist with regard to current events is an open question[89] and, under the

[84] Proposed 8 CFR § 1003.1(d)(7)(v) (proposed Aug. 26, 2020).
[85] Note that this proposed rule states that "nothing in the regulation prohibits the Board from remanding a case based on new evidence or information obtained after the date of the immigration judge's decision as a result of identity, law enforcement, or security investigations or examinations, *including investigations occurring separate from those required by 8 CFR 1003.47*. (Emphasis added). This language seems to provide DHS with carte blanche to open an investigation at any time in the future and then seek to reopen a case on that basis. Such carte blanche undermines the very finality principles that EOIR allegedly adheres to and has cited no less than 12 times in this NPRM.
[86] *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 192 (BIA 2018); BIA Practice Manual § 4.8(b).
[87] *Padilla-Martinez v. Holder*, 770 F.3d 825, 831 (9th Cir. 2014).
[88] *Bermudez-Ariza v. Sessions*, 893 F.3d 685, 688 (9th Cir. 2018) (when it comes to the scope of a remand, "[t]he government, however, must play by the same rules.").
[89] Jason Clemence, *How Can America Reckon With Racism, If There Are No Facts?*, WBUR, Sept. 11, 2020, https://www.theatlantic.com/notes/2016/11/theres-no-such-thing-any-more-unfortunately-as-facts/509276/.

current administration, it is difficult to trust the accuracy of even official government documents.[90] In fact, a senior DHS official recently filed a Whistleblower Reprisal Complaint with the DHS Office of Inspector General alleging the following:

> In December 2019, Mr. Murphy attended a meeting with Messrs. Cuccinelli and Glawe to discuss intelligence reports regarding conditions in Guatemala, Honduras, and El Salvador. The intelligence reports were designed to help asylum officers render better determinations regarding their legal standards. Mr. Murphy's team at DHS I&A completed the intelligence reports and he presented them to Mr. Cuccinelli in the meeting. Mr. Murphy defended the work in the reports, but Mr. Cuccinelli stated he wanted changes to the information outlining high levels of corruption, violence, and poor economic conditions in the three respective countries. Mr. Cuccinelli expressed frustration with the intelligence reports, and he accused unknown "deep state intelligence analysts" of compiling the intelligence information to undermine President Donald J. Trump's policy objectives with respect to asylum. Notwithstanding Mr. Murphy's response that the intelligence reports' assessments were consistent with past assessments made for several years, Mr. Cuccinelli ordered Messrs. Murphy and Glawe to identify the names of the "deep state" individuals who compiled the intelligence reports and to either fire or reassign them immediately.[91]

The proposed rule would also specifically strip the BIA of the ability to remand a case *sua sponte* for further factfinding or where the issue was not adequately raised below unless there is an issue regarding jurisdiction. The limitation on the BIA's authority to *sua sponte* remand a case for further fact-finding disproportionately prejudices respondents, particularly those appearing *pro se*. *Pro se* respondents are dependent on IJs to identify potential eligibility for relief, explain what is required to meet their burden of establishing eligibility for relief, and to fully develop the record. Where an IJ fails to do so and a respondent is not aware of this failure, or does not specifically articulate the need for further fact-finding in an appeal to the BIA, the limitation on *sua sponte* remands for additional fact-finding would only serve to exacerbate the due process violation that has already been committed by the IJ. The BIA would now be required to issue decisions against respondents where the IJ fails to sufficiently develop the record or identify an avenue for relief. In contrast, DHS is always represented by counsel familiar with immigration law and procedures, and therefore has already had a full and fair opportunity to establish the facts in support of their case.

Even where noncitizens are represented by counsel, it would be almost impossible in most cases to successfully argue for remand to the IJ under the proposed rule. The proposed rule would impose a long list of requirements that must be met before the BIA could potentially remand a

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[90] Tanvi Misra, *Whistleblower: DHS officials obstructed intelligence reports*, ROLL CALL, Sept. 9, 2020, https://www.rollcall.com/2020/09/09/whistleblower-murphy-dhs-officials-obstructed-intelligence-reports/.

[91] Whistleblower Reprisal Complaint by Mr. Brian Murphy, Principal Deputy Under Secretary, DHS Office of Intelligence and Analysis, (Sept. 8, 2020), https://intelligence.house.gov/uploadedfiles/murphy_wb_dhs_oig_complaint9.8.20.pdf?fbclid=IwAR1gn8fjs2abNFSAnwYrw541D1-xHPHlxoUA7qe09Vp0h6LrgujJDdnd4qs.

case. Under proposed 8 CFR § § 1003.1(d)(3)(iv)(D), the BIA could only remand a case for further factfinding if all of the following conditions are met:

(1) The party seeking remand preserved the issue by presenting it before the immigration judge;
(2) The party seeking remand, if it bore the burden of proof before the immigration judge, attempted to adduce the additional facts before the immigration judge;
(3) The additional factfinding would alter the outcome or disposition of the case;
(4) The additional factfinding would not be cumulative of the evidence already presented or contained in the record; and
(5) One of the following circumstances is present in the case:
    (i) The immigration judge's factual findings were clearly erroneous, or
    (ii) Remand to DHS is warranted following de novo review.

Under the system in the proposed rules, it would no longer be possible for the BIA to remand a case under some of the most frequent scenarios.[92] For example, there is no provision to remand the case based on changes in the law that now require further factfinding.[93] Moreover, proceedings could only be remanded if the IJ's factual findings were "clearly erroneous," again leaving no ability for the BIA to remand if the IJ's fact findings were simply inadequate. CLINIC is very concerned that IJs, faced with performance metrics that require them to adjudicate 700 cases per year,[94] would have little incentive to take the time to develop the record in *pro se* cases where there is no possibility that the case could be remanded for failure to do so.

E. The proposed changes to the BIA's authority to reopen or reconsider a case *sua sponte*, or to self-certify an appeal, would prevent the BIA from correcting patent injustices and drastically harm respondents.

CLINIC opposes amending 8 CFR §§1003.2(a) and 1003.23(b)(1) to remove the provision allowing the BIA to reopen or reconsider a decision *sua sponte*, and to limit the authority of IJs to reopen or reconsider cases *sua sponte*. This provision would greatly reduce respondents' ability to have motions to reopen granted that are untimely or that are number-barred, even in circumstances where the noncitizen could not have filed the motion earlier.

[92] This includes the "totality of the circumstances" standard because "[a]lthough the Board sometimes uses that standard to justify remanding a case, there is no statutory or regulatory basis for this standard." However, there are circumstances when it would be appropriate for the BIA to apply this standard and one of those circumstances is when it would be in the interest of justice to do so.

[93] For example, in the past three years, decisions by the Attorney General have substantially altered accepted norms in asylum law. As a result of *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) and *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019), every particular social group must be proved through the three-prong cognizability test. There are many cases pending at the BIA that predated at least one of these decisions where the IJ may have relied on precedent in effect at the time. The intervening precedent requires remand so that asylum-seekers can present evidence in the first instance that the IJ did not require at the time of the hearing. Under the proposed rule, there is no ability for the BIA to remand for this reason.

[94] *See* CLINIC, *DOJ Requires Immigration Judges to Meet Quotas*, (Apr. 27, 2018). https://cliniclegal.org/resources/doj-requires-immigration-judges-meet-quotas.

The BIA and IJs have long held limited discretionary powers to reopen or reconsider cases *sua sponte* where it would "serve the interest of justice."[95] The proposed rule would curtail those powers, limiting the authority of the BIA to reopen cases and preventing IJs from reopening or reconsidering a case on their own motion except to correct typographical or administrative errors.[96] Even if a Board Member sees that there is a good reason to reopen a case or that failing to do so would result in a manifest injustice, this rule would strip the BIA of its authority to reopen. This change would contradict years of precedent stating that it "is a basic concept of the BIA's appellate jurisdiction that it must do complete justice for the alien in a given case."[97]

Like many of the proposed changes in the NPRM, the elimination of *sua sponte* authority would disproportionately harm respondents, who are subject to time and number restrictions on filing motions to reopen. Because DHS can file any number of motions to reopen and at any time, the elimination of *sua sponte* reopening would unfairly prevent one party from having access to further review of IJ and BIA decisions. If one of the stated purposes of the NPRM is to achieve finality in removal proceedings, then continuing to allow one party to seek reopening based on new information or a change in circumstances undercuts that goal. Moreover, this proposed change undercuts any remaining façade that the EOIR is a neutral arbiter, and reaffirms EOIR's obvious bias towards DHS.

The proposed elimination of *sua sponte* reopening is particularly harsh when considered in combination with the proposed elimination of the BIA's ability to remand a case for the consideration of new evidence presented by the respondent, and the instruction that respondents should instead file motions to reopen. DOJ cannot restrict the BIA's ability to remand a case and eliminate *sua sponte* reopening, and still claim that respondents have sufficient avenues available to present their claims for relief.

The proposed rule would also eliminate the BIA's authority to consider a late-filed appeal through its self-certification process. This proposed change would punish the most vulnerable respondents for their inability to comply with the technical requirements of filing an appeal. The BIA typically uses its self-certification powers to remedy defects in the filing of a Notice of Appeal. There are many factors beyond the control of a respondent in detention, such as mail processing delays, lockdowns due to illness, or the inability to access the commissary to purchase stamps, that might prevent a detainee from timely filing their Notice of Appeal. Recognizing this, the BIA would sometimes self-certify an appeal that arrived just past the deadline. Similarly, a respondent who is not literate or proficient in English might submit a Notice of Appeal that is missing a signature, a proper certificate of service, or the correct filing fee. Currently, the BIA will permit the respondent 15 days to correct this defect, and then accept the Notice of Appeal by certification. The rationalization for this change—that there are no clear standards for when the BIA should exercise this authority and that it has historically been applied inconsistently—do not justify its wholesale elimination.

F. The proposed rule allowing IJs to circumvent the BIA and seek "quality assurance" directly from the EOIR Director turns appellate review on its head.

[95] *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998) (citing *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997)).
[96] Proposed 8 CFR § 1003.23(b)(1) (proposed Aug. 26, 2020).
[97] *Matter of S-N-*, 6 I&N Dec. 73 (A.G. 1954).

Proposed 8 CFR § 1003.1(k) would allow IJs to certify cases directly to the EOIR Director if the BIA reopens or remands the decision to the IJ. This change would turn appellate procedure on its head—allowing IJs to question the appellate body whose job is to assure that the IJs are following the law. If the BIA gets a decision wrong, there are already two existing procedures in place to rectify the BIA's error: a motion to reconsider before the BIA or a petition for review before the federal court of appeals. Overall, this proposed rule would undermine confidence in the legitimacy of the immigration courts by allowing an individual judge to circumvent the BIA and certify a case to a single, political appointee.

The NPRM states that there is currently, "no clear mechanism" when "the immigration judge alleges that the BIA made an error."[98] However, it is not the role of an IJ whose decision has been overturned to question the decision of the appellate body; it is the role of the parties—DHS and the respondent—to take further action if one or both parties believes the BIA has erred. The NPRM acknowledges that the regulations provide an avenue for a party to challenge an erroneous decision by the BIA by filing a motion to reconsider, but, with no further explanation concludes that this process "is cumbersome, time consuming, and may not fully address the alleged error."[99] The NPRM provides no data or analysis of why the motion to reconsider process is inadequate. It does not provide any statistics on the numbers of motions to reconsider that the BIA has had to decide, nor does it provide statistics on the grant rate of such motions.

Indeed, the newly proposed procedure for certifying a case to the EOIR Director is more burdensome on the parties and more time consuming than the existing process. Under the proposed rule, the IJ would have to certify the decision to the Director within 30 days of receipt, or 15 days for detained cases. While the proposed rule requires the IJ to serve the certification on both parties, it does not provide any opportunity for the parties to address the errors alleged in the certification or for further briefing before the Director renders a decision. Furthermore, while the Director's authority to act is "identical to that of the Board," including being authorized to issue a precedential decision, the Director has no authority "to grant or deny an application for relief or protection from removal."[100] Because the case would need to be remanded to the BIA (again) or to the IJ (again) regardless of the Director's ultimate decision in the matter, it is difficult to see how this process improves efficiency or is less "cumbersome" than a motion to reconsider.

Additionally the proposed rule provides no timeframe within which the Director must address the certification request, and no data or analysis on the expected number of certifications the Director might receive in a given period. The Director is responsible for managing the entire Executive Office for Immigration Review and for reporting to the Attorney General, members of Congress, the media, and others.[101] These duties would certainly take precedence over the review of individual removal cases, and result in significant delays in adjudication. It is difficult to see how the Director, with numerous competing responsibilities, is in a better position to thoughtfully and efficiently review decisions of the BIA than the BIA itself or the federal courts of appeals.

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[98] 85 Fed. Reg. 52502.
[99] *Id.*
[100] Proposed 8 CFR § 1003.1(k)(3) (proposed Aug. 26, 2020).
[101] EOIR, Office of the Director, https://www.justice.gov/eoir/office-of-the-director.

Furthermore, CLINIC is concerned that *pro se* respondents would not understand what is happening in their case if they receive a certification notice from the IJ. While most unrepresented litigants are familiar generally with the concept of appeal to a higher authority, it is unlikely that an unrepresented respondent would understand why the IJ is permitted to question the decision of the appellate body, or how that certification may affect their case.

The other existing "quality assurance" tool, is the petition for review to federal court. If federal courts of appeals are regularly overturning a particular Board Member's decisions, then EOIR can use that fact to provide further training to the Board Member or, if warranted, take appropriate personnel action. Instead, the proposed rule would allow IJs who share the political views of the EOIR Director to further politicize the immigration courts by referring decisions directly to "an unconfirmed political appointee."[102]

The proposed rule would fundamentally alter the adjudication system. Rather than relying on a party who believes a case was wrongly decided to take further action to seek review of the decision up the appellate hierarchy, an IJ would be empowered to challenge the decisions of the very body whose job it is to review the IJ's work. One justification that the NPRM puts forward for this proposed new review mechanism is that IJs may be unfairly subject to poor performance reviews based on BIA remands. Under the controversial performance metrics, an IJ must not receive remands in more than 15% of their cases, or the IJ cannot receive a satisfactory performance review.[103] The National Association of Immigration Judges has critiqued the performance metrics as setting up an ethical bind—under the performance metrics, IJs have a financial interest in completing cases quickly and in not being overturned on appeal.[104] A federal district court judge recently denied a motion to dismiss in a case challenging immigration court procedures, including the performance metrics, finding that "as Plaintiffs have stated, the metrics policy has direct consequences for judges' performance evaluations and, by extension, for their jobs."[105] Under the proposed regulations, IJs would be able to circumvent decisions that they do not like—and that could affect their performance review—by reporting their disagreements directly to the EOIR Director.

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[102] Eric Katz, *Trump Administration Expands Political Power Over Career Immigration Judges*, GOVERNMENT EXECUTIVE, Aug. 26, 2019, https://www.govexec.com/management/2019/08/trump-administration-expands-power-political-appointee-over-career-immigration-judges/159453/ (quoting Ashley Tabaddor, the president of the National Association of Immigration Judges, who expressed outrage when EOIR issued regulations in 2019 empowering the EOIR Director to issue precedential decisions. '"By collapsing the policymaking role with the adjudication role into a single individual, the director of EOIR, an unconfirmed political appointee, the immigration court system has effectively been dismantled,' Tabaddor said.")

[103] Betsy Swan, *New Quotas for Immigration Judges Are 'Incredibly Concerning,' Critics Warn*, DAILY BEAST, Apr. 2, 2018, https://www.thedailybeast.com/new-quotas-for-immigration-judges-are-a-recipe-for-disaster-critics-warn.

[104] Judge A. Ashley Tabaddor, President National Association of Immigration Judges, *Testimony Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on "Strengthening and Reforming America's Immigration Court System"* (Apr. 18, 2018), https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf ("production quotas and time-based deadlines violate a fundamental canon of judicial ethics which requires a judge to recuse herself in any matter in which she has a financial interest that could be affected substantially by the outcome of the proceeding.").

[105] *Las Americas Immigrant Advocacy Ctr. v. Trump*, No. 3:19-CV-02051-IM, 2020 WL 4431682, at *14 (D. Or. July 31, 2020).

CLINIC strongly objected to last year's Interim Final Rule (IFR) that authorized the EOIR Director to render precedential decisions.[106] In that IFR, the sole justification for allowing the EOIR Director to adjudicate appeals was to allow the Director to adjudicate cases that had not been adjudicated in a timely manner.[107] At the time of the IFR's publication, the president of the National Association of Immigration Judges, Ashley Tabaddor, raised alarm bells. "'The creation of a mini-attorney general in the EOIR's director, who is a political appointee, not confirmed by the Senate and currently not empowered to adjudicate cases, would in effect abolish the separation of functions where the attorney general's duties as a law enforcement agent are distinct and separate from his adjudicatory duties,'" she said.[108] Likewise, former BIA chairperson, Paul Schmidt warned, "the rule signals that the director may take a more active role in adjudications and could even issue precedent decisions. 'Look for the director over time to reinsert himself in the adjudicative activities of EOIR for the purpose of insuring subservience to [the] administration's political enforcement priorities,' Schmidt said."[109]

With this proposed rule, former Chairman Schmidt's prophecy is likely to be realized. The proposed rule appears designed to prevent Board Members from reopening or remanding decisions to IJs who have high rates of denying cases. Recently, the attorney general promoted IJs who had some of the highest asylum denial rates in the country to the role of "Appellate Immigration Judge"—a hybrid role in which they act as both an IJ and a Board Member.[110] At the same time, EOIR has been hiring IJs whose background is either in immigration enforcement, or who have no immigration experience: of the 46 most recently hired IJs, 20 were former Immigration and Customs Enforcement prosecutors; 2 came from private practice; and the remainder had little or no immigration experience, instead coming from the military, the U.S. attorney's office, other administrative agencies or state courts.[111] One of the newly hired IJs previously worked for Federation for American Immigration Reform, an organization designated by the Southern Poverty Law Center as an anti-immigrant hate group.[112] At the same time, experienced IJs have resigned

[106] *See* CLINIC, Comments in Opposition to Organization of the Executive Office for Immigration Review (EOIR Docket No. 18–0502) (Oct. 17, 2019), https://beta.regulations.gov/comment/EOIR-2019-0003-0089.
[107] *Id.*
[108] Nicole Narea, *EOIR Director Given Power To Decide BIA Cases In New Rule*, LAW360, Aug. 23, 2019, https://www.law360.com/articles/1191879/eoir-director-given-power-to-decide-bia-cases-in-new-rule.
[109] *Id.*
[110] Tal Kopan, *AG William Barr Promotes Immigration Judges with High Asylum Denial Rates*, SAN FRANCISCO CHRONICLE, Aug. 23, 2019, https://www.sfchronicle.com/politics/article/AG-William-Barr-promotes-immigration-judges-with-14373344.php (One of these appointees had an asylum denial rate of over 95% and had been the subject of 11 complaints, five of which resulted in his "being counseled by a superior on proper judicial behavior.").
[111] EOIR Announces 46 New Immigration Judges, (Jul. 17, 2020) https://www.justice.gov/eoir/page/file/1295301/download. *See also* Nolan Rappaport, *No Experience Required: US Hiring Immigration Judges Who Don't Have any Immigration Law Experience*, THE HILL, Feb. 3, 2020, https://thehill.com/opinion/immigration/481152-us-hiring-immigration-judges-who-dont-have-any-immigration-law-experience; Innovation Law Lab and Southern Poverty Law Center, *The Attorney General's Judges How the U.S. Immigration Courts Became a Deportation Tool*, at 22 (June 2019) https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf ("Roughly three-fourths of immigration judges hired by the Trump administration have prosecutorial experience, and many previously worked for ICE as trial attorneys who represented the government in removal proceedings.").
[112] Southern Poverty Law Center, *Federation For American Immigration Reform*, https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform.

or retired in high numbers.[113] It is difficult to imagine any reason why EOIR would allow an immigration court bench that has an extraordinary percentage of new IJs, many with no immigration law background, to second-guess decisions by the BIA and allow them to seek review directly with the EOIR Director.

While the NPRM claims that IJs can only seek review by the Director in "limited circumstances,"[114] the categories for Director certification are so broad that an IJ could argue that one of the categories applies in nearly any case where the IJ disagrees with the BIA's decision.[115] The NPRM likens this proposed system to existing rules that the Social Security Administration (SSA) follows, which allow an administrative law judge (ALJ) to seek clarification from the Appeals Council.[116] However, the SSA procedure only allows the ALJ to seek clarification directly from the Appeals Council—that is, directly from the body that reviewed the ALJ's original decision. In contrast, the proposed rule here allows the IJ to go over the BIA's head and seek redress directly from the Director (the boss of both the Board Members and the IJs). These two procedures are not the same. Moreover, unlike the expansive language in this proposed rule, Social Security ALJs can only seek clarification in the limited circumstances where, "The ALJ cannot carry out the directive(s) set forth in the remand order; or The directive(s) in the remand order appears to have been rendered moot."[117]

The NPRM takes the language for when an IJ may seek the EOIR Director's certification directly from another section of the Social Security Administration (SSA) Handbook.[118] The NPRM provides no explanation for why the immigration court rules should more closely parallel those of the SSA, when in reality the context is very different. Social Security decisions involve monetary benefits and generally hinge on the analysis of technical medical evidence. By way of contrast, EOIR considers myriad, complex legal issues that range from applying the categorical approach to criminal convictions, to analyzing a foreign government's potential acquiescence in torture, to determining whether an adjustment of status applicant is likely to become a public charge. The outcomes of immigration court proceedings can result in permanent family separation, or even the death of the applicant if they are returned to a country where they would face persecution or torture. The function of the two agencies and the range of legal issues they cover are simply not analogous. Furthermore, rather than the SSA judge being able to seek review, it is

[113] Alexandra Kelley, *Immigration Judges Are Quitting and Retiring Early Due to Job Stress*, THE HILL, Jan. 27, 2020, https://thehill.com/changing-america/well-being/mental-health/480165-immigration-judges-are-retiring-and-quitting-early.
[114] 85 Fed. Reg. 52492.
[115] The categories include: (ii) The Board decision is clearly contrary to a provision of the Act, any other immigration law or statute, any applicable regulation, or a published, binding precedent; (iii) The Board decision is vague, ambiguous, internally inconsistent, or otherwise did not resolve the basis for the appeal; or (iv) A material factor pertinent to the issue(s) before the immigration judge was clearly not considered in the decision. Proposed 8 CFR § 1003.1(k)(1). Since IJs will rely on their interpretation of the law in rendering their decisions, arguably, in most cases in which the BIA overturns them, the IJ may believe that the BIA's decision was contrary to law. Similarly, the terms "vague" and "ambiguous" are so broad that an IJ could label virtually any decision by the BIA with one of these terms.
[116] 85 Fed. Reg. 52496.
[117] SSA HALLEX, Hearings, Appeals, and Litigation Law Manual, I--2-1-85, Requesting Clarification of Appeals Council Remand Orders – Policy, https://www.ssa.gov/OP_Home/hallex/I-02/I-2-1-85.html (last updated Mar. 2, 2015).
[118] *See* SSA HALLEX, Hearings, Appeals, and Litigation Law Manual, I-3-6-10, Protests of a Prior Decision, https://www.ssa.gov/OP_Home/hallex/I-03/I-3-6-10.html (last updated Sept. 27, 2018).

the agency component that carries out the judge's order that can seek review if it is unable to effectuate the order without clarification.[119]

CLINIC strongly objects to EOIR giving the EOIR Director even greater power than he has already amassed. CLINIC is very concerned that allowing the Director to overrule BIA decisions, which were likely issued by a three-member panel,[120] at the request of IJs undermines the legitimacy of the agency and the immigration courts, and would add to the growing perception that decision-making at EOIR is being further politicized.

G. The proposed rule to eliminate administrative closure would decrease efficiency and undermine existing laws and regulations.

The proposed rule to amend 8 CFR §§ 1003.1(d)(1)(ii) and 1003.10(b) codifying DOJ's recently adopted position that IJs and the BIA have no freestanding authority to administratively close cases should be withdrawn. It directly undermines the NPRM's stated goal of increasing efficiency in the immigration courts and would result in the harsh and unlawful removal of vulnerable noncitizens that Congress intended to protect. It is especially harmful when considered in conjunction with other provisions of the prosed rule that would dramatically limit the BIA's ability to remand or reopen a case.[121]

Article III courts routinely use administrative closure and other docket management tools to prioritize cases in need of immediate resolution and deprioritize others.[122] Likewise, until 2018, EOIR recognized administrative closure as an important tool for immigration judges to manage their large caseloads. *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) (demonstrating the importance of administrative closure in conserving judicial resources and ensuring a just outcome for noncitizens). In 2018, the Attorney General issued *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) holding that neither IJs nor the BIA have inherent authority to administratively close a case, and chastising the IJ for administratively closing the case of an unaccompanied minor instead of ordering him removed *in absentia*. This decision overturned *Matter of Avetisyan* and decades of precedent that allowed IJs to administratively close cases, typically with the agreement of DHS counsel, in order to efficiently manage their dockets and fairly allow respondents to await the resolution of an outside matter that would impact the result in their case. Recently, two courts of appeals rejected the reasoning in *Matter of Castro-Tum* and overruled the attorney general, thus allowing IJs in those jurisdictions to resume administratively closing cases when appropriate. In fact, the U.S. Court of Appeals for the Fourth Circuit noted that, in contrast to the attorney general's assertions in *Matter of Castro-Tum*, *Matter of Avetisyan* demonstrates how administrative closure of a case may actually expedite its resolution.[123] The proposed rule is an

[119] *Id.* ("When title II effectuating components (i.e., processing centers) or Regional Commissioners' offices, which handle all title XVI referrals, (collectively, 'protesting components') believe an administrative law judge (ALJ) or an Appeals Council (AC) decision cannot be effectuated, they may refer the case to the AC.").
[120] 8 CFR § 1003.1(e)(6).
[121] Proposed 8 CFR § 1003.1(d)(3)(iv)(D)(7)(ii) (proposed Aug. 26, 2020).
[122] *See Penn-Am. Ins. Co. v. Mapp*, 521 F.3d 290, 295 (4th Cir. 2008) (explaining how district courts may administratively close cases, such as by removing them from the active docket, as a docket management tool).
[123] *Romero v. Barr*, 937 F.3d 282, n.13 (4th Cir. 2019), overruling the BIA and finding that IJs and the BIA do have the authority to administratively close cases.

end-run around the courts of appeals and further restricts the independence of IJs to efficiently and justly adjudicate the cases before them.

Additionally, the proposed rule undermines the will of Congress in enacting immigration protections for vulnerable noncitizens. Congress authorized Special Immigrant Juvenile Status for noncitizens present in the United States, under the age of 21, who have been abused, abandoned, or neglected by one or both parents, and for whom being returned to their country of citizenship would not be in their best interest.[124] Congress also authorized visas for victims of human trafficking and victims of crimes who have cooperated with law enforcement.[125] Because of extreme delays in processing by USCIS,[126] as well as backlogs in the availability of visas,[127] noncitizens who are eligible for legal status through these provisions could be removed from the United States and become ineligible for relief.[128] USCIS has exclusive jurisdiction over these humanitarian benefits, but without the management tools to allow IJs to place cases on hold, IJs would have to order many of these individuals removed before USCIS adjudicates their applications or petitions or a visa is available. Forcing an early resolution of these cases by the IJ has already led to unnecessary appeals to the BIA and subsequent motions to remand or reopen once USCIS approves the humanitarian benefit. By stripping IJs and the BIA of the authority to administratively close cases, while simultaneously limiting the circumstances under which a case can be remanded or reopened,[129] EOIR is cruelly depriving noncitizens of the ability to receive benefits for which they are entitled under the law. Finalizing this proposed rule would result in the wrongful removal of numerous, vulnerable noncitizens whom Congress intended to protect.[130]

This rule would also undermine other existing regulations. The inability of IJs to administratively close cases runs counter to procedures promulgated by other immigration agencies and impedes the ability of those agencies to process benefits applications. For example, pursuant to 8 CFR § 212.7(e)(4)(iii), individuals in removal proceedings are ineligible to seek an I-601A provisional waiver unless removal proceedings are administratively closed and have not been re-calendared at the time of filing. Without administrative closure, a noncitizen whose United States citizen or lawful permanent resident spouse or parent would suffer extreme hardship as a result of their deportation would be forced to depart the United States and await adjudication of their unlawful presence waiver abroad.[131] Preventing IJs from administratively closing cases would essentially nullify the regulations enacted by USCIS relating to provisional unlawful presence waivers for individuals in removal proceedings. As a result, U.S. citizen and lawful

[124] INA § 101(a)(27)(J).
[125] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, div. A, § 1513, 114 Stat. 1464 (Oct. 28, 2000) ("VTVPA"); INA § 101(a)(15)(U) & (T).
[126] AILA Policy Brief: USCIS Processing Delays Have Reached Crisis Levels Under the Trump Administration, American Immigration Lawyers Association (Jan. 2019), https://www.aila.org/infonet/aila-policy-brief-uscis-processing-delays.
[127] U.S. Department of State, Visa Bulletin For September 2020, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-september-2020.html.
[128] INA § 101(a)(15)(T)(II) (requiring a T visa applicant to be physically present in the United States); INA § 101(a)(27)(J) (requiring that a non-citizen be present in the United States in order to maintain SIJS); *Joshua M. v. Barr*, 439 F. Supp. 3d 632, 679 (E.D. Va. 2020).
[129] Section E, *supra*.
[130] Even if USCIS ultimately grants a noncitizen relief, returning to the United States following removal is very difficult because of possible inadmissibility bars and a lack of a procedure, to name a couple of hurdles.
[131] INA § 212(a)(9)(B)(v).

permanent resident family members would be left behind to suffer extreme hardship and the uncertainty of not knowing if or when their noncitizen family member would be able to return to the United States.

Moreover, the limiting of administrative closure in recent years has already increased the overwhelming backlog of pending cases. The Booze Allen Hamilton case study of EOIR found that "ballooning caseload[s]" and re-calendaring administratively closed cases were contributing to untimely adjudications.[132] The study recommended, among other things, that EOIR collaborate with DHS on a "policy to administratively close cases awaiting adjudication in other agencies or courts."[133] Yet, since the issuance of that report, EOIR has done the opposite. The NPRM uses selective and misconstrued data to assert that eliminating administrative closure would increase the productivity of IJs.[134] According to a recent analysis by the Transactional Records Access Clearinghouse (TRAC) of EOIR's own statistics, since 2017, when the current administration ended prosecutorial discretion and severely limited administrative closure, the average number of case completions per IJ actually dropped.[135]

Administrative closure helps IJs conserve judicial resources by avoiding scheduling unnecessary status hearings while awaiting the resolution of matters outside the IJ's jurisdiction. EOIR data shows that the average time between the administrative closing of a case and re-calendaring is over three years.[136] But once a case is re-calendared, it is typically resolved in just four months.[137] The proposed rule would forces IJs to hold these unnecessary status hearings, at the expense of resolving other cases that are ready for adjudication, or to order the removal of individuals with pending applications for humanitarian benefits. The NPRM also fails to address what would happen to cases that are currently administratively closed or how the potential re-calendaring of those cases would undermine attempts to resolve the backlog of pending cases.

H. Amending 8 CFR § 1003.5 to eliminate IJ review of oral decisions would cause confusion and delay.

CLINIC opposes amending 8 CFR § 1003.5 to eliminate the provision that requires an IJ to review the transcription of any oral decision before the transcript is sent to the parties. As noted in Booze Allen Hamilton's report, the issuance of oral decisions contributes to inefficiencies in adjudicating cases.[138] Because of time constraints, IJs do not feel comfortable writing written decisions and instead often issue an oral decision immediately upon the conclusion of a hearing, before they have been able to fully deliberate the issues in the case. Even with the current regulation requiring IJs to review and correct the transcription, the Booze Allen Hamilton study found that oral decisions "make it difficult for respondents, BIA, and circuit courts to examine the

[132] Booze Allen EOIR Study, *supra* note 20, at 18, 26.
[133] *Id*. at 26.
[134] Transactional Records Access Clearinghouse, *The Life and Death of Administrative Closure* (Sept. 2020), https://trac.syr.edu/immigration/reports/623/.
[135] *Id*.
[136] *Id*.
[137] *Id*.
[138] Booze Allen EOIR Study, *supra* note 20, at 25.

IJ's reasoning" and the report recommended that EOIR take steps to allow IJs to issue more written decisions.[139]

Difficulties in understanding IJ decisions would certainly lead to unnecessary remands and other delays. The NPRM states that parties can address any inaccuracies in the transcript by following the procedures outlined in the BIA Practice Manual Section 4.2(f)(3).[140] However, that procedure merely allows parties to bring obvious defects or typographical errors to the attention of the BIA, and provides for the BIA to try to remedy the error itself or "consider any allegations of the transcript error in the course of adjudicating the appeal."[141] There is no mechanism for returning the case to the IJ to clear up confusion resulting from a hastily dictated oral decision. Even if the BIA Practice Manual had such a procedure, sending a case back to the IJ after a briefing schedule has been issued would only increase adjudication delays. Although the proposed change might allow the BIA to issue briefing schedules faster, it would ultimately lead to more difficulties for parties and the BIA on appeal, and more remands from the federal courts of appeals.

I. The NPRM fails to analyze adequately the impact the proposed rule would have on small entities.

As discussed at length above, the proposed rule would significantly alter immigration court and appellate practice. These changes would dramatically affect how small law offices, both private attorneys and non-profit organizations, would be able to accept cases, manage their dockets, and, in some instances, charge fees. The end of administrative closure would cause many representatives to litigate cases before the immigration court while their clients await relief from USCIS. Most private attorneys bill their clients based on flat fees[142] and virtually all non-profit legal service providers that charge a nominal fee, do so on a flat-fee basis.[143] As a result, as immigration procedures become more complicated, immigration practitioners either lose money or charge higher fees. Charging more in fees means that representation will be cost-prohibitive and more respondents would proceed *pro se*. The end of administrative closure would mean more in-person immigration court appearances for practitioners, which means more time away from the office, and fewer cases they can take on. Likewise, as discussed above, simultaneous briefing on appeals would mean that practitioners would have to take more time on every brief, addressing every issue raised in the Notice of Appeal, even if DHS only ultimately briefs one issue. Again, this would result in more time spent by the practitioner and correspondingly reduce revenue.[144] Furthermore, with the many due process violations that we discuss above, immigration practitioners would likely have to appeal more BIA decisions to federal courts of appeals, again

[139] *Id*.
[140] 85 Fed. Reg. 52508.
[141] *Id*.
[142] *See* AILA Study, *supra* note 29, at 18.
[143] Even non-profit organizations, like those in CLINIC's network, that provide legal services for free to indigent clients often have numerical deliverables for funders, meaning that as each case becomes more complex, the organization can take on fewer cases, jeopardizing their ongoing funding.
[144] Note that those seeking to become accredited representatives or renew their accreditation under the DOJ Recognition & Accreditation Program will also spend additional time completing Form EOIR-31, Request for New Recognition, Renewal of Recognition, Extension of Recognition of a Non-Profit Religious, Charitable, Social Service, or Similar Organization, should DOJ proceed with revising the form pursuant to its Justice Department's Information Collection. Indeed, the combined effect of all the recent proposed changes is best characterized as "death by a thousand cuts" to recognized non-profit religious, charitable, social service, or similar organization agencies.

expending significant resources not just representing the cases but also seeking admission to the various federal courts of appeals.

Although the proposed rule would have severe consequences on immigration practitioners' livelihood, the NPRM's only statement about the effect of the proposed rule on small entities is, "The rule will not economically impact representatives of aliens in immigration proceedings. It does not limit the fees they may charge, or the number of cases a representative may ethically accept under the rules of professional responsibility."[145] These statements are not accurate, and the government provides no data to back them up. The proposed rules would affect the number of cases representatives could accept because each case would require more work. Without administrative closure, representatives would have to appear in court more often and would have to litigate relief in court, such as adjustment of status, that they could otherwise pursue in a non-adversarial setting before USCIS. Disposing with administrative closure would also encourage respondents to pursue weak (though not frivolous) immigration relief despite a strong claim for relief being pending before USCIS, which would resolve the noncitizen's immigration status without the need to use EOIR's limited resources. Furthermore, with the reduced time limit for BIA appeal extensions, and the bar on any extension beyond 14 days, practitioners would be limited in the number of appeals cases they could ethically take on because if the BIA issues multiple briefing schedules at the same time, the practitioner would not have capacity to brief them all competently. The proposed rule should be withdrawn and, if the agency chooses to issue a new NPRM, it should provide data and analysis of how it reached the conclusion that the proposed rule would not affect small entities, who make up more than 50% of all immigration practitioners.[146]

IV. CONCLUSION

CLINIC acknowledges the need for EOIR to address the tremendous backlog of pending cases, a backlog that has only grown over the past three years, and improve efficiency within the agency. However, historical evidence and multiple studies of EOIR's practices have demonstrated that the changes proposed in this NPRM are likely to achieve the opposite result, at the expense of fairness and due process for respondents. "When Congress directs an agency to establish a procedure, it can be assumed that Congress intends that procedure to be a fair one."[147] Because the

[145] 85 Fed. Reg. 52509.
[146] *See* AILA Study, *supra* note 29, at 8.
[147] *De Belbruno v. Ashcroft*, 362 F.3d 272, 280-81 (4th Cir. 2004) (internal quotations omitted).

procedural changes proposed here are patently unfair and would result in numerous wrongful removal orders, CLINIC recommends that this NPRM be withdrawn in its entirety.

Thank you for your consideration of these comments. Please do not hesitate to contact Jill Marie Bussey, Director of Advocacy, at jbussey@cliniclegal.org, with any questions or concerns about our recommendations.

Sincerely,

Anna Gallagher
Executive Director