



Submitted via www.regulations.gov

December 23, 2020

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**RE: RIN 1125-AB03; EOIR Docket No. 19-0410; Dir. Order No. 02-2021,
Public Comment Opposing Proposed Executive Office for Immigration Review Rule Titled
“Good Cause for a Continuance in Immigration Proceedings”**

I. Introduction

The Catholic Legal Immigration Network, Inc. (CLINIC)¹ submits these comments in strong opposition to the proposed rule governing continuances in immigration court, which would strip important due process rights from noncitizens in removal proceedings and curtail immigration judge (IJ) discretion to manage their cases in an individualized and fair manner. This Notice of Proposed Rule Making (NPRM) purports to increase efficiency, however, those supposed gains are hollow because the rule ignores the statutory and due process rights of noncitizens and would result in the wrongful removal of individuals with legitimate claims for relief. The proposed rule would actually render immigration courts less efficient by forcing cases not ripe for resolution to go forward with final hearings, leading to needless appeals and subsequent motions to reopen, and burying even further in the backlog cases that have been awaiting a merits hearing date for years. Ultimately, this rule would thwart the Executive Office for Immigration Review’s 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 and engagement with policy makers.

¹ Rebecca Scholtz, Defending Vulnerable Populations (DVP) Senior Attorney authored these comments. Michelle Mendez, DVP Program Director, Rachel Naggar, CLINIC BIA Pro Bono Project Manager, Victoria Neilson, DVP Managing Attorney, Katy Lewis, DVP Consulting Attorney, and Karen Sullivan, CLINIC Advocacy Attorney, contributed to this comment.

²Executive Office for Immigration Review, *About the Office* (updated Aug. 14, 2018), <https://www.justice.gov/eoir/about-office>.

CLINIC provides training and technical assistance to its network of affiliates on immigration matters, including those related to continuances in removal proceedings. CLINIC also 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, 4) the Estamos Unidos Asylum Project, and 5) Religious Immigrant Services.

CLINIC submits this comment urging the Executive Office for Immigration Review (EOIR or the agency) to withdraw this proposed rule in its 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, unaccompanied children, individuals with disabilities, and indigent persons—deserve an immigration system that is fair and humane.

As Pope Francis has said, “thousands of persons are led to travel [to the United States] 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.”³ CLINIC likewise believes that the most vulnerable among us deserve compassion, fairness, and due process in their treatment in the U.S. immigration system. In this vein, CLINIC submits the following comments in opposition to the proposed changes.

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

CLINIC urges EOIR to withdraw this NPRM because the 30-day comment period—spanning multiple holidays, during a global pandemic, and running concurrently with other similarly inadequate comment periods—does not give stakeholders a “reasonable opportunity to participate in the rulemaking process” as required by the Administrative Procedures Act (APA).⁴ As discussed below, the proposed regulations would radically limit the circumstances in which an IJ may grant a continuance, with the result that many noncitizens would be forced to proceed without counsel and would be ordered removed before they are able to have their claims for immigration protection considered. The public should be given adequate time to consider these dramatic revisions to existing law in order to provide thoughtful and well-researched comments. Instead, EOIR has given no reason for allowing only 30 days for the public to submit comments to this proposed rule rather than the customary 60-day comment period.⁵

³ *Transcript: Read the Speech Pope Francis Gave to Congress*, TIME, Sept. 24, 2015, <https://time.com/4048176/pope-francis-us-visit-congress-transcript/>.

⁴ *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977); see 5 U.S.C. § 553; *N.C. Growers' Ass'n v. UFW*, 702 F.3d 755, 763 (4th Cir. 2012) (opportunity to comment must be “meaningful”).

⁵ See Exec. Order No. 13563, Improving Regulation and Regulatory Review § 2(b) (Jan. 18, 2011).

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 another significant proposed rule issued on the same day as this one, magnify the challenges to the public posed by this short time period to timely respond to the NPRM.⁶

The shortened comment period is even more unreasonable given that it spans multiple holidays. EOIR announced the rule over a holiday weekend (the Friday following Thanksgiving) and the comment period ends on the Monday after Christmas. The comment period also includes the entirety of Hanukkah, a major religious holiday that begins on December 10, 2020 and ends on December 18, 2020, and the first three days of Kwanzaa, which begins on December 26, 2020. EOIR thus imposed a comment period that spans multiple major holidays when many stakeholders will not be working.⁷

The inadequate 30-day timeframe means that many CLINIC affiliates⁸ who might otherwise submit comments providing the agency with detailed information about how the proposal would impact their organizations, clients, and communities, will not have the opportunity to submit any comment at all, depriving them of a reasonable and meaningful opportunity to participate in the rulemaking process.⁹ For this procedural reason alone, we urge the administration to rescind the proposed rule. If it wishes to reissue proposed regulations on this subject, it should grant the public at least 60 days to have adequate time to provide comprehensive comments.¹⁰

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

⁶ See, e.g., EOIR NPRM, Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, 85 Fed. Reg. 75942 (proposed Nov. 27, 2020); Department of Homeland Security (DHS) NPRM, Employment Authorization for Certain Classes of Aliens with Final Orders of Removal, 85 Fed. Reg. 74196 (proposed Nov. 19, 2020); DHS NPRM, Collection and Use of Biometrics by U.S. Citizenship and Immigration Services, 85 Fed. Reg. 56338 (proposed Sept. 11, 2020); EOIR NPRM, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52491 (proposed Aug. 26, 2020).

⁷ See *Pangea Legal Servs. v. DHS*, No. 20-CV-07721-SI, 2020 WL 6802474, at *20 (N.D. Cal. Nov. 19, 2020) (“That the comment period spanned the year-end holidays shortened the period further still and undercut the purpose of the notice process to invite broad public comment.”).

⁸ CLINIC affiliates would meet the definition of “small entity” under the Regulatory Flexibility Act, as small organizations defined as “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.” 5 U.S.C. § 601(4).

⁹ *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977); *N.C. Growers’ Ass’n v. UFW*, 702 F.3d 755, 763 (4th Cir. 2012).

¹⁰ 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, e.g., 85 Fed. Reg. 30890 (May 21, 2020).

III. CLINIC STRONGLY OBJECTS TO THE SUBSTANCE OF THE PROPOSED RULE, WHICH UNNECESSARILY AND UNFAIRLY LIMITS THE ABILITY OF NONCITIZENS TO PURSUE RELIEF FROM REMOVAL.

CLINIC urges EOIR to withdraw the proposed rule in its entirety, as it violates statutory and due process rights of noncitizens, exacerbates the problems it purports to solve, fails to consider better alternatives for addressing the identified problem (*i.e.*, eradicating ill-conceived government policies), ignores the proposed rule’s impact on small entities as required by the Regulatory Flexibility Act, and does not consider the grave harms the rule would cause.

EOIR should withdraw this proposed rule because it violates noncitizens’ rights to counsel and to pursue legal protection. This proposed rule is only the latest in a long line of policy measures by this administration that erode due process rights, remove IJ authority to manage their own dockets and provide respondents with the time necessary to pursue legal relief, and unlawfully sanction the swift removal of noncitizens entitled to legal protection.¹¹ In light of the administration’s previous policy measures, continuances in many circumstances are the only tool still available to allow noncitizens to pursue immigration relief while in removal proceedings.

Not only does the proposed rule erode crucial rights of noncitizens, but it will not alleviate the problems it purports to solve. First, the NPRM repeatedly implies that continuances harm respondents with “valid claim[s] for relief” who desire timely resolution of their cases.¹² But the proposed rule would harm respondents with valid claims for relief—resulting in the denial of continuances to those whose claims are currently being adjudicated by USCIS, and driving further into the backlog cases that are ripe for resolution and are awaiting an individual hearing date. Instead of benefitting respondents with valid claims, these proposed rules will seriously harm them by authorizing their swift removal before their claims can be heard. In fact, the proposed rule will disproportionately harm some of the most vulnerable respondents in immigration court proceedings, despite their eligibility for and likelihood of obtaining lawful status if they were only given time to pursue it. Those targeted by this rule include unaccompanied children and survivors of domestic violence and trafficking who are pursuing immigration relief with USCIS, children with approved Special Immigrant Juvenile Status petitions who are awaiting a current priority date, pro se respondents, and those with mental disabilities. This rule will effectively strip rights to benefits and relief authorized by law to immigrant men, women and children in our country.

¹¹ See, e.g., *Matter of L-N-Y-*, 27 I&N Dec. 755 (BIA 2020); *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018); *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); EOIR Notice of Proposed Rulemaking, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52491 (Aug. 26, 2020); Memorandum from James R. McHenry III, EOIR Dir., Enhanced Case Flow Processing in Removal Proceedings (Dec. 1, 2020), <https://www.justice.gov/eoir/page/file/1341121/download>; Memorandum from James R. McHenry III, EOIR Dir., Use of Status Dockets (Aug. 16, 2019), <https://www.justice.gov/eoir/page/file/1196336/download>; Priscilla Alvarez, *Justice Department Places New Pressure on Immigrants Facing Deportation*, CNN, Nov. 24, 2020, <https://www.cnn.com/2020/11/24/politics/immigration-justice-department/index.html>.

¹² 85 Fed. Reg. at 75928, 75939.

The NPRM also purports to improve “efficiency” and reduce backlogs in immigration courts, but, in fact, it will likely increase the backlog and result in massive inefficiencies. By forcing cases not ripe for resolution to go forward to merits hearings, the proposed rule will result in needless appeals and subsequent motions to remand and/or reopen.¹³ Further, in forcing final hearings in cases not ripe for decision, the proposed rule will relegate cases that have been awaiting a merits hearing date for years further into the backlog.

Not only will the proposed rule exacerbate the problems it purports to solve, but it also fails to consider obvious ways to address the identified problem—by eradicating the ill-conceived government policies that have created and exacerbated the problem in the first place. There is no doubt that the immigration court system has a serious backlog—of nearly 1.3 million cases currently.¹⁴ But Trump administration policies have considerably worsened this backlog, including by eliminating prosecutorial discretion and enforcement priorities, disproportionately spending on apprehension of noncitizens without comparably increasing funding for EOIR, shuffling IJs and dockets based on shifting EOIR priorities, and imposing policies that deprive IJs of the ability to manage their own dockets through administrative closure, terminating proceedings, or granting continuances.¹⁵ Indeed, in the first several months of the COVID-19 pandemic—at the same time as immigration courts closed—ICE filed over 100,000 new immigration cases and stated that “the agency’s courtroom attorneys are using the time they would normally spend in the courtroom to file motions to reopen or recalendar cases that were administratively closed in the past.”¹⁶

The government’s eradication of administrative closure through *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), and then via rulemaking,¹⁷ has further increased the overwhelming backlog of pending cases. According to a recent analysis of EOIR’s own statistics by the Transactional Records Access Clearinghouse (TRAC), since 2017, when the Trump administration ended prosecutorial discretion and severely limited administrative closure, the average number of case completions per IJ have actually dropped.¹⁸ Administrative closure helps IJs conserve judicial resources by avoiding scheduling unnecessary status hearings while awaiting the resolution of matters outside the IJ’s jurisdiction. A study of administrative closure shows that the majority of

¹³ See, e.g., *Malilia v. Holder*, 632 F.3d 598, 606 (9th Cir. 2011) (concluding that IJ abused discretion in denying continuance and remanding to the immigration court); *Ahmed v. Holder*, 569 F.3d 1009, 1013-14 (9th Cir. 2009) (granting PFR and remanding for further proceedings finding that IJ abused discretion in denying continuance to await appeal of denied visa petition).

¹⁴ TRAC Immigration, *Immigration Court Backlog Tool* (Oct. 2020), https://trac.syr.edu/phptools/immigration/court_backlog/.

¹⁵ See Congressional Research Service, *Pending Cases in U.S. Immigration Courts, FY 2008-FY2020* (Nov. 19, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF11690> (“The Trump Administration broadened enforcement priorities, increasing the number of removal orders for unauthorized foreign nationals without criminal histories, while also reducing IJs’ discretion to close cases administratively. These policies contributed to the increased number of pending cases.”)

¹⁶ Austin Kocher, *ICE Filed over 100,000 New Cases and Clogged the Courts at the Peak of the Pandemic*, Sept. 16, 2020, DOCUMENTED, <https://documentedny.com/2020/09/16/ice-filed-over-100000-new-cases-and-clogged-the-courts-in-the-peak-of-the-pandemic/#:~:text=The%20immigration%20court%20shutdowns%20caused,New%20York%20City%20particularly%20hard.&text=While%20the%20judges%20were%20slowing,months%20of%20the%20current%20shutdown>.

¹⁷ EOIR, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81588 (final rule published Dec. 16, 2020).

¹⁸ TRAC Immigration, *The Life and Death of Administrative Closure* (Sept. 10, 2020), <https://trac.syr.edu/immigration/reports/623/>.

administratively closed cases later re-calendared and decided resulted either in termination of removal proceedings or in the winning of relief from removal—promoting decisional finality while conserving scarce docket time.¹⁹ The administration’s decision to eradicate administrative closure and recalendar closed cases “has single-handedly exacerbated the immigration court crisis.”²⁰ As a group of retired IJs testified before Congress in January 2020, recent attorney general decisions stripping IJs of their ability to administratively close, terminate, and continue cases where due process requires it have “resulted in unprecedented, sky-rocketing backlogs,” which have “increased exponentially despite the dramatic increase in Immigration Judge appointments, most of which have favored individuals with enforcement backgrounds.”²¹

In sum, instead of implementing a real solution to the problem—restoring IJ authority to terminate, administratively close, and continue cases where due process requires it—the proposed rule will make the problem worse and punish noncitizens. It further strips IJs of discretion to efficiently manage their cases such that those that are ripe for resolution can go forward and those that are not can be terminated or closed without wasting court resources.

The proposed rule is also fundamentally flawed because it skips the required regulatory flexibility analysis, falsely asserting that the rule will not have a significant economic impact on small entities.²² In fact, the proposed rule would substantially burden countless small entities, including CLINIC as well as many of our nonprofit affiliate organizations. Some of the proposed rule’s draconian limitations on continuance requests target representatives directly, and they will all require significant extra work by small entities—both private attorneys and non-profit legal services providers—in preparing continuance requests, or in pursuing complex and resource-intensive remedies for clients whose continuance requests will be denied as a result of the proposed rule. The proposed rule’s restrictions on continuances would cause many representatives to litigate cases before the immigration court while their clients await relief from USCIS. Many private attorneys bill their clients based on flat fees²³ and virtually all non-profit legal services providers that charge a nominal fee, do so on a flat-fee basis.²⁴ 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*. Curtailment of continuances would mean more in-person immigration court appearances at merits hearings for practitioners, which means more time away from the office, and

¹⁹ *Id.* (“[F]or those cases in which the government was seeking removal orders, six out of ten (60.1%) immigrants met the high legal threshold of remaining in the country. The largest proportion of these had their cases terminated since the Court ultimately found there were no longer valid grounds to deport them.”)

²⁰ TRAC Immigration, *Crushing Immigration Judge Caseloads and Lengthening Hearing Wait Times* (Oct. 2019), <https://trac.syr.edu/immigration/reports/579/>.

²¹ Statement of the Round Table of Former Immigration Judges Submitted to the House Judiciary Subcommittee on Immigration and Citizenship, Hearing on “Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts,” at 3 (Jan. 29, 2020), <https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-20200129-SD022.pdf>.

²² 85 Fed. Reg. at 75939.

²³ See American Immigration Lawyers Association, *The 2016 AILA Marketplace Study: A National Reference on the Economics of Immigration Law Practice*, at 18 (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”].

²⁴ 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.

fewer cases they can take on. Furthermore, because of the due process and statutory violations caused by the rule as discussed below, immigration practitioners would likely have to appeal more cases to the BIA and then to federal courts of appeals, again expending significant resources not just representing the cases but also seeking admission to the various federal courts of appeals. The proposed rule provides no data or analysis for how it reached the conclusion that it would not affect small entities, who make up a substantial proportion of all immigration practitioners.²⁵

The NPRM also fails to acknowledge that the proposed rule would also likely adversely affect a significant number of small businesses that employ noncitizens, who under the proposed rule would be issued removal orders. Removing such noncitizens would deprive the small business of a valued employee, with no easy way to replace the missing noncitizen worker. In sum, the agency did not comply with the Regulatory Flexibility Act because it failed to acknowledge or consider the proposed rule's effect on small business and small organizations.

Not only does the proposed rule fail to conduct the required regulatory flexibility analysis, but it falsely asserts that “the expected costs of this proposed rule are likely to be *de minimis*, whereas the benefits to all parties . . . are significant.”²⁶ The NPRM acknowledges that the proposed rule is likely to result in fewer continuances being granted and asserts that a reduction in continuances would “benefit aliens with valid claims who would otherwise have to wait longer to receive relief or protection” and “provide some benefit to attorneys, particularly pro bono attorneys, who would not need to commit to representation for several years if the hearing process worked more efficiently.”²⁷ In fact, as described in more detail below, the proposed rule will cause grave harm to large numbers of respondents—many of them particularly vulnerable—who have strong claims for legal protection but who will not qualify under the rule for a continuance for their claim to be adjudicated. Further, the rule will harm attorneys and organizations like ours, for the reasons stated above. The NPRM's failure to consider these harms and costs of the rule render it unjustifiable.

In sum, the proposed rule strips IJs of discretion to make case-by-case, individualized determinations that ensure due process, a result that will significantly economically impact CLINIC, its network, and other small entities. We urge EOIR to withdraw the rule in its entirety and to restore IJs' ability to manage their dockets through the fair use of continuances, administrative closure, and termination.

IV. COMMENTS ON SPECIFIC PROVISIONS

A. CLINIC Opposes the Proposed Rule's Limitations on Continuances for Asylum Seekers, as They Will Deprive Asylum Seekers of a Meaningful Opportunity to Have Their Claims Heard (Proposed 8 CFR § 1003.29(a))

²⁵ See AILA Study, *supra* note 23, at 8.

²⁶ 85 Fed. Reg. at 75939.

²⁷ *Id.*

CLINIC strongly opposes the proposed rule’s limitation on an IJ’s authority to grant a continuance to asylum seekers if it results in the asylum application adjudication exceeding 180 days. While the 180-day language derives from the statute, the Department of Justice has never attempted to implement this unworkable timeframe through regulations in the quarter century that has passed since the enactment of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act. Moreover, since the time that Congress created this time limit, the immigration court landscape has changed dramatically, as today the immigration court backlog has skyrocketed to 1,273,885 cases.²⁸ Of this number, EOIR states that nearly 590,000 pending cases include applications for asylum.²⁹ If EOIR now prioritizes the adjudication of newly filed asylum cases, the half million asylum cases in the backlog that EOIR has created will further languish as IJs would be required to schedule the newly filed cases for individual hearings on an expedited basis. At the same time, asylum seekers who have recently arrived in the United States will be forced to move forward with their asylum claims before they are able to secure legal counsel, mental health counseling, and expert witnesses for their cases.

CLINIC acknowledges that EOIR has already implemented nearly identical language to that of this proposed provision through a separate final rule, “Procedures for Asylum and Withholding of Removal,” that it published on December 16, 2021.³⁰ During the public comment period for the latter rule, CLINIC submitted a comment detailing the harm that this provision would cause asylum seekers. CLINIC hereby incorporates by reference our comment to the asylum procedures rule, and attaches it as a separate PDF (specifically pages 5-9 of that comment). For the reasons further detailed in the attached comment, CLINIC urges EOIR to rescind the asylum procedures rule and to withdraw the current NPRM, as both would unconscionably speed up asylum hearings at the same time that the administration has taken unprecedented steps to undermine asylum seekers’ rights.

B. CLINIC Opposes the Proposed Rule’s List of Good Cause Factors as Incomplete and Biased Against Respondents (Proposed 8 CFR § 1003.29(b)(1))

CLINIC opposes the proposed rule’s list of good cause factors because it fails adequately to take into account the harm to respondents of denying a continuance and would promote biased decision-making. The proposed regulation injects an improper subjective element into the good cause analysis by encouraging IJs to look behind the stated purpose of the continuance to investigate whether the purpose is “dilatatory or contrived.” This type of subjective inquiry invites bias and disparate treatment of similarly situated respondents. The proposed list of factors emphasizes “administrative efficiency”—something over which the respondent has no control—but does not call for consideration of the harm to the respondent if the continuance is denied, or consideration of whether a respondent’s due process or statutory rights require a continuance.³¹ Further, neither

²⁸ TRAC Immigration, *Immigration Court Backlog Tool* (Oct. 2020), https://trac.syr.edu/phptools/immigration/court_backlog/.

²⁹ EOIR Adjudication Statistics, Total Asylum Applications (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1106366/download>.

³⁰ See *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 81698, 81750 (Dec. 16, 2020) (amending 8 CFR § 1003.29).

³¹ See *Ahmed v. Holder*, 569 F.3d 1009, 1013-14 (9th Cir. 2009) (“[A] myopic insistence upon expeditiousness will not justify the denial of a meritorious request for delay, especially where the delay impairs the petitioner’s statutory

in the above-mentioned provision nor anywhere else in the entirety of the proposed rule is there any reference to or acknowledgement of special circumstances of vulnerable populations, whose situation might especially warrant additional time. These populations include respondents with mental disabilities,³² child respondents including unaccompanied children, trauma and torture survivors, rare language speakers, and individuals in detention. For all of these reasons, the proposed rule's myopic list of good cause factors is inadequate and unfair.

C. CLINIC Opposes the Proposed Rule's List of Scenarios That Do Not Demonstrate Good Cause (Proposed 8 CFR § 1003.29(b)(2))

CLINIC strongly opposes the proposed rule's list of situations that do not show good cause, as they would remove the IJ's discretion to fairly resolve cases considering the particular circumstances of the case. The proposed rule prohibits a finding of good cause for a continuance in three scenarios: (1) where the continuance would not materially affect the outcome, or, if based on a "collateral" matter, where the respondent has not demonstrated by clear and convincing evidence a likelihood of obtaining relief on the "collateral" matter; (2) in order to seek parole, deferred action, or prosecutorial discretion by DHS, and (3) if it would cause the immigration court to exceed a statutory or regulatory deadline. Each of these prohibitions is unwarranted.

First, the proposed rule's ban on continuances unless the respondent can show by "clear and convincing evidence" a likelihood of obtaining relief in the "collateral matter" creates an unduly high burden on the respondent and counsel, if any, and will decrease efficiency—thwarting the proposed rule's purpose. At the stage of a continuance, it is unreasonable to ask a respondent to prove by the high standard of "clear and convincing evidence" that the collateral relief will be granted, particularly where another agency (typically USCIS) and not the IJ has authority and expertise to grant the relief. Further, requiring respondents to prove the ultimate merits in order to obtain a continuance will result in inefficient use of scarce court resources, requiring IJs to conduct a mini-merits review even while another entity is concurrently doing a full merits review of the same application.

Moreover, proposed 8 CFR § 1003.29(b)(2)(i) would apparently require a respondent to show that any requested continuance would "materially affect the outcome of removal proceedings," even for initial continuances to secure counsel or to review the Notice to Appear (NTA) before pleading. Requiring a respondent—including those who are pro se—to make this showing before receiving such a continuance impedes due process and statutory rights to counsel, to present evidence, and to review and respond to the government's evidence.³³

rights. An immigrant's right to have his or her case heard should not be sacrificed because of the [IJ]'s heavy caseload." (brackets, citations and internal quotation marks omitted)).

³² See INA § 240(b)(3); *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011); Rehabilitation Act, 29 U.S.C. § 701 *et seq.*; see also, *e.g.*, *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG DTBx, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013).

³³ See INA §§ 240(b)(4)(A) (guaranteeing respondents the "privilege of being represented, at no expense to the Government, by counsel of the alien's choosing"); 240(b)(4)(B) (giving respondents the right to "a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government"); see also, *e.g.*, *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1302 (7th Cir. 1975) (concluding that denial of right to counsel was inherently prejudicial and rendered immigration proceedings "tainted from their roots" and "refus[ing] to indulge in 'nice calculations as to the amount of prejudice flowing from the denial'" (internal citation omitted)).

Second, the proposed rule would require IJs to deny continuances to respondents pursuing humanitarian protections like Deferred Action for Childhood Arrivals, humanitarian deferred action, parole, and prosecutorial discretion with DHS. Because the Trump administration has removed IJs' authority to terminate or administratively close such cases,³⁴ IJs will be forced to enter a removal order against many of these individuals. Removing individuals whom DHS has determined merit discretionary protection from removal is absurd and unfair. The proposed rule's continuance ban in this circumstance also works to thwart the parties' ability to achieve a mutually desired resolution of the case. It is particularly inappropriate for the administration to cabin an IJ's discretion to continue a case for the respondent to seek discretionary options with DHS given that the administration will soon change and new leadership may re-institute many prosecutorial discretion programs that the Trump administration eliminated. As noted above, CLINIC strongly urges the agency to reinstitute IJs' authority to administratively close and terminate cases; such a measure would particularly benefit this population and promote efficiency.

Finally, the proposed rule bans continuances that would "cause an immigration court to exceed a statutory or regulatory adjudication deadline." The proposed rule nowhere specifies what adjudication deadlines it contemplates, other than to refer again to the 180-day asylum adjudication deadline, which the regulation addresses specifically in a separate provision. CLINIC opposes this categorical and vague prohibition for the same reasons discussed in part IV.A above.

D. CLINIC Objects to the Proposed Rule's Diminishment of USCIS Immigration Applications as "Collateral" (Proposed 8 CFR § 1003.29(b)(3)) and Therefore Not Equally Valid

Proposed 8 CFR § 1003.29(b)(3) is titled "Continuances of Removal Proceedings Related to Collateral Immigration Applications." As an initial matter, CLINIC objects to proposed rule's repeated characterization of forms of immigration relief as "collateral," merely because they are adjudicated by USCIS rather than an IJ. The first definition of the adjective "collateral" in the Merriam Webster Dictionary is "accompanying as secondary or subordinate."³⁵ Nothing in the statutes granting these forms of protection allows the agency to characterize them as secondary or subordinate. Instead, EOIR should respect Congress's creation of statutory forms of immigration protection that confer lawful status, regardless of what executive agency adjudicates the application.

E. CLINIC Opposes the Proposed Rule's Unlawful Presumption Against Continuances for Individuals Applying for or Awaiting an Immigrant Visa, Which Will Particularly Harm Vulnerable Groups Congress Intended to Protect (Proposed 8 CFR § 1003.29(b)(3)(i), (ii))

CLINIC strongly opposes the proposed rule's presumption against continuances for many respondents pursuing visa petitions and eventual adjustment of status as cruel, unnecessary, and

³⁴ See *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018); EOIR, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (final rule published Dec. 16, 2020).

³⁵ Collateral (Adjective) Definition, Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/collateral> (last visited Dec. 10, 2020).

contrary to congressional intent. The proposed rule would render ineligible for continuances those seeking to obtain permanent resident status through a visa petition unless (1) approval of the petition would provide an immediately available visa or a priority date within six months, (2) they can demonstrate prima facie eligibility for visa, adjustment of status, and any waivers, and (3) the IJ has jurisdiction over any application for adjustment of status and any waivers. The practical effect of this arbitrary continuance ban will be that thousands of respondents who would almost certainly be granted adjustment of status will be ordered removed before they are able to pursue that relief. While the proposed rule will impact many groups, CLINIC’s comments here focus on the rule’s impact on one particularly vulnerable population—children and youth eligible for Special Immigrant Juvenile Status (SIJS).

The proposed rule will have a disastrous impact on SIJS-eligible respondents. Because there is a visa backlog affecting SIJS beneficiaries from Honduras, Guatemala, El Salvador, and Mexico,³⁶ many SIJS-eligible children from these countries—even those who have already been *approved* for SIJS—would be swiftly ordered removed under the proposed rule. This result conflicts with federal law and undermines the congressional intent behind the SIJS program. The text, purpose, and history of the SIJS provisions show that Congress intended to allow SIJS-eligible children to remain safely in the United States while waiting to adjust status.³⁷ CLINIC incorporates by reference the amicus brief it filed in *C.M.L. v. Barr*, which lays out in detail why denial of a continuance to an SIJS-eligible child due to the visa backlog—the result required by this proposed rule—violates the statute and due process.³⁸ The brief explains that SIJS protections are “meaningless if — in derogation of a state court finding that repatriation conflicts with the juvenile’s best interest — the Government separates [a child] from the caregiver with whom the state court has placed him and removes him from the United States on one of the grounds that Congress has said is inapplicable to him. Such a removal order is not justifiable merely because the juvenile, through no fault of his own, may have to wait years before applying to adjust status.” Despite these severe consequences, the proposed regulation does not consider its impact on SIJS-eligible children at all—nowhere in the NPRM are SIJS beneficiaries even mentioned.

But even engaging the proposed rule on its own terms, it is unjustifiable. It claims that its prohibition on continuances for those already found prima facie eligible or granted deferred action or parole is “in line with the general admonition against continuances based on relief that is

³⁶ See Final Action Dates for Employment-Based Preference Cases, in Visa Bulletin for December 2020, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2021/visa-bulletin-for-december-2020.html> (individuals granted SIJS are allotted visas from the EB-4 category).

³⁷ See, e.g., *Osorio-Martinez v. Att’y Gen. U.S.*, 893 F.3d 153, 168 (3d Cir. 2018) (“[T]he requirements for SIJ status . . . show a congressional intent to assist a limited group of abused children to *remain safely* in the country with a means to apply for LPR status.” (emphasis added) (citation and quotations omitted)); *Garcia v. Holder*, 659 F.3d 1261, 1271 (9th Cir. 2011) (concluding that Congress intended SIJS-based parole to be durable, entitling beneficiaries “to *remain in the country pending the outcome of their adjustment of status application*” (emphasis added) and to “assist a limited group of abused children to remain safely in the country with a means to apply for LPR status”); see also *C.J.L.G. v. Barr*, 923 F.3d 622, 628-29 (9th Cir. 2019) (en banc) (IJ erred in failing to inform respondent—who would be subject to visa backlog--of eligibility for SIJS).

³⁸ Amicus Brief in *C.M.L. v. Barr*, at 4 (10th Cir. filed Nov. 25, 2020), <https://www.lowenstein.com/media/6305/cml-v-william-barr-us-court-of-appeals-for-the-tenth-circuit-amicus-brief-11252020.pdf>. CLINIC was an amicus in this case along with a number of other nonprofit organizations, represented by Lowenstein Sandler LLP.

speculative.”³⁹ But, by definition, for individuals whose visa petitions the agency has already found prima facie approvable, their likelihood of obtaining relief is the opposite of speculative. It is not a question of the likelihood of obtaining relief, but rather merely a question of when they will be able to complete the process. Denying continuances and ordering removal of noncitizens where the agency has already preliminarily favorably adjudicated the case defies common sense.

Further, the proposed rule’s imposition of a bright-line six-month cut-off for whether a continuance may be granted when an individual is awaiting a priority date is arbitrary and unfair. The NPRM appears to have plucked the six-month timeframe out of thin air, asserting merely that “the Department believes that using a date six months or less from the priority date reflected in the Visa Bulletin for filing visa applications for the month in which the continuance request is made represents the clearest and most appropriate boundary for assessing remoteness for purposes of determining whether good cause exists” and that it “strikes the right balance between providing a reasonable opportunity for an alien to obtain visa-based relief and avoiding indeterminate delays based on visas that may not be current for a significant period of time.”⁴⁰ The NPRM cites no data or evidence to support these assertions, such as historical progressions of priority dates in the Visa Bulletin. In fact, priority dates vary from month to month and can jump significantly from one month to the next. The proposed rule concedes that “case law has not defined how near or remote visa availability should be to support a finding of good cause” but asserts that the proposed rule is “in line with current framework,” relying on *Matter of Quintero*.⁴¹ However, in that case the BIA affirmed the IJ’s continuance denial where the priority date for Mexican beneficiaries of second preference petitions like the respondent’s at the time of the October 1981 IJ decision was March 1970,⁴² and the decision did not indicate that the respondent had been admitted or paroled such that he would even be eligible to eventually adjust status in the United States. In sum, the proposed rule’s six-month rule is unsupported by case law or data and should be eliminated.

Further, the proposed rule’s prohibition on continuances in cases where the IJ lacks jurisdiction over adjustment of status, even for cases where the individual can immediately adjust status, is without lawful basis and an incredible waste of resources. Despite the fact that these individuals are statutorily eligible to immediately seek adjustment of status—which, if granted, would likely require termination of the removal proceedings—the proposed rule would force the IJ to order their removal. Congress said nothing in INA § 245(a) about which agency has jurisdiction to adjudicate the adjustment application. EOIR and DHS created jurisdictional rules such that “arriving aliens” have their applications heard by USCIS, even when in removal proceedings.⁴³ But there is no statutory basis to treat certain adjustment applicants differently in terms of allowing sufficient time for their claim to be adjudicated and for them to obtain lawful status. The NPRM relies on *Matter of Yauri*, but that case does not support the proposed rule as it involved an untimely motion to reopen and did not reach the issue of continuances.⁴⁴

³⁹ 85 Fed. Reg. at 75934.

⁴⁰ 85 Fed. Reg. at 75932-33.

⁴¹ 85 Fed. Reg. at 75932 (citing *Matter of Quintero*, 18 I&N Dec. 348, 350 (BIA 1982)).

⁴² Interpreter Releases Vol. 58, No. 36, at 465 (Sept. 15, 1981) (reporting visa numbers for October 1981).

⁴³ See 8 CFR §§ 1245.2(a)(1); 245.2(a)(1).

⁴⁴ 25 I&N Dec. 103, 111 n.8 (BIA 2009) (“There can be sound reasons to continue or administratively close proceedings while matters outside the Immigration Judge’s jurisdiction are resolved, often including reasons directly related to administrative efficiency and the best utilization of adjudicative resources. . . . [W]hile we acknowledge

The proposed continuance prohibition for those seeking adjustment with USCIS is further flawed because it is based in part on the premise that individuals who will be issued removal orders under this proposed rule will be able to get a stay of removal from DHS.⁴⁵ But it is inappropriate for EOIR to evade responsibility for ensuring fair proceedings by suggesting that DHS—the adverse party in removal proceedings and an agency that in recent years rarely grants stays of removal—could grant a stay in its discretion. DHS is not a neutral arbiter, and a DHS stay denial is not subject to judicial review. The prohibition on continuances in this situation will thwart the stated purpose of efficiency, as it will result in needless BIA appeals of continuance denials for respondents pursuing adjustment with USCIS.⁴⁶ This rule places an undue burden on respondents, forcing them to jump through complex and expensive administrative hoops (appeal continuance denial with the BIA, file a stay request with DHS) and does not address how the individual can remedy the order once they are granted LPR status.⁴⁷ Even worse, by mandating removal orders for noncitizens who the agency has decided must file adjustment with USCIS, EOIR creates a negative discretionary factor that may result in USCIS denying the adjustment application,⁴⁸ an impermissible result that thwarts congressional intent.

As noted above, CLINIC strongly urges the agency to reinstitute IJs’ authority to administratively close and terminate cases. Such a measure would particularly benefit this population and promote efficient and final resolution of cases in a way that protects the statutory and due process rights of noncitizens.

F. CLINIC Opposes the Proposed Rule’s Presumption Against Continuances to Apply for Nonimmigrant Visas (Proposed 8 CFR § 1003.29(b)(3)(iii), (iv))

CLINIC strongly opposes the proposed rule’s presumption against continuances for many respondents pursuing nonimmigrant visas. The proposed rule creates a presumption against continuances to apply for a nonimmigrant visa or wait for a nonimmigrant visa to become available, including any waiver, unless visa approval would vitiate all removal grounds and final approval of the visa and receipt of the applicable visa has occurred or will occur within six months of the continuance request. Under this proposed rule, survivors of serious crimes and severe trafficking in persons pursuing U and T nonimmigrant status would be ineligible for continuances and face immediate removal. This would be the case even for those who had received a prima facie or bona fide determination from USCIS. By obliterating protection from removal for survivors, the proposed rule defies Congress’s intent to protect victims and provide them with a way to remain

the arguments raised surrounding the question whether proceedings can or should be continued when an arriving alien’s adjustment application is pending with the USCIS, our decision in this case does not resolve that issue.”).

⁴⁵ See 85 Fed. Reg. at 75933 (“The potential availability of a stay of removal from DHS further diminishes any need to keep immigration proceedings open in circumstances in which an immigration judge or the Board can take no action on a collateral application.”).

⁴⁶ See 85 Fed. Reg. at 75934 n.12 (suggesting that respondents in this situation will file appeals).

⁴⁷ See EOIR, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (final rule published Dec. 16, 2020) (eradicating *sua sponte* reopening and BIA remands to consider new evidence submitted during pendency of appeal).

⁴⁸ See USCIS Policy Manual, Vol. 7, Ch.10.B.2 n.32, <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10#footnotelink-32> (stating that in adjustment of status adjudication “where a removal order has been issued to an “arriving alien” but not executed, USCIS generally does not exercise favorable discretion”).

safely in the United States. The NPRM does not address T nonimmigrant status at all, much less consider the fact that T applicants lose eligibility if they are not in the United States.⁴⁹

What's more, by requiring that the respondent prove that they will win final approval and obtain a visa within six months in order to qualify for a continuance, the proposed rule effectively bans continuances outright, since it would be impossible for any applicant to make this showing. Nowhere does the NPRM even attempt to justify this arbitrary six-month rule or provide any evidence or data to explain how it was derived. Requiring that the applicant prove that the agency will adjudicate the application and issue the visa in six months requires the applicant to demonstrate something that is completely outside of their control and depends solely on the agency's bureaucracy. But "delays in the USCIS approval process are no reason to deny an otherwise reasonable continuance request, and "basing a denial on such grounds is akin to 'blaming a petitioner for an administrative agency's delay.'"⁵⁰

G. CLINIC Opposes the Proposed Rule's Restrictions on Continuances for Individuals Seeking Relief over Which DHS Has Initial Jurisdiction (Proposed 8 CFR § 1003.29(b)(3)(v))

CLINIC strongly opposes the proposed rule's limitations on continuances for individuals pursuing immigration protections over which DHS has initial jurisdiction. Under this proposed regulation, even though certain individuals have a statutory right to first pursue relief with DHS, the regulation allows IJs to deny a continuance while DHS is exercising its statutory adjudication authority over the respondent's application if the IJ decides that the person has not shown prima facie eligibility for the benefit. The proposed rule also wastefully forces unripe cases to proceed to final hearing in immigration court while the DHS application is pending, if the respondent has any other form of relief they might seek in immigration court. This proposed rule would impact respondents applying for a variety of immigration protections, but CLINIC's comment focuses on its impact on unaccompanied children seeking asylum.

The proposed rule would thwart the purpose behind the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA),⁵¹ which Congress enacted in recognition of the vulnerability and special needs of unaccompanied children. Among other protections for unaccompanied children, the TVPRA grants USCIS initial jurisdiction over their asylum applications.⁵² Thus, pursuant to the TVPRA, unaccompanied children have a "statutory right to

⁴⁹ In order to be eligible for T nonimmigrant status, the applicant must be "physically present in the United States." INA § 101(a)(15)(T)(i)(II); 8 CFR §§ 214.11(b)(2), 214.11(g)(2) (an individual who is removed from the United States after the trafficking act is generally "deemed not to be present in the United States"). A T applicant must show that he or she would suffer "extreme hardship involving unusual and severe harm" if removed from the United States. INA § 101(a)(15)(T)(i)(IV); 8 CFR § 214.11(i).

⁵⁰ *Malilia v. Holder*, 632 F.3d 598, 606 (9th Cir. 2011) (quoting *Ahmed*, 569 F.3d at 1013); see also *Rajah v. Mukasey*, 544 F.3d 449, 456 (2d Cir. 2008) (reversing denial of continuance and remanding for further proceedings recognizing "delays endemic in almost every stage of acquiring any visa"); *Subhan v. Ashcroft*, 383 F.3d 591, 593-95 (7th Cir. 2004) (concluding that the IJ erred in denying third continuance because the Department of Labor had not yet acted on pending labor certification and that the IJ violated INA § 245(i) in denying a continuance without providing a reason consistent with that statute).

⁵¹ William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. 110-457, 122 Stat. 5044 (2008).

⁵² TVPRA § 235(d)(7)(B), *codified at* INA § 208(b)(3)(C) ("An asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child . . .").

initial consideration of an asylum application by the DHS.”⁵³ This statutory right is crucial to ensuring that unaccompanied children have a meaningful and fair opportunity to have their asylum claims heard. “The USCIS asylum process is a less adversarial system more sensitive to the special needs of children who do not know how to navigate an immigration system designed for adults”—rather than “having to be cross-examined in an adversarial courtroom by trained government lawyers, unaccompanied children engage with USCIS officers trained to conduct non-adversarial interviews and to apply child-sensitive and trauma-informed interview techniques.”⁵⁴

For respondents such as asylum-seeking unaccompanied children who have a statutory right to pursue initial adjudication with USCIS, the proposed regulation unlawfully allows IJs to deny a continuance if the IJ determines that the individual is not prima facie eligible or disagrees with USCIS’s determination that USCIS has jurisdiction. This inappropriately intrudes on USCIS’s initial authority to determine its own jurisdiction and applicants’ eligibility for asylum. This is particularly problematic in the case of USCIS exercising its initial jurisdiction over the asylum applications of unaccompanied children, where USCIS has more expertise in applying complex asylum law with a child-focused lens. The proposed rule allows EOIR to thwart the TVPRA’s purpose by forcing an asylum-seeking unaccompanied child to go forward on their asylum application in the adversarial immigration court process even while USCIS is adjudicating the claim through the more child-appropriate process that Congress mandated, whenever the IJ determines that the child is not prima facie eligible for asylum or if the IJ disagrees with USCIS’s determination of its own jurisdiction. Instead, EOIR should act consistent with the TVPRA and recognize that an unaccompanied child’s pending asylum application with USCIS is per se good cause for a continuance. The IJ has no authority to further evaluate the application for likelihood of success or prima facie eligibility because the IJ’s statutory authority over the asylum application arises only if and when USCIS, after exercising its exclusive initial jurisdiction, refers the matter to the immigration court. In other words, a continuance for an unaccompanied child who has filed or wishes to file for asylum is not a discretionary consideration for the IJ, but rather the statute requires that the IJ grant such continuances (or otherwise postpone the proceedings) to allow the child to vindicate their statutory right to seek asylum with USCIS in the first instance. Refraining from re-assessing eligibility or jurisdiction while USCIS is adjudicating a case pursuant to USCIS’s own jurisdiction policy facilitates “smooth coordination” among agencies, a priority EOIR recognized shortly after the TVPRA was enacted.⁵⁵

The proposed regulation would also result in massive inefficiency, contrary to the NPRM’s stated purpose. Forcing dual adjudications of the same application—one with USCIS, the agency with statutory initial jurisdiction, and one with the immigration court, despite it lacking jurisdiction—unnecessarily expends scarce court time and resources. If IJs instead properly granted continuances in such cases, the ultimate result will often be termination of the immigration court proceeding after USCIS grants the relief. Instead, a respondent might end up with a grant of relief from USCIS—the agency with authority to adjudicate the application—and a denial on the same

⁵³ *Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. 168, 169 n.2 (BIA 2017).

⁵⁴ *J.O.P. v. DHS*, 409 F. Supp. 3d 367, 373 (D. Md. 2019).

⁵⁵ Memorandum from Michael C. McGoings, EOIR Acting Chief Immigration Judge, Implementation of the Trafficking Victims Protection Reauthorization Act of 2008 Asylum Jurisdictional Provision (Interim Guidance), at 2 (Mar. 20, 2009). CLINIC urges EOIR to vacate *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018), and other ill-conceived policies that unlawfully allow the IJ to usurp USCIS’s statutorily mandated initial jurisdiction.

application and removal order from the immigration court. The NPRM does not consider the substantial resources that will be required to untangle this mess, or the burden it imposes on respondents, representatives, and the immigration system.

Inefficiency is also what will result from the proposed rule's requirement that continuances be denied if the respondent has any separate relief before the court. The proposed rule forces IJs to waste scarce hearing time on a respondent's back-up relief, whereas if permitted to continue the case to allow USCIS to adjudicate the primary relief, the result would often be termination of the immigration proceedings following a grant from USCIS without ever having an immigration court merits hearing. As an example, the proposed rule would require the IJ to deny a continuance to a conditional permanent resident pursuing a straightforward I-751 with USCIS and instead move forward to a merits hearing on respondent's back-up relief of asylum, withholding and protection under the Convention Against Torture.

H. CLINIC Strongly Opposes the Proposed Rule's Unlawful Limitations on Continuances to Secure Representation (Proposed 8 CFR § 1003.29(b)(4)(i), (ii))

CLINIC strongly opposes the proposed rule's limitations on continuances to allow a pro se respondent to find counsel, as it would violate respondents' statutory and due process rights. The proposed rule would prohibit IJs from granting any continuances, of any length, to find counsel in many cases, and even in the narrow circumstances where an IJ would be permitted to grant a continuance to secure counsel, only a single, short continuance would be permitted. There would be no ability to consider individual circumstances as is required by due process. In short, the proposed rule would effectively eliminate continuances to secure representation.

The proposed rule violates the due process and statutory rights to counsel to which noncitizens in removal proceedings are entitled. In eradicating continuances to secure counsel, the NPRM flouts longstanding precedents recognizing that reasonable continuances to secure counsel are required as a matter of due process.⁵⁶ Instead, it relies on a statute governing the initiation of removal proceedings that nowhere even mentions continuances, much less continuances to seek counsel. That statute requires a minimum of 10 days between the service of the NTA and the first hearing so that a respondent may have the "opportunity to secure counsel before the first hearing date."⁵⁷ However, it does not speak to continuances that may be required if the noncitizen is not able to

⁵⁶ See INA §§ 240(b)(4)(A), 292; 8 CFR §§ 1003.16(b); 1240.3, 1240.10(a) (2012); *Biwot v. Gonzales*, 403 F.3d 1094, 1100 (9th Cir. 2005) (denial of reasonable time to locate counsel was "tantamount to denial of counsel" and noting that in considering whether time is reasonable, courts look at, *inter alia*, the "realistic time necessary to obtain counsel; the time frame of the requests for counsel; the number of continuances; any barriers that frustrated a petitioner's efforts to obtain counsel, such as being incarcerated or an inability to speak English; and whether the petitioner appears to be delaying in bad faith," *id.* at 1099); *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004) ("Congress has recognized [the right to counsel] among the rights stemming from the Fifth Amendment guarantee of due process that adhere to individuals that are the subject of removal proceedings."); *Rios-Berrios v. INS*, 776 F.2d 859, 863 (9th Cir. 1985) ("[T]he immigration judge, *sua sponte* if necessary, should have continued the hearing so as to provide the petitioner a reasonable time to locate counsel, and permit counsel to prepare for the hearing."); *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1300 (7th Cir. 1975) (holding that by denying the respondents a reasonable further continuance, "the immigration judge denied the Castanedas procedural due process by depriving them of their right to counsel granted by statute and regulation"); see also *Matter of C-B-*, 25 I&N Dec. 888, 890 (BIA 2012) ("[T]he Immigration Judge's denial of a continuance to seek such representation resulted in the denial of the respondent's statutory and regulatory privilege.").

⁵⁷ INA § 239(b)(1).

secure counsel by the time of the first hearing.⁵⁸ The NPRM disingenuously asserts that because the statute requires a minimum time period of 10 days between NTA service and the first hearing, those 10 days are necessarily “a reasonable amount of time to secure counsel.”⁵⁹ This assertion is preposterous on its face and a shameful low for the agency, which provides no data or evidence to justify how a blanket 10-days-maximum rule could possibly be “a reasonable and realistic period of time to provide a fair opportunity for a respondent to seek, speak with, and retain counsel” as required by the agency’s own precedent.⁶⁰ Respondents who are, for example, unaccompanied minors, individuals with disabilities, or indigent would be severely disadvantaged by this time limit.

In order to afford respondents a “reasonable and realistic” opportunity to secure counsel and comport with due process, IJs must grant a period of time sufficient to account for the realities that the particular respondent faces. One study of immigration court continuance practice in cases of children and families found that “increasing the time between the first and second hearing from one to two months *doubled* children’s and families’ chances of finding a lawyer,”⁶¹ and that “immigrants granted longer continuances are significantly more likely to find representation and avoid deportation.”⁶² The study identified several barriers to quickly accessing counsel that explained why sufficient continuance time made such a difference, including the fact that immigrants may need time to save up the money to pay the thousands of dollars that full representation can cost and that it can take significant time, even with money saved up, to reach an available attorney and secure representation.⁶³ For indigent respondents who seek free or low-cost legal services, the respondent will be at the mercy of the availability and capacity of local free or low-cost legal services in the area. Some jurisdictions suffer from a deeply inadequate pool of legal services providers, and legal services providers sometimes run out of capacity and place respondents on a wait list.⁶⁴

In response to the Trump Administration’s 2018 “Zero Tolerance” policy that intentionally separated parents from their young children, in 2018 CLINIC began a project to find pro bono counsel on behalf of these families for representation in their immigration cases. Even in these very sympathetic cases, it has been extremely difficult to quickly find attorneys to represent these families. For example, many of the families had relocated to Florida, often to more remote parts of the state, and CLINIC learned that there was a scarcity of immigration representatives in that

⁵⁸ While the statute permits the IJ to proceed with the hearing if the required 10 days have passed, INA § 239(b)(1)(C), it does not speak to additional continuances that may be required as a matter of due process and the respondent’s statutory right to counsel.

⁵⁹ 85 Fed. Reg. at 75935-36.

⁶⁰ *Matter of C-B-*, 25 I&N Dec. 888, 889 (BIA 2012).

⁶¹ David Hausman & Jayashri Srikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*, 84 *FORDHAM L. REV.* 1823, 1825 (2016).

⁶² *Id.* at 1832.

⁶³ *Id.* at 1827.

⁶⁴ *Cf.* Statement of Judge A. Ashley Tabaddor, President, National Association of Immigration Judges, Before the United States House of Representatives Committee on the Judiciary Subcommittee on Immigration and Citizenship, Hearing on “The State of Judicial Independence and Due Process in U.S. Immigration Courts,” at 6 (Jan. 29, 2020), <https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-Wstate-TabaddorA-20200129.pdf> (“[I]t is not infrequent that a case needs to be continued because . . . a respondent has only gathered the funds to hire an attorney shortly before the hearing in an area where pro bono attorneys are not accepting new clients.”).

region such that there were many cases that we could not place until we were able to secure some limited funding to address this need, a process that took many months. CLINIC has also identified formerly separated families who have settled in other remote locations where there are no experienced nonprofit immigration legal services providers, and it has rendered it challenging to find representation for these families, let alone within 10 days of a hearing. Even when CLINIC was helping to facilitate finding counsel in major metropolitan areas, it was difficult to quickly place cases due to non-profit, law school clinics, and private attorneys' capacity. Moreover, scheduling an initial intake appointment often took weeks to coordinate, some representatives required multiple intake appointments, and sometimes after the intake process, the representative would decline to take the case, requiring the family to continue to seek counsel.

Instead of recognizing these realities, the NPRM asserts without evidence that respondents "generally have ample time to seek representation if they exercise diligence" and that the problem is that they do not want to pay or have a meritless case so they cannot find an attorney to take it.⁶⁵ The NPRM's assertion that the time between NTA and first hearing is "ample" fails to recognize the fact that many pro se respondents are unfamiliar with the immigration court process. It is not until their first immigration court hearing that they learn from the IJ, through an interpreter in their own language, what the immigration court process will entail and what the next steps are.

Not only does the proposed rule violate constitutional and statutory rights to counsel grounded in fundamental fairness, but its practical effect will be to prevent thousands of noncitizens with meritorious claims for relief from accessing protection to which they are entitled under U.S. law. The result of the denial of counsel will be the entry of removal orders that return vulnerable noncitizens to a country where they will suffer serious harm or even death. The agency should care about getting it right and ensuring that those entitled to relief under our laws are able to seek it; instead, the NPRM hails the "importan[ce]" of "ensur[ing] that representation does not undermine the orderly procedure of the immigration courts and is not a hindrance to fair and timely adjudications."⁶⁶ The proposed regulation prioritizes efficiency over justice, fairness, and congressional intent.

Studies confirm an obvious proposition—those with counsel are much more likely to be granted relief than those who lack counsel. One study found that the odds of being granted relief were 15 times higher for represented noncitizens than for those who proceeded pro se.⁶⁷ And for certain vulnerable populations, such as those with mental disabilities and children, their ability to access legal relief is virtually nonexistent without the guidance of counsel. Even for respondents who have a basic understanding of immigration proceedings, their likelihood of meeting their burden of proof to win immigration relief without an immigration attorney is very low. A salient example is in the case of asylum applications. The agency, particularly in recent years, has imposed ever-more-burdensome legal requirements that a respondent must meet to prove eligibility for asylum.⁶⁸

⁶⁵ 85 Fed. Reg. at 75936 & n.16.

⁶⁶ 85 Fed. Reg. at 75935.

⁶⁷ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 9 (2015).

⁶⁸ See, e.g., *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019); *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

The most recent example is a draconian asylum rule that is slated to go into effect next month.⁶⁹ Without an attorney who is familiar with the lengthy regulation and can prepare the respondent's case in light of current interpretations of law, a pro se respondent is likely to have their application pretermitted by the IJ without even the opportunity for a hearing where they can tell the IJ why they fear persecution if returned. As one former IJ explained, "a knowledge of existing case law is essential in crafting a proposed social group to present to the immigration judge. In other words, the denial of additional continuances to allow an asylum applicant to obtain representation in order to move a case along can be fatal to an individual's chances for obtaining relief, and can further undermine the applicant's chance of success on appeal."⁷⁰

Instead of recognizing these realities, EOIR cites what appear to be inflated representation rates and then seems to blame the fact that some respondents are represented for "undermin[ing] the orderly procedure of the immigration courts."⁷¹ While EOIR claims that nearly two-thirds of respondents have representation and nearly 90 percent of asylum seekers are represented,⁷² these percentages are wildly misleading. While the NPRM claims that "nearly ninety percent of those seeking asylum have representation," it cites to its own data about those with pending cases, *i.e.*, those who have already filed an asylum application. The NPRM's misleading use of the term "asylum seekers" suggests a much larger group of respondents (many of whom are likely unrepresented) than those who have successfully filed an asylum application with the immigration court.

Further the NPRM's claim that nearly two thirds of respondents are represented does not appear to include the hundreds of thousands of respondents against whom IJs have issued *in absentia* removal orders during the Trump administration. Noncitizens are more likely to attend court hearings, and apply for relief, when they are represented.⁷³ The EOIR data thus only proves the point that without representation, many asylum seekers and other respondents have no realistic ability to seek relief for which they are eligible. EOIR data released to CLINIC shows, for example, that 92.6 percent of respondents with *in absentia* orders issued in fiscal year 2020 were unrepresented, 88 percent of unaccompanied children with *in absentia* orders issued in fiscal year FY2020 were unrepresented, and 94.2 percent of family units who received *in absentia* removal orders in the first half of FY 2020 were unrepresented.⁷⁴

⁶⁹ EOIR & DHS, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 (final rule published Dec. 11, 2020).

⁷⁰ Jeffrey S. Chase, *In Support of Continuances* (Aug. 13, 2017), <https://www.jeffreyschase.com/blog/2017/8/3/in-support-of-continuances>.

⁷¹ 85 Fed. Reg. at 75935.

⁷² *Id.*

⁷³ Marissa Esthimer, *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?*, Oct. 3, 2019, Migration Policy Institute, <https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point#:~:text=Migration%20Information%20Source-.Crisis%20in%20the%20Courts%3A%20Is%20the%20Backlogged%20U.S.%20Immigration,System%20at%20Its%20Breaking%20Point%3F&text=It%20examines%20the%20overall%20backlog,by%20court%20and%20representation%20status> ("Noncitizens are also more likely to attend their court hearings if they have representation. For proceedings beginning in FY 2008 to June 2019, 97 percent of immigrants with an attorney appeared, compared to 83 percent of the total, according to an analysis of TRAC data.")

⁷⁴ CLINIC, *FOIA Disclosures on In Absentia Removal Numbers Based on Legal Representation* (Mar. 27, 2020), <https://cliniclegal.org/resources/freedom-information-act/foia-disclosures-absentia-removal-numbers-based-legal>.

I. CLINIC Opposes the Proposed Rule’s Blanket Denial of Good Cause Based on Representative Workload (Proposed 8 CFR § 1003.29(b)(4)(iii))

CLINIC strongly opposes the proposed rule’s limitations on continuances based on a representative’s workload or obligations in other cases as nonsensical. As an initial matter, the NPRM offers no explanation for why this rule applies only to respondents’ representatives and not to DHS attorneys, who are known to arrive in court without the file and to seek (and be granted) continuances for this reason.⁷⁵ Further, the NPRM states that “professional responsibility obligations require that representatives do not take on no [sic] more cases than they can handle,”⁷⁶ but this statement is circular—representatives are only able to handle multiple cases because they are able to control deadlines and seek continuances to space out workload. While the NPRM asserts that “it would not constitute good cause if a representative is not abiding by [the requirements to provide competent and diligent representation],”⁷⁷ granting continuances as appropriate would ensure that representatives can provide competent and diligent representation. This rigid prohibition is likely to disproportionately harm mission-driven nonprofit organizations, like many of CLINIC’s affiliates, who are called by their faith or other values to provide low- or no-cost representation to as many indigent noncitizens as possible, noncitizens who would otherwise be forced to proceed pro se.

J. CLINIC Strongly Opposes the Proposed Rule’s Effective Eradication of Continuances for Preparation (Proposed 8 CFR § 1003.29(b)(4)(iv))

CLINIC strongly opposes the proposed rule’s unreasonable and draconian limit on continuances for preparation, as it conflicts with respondents’ statutory right to present their case and right to due process in removal proceedings. The proposed rule would essentially eradicate continuances to prepare the case, with the narrow exception of allowing one continuance, of a maximum of 14 days, prior to pleading to the NTA. The proposed rule would apparently prohibit continuances for any other type of preparation, such as to prepare the filing of an application for relief, to obtain supplemental evidence in support of an application, or to review and respond to newly filed DHS evidence. As IJ Ashley Tabaddor testified in a hearing before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Immigration and Citizenship, “[I]t is not infrequent that a case needs to be continued because evidence critical to a respondent’s case arrives late from overseas and needs to be translated. . . or a change in the law requires additional briefing on a complex issue. . . .”⁷⁸ But the proposed rule would ban continuances for these crucial reasons. And, despite the fact that respondents generally lack a recognized right to discovery in removal proceedings, the proposed rule would apparently prohibit a continuance for purposes of a

⁷⁵ At least six attorneys in CLINIC’s DVP program have personally witnessed this occur in immigration court.

⁷⁶ 85 Fed. Reg. at 75936.

⁷⁷ *Id.*

⁷⁸ Statement of Judge A. Ashley Tabaddor, President, National Association of Immigration Judges, Before the United States House of Representatives Committee on the Judiciary Subcommittee on Immigration and Citizenship, Hearing on “The State of Judicial Independence and Due Process in U.S. Immigration Courts,” at 6 (Jan. 29, 2020), <https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-Wstate-TabaddorA-20200129.pdf>

respondent seeking and obtaining access to their own records, which are in the government's possession and are often crucial to their case.⁷⁹

The proposed rule's ban on preparation continuances—including the crucial types of continuances listed above—amounts to a violation of a respondent's statutory and constitutional rights. Noncitizens in removal proceedings have the statutory right to “a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government.”⁸⁰ Noncitizens also have a right to due process, which requires that they be afforded an opportunity to fully and fairly present their case.⁸¹

Aside from generally violating the INA and the Constitution, the proposed rule also fails to consider its unfair and disparate impact on vulnerable populations whose rights Congress has required the government to protect. The NPRM offers no discussion of how this rule would burden children, including unaccompanied children. Indeed, it frustrates Congress's mandate in the TVRPA that “[a]pplications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases.”⁸² The rule's blanket denial of preparation continuances to respondents including unaccompanied children will “mean that children will be forced to quickly disclose traumatic case histories—and link those experiences to the complex immigration legal framework on their own—and be ready to present their cases without sufficient time to meaningfully work with legal counsel to develop their cases.”⁸³ This result violates due process and frustrates the TVPRA's purposes.

The proposed rule's categorical ban on preparation continuances also fails to consider those with mental disabilities, including individuals with trauma-related disabilities hindering their ability to meaningfully present their case unless provided appropriate safeguards.⁸⁴ In fact, the NPRM fails to acknowledge the agency's own precedent, *Matter of M-A-M-*, which recognizes that continuances may be necessary in the process of assessing a respondent's competency “to allow the parties to gather and submit evidence relevant to these matters, such as medical treatment reports, documentation from criminal proceedings, or letters and testimony from other third party sources that bear on the respondent's mental health,” “to be closer to family or available treatment programs,” or “to allow for further evaluation of competency or an assessment of changes in the respondent's condition.”⁸⁵

⁷⁹ See *Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010) (recognizing right of access to file in Ninth Circuit and noting that it would “unconstitutional” if a respondent was required to rely on a FOIA request to gain access to government records but was denied actual access due to delay).

⁸⁰ INA § 240(b)(4)(B).

⁸¹ See, e.g., *Cruz Rendon v. Holder*, 603 F.3d 1104, 1111 (9th Cir. 2010) (concluding that IJ violated due process by denying continuance so that respondent could obtain evidence of her child's special needs).

⁸² TVPRA § 235(d)(8), codified at 8 U.S.C. § 1232(d)(8).

⁸³ Vera, *Express Injustice: Expedited Immigration Hearings Pose Danger to Detained Children's Right to a Fair Process* (July 2020), <https://www.vera.org/express-injustice-expedited-immigration-hearings>.

⁸⁴ See INA § 240(b)(3); *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011); Rehabilitation Act, 29 U.S.C. § 701 *et seq.*; see also, e.g., *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG DTBx, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013).

⁸⁵ 25 I&N Dec. 474, 481 (BIA 2011); see also *id.* at 483 (specifically listing a continuance as an example of an appropriate safeguard).

Not only does the proposed rule violate the due process and statutory rights of respondents and particularly prejudice vulnerable groups, but the NPRM's justification also fails on its own terms. The NPRM claims that preparation continuances are unnecessary because preparation time is "already built into immigration proceedings, especially between a master calendar hearing and an individual merits hearing."⁸⁶ While this may be true in some cases, it is not true across the board—some respondents are not granted adequate time between a master and individual. Further, the NPRM does not acknowledge that EOIR recently implemented a "case flow" policy that would essentially eradicate master calendar hearings in many cases altogether and impose tight deadlines for the filing of all relief.⁸⁷ The NPRM disrespectfully implies, without any evidence or data to support the claim, that representatives seek additional time for "putative" preparation which "raises questions about the true purpose of the requested delay."⁸⁸

Finally, the proposed rule is biased as it applies to only one party in the proceedings—the respondent and their representative—while apparently permitting the IJ to grant the other party—DHS—preparation continuances for any reason.

K. CLINIC Opposes the Proposed Rule's Eradication of Continuances for Representative Scheduling Conflicts (Proposed 8 CFR § 1003.29(b)(4)(v))

CLINIC opposes the proposed rule's overly narrow provision related to continuances for representative scheduling conflicts, as it unreasonably limits an IJ's discretion to consider the individual circumstances surrounding a representative's conflict. While CLINIC agrees with the general premise that a representative should alert the court to pre-existing scheduling conflicts, representatives, like all human beings, occasionally make mistakes such as by writing a hearing on the wrong date in one's calendar. In such a circumstance, the proposed rule would essentially punish the respondent and deny the right to counsel by categorically prohibiting a continuance despite the representative's unavailability.

The NPRM attempts to justify the removing of IJ discretion to continue cases in these circumstances by citing the "disregard shown to immigration courts by practitioners who either misleadingly inform the immigration judge that they do not have a conflict when scheduling a future hearing or take on cases in other courts after the immigration court hearing has been scheduled knowing that a conflict exists."⁸⁹ But it offers no evidence or data about the prevalence of this alleged problem, such as how often a practitioner "misleadingly inform[s]" an IJ that they do not have a scheduling conflict.

Further, the proposed rule would only allow a continuance for an after-acquired scheduling conflict if the representative were appointed by the court as counsel in that case, likely a rare occurrence. Even if the representative is not able to move the other hearing and did not have input in scheduling

⁸⁶ 85 Fed. Reg. at 75936; *see also id.* at 75937 n.20 ("[T]he normal time between a master calendar hearing and an individual merits hearing should provide an attorney ample time for preparation. . . .").

⁸⁷ Memorandum from James R. McHenry III, EOIR Dir., Enhanced Case Flow Processing in Removal Proceedings (Nov. 30, 2020), <https://www.justice.gov/eoir/page/file/1341121/download>.

⁸⁸ 85 Fed. Reg. at 75937.

⁸⁹ 85 Fed. Reg. at 75937.

it, the proposed rule would punish the representative and force them to choose one client over another, resulting in the other client being denied counsel.

The proposed rule is also biased, as it imposes its prohibition on continuances on only one party to the proceedings—the respondent’s representative—but not on the DHS attorney.

L. CLINIC Opposes the Proposed Rule’s Limited Allowance of a Short Continuance to Respondents Whose Representative Fails to Appear at a Hearing (Proposed 8 CFR § 1003.29(b)(4)(vi))

While CLINIC agrees that IJs should grant continuances to respondents whose representative fails to appear for a scheduled hearing, the proposed rule is overly restrictive in permitting a maximum continuance of 14 days. The proposed rule fails to grapple with the myriad reasons outside of the representative’s control that they may fail to appear for a hearing, such as a health emergency or car accident on the day of the hearing. It can be difficult or impossible to reach a live person at a particular immigration court on the day of the hearing when such unexpected events occur. The proposed rule punishes respondents and their counsel by only allowing for a maximum continuance length of 14 days in these circumstances, even where the particular facts would persuade an IJ that more time was necessary. (for example, in a situation where the representative remains in the hospital 14 days after an accident that occurred on the hearing date). Further, an IJ may not have any open hearing slot within 14 days, which seemingly would require the IJ to force the respondent to proceed without their representative since the rule would prohibit a longer continuance. Forcing respondents to proceed without their representative in this situation amounts to a deprivation of the right to counsel.

M. CLINIC Opposes the Proposed Regulation’s Drastic Limitations on IJs’ Authority to Continue a Case on Their Own Motion (Proposed 8 CFR § 1003.29(b)(5))

CLINIC opposes the proposed rule’s removing of IJs’ discretion to continue cases *sua sponte* where they determine that a continuance is warranted. The rule strips IJs of authority to grant continuances on their own motion where they determine good cause exists, unless one of 14 narrow circumstances is present. While many of the 14 specified categories would certainly present good cause for a continuance, it would be impossible for a regulation to come up with a complete list of all possible circumstances that could arise and would require a continuance. Further, the catch-all provision in the last category imposes an extremely high threshold, much more burdensome than “good cause.”

The proposed rule eliminates IJs’ discretion to manage cases on their docket in order to ensure fairness and efficient use of resources. The NPRM offers no data or evidence about any problem that this proposal rule would remedy, such as data on the number and type of IJ-initiated continuances. There is no legitimate reason to strike—as the NPRM would—the current text of 8 CFR § 1240.6, which grants IJs the authority to grant “a reasonable adjournment . . . at his or her

own instance.” This provision, like the rest of the proposed regulation, reflects a complete lack of trust in IJs to exercise discretion and common sense, something the agency once valued.⁹⁰

N. CLINIC Opposes the Proposed Rule’s Rigid Limitations on Continuances of Merits Hearings Because They Eliminate IJ Discretion to Continue a Case Where Fairness Requires It Based on Individual Circumstances (Proposed 8 CFR § 1003.29(b)(6))

CLINIC strongly opposes the proposed regulation curtailing IJs’ authority to continue a merits hearing unless the case falls within a narrow list of circumstances and limiting a merits hearing continuance to a maximum of 30 days. While CLINIC recognizes that unexpected and last minute cancellation of merits hearings are harmful to the parties and can impede the respondent’s ability to present their case, there are myriad unforeseen circumstances not included in the proposed list that would justify a continuance in the interests of fairness. This narrow, prescriptive list necessarily will not account for many circumstances that could occur and would cause a respondent to seek a continuance of a merits hearing. For example, indicia of incompetency could arise that require a competency hearing under *Matter of M-A-M-* before any merits hearing can go forward. In fact, the BIA has recognized that “[m]ental competency is a variable condition” and that indicia of incompetency can arise at various stages of removal proceedings.⁹¹ Such unforeseen circumstances require a continuance to comply with due process but might not be found to meet the rule’s narrow exception for “[u]nforeseen exceptional or extraordinary circumstances beyond the control of the alien, the alien’s representative, government counsel, or the immigration judge.”⁹² By fettering IJ discretion to grant a continuance where fairness to a respondent requires it, the rule would result in due process violations.

Further, the proposed rule’s dictate that merits hearing continuances be granted for “no more than 30 days” effectively prevents IJs from continuing merits hearings even if the circumstances meet the restrictive substantive requirements laid out in the rule. This is because given immigration court dockets it may be virtually impossible to find an open individual hearing slot within 30 days.⁹³ If there are no open hearing slots available in this limited time frame, IJs will be unable to grant merits hearing continuances even if they find that the limited regulatory circumstances are met.

Further, even if a hearing slot is available in the 30-day time frame, the 30-day rule is arbitrary because it will often not provide sufficient time to resolve the underlying reason for the continuance. For example, there may be cases of serious illness of the respondent where the illness

⁹⁰ See, e.g., *Matter of Garcia*, 16 I&N Dec. 653, 657 (BIA 1978) (“We are satisfied that the breadth of the immigration judge’s discretion, together with continuing efforts by the Service to expedite the processing of visa petitions submitted simultaneously with applications for adjustment of status, should serve to alleviate concerns that the policy announced herein will result in unduly delaying the entry of final orders of deportation in unmeritorious cases.”).

⁹¹ *Matter of E-S-I-*, 26 I&N Dec. 136, 144 (BIA 2013); see *Matter of M-A-M-*, 25 I&N Dec. 474, 480 (BIA 2011).

⁹² Proposed 8 CFR § 1003.29(b)(5)(xiv).

⁹³ See David Hausman & Jayashri Srikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*, 84 FORDHAM L. REV. 1823, 1841 (2016)

(“Although backlog and delay in immigration court are real problems, the most important factor in delay is the difficulty of scheduling an individual merits hearing. . . .”).

is not resolved in 30 days. The NPRM asserts that 30 days “is a reasonable amount of time to address the issue that necessitated the continuance,”⁹⁴ but provides no data or evidence to support that assertion, such as evidence of the most common reasons a merits hearing is continued and for what length of time.

In sum, the proposed rule removes an IJ’s discretion to continue a merits hearing where fairness requires it, and for an amount of time necessary to address the reason the continuance is needed.

V. Conclusion

CLINIC acknowledges the need for EOIR to address the tremendous backlog of pending cases, a backlog that has only grown since 2017, and improve efficiency within the agency. However, the changes proposed in this NPRM are likely to achieve the opposite result, at the expense of fairness and due process for respondents. Because the 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 comments.

Sincerely,

A handwritten signature in blue ink that reads "Anna Gallagher". The signature is fluid and cursive, with the first name "Anna" and last name "Gallagher" clearly legible.

Anna Gallagher
Executive Director

⁹⁴ 85 Fed. Reg. at 75938.