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Lauren Alder Reid, Assistant Director
Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041

**RE: RIN 1125-AB01; EOIR Docket No. 18-0503; Dir. Order No. 01-2021,
Public Comment Opposing the Majority of the Proposed Rules on Motions to Reopen and
Reconsider; Effect of Departure; Stay of Removal**

Assistant Director Alder Reid:

Catholic Legal Immigration Network Inc. (CLINIC)¹ submits this comment urging the Department of Justice (DOJ) to withdraw the majority of these proposed rules. The Notice of Proposed Rulemaking (NPRM) proposes myriad changes that would deny vital due process rights to noncitizens filing motions before the immigration courts and Board of Immigration Appeals (BIA or Board). The Supreme Court has emphasized that “[t]he motion to reopen is an ‘important safeguard’ intended ‘to ensure a proper and lawful disposition’ of immigration proceedings.”² Yet these proposed regulations create insurmountable barriers to noncitizens exercising their right to pursue this important safeguard. These proposed changes make it substantially more likely that noncitizens will be unlawfully and improperly removed to countries where they may be killed or permanently separated from their family. In addition, the rule creates troubling impediments to obtaining a stay of removal, which will inevitably lead to many people with meritorious claims being unjustly removed from the United States before the BIA or the Immigration Judge rules on their motions. The U.S. government should ensure that, before it imposes such severe consequences as removing someone from the United States, noncitizens have a fair opportunity to pursue their statutory right to file a motion to reopen or a motion to reconsider. We thus urge the DOJ to withdraw the majority of these proposed rules, as described below.

Embracing the Gospel value of welcoming the stranger, CLINIC promotes the dignity and protects the rights of immigrants in partnership with a dedicated network of immigration legal services programs. This network includes approximately 380 programs operating in 49 states and the District of Columbia. CLINIC’s network employs roughly 1,400 attorneys and accredited

¹ Aimee Mayer-Salins, Defending Vulnerable Populations (DVP) Staff Attorney authored this comment. Michelle Mendez, DVP Program Director, Bradley Jenkins CLINIC Federal Litigation Attorney, Rebecca Scholtz, DVP Senior Attorney, Katy Lewis, DVP Consulting Attorney, and Karen Sullivan, CLINIC Advocacy Attorney, contributed to this comment.

² *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1 (2008)).

representatives who, in turn, serve hundreds of thousands of low-income immigrants each year. In addition to affirmative applications for benefits, CLINIC affiliates have increasingly begun to represent clients in removal proceedings. In 2019, CLINIC established a section, Defending Vulnerable Populations, which focuses on training and mentoring in several areas, including: asylum, removal defense, appeals, and motions to reopen. 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 Immigration Services.

CLINIC submits this comment urging the Executive Office for Immigration Review (EOIR or the agency) to withdraw significant portions of this proposed rule. 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 [here] in search of a better life for themselves and for their loved ones, in search of greater opportunities . . . We must not be taken aback by their numbers, but rather view them as persons, seeing their faces and listening to their stories, trying to respond as best we can to their situation. To respond in a way which is always humane, just and fraternal.”³ CLINIC likewise believes that the most vulnerable among us deserve compassion, fairness, and due process in the adjudication of their claims for relief. In this vein, CLINIC submits the following comments in opposition to the majority of the proposed changes.

I. We Object to DOJ Allowing Only 30 Days to Respond to Comment on the Notice of Proposed Rulemaking (NPRM)

As discussed below, the proposed regulations would radically change motions practice before the immigration courts and the BIA. The DOJ should give the public sufficient time to consider these dramatic revisions to existing law in order to provide thorough and well-researched comments. Instead, DOJ has given no reason for allowing only 30 days for the public to submit comments to these dense and complex proposed rules rather than the customary 60-day comment period. DOJ issued the notice of proposed rulemaking on the Friday immediately following the Thanksgiving holiday, and the shortened comment period closes just after the Christmas holiday. While this time of year is always busy, this year the shortened comment period presents exceptional challenges given that the United States continues to be in the midst of an unprecedented pandemic, forcing many members of the public to work from home and balance childcare with work activities. This is particularly true at CLINIC, where our headquarters remains closed and employees are all working remotely. Numerous CLINIC staff members are balancing work with childcare duties, as many schools and daycares remain closed for in-person learning.

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

This proposed rule, with its radical changes to EOIR motions practice, follows closely after DOJ rules that have brought sweeping changes to long-established rules for appellate and motions practice.⁴ Significant changes to established practice should be well-thought out and provide the public sufficient opportunity to provide substantive comments. Instead, the agencies have used the summer and fall months during a pandemic to rush through rules that would drastically alter procedures that have been in place for decades and leave tens of thousands of noncitizens who could qualify for lawful status with no recourse.⁵ Furthermore, it is counterproductive to make such sweeping changes to motions practice given that administrative leadership is due to change in approximately one month and all involved may have to reverse course again. For these reasons, we urge the agency to rescind the proposed rule. If it wishes to reissue the proposed regulations, it should grant the public at least 60 days to have adequate time to provide comprehensive comments.

Despite the inadequate and unfair 30-day timeframe for commenting, CLINIC submits this comment because we must object to significant portions of the proposed regulations. CLINIC must object because the proposed rules would lead to permanent family separations and potentially the torture and death of many asylum seekers unjustly forced to return to countries where they fear persecution.

II. The agency incorrectly asserts that this rule would not have a significant economic impact on a substantial number of small entities.

We object to the agency's assertion that this rule would not have a significant economic impact on a substantial number of small entities, including nonprofit organizations like CLINIC and its affiliates. The onerous new requirements outlined in these proposed regulations, which are discussed further below, will require CLINIC staff and volunteers to spend significantly more time on each case. In turn, it will be harder to place cases with private attorneys volunteering to provide pro bono services, and CLINIC staff will likely be forced to do more motions in-house, rather than simply mentoring volunteers providing pro bono representation. This additional workload will likely require staffing changes, which of course are dependent on funding. CLINIC, like many nonprofits, anticipates that finding additional funding for this work will be difficult in light of current economic conditions.⁶ CLINIC's affiliates would face similar staffing challenges in light of the new burdensome requirements outlined in this proposed regulation. Because of the significant economic impact to organizations like ours, this regulation must be closely scrutinized by the Office of Information and Regulatory Affairs.⁷

⁴ See, e.g., Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (Dec. 16, 2020).

⁵ See, e.g., Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 (Dec. 11, 2020); Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 81698 (Dec. 16, 2020).

⁶ See, e.g., Betsy Morris, *Nonprofits Face Bleak Future as Revenue Dries Up Amid Coronavirus*, THE WALL STREET JOURNAL, May 11, 2020, <https://www.wsj.com/articles/nonprofits-face-bleak-future-as-revenue-dries-up-amid-coronavirus-11589223487>; National Council of Nonprofits, *Data on How the Pandemic and Economic Crises Are Affecting Nonprofits*, <https://www.councilofnonprofits.org/data-how-the-pandemic-and-economic-crises-are-affecting-nonprofits> (providing state-specific surveys and data on the effect of the pandemic on nonprofits).

⁷ See Regulatory Flexibility Act, 5 U.S.C. § 603.

III. We Strongly Urge the Administration to Rescind Significant Portions of the Proposed Rule.

The proposed regulatory changes significantly undermine the ability of noncitizens to pursue motions to reopen, despite the Supreme Court underscoring that “[t]he motion to reopen is an ‘important safeguard’ intended ‘to ensure a proper and lawful disposition’ of immigration proceedings.”⁸ The proposed rule makes it significantly more likely that noncitizens with meritorious claims will be unjustly removed to a country where they may permanently separated from their family or even killed. Despite the grave consequences, this rule makes it impossible for a noncitizen to have a fair opportunity to pursue their statutory right to file a motion to reopen or a motion to reconsider. We thus urge the agency to withdraw the majority of these proposed rules and make several important modifications to the proposed regulatory language.

A. Proposed 8 C.F.R. § 1001.1(cc) —The proposed regulatory definition of departure as any physical departure from the United States not pursuant to exclusion, deportation, or removal fails to take into account involuntary exits from the United States and wrongfully overrules *Matter of Arrabally and Yerrabelly*.

The preface to the proposed regulations asserts that the proposed definition of departure relies on voluntariness, but the actual regulatory language does not contain any voluntariness language.⁹ Instead, the proposed regulation merely says,

The terms depart or departure, unless otherwise specified, refer to the physical departure of an alien from the United States to a foreign location. A departure shall not include the physical removal, deportation, or exclusion of an alien from the United States under the auspices or direction of DHS or a return to contiguous foreign territory by DHS in accordance with section 235(b)(2)(C) of the Act, but shall include any other departure from the United States...¹⁰

CLINIC recommends that EOIR withdraw this provision of the proposed regulation. In the alternative, we suggest that the agency modify the regulatory language to clarify that a departure must be voluntary in order to carry immigration consequences. The clarification of the regulatory language is critical to assuage the concerns rightly noted in *Matter of Arrabally and Yerrabelly* that the word departure taken in its broadest sense, and indeed as currently defined in the proposed regulations, includes “departures by people who stray across the border by accident, are induced to cross the border by deception or threat, or are kidnaped outright and spirited across the border against their will.”¹¹ CLINIC and our network of affiliates work with many especially vulnerable populations, including unaccompanied children, individuals with mental illness, and survivors of domestic violence and human trafficking.¹² We often see situations where a person has left the

⁸ *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1 (2008)).

⁹ 85 Fed. Reg. at 75947.

¹⁰ 85 Fed. Reg. at 75955.

¹¹ *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771, 775 (BIA 2012).

¹² See, e.g., CLINIC, *Fact Sheet: Immigration Court Considerations for Unaccompanied Children Who File for Asylum with USCIS While in Removal Proceedings, in Light of J.O.P. v. DHS, No. 19-01944 (D. Md. filed July 1, 2019)*, <https://cliniclegal.org/resources/asylum-and-refugee-law/fact-sheet-immigration-court-considerations-unaccompanied-children> (Oct. 21, 2020); CLINIC, *Practice Advisory: Representing Noncitizens with Mental Illness*,

United States in circumstances that were not fully voluntary, including where the noncitizen's departure from the United States occurred in connection with human trafficking or domestic violence, where the noncitizen was a young child with no say over where they would travel, or where a noncitizen's close relative became ill or died. The addition of the term voluntary to the regulatory language is critical for ensuring that noncitizens do not suffer serious immigration consequences where they have left the United States through no fault of their own.

In addition, we urge the agency to retain the rule announced in *Matter of Arrabally and Yerrabelly*, that leaving the United States pursuant to a grant of advanced parole is not a "departure" for purposes of INA § 212(a)(9)(B)(i)(II). *Matter of Arrabally and Yerrabelly* rightly distinguished between a departure under a grant of advance parole and other departures and found that in the particular context of INA § 212(a)(9)(B)(i)(II), it simply does not make sense to understand the unique situation of a departure under a grant of advance parole as a departure for purposes of triggering inadmissibility under INA § 212(a)(9)(B)(i)(II).¹³ Further, the rule outlined in *Matter of Arrabally and Yerrabelly* promotes efficiency by allowing people to adjust status without applying for waivers.¹⁴ By doing away with *Matter of Arrabally and Yerrabelly*, EOIR would create additional unnecessary work for other government agencies. Therefore, we urge EOIR to codify by regulation that leaving the United States pursuant to a grant of advanced parole is not a "departure" for purposes of INA § 212(a)(9)(B)(i)(II), instead of overruling *Matter of Arrabally and Yerrabelly* through regulation.

In addition, we object to EOIR's plans to retroactively apply this new rule even where a person has traveled on advance parole prior to the effective date of the rule. Applying this new rule retroactively implicates significant reliance interests, particularly in light of the long-standing rule outlined in *Matter of Arrabally and Yerrabelly*. "Where an agency changes course... it must be cognizant of longstanding policies that may have engendered serious reliance interests that must be taken into account."¹⁵ The preamble to the proposed rule indicates that EOIR has not seriously considered the significant reliance interests created by *Matter of Arrabally and Yerrabelly*. If EOIR adopts any interpretation of a departure that narrows *Matter of Arrabally and Yerrabelly*, it should not apply this interpretation to any person who traveled on advance parole prior to the effective date of the rule.¹⁶

<https://cliniclegal.org/resources/removal-proceedings/representing-noncitizens-mental-illness> (May 12, 2020); CLINIC, *Practice Advisory on Strategies to Combat Government Efforts to Terminate Unaccompanied Children Determinations* (May 2017), <https://cliniclegal.org/resources/childrens-issues/practice-advisory-strategies-combat-government-efforts-terminate>.

¹³ The Board explicitly stated that its holding that leaving under a grant of advance parole is not a departure under 212(a)(9)(B)(i)(II) "does not preclude a trip under a grant of advance parole from being considered a 'departure' for other purposes. . . ." *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. at 780.

¹⁴ See, e.g., USCIS, *I-601, Application for Waiver of Grounds of Inadmissibility*, <https://www.uscis.gov/i-601> (explaining the process for applying for waiver for unlawful presence)

¹⁵ *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S.Ct. 1891, 1913 (2020) (internal citations and quotations omitted).

¹⁶ See *Matter of Z-R-Z-C-*, Adopted Decision 2020-02 at 9 (AAO Aug. 20, 2020) ("We acknowledge the Applicant's reasonable reliance on the agencies' erroneous past practice, and conclude that the statutory construction announced in this decision should not apply to her application based on such reliance.").

B. Proposed 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1) —EOIR should rescind the departure bar in its entirety—including the withdrawal provision—and should not replace it.

CLINIC strongly supports eliminating the departure bar from 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1), but opposes replacing it with a narrower withdrawal provision that would still apply where a noncitizen leaves the United States while waiting for the Immigration Court or the BIA to adjudicate a motion. Instead, the departure bar—including the withdrawal provision—should be rescinded in its entirety and should not be replaced.

EOIR correctly notes that every circuit court to have considered the issue has concluded that the departure bar “clearly conflicts” with the Immigration and Nationality Act (INA) or “impermissibly restricts” the BIA’s jurisdiction.¹⁷ The agency therefore rightly proposes removing the departure bar from the regulations.

However, EOIR’s assertion that it can maintain a narrower withdrawal provision that applies where a noncitizen “voluntarily” departs from the United States while the motion is pending conflicts with binding Supreme Court and circuit court precedent. EOIR’s refusal to exercise its congressionally delegated jurisdiction where a noncitizen leaves the United States while the motion remains pending conflicts with the Supreme Court’s decision in *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009), which prohibits an agency from narrowing its own jurisdiction. Indeed, several circuit courts have explicitly stated EOIR must exercise its congressionally-delegated jurisdiction irrespective of whether the noncitizen has departed the United States.¹⁸ These courts have reasoned that Congress delegated the authority to adjudicate all motions to immigration judges and the Board of Immigration Appeals and, consequently, the agency cannot refuse to adjudicate a subset of motions (i.e., post-departure motions) on jurisdictional grounds.¹⁹ EOIR is not empowered to limit its own jurisdiction through rulemaking, nor to ignore the Supreme Court and the U.S. courts of appeal.

¹⁷ *Toor v. Lynch*, 789 F. 3d 1055, 1057 n.1 (9th Cir. 2015) (enumerating the decisions of other circuit courts on this issue); see also CLINIC & Boston College Post-Deportation Human Rights Project, *Practice Advisory Post-Departure Motions to Reopen and Reconsider* (Nov. 2019), available at <https://cliniclegal.org/resources/removal-proceedings/practice-advisory-post-departure-motions-reopen-and-reconsider> (providing an overview of how circuit courts have treated the departure bar).

¹⁸ *Luna v. Holder*, 637 F.3d 85, 101-02 (2d Cir. 2011) (“Nor has Congress indicated since it enacted IIRIRA that an alien’s departure after filing a motion to reopen should be a jurisdictional bar . . . The BIA must exercise its full jurisdiction to adjudicate a statutory motion to reopen by an alien who is removed *or otherwise departs* the United States *before or after* filing the motion.” (emphasis added) (citing *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011) and *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010)); *Marin-Rodriguez*, 612 F.3d at 594 (“nothing in the statute undergirds a conclusion that the Board lacks ‘jurisdiction’—which is to say, adjudicatory competence. . . to issue decisions that affect the legal rights of departed aliens.”).

¹⁹ To the extent that the proposed regulations seek to categorize this withdrawal provision as a categorical exercise of discretion, rather than a jurisdictional bar, see *Marin-Rodriguez v. Holder*, 612 F.3d at 595 (leaving open the possibility that the BIA may be able to “recast its approach as one resting on a categorical exercise of discretion.”), such a classification still would not render the agency’s actions lawful. In *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the Supreme Court held that where an agency has been granted jurisdiction, it must exercise that discretion on a case-by-case basis. See also *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957) (requiring that where discretion has been granted it be properly exercised, and reviewing a BIA decision for abuse of discretion and failure to exercise discretion).

Moreover, EOIR violates the plain language of the motion to reopen statute by deeming a motion withdrawn simply because a noncitizen “volitionally” leaves the United States while the motion remains pending. The plain language of the statute contains no geographic limitation, and artificially inventing one—even for the smaller subset of individuals who leave the United States while their motion remains pending—undercuts the statutory right to file a motion to reopen.²⁰

The statutory right to a motion to reopen makes motions meaningfully distinct from appeals. There is no statutory right to an administrative appeal, so even assuming *arguendo* that the agency could curtail a noncitizen’s right to file an appeal through a similar withdrawal provision in that context, the agency may not supplant the reasoned decision of Congress by imposing a withdrawal provision in the motions context. The agency’s rationale that a motion “functions similarly” to an appeal²¹ is thus unpersuasive.

For these reasons, we strongly oppose the proposed regulation’s inclusion of a withdrawal provision that would still apply where a noncitizen leaves the United States while a motion is pending.

C. Proposed 8 C.F.R. § 1003.48(b)— EOIR should continue to accept as true factual assertions made in the motions to reopen unless those assertions are inherently unbelievable.

CLINIC strongly objects to the inclusion of regulatory language purporting to eliminate the rule that facts stated in an affidavit must be accepted as true unless inherently unreliable. U.S. courts of appeal have repeatedly rebuked EOIR for its failure to accept facts presented in a motion to reopen as true unless inherently unbelievable.²² These federal courts have explained repeatedly that “[t]he purpose of this rule is to ensure that the applicant has had her day in court to demonstrate the truth of facts alleged.”²³

²⁰ *E.g.*, *Luna v. Holder*, 637 F.3d at 101 (finding significant that when Congress amended the INA to provide relief from the 90-day motion-to-reopen filing deadline for victims of domestic violence, “Congress explicitly required presence only ‘at the time of filing the motion,’ not thereafter, and did not include any requirement of physical presence elsewhere in Section 1229a(c)(7). Congress’s choice to include this limitation in only one small subsection makes significant its decision to omit such a requirement from the rest of the law, and we should refrain from reading that limitation into text where Congress has left it out.”).

²¹ *See* 85 Fed. Reg. at 75946.

²² *See, e.g.*, *Trujillo Diaz v. Sessions*, 880 F.3d 244, 252 (6th Cir. 2018) (“The BIA’s role in reviewing a motion to reopen is like a trial court’s role in reviewing a motion for summary judgment . . . In both cases the purpose of the inquiry is to isolate cases worthy of further consideration; in neither case is the court or agency to assess the credibility of the evidence.”) (internal quotations and citations omitted); *Yang v. Lynch*, 822 F.3d 504, 509 (9th Cir. 2016) (“[T]he BIA may not make adverse credibility determinations (including adverse credibility determinations based on the *falsus maxim*) in denying a motion to reopen.”); *Shardar v. Att’y Gen.*, 503 F.3d 308, 313 (3d Cir.2007) (stating that “[f]acts presented in the motion to reopen are ‘accepted as true unless inherently unbelievable.’” (quoting *Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005))); *Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005) (stating that the “self-serving nature of a declaration in support of a motion to reopen is not an appropriate basis for discrediting its content”); *Fessehaye v. Gonzales*, 414 F.3d 746, 755 (7th Cir. 2005) (“In a motion to reopen that is based simply on paper submissions, as opposed to in-person testimony, the BIA is required to accept the facts stated in the alien’s affidavit unless they are inherently unbelievable.”) (internal quotations and citations omitted); *Ghadessi v. INS*, 797 F.2d 804, 806 (9th Cir. 1986) (“As motions to reopen are decided without a factual hearing, the Board is unable to make credibility determinations at this stage of the proceedings.”).

²³ *Trujillo Diaz*, 880 F.3d at 252-53.

Additionally, the prohibitions on accepting factual assertions as true enumerated in proposed section 1003.48(b)(2) are replete with due process problems and clear statutory violations. First, the statement in subsections (b)(2)(i) and (ii) that an adjudicator should not accept as true anything that is contradicted by any evidence in the record (including material provided by sources such as the Department of State, the Office of International Affairs, international organizations, news organizations, or academic institutions) is absurd. The entire purpose of a motion to reopen is to decide whether to hold a new hearing. Motions to reopen by definition seek to add evidence to the record because the record is incomplete or inaccurate.²⁴ The new evidence will therefore nearly always contradict something in the record. For example, under this proposed rule, if the Government had submitted evidence that a foreign government was upholding all human rights norms and the Respondent later submitted with a motion to reopen previously unavailable evidence that the foreign government was actually torturing members of a particular ethnic group or political dissidents, the adjudicator would be barred from accepting this new evidence as true for purposes of deciding whether to hold a new hearing. This result is fundamentally unfair. If there is a factual dispute, the adjudicator should only make a final factual determination after the parties have had the opportunity to be heard at a hearing.

Second, the statement in subsection (b)(2)(iii) that an adjudicator may not accept as true any statements that are conclusory, uncorroborated, or unsupported by other evidence in the record directly conflicts with the statutory language at INA § 208(b)(1)(B)(ii) stating that “[t]he testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration.” Noncitizens filing motions to reopen may be unable to obtain corroborating evidence due to the circumstances of their persecution. For example, contacts abroad may not be able to safely mail evidence to the noncitizen, or contacts who might have provided a supporting declaration may be imprisoned or dead. In addition, where an individual is detained, it can be nearly impossible to obtain additional evidence within the normally applicable 90-day filing deadline or before an imminent removal. ICE detainees frequently lack adequate access to library facilities,²⁵ cannot use the phone,²⁶ and have difficulty accessing legal representation.²⁷ These barriers make it extremely difficult to quickly gather corroborating evidence.

Further, the prohibition on accepting as true affidavits that are based principally on hearsay is fundamentally unfair and contravenes longstanding rule that hearsay evidence is admissible in deportation proceedings unless its use is fundamentally unfair.²⁸ The Federal Rules of Evidence (FRE) do not even apply in immigration proceedings. Even if they did, the FRE assure the

²⁴ See 8 C.F.R. § 1003.23(b)(3) (“A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material . . . A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing.”).

²⁵ See, e.g., *SPLC: Detention Center Must Provide Detained Immigrants with Law Library Access* (Aug 22, 2017), <https://www.splcenter.org/news/2017/08/22/splc-detention-center-must-provide-detained-immigrants-law-library-access>.

²⁶ See, e.g., Katie Shepherd, *Immigration Impact: ICE Faces Lawsuit Over Blocking Phone Access to Detainees* (May 4, 2020), <https://immigrationimpact.com/2020/05/04/ice-phone-access-lawsuit/#.X9peU9hKiUk>.

²⁷ See, e.g., *AILA and Others Sue to Challenge Lack of Access to Counsel in Immigration Detention* (Apr. 11, 2020), <https://www.aila.org/infonet/aila-others-sue-lack-of-access-to-counsel>.

²⁸ *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988); 8 C.F.R. § 1240.7(a).

fundamental fairness of proceedings by including numerous exceptions allowing for the admission of hearsay, expressly confirming that hearsay statements are often reliable and necessary for the fair adjudication of a controversy. FRE 803 contains 23 separate exceptions allowing the admission of evidence that would otherwise be considered hearsay based on a determination that the evidence indeed is likely to be reliable. FRE 804 lists additional hearsay exceptions based on the unavailability of a witness. Moreover, FRE 807 contains a residual exception that allows for admission of a hearsay statement even where there is no specific exception that applies, so long as “(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.”

In immigration proceedings, hearsay statements are often vital for proving a case.²⁹ For example, the words of a persecutor are often critical to establishing nexus, but it is exceedingly unlikely that the persecutor would be willing to submit an affidavit in support of the respondent’s case or would be available to testify. Instead, adjudicators must rely on reports from witnesses, including often the respondents themselves. The proposed prohibition on accepting as true affidavits that are based principally on hearsay for purposes of a motion to reopen is therefore tremendously problematic. We firmly oppose its inclusion in the final regulations.

Finally, the statement in subsection (b)(2)(iv) that an adjudicator may not accept as true statements made by the Respondent about individuals who are not presently in the United States is patently absurd. Numerous forms of relief from removal—most notably asylum, withholding of removal, and protection under the Convention Against Torture—are based entirely on what individuals outside the United States have done and will do if the Respondent returns to their native country. As previously noted, it is patently unreasonable to expect a respondent to obtain an affidavit from the persecutor in support of the respondent’s applications for relief. Often, the respondent will be best positioned to provide probative evidence, including for example, testimony that the persecutor called to threaten the respondent. Further, the respondent often will not be able to obtain statements from others in the country of feared persecution because those witnesses are in hiding, in prison, or dead. Congress considered the possibility that people who had fled persecution would be unable to obtain such statements, and the statutory language at INA § 208(b)(1)(B)(ii) states that “[t]he testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration.” The proposed regulatory language directly conflicts with this statutory language. It also profoundly weakens a noncitizen’s ability to demonstrate that a hearing is warranted because of new, previously unavailable evidence.

Cumulatively, these proposed changes make it impossible for a respondent to meet the burden of proof and effectively render motions practice futile, particularly for asylum seekers. We therefore strongly urge EOIR to entirely eliminate the proposed 8 C.F.R. § 1003.48(b) because these proposed changes to the regulations are an affront to due process, conflict with the statute, and do not account for the inherent difficulties of obtaining certain kinds of corroborating evidence where the respondent has fled persecution, is detained, or faces similar barriers.

²⁹ See, e.g., Nicole J. Thomas, Note, “*They Told Me He Said He Would Kill Me.*” *Why Hearsay Should Get Full Weight in Asylum Proceedings*, 37 CAL. W. INT’L L.J. 299 (2007).

D. Proposed 8 C.F.R. § 1003.48(c)—EOIR should remove the proposed regulation’s requirement that motions include a statement concerning whether the noncitizen has complied with their duty to surrender for removal and the regulatory language that states that a noncitizen’s failure to comply may result in denial of the motion.

EOIR should eliminate the proposed regulation’s requirement that motions include a statement regarding whether the noncitizen has complied with their duty to surrender for removal and the regulatory language stating that a noncitizen’s failure to comply may result in denial of the motion. Incorporating such an expansive interpretation of the fugitive disentitlement doctrine into administrative proceedings is unreasonable, unfair, and enormously burdensome.

First, the fugitive disentitlement doctrine is a severe penalty that should not be lightly imposed.³⁰ Yet, the proposed regulations purport to apply it to virtually all cases in which an individual has not complied with a notice to surrender. The proposed regulations contain no requirement that the adjudicator find that the respondent is intentionally evading the law or the agency’s jurisdiction, nor do they require the adjudicator to evaluate whether the respondent’s actions have made it impossible to enforce an adverse judgement. Instead, the proposed regulations bluntly apply this draconian sanction with meagre analysis or consideration.

Additionally, federal courts have pointed out that respondents do not always receive proper notice of their obligation to surrender.³¹ These courts have cautioned against applying the fugitive disentitlement doctrine when the government repeatedly sends important documents to the incorrect address.³² Given the government’s frequent mistakes in attempting to notify the respondent of their obligation to surrender, we foresee that this new requirement will lead to many wrongful denials of motions and quite a bit of litigation.

Further, the proposed requirement that a movant include in their motion a statement regarding whether they have received a notice to surrender, and if so, whether they have complied is quite onerous. Proposed subsection 1003.48(b)(i) states that “allegations of fact contained in a motion to reopen or motion to reconsider are not evidence and shall not be treated as evidence.” Yet, this newly imposed requirement to discuss receipt of a notice to surrender will compel movants to make detailed notice arguments, supported by affidavits and other evidence, to corroborate their assertion that they have not received such a letter. Such arguments will likely take up a significant portion of their motion to reopen and will prejudice their ability to appropriately develop other required statutory and equitable tolling arguments in the limited space allowed by the 25-page-limit provided in the Practice Manual. In addition, even where respondents submit affidavits and other evidence concerning whether they have received a notice to surrender, per proposed subsection 1003.48(b), the adjudicator will no longer presume that the affidavits are true. Also, drafting declarations and obtaining other supporting evidence is burdensome. CLINIC and its affiliates serve many clients for whom declaration drafting is particularly challenging, including

³⁰ See *Hassan v. Gonzales*, 484 F.3d 513, 516 (8th Cir. 2007) (describing the doctrine as “an extreme sanction”); *Gutierrez-Almazan v. Gonzales*, 453 F.3d 956, 957 (7th Cir. 2006) (“[t]he Supreme Court cautioned against frequent use of fugitive dismissal, stating that it is too blunt an instrument for deterring other petitioners from absconding and for preserving the court’s authority and dignity.”).

³¹ See *Bhasin v. Gonzales*, 423 F.3d 977, 988-89 (9th Cir. 2005).

³² *Id.*

adults with low levels of literacy, children, individuals with mental illnesses, monolingual speakers of indigenous languages, and people who have experienced extreme trauma. Drafting even short declarations with these clients often requires many hours of work, including multiple client meetings and finding and utilizing interpreters (which can be particularly challenging for rare languages). In addition to the burden of drafting a declaration on this topic, for many of the clients that CLINIC and its affiliates serve, gathering supplemental evidence concerning receipt of the notice to surrender will be extraordinarily challenging. Many of our clients are in dire situations—they may not have access to the relevant corroborating evidence of non-receipt because they have fled domestic violence or human trafficking, they have become homeless, or for similar reasons. This new requirement accordingly will be very burdensome for movants and their legal representatives, and in some cases, nearly impossible to meet.

CLINIC is also very concerned about the agency’s attempt to insulate from federal court review its determinations concerning whether a movant has complied with their duty to surrender for removal and whether to deny a motion on the basis of such a determination. The regulatory language includes discretionary language—“may result in the denial”—and the preamble to the proposed regulation makes clear that the agency views this determination as an exercise of discretion. Section 242 of the INA severely limits federal court jurisdiction to review discretionary determinations.³³ By adding this kind of discretionary language, EOIR improperly attempts to undermine a noncitizen’s right to judicial review of its determinations.

CLINIC therefore strongly urges EOIR to completely eliminate the proposed regulation’s requirement that motions include a statement concerning whether the noncitizen has complied with their duty to surrender for removal and the regulatory language that states that a noncitizen’s failure to comply may result in denial of the motion.

E. Proposed 8 C.F.R. § 1003.48(e)(1), (2)— EOIR should eliminate the proposal to disallow reopening and reconsideration based on a pending USCIS application.

CLINIC strongly opposes EOIR’s proposal to bar adjudicators from granting a motion to reopen or reconsider that is premised upon a pending application for relief that the immigration judge or the BIA lacks authority to grant. Relief granted by another agency, typically U.S. Citizenship and Immigration Services (USCIS), is no less a form of relief than relief granted by EOIR. Indeed, Congress expressly created many forms of relief intended to allow a person to remain in the United States over which only USCIS has jurisdiction. These forms of relief include relief for some of the most vulnerable groups in society, such as victims of human trafficking and unaccompanied children. USCIS adjudication of such applications in a non-adversarial forum is particularly important for these traumatized and vulnerable groups.³⁴ EOIR may not thwart Congressional directives by refusing to provide an opportunity for its USCIS to adjudicate an application.

³³ INA § 242(a)(2)(B).

³⁴ See, e.g., Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457 (2016) (arguing that adversarial proceedings are an inherently flawed way to adjudicate trauma survivors’ claims).

This proposed regulation follows shortly after policy changes at EOIR that discourage continuances and administrative closure to pursue relief before USCIS.³⁵ Increasingly, respondents are being ordered removed simply because USCIS has not yet adjudicated their applications for relief.³⁶

Average USCIS processing times are extremely lengthy.³⁷ USCIS itself provides case processing times that are sometimes upwards of 57 months.³⁸ Yet, motions to reopen are generally subject to a 90-day filing deadline.³⁹ There is an even shorter period for timely filing motions to reconsider: 30 days.⁴⁰

Previously, respondents could move to have their cases reopened *sua sponte* should they be unable to comply with the normally applicable statutory deadline because USCIS had not completed its adjudication of an application, but EOIR has separately finalized regulations that would eliminate *sua sponte* reopening.⁴¹ The proposed regulations would therefore render reopening impossible in the vast majority of cases in which a person has relief available but USCIS has jurisdiction to adjudicate that form of relief. Such a result is unfair and undermines congressional intent. We therefore urge EOIR to rescind its proposal to disallow reopening based on an application pending before another agency.

F. Proposed 8 C.F.R. § 1003.48(e)(3)— EOIR should remove the proposal to limit the scope of reopened proceedings to the issues upon which reopening or reconsideration was granted.

CLINIC opposes the proposal to confine the scope of reopened proceedings to the issues upon which the adjudicator granted reopening or reconsideration. As explained in the preamble to the proposed rule, this change is a stark reversal of past policies governing remands and motions.⁴²

³⁵ See, e.g., *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).

³⁶ See Victoria Neilson, Immigration Court Scheduling Orders Could Ramp Up Removal Orders (Dec. 15, 2020), <https://cliniclegal.org/resources/removal-proceedings/immigration-court-scheduling-orders-could-ramp-removal-orders>; Shannon Dooling, WBUR NEWS, 'We've Never Seen These Orders Issued Before': New Deadlines In Immigration Court Have Attorneys Scrambling (Nov. 24, 2020), <https://www.wbur.org/news/2020/11/24/new-deadlines-immigration-court>.

³⁷ USCIS processing delays are largely due to policy changes implemented under the current administration that have needlessly created inefficiencies. See, e.g., *AILA Policy Brief: Crisis Level USCIS Processing Delays and Inefficiencies Continue to Grow* (February 26, 2020), <https://www.congress.gov/116/meeting/house/110946/witnesses/HHRG-116-JU01-Wstate-Dalal-DheiniS-20200729-SD002.pdf>.

³⁸ See USCIS, "Check Case Processing Times," <https://egov.uscis.gov/processing-times/> (last visited Dec. 7, 2020) (showing that USCIS currently estimates that adjudication of a Form I-918 by the Vermont Service Center will take 57 to 57.5 months).

³⁹ See INA § 240(c)(7).

⁴⁰ INA § 240(c)(6).

⁴¹ See Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (Dec. 16, 2020).

⁴² See also *Matter of M-D-*, 24 I&N Dec. 138 (BIA 2007) (considering the scope of remand where the Board remands for background checks); *Matter of L-V-K-*, 22 I&N Dec. 976, 981 (BIA 1999) ("Once a case is remanded, such a remand, unless specifically limited, is for any appropriate purpose."); *Matter of Patel*, 16 I&N Dec. 600, 601 (BIA 1978) ("[W]hen the Board remands a case to an immigration judge for further proceedings, it divests itself of jurisdiction of that case unless jurisdiction is expressly retained. Further, when this is done, unless the Board qualifies

Limiting the scope of reopened proceedings is not a prudent way to save valuable time and resources. Litigants often have multiple alternatives for relief from removal, but may choose to go forward with the forms of relief that are the most straightforward or for which they have the strongest likelihood of prevailing. This strategic decision does not indicate that their other claims were frivolous or false, instead the litigant has chosen to use resources efficiently. Allowing litigants to select which forms of relief to pursue allows the court to avoid time-consuming hearings, and perhaps multiple appeals, on a complicated claim where it would have been more efficient to proceed on a straightforward and uncontested application.

Moreover, permitting an adjudicator to consider any and all issues in reopened proceedings is important because circumstances may change during the pendency of proceedings. For example, there may be instances where proceedings are reopened to pursue cancellation of removal, but during the pendency of the reopened proceedings, there is a change in country conditions in the country of removal such that an asylum claim suddenly became viable or the respondent becomes eligible to adjust status through a marriage to a U.S. citizen. If the proposed rule were to go into effect, the litigant in these circumstances might be forever barred from having the agency consider the claim that arose during the pendency of reopened proceedings because the regulations would bar the adjudicator from considering the claim during the ongoing reopened proceedings, and the respondent might later be unable to demonstrate that the evidence was previously unavailable for purposes of yet another motion to reopen. Such a result is manifestly unfair.

The agency mentions fairness concerns in the preamble to the regulations, explaining that some litigants do not have the option to “shoehorn their otherwise barred claims into reopened proceedings.” EOIR rightly observes that it is unfair that some people have viable claims to relief, but face time and number bars to reopening their proceedings. However, the agency could remedy this fairness concern by making it easier for all movants to reopen where they have viable relief available. For example, the agency might have instead elected to use regulatory changes to expand its *sua sponte* authority, and specifically encouraged adjudicators to grant motions using *sua sponte* authority where relief is available. This alternative approach would have appropriately addressed fairness concerns without imposing unnecessary and unfair impediments for even more litigants. Instead, EOIR has repeatedly tried to hinder noncitizens who are simply trying to legalize their status in the United States.⁴³

G. Proposed 8 C.F.R. § 1003.48(i)(2)— The proposed rule rightly clarifies that respondents can file motions to reopen where a notario or other person committing unauthorized practice of law provided ineffective assistance of counsel.

CLINIC commends EOIR for clarifying that an ineffective assistance counsel claim may lie against an individual who the respondent reasonably but erroneously believed to be an attorney.

or limits the remand for a specific purpose, the remand is effective for the stated purpose and for consideration of any and all matters which the Service officer deems appropriate . . .”).

⁴³ See Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (Dec. 16, 2020) (doing away with *sua sponte* reopening in nearly all circumstances); Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 (December 11, 2020).

Unauthorized practice of law and defrauding immigrant communities through so-called “notario fraud” is an unfortunately common problem that can have devastating consequences.⁴⁴ CLINIC supports EOIR’s efforts to combat notario fraud and the clarification that respondents may file a motion to reopen based on ineffective assistance, even where an individual who was not a licensed attorney or a DOJ accredited representative provided the assistance.

H. Proposed 8 C.F.R. § 1003.48(i)(5)—EOIR should eliminate the regulatory language creating significant and unnecessary additional impediments to properly filing a motion based on ineffective assistance of counsel.

The proposed regulation creates unnecessary impediments to properly filing a motion based on ineffective assistance of counsel. These added requirements do not protect noncitizens from unscrupulous or incompetent attorneys, shield attorneys from improper or unfounded allegations, or safeguard the integrity of immigration proceedings as a whole. Instead, they are merely additional obstacles to obtaining fair adjudication of a motion to reopen. We therefore urge EOIR to eliminate the remainder of the proposed regulatory language about motions based on ineffective assistance of counsel.

First, the additional procedural requirements are onerous and unnecessary. Currently, motions to reopen based on ineffective assistance of counsel must contain: (1) an affidavit explaining the agreement with former counsel and what prior counsel represented to the respondent; (2) an indication that prior counsel has been informed of the allegations of ineffective assistance of counsel and allowed an opportunity to respond; and (3) an indication of whether the respondent filed a complaint with the appropriate disciplinary authority regarding counsel’s conduct, or, if a complaint was not filed, an explanation for not filing one.⁴⁵ In many circuits, substantial compliance with these procedural requirements is sufficient.⁴⁶ The burdensome procedural requirements that this proposed rule adds are especially problematic because the proposed regulation first makes clear that substantial compliance will generally be inadequate; instead, strict compliance will be required, particularly where the noncitizen is represented by counsel. We oppose the strict compliance requirement because it prioritizes arbitrary procedures over the rights of noncitizens to effective representation. Applying the procedural requirements flexibly is consistent with EOIR’s policy goals, “which are to provide a framework within which to assess the bona fides of the substantial number of ineffective assistance claims asserted, to discourage baseless allegations and meritless claims, and to hold attorneys to appropriate standards of performance.”⁴⁷ When the motion has fulfilled these objectives, EOIR should not insist upon strict compliance with arbitrary procedural rules.⁴⁸

Also, the regulation requires that a motion based on ineffective assistance of counsel include an affidavit or written statement executed under penalty of perjury from the noncitizen explaining their representation agreement with former counsel. The regulation then requires that such a

⁴⁴ See, e.g., stopnotariofraud.org (providing information and resources from the American Immigration Lawyers Association and the American Bar Association on combatting notario fraud); Consumer.gov, Notario Fraud, <https://www.consumer.gov/content/notario-fraud> (detailing common scams that defraud immigrants).

⁴⁵ *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988).

⁴⁶ See, e.g., *Morales Apolinar v. Mukasey*, 514 F.3d 893, 896 (9th Cir. 2008).

⁴⁷ *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988).

⁴⁸ *Lo v. Ashcroft*, 341 F.3d 934, 937 (9th Cir. 2003).

statement “identify who drafted it” and where the noncitizen did not draft it themselves, the affidavit must expressly aver that the affidavit has been read aloud to the noncitizen in a language they understand and that by signing, they affirm that they understand and agree to the contents of the affidavit. This requirement is odd because many noncitizens are literate, rendering this requirement inapposite to a large portion of noncitizens seeking to reopen proceedings. Second, it insinuates that it is improper for a legal representative to aid in drafting a declaration. However, competent representation requires counsel to assist with declaration drafting to ensure that the noncitizen understands which facts are legally relevant, and which facts are superfluous. The penalty of perjury already obligates the noncitizen to include only truthful information, and legal representatives already have ethical duties to effectively communicate with their clients and present truthful information to EOIR.⁴⁹ This additional requirement is unnecessary and seems intended only as a pretext for adjudicators to unjustly deny motions simply because the declaration does not contain specified magic words.⁵⁰

Moreover, the regulation requires that bar complaints be filed in all ineffective assistance of counsel cases, except where prior counsel is deceased. This regulation expressly, but without any justification, states that movants must file a bar complaint even where an attorney has already been disbarred or suspended from the practice of law. In this instance, it is not even clear that the state disciplinary authorities would accept or review such a complaint. Furthermore, where state authorities have already prohibited the disbarred attorney from practicing law, filing another complaint does not serve to protect the public. In addition, the rule does not consider the many other reasonable explanations for not filing a bar complaint, including but not limited to: 1) the statute of limitations for filing an attorney grievance with state disciplinary authorities has already passed,⁵¹ 2) state bar counsel has advised that there is no need to file a bar complaint,⁵² 3) prior counsel no longer has an active law license (following retirement, grave illness, or similar events), or 4) counsel acknowledges the ineffectiveness and makes every effort to remedy the situation.⁵³

Finally, the regulations require that practitioners file two separate complaints where a legal representative has provided ineffective assistance: one to state disciplinary authorities and one to EOIR disciplinary counsel. This requirement is duplicative and onerous. Filing one bar complaint to state authorities often requires many hours simply to draft the complaint and compile the required supporting evidence, plus additional hours spent conferring with state disciplinary authorities and assisting with the investigation into the attorney’s conduct. Having to go through this process twice would substantially increase the workload required for each motion to reopen based on ineffective assistance. This increased workload will force CLINIC attorneys mentoring

⁴⁹ See, e.g., Model Rules of Professional Conduct, Rule 3.3: Candor Toward the Tribunal, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal/.

⁵⁰ EOIR’s new policy in this regard appears to mirror a similar USCIS policy to reject applications that contained blank spaces where an item was inapplicable. That policy is subject to litigation. See Class Action Complaint for Injunctive and Declaratory Relief, *Vangala v. USCIS*, No. 3:20-cv-08143 (N.D. Cal. Nov. 19, 2020).

⁵¹ See, e.g., State Bar of Georgia Rule 4-222 (establishing a four-year statute of limitations for filing an attorney grievance).

⁵² Many states offer a confidential ethics hotline that attorneys may call to obtain advice. See, e.g., Virginia State Bar, Ethics Questions and Opinions, <https://www.vsb.org/site/regulation/ethics> (allowing attorneys to email or call to request ethics advice).

⁵³ See *Fadiga v. Att’y Gen.*, 488 F.3d 142, 156-58 (3d Cir. 2007) (explaining that the policy objectives of *Lozada* are served where counsel acknowledges the ineffectiveness and makes every effort to remedy the situation).

pro bono attorneys to spend substantially more time reviewing submissions. In addition, pro bono attorneys likely will be even more hesitant to take on representation on a motion to reopen involving ineffective assistance of counsel due to the increased time commitment, and CLINIC staff would likely be forced to do more of these motions in-house.

We accordingly urge EOIR to eliminate these unjustifiably burdensome additional requirements. They do not protect noncitizens from unscrupulous or incompetent attorneys, shield attorneys from improper or unfounded allegations, or safeguard the integrity of immigration proceedings. Instead, they merely create unnecessary barriers for individuals who have viable claims for relief but who unfortunately received ineffective assistance of counsel.

I. *Proposed 8 C.F.R. § 1003.48(k)*— The proposed rule creates alarming barriers to obtaining a stay of removal.

CLINIC objects in the strongest possible terms the inclusion of significant new barriers to obtaining a stay of removal and implores the agency to completely eliminate the proposed language regarding stays of removal. The proposed regulations emphasize that a stay is an extraordinary remedy, but many of the clients that CLINIC and its affiliates serve undeniably merit the agency's exercise of discretion to grant this extraordinary remedy. Many would face torture or death if removed and ultimately prevail on their motion to reopen.⁵⁴ Despite the high stakes, requests for a stay of removal are frequently submitted quickly because ICE frequently provides very little advance warning concerning its plans for detaining a person or effectuating a removal, and ICE's plans change frequently with little, if any, notice to counsel.⁵⁵ If a noncitizen is unable to obtain a stay of removal, the noncitizen could face removal to a country where they may be tortured or killed. CLINIC therefore finds the proposed regulation's addition of numerous significant barriers to obtaining a stay of removal extremely alarming given the urgent nature of most discretionary stay requests and the dire consequences that a noncitizen may face if the removal is carried out.

First, the proposed rule creates unnecessary and onerous hurdles by requiring noncitizens to first file a stay request with DHS before they can file a stay request with EOIR. This requirement is extremely burdensome.⁵⁶ Volunteer attorneys and CLINIC staff will be forced to spend a significant amount of time helping clients obtain passports, gathering evidence of medical

⁵⁴ CLINIC's Remote Motions to Reopen Project represents formerly separated families as well as other asylum-seekers on motions to reopen removal orders. Through this project, CLINIC partners with pro bono attorneys to provide high quality representation on motions to reopen. These motions, if successful, allow asylum-seekers to have an opportunity to gain protection from removal. Once the case is successfully reopened, CLINIC places the case with competent local counsel and provides mentorship assistance as needed. CLINIC began the project in 2015 on behalf of 46 mothers and children released from family detention and achieved reopening in all the cases. Since 2019, CLINIC has achieved an over 75 percent grant rate on motions filed through this project.

⁵⁵ CLINIC's BIA Pro Bono Project has observed that many respondents receive no advance notice of removal flights. For example, one Haitian client was moved to a staging area for removal within three days of the BIA dismissing his appeal with no advanced notice to the respondent or counsel. Similarly, ICE frequently changes its plans for removals, often canceling and rescheduling flights. ICE officers have reported to CLINIC staff that these types of flight changes have become more common due to COVID

⁵⁶ See CLINIC, *Practice Advisory: Stays of Removal for DACA Recipients with Removal Orders (April 25, 2018)*, <https://cliniclegal.org/resources/removal-proceedings/practice-advisory-stays-removal-daca-recipients-removal-orders> (outlining the procedures for filing an administrative stay request with DHS).

conditions, gathering supporting letters and declarations from community members, and drafting declarations in order to properly file a stay request. Despite the substantial money, time, and effort required to request a stay from DHS, DHS rarely grants stay requests.

Moreover, the proposed regulation makes the granting of a stay contingent on whether a noncitizen can afford the \$155 fee for filing a stay request with DHS⁵⁷ (and the additional costs associated with passport application fees). Although EOIR does not charge a fee for stay requests,⁵⁸ by conditioning EOIR's power to grant a stay of removal on the noncitizen having first requested a stay from DHS, EOIR is effectively imposing a cost of at least \$155 for filing a stay request. This cost is out of reach for many indigent clients served by CLINIC and our affiliates. CLINIC strongly objects to the imposition of these costs on all individuals seeking a stay because it makes the determination of who can obtain a stay of removal—a decision which in many cases may determine who lives and who dies—dependent on the individual's financial resources.

The proposed regulatory language also inappropriately permits one party to the litigation to effectively control the ultimate decision of the Board or the Immigration Judge regarding a stay of removal. Subsection (vi)(A) states that a discretionary stay cannot be granted unless the opposing party: (1) joins or affirmatively consents or (2) does not respond after 3 business days. Based on this proposed regulatory language, the adjudicator may not grant a stay request if the opposing party affirmatively opposes the stay request. This proposed regulation therefore allows DHS to single-handedly defeat a noncitizen's request for stay of removal simply by registering its opposition without even offering an explanation. Providing one litigant—DHS—such unrestrained power is fundamentally unfair.⁵⁹

Additionally, CLINIC objects to the regulatory requirement that the stay motion include a full case history, all relevant facts, a copy of the stay motion filed with DHS, and a copy of the removal order or description of the order. Respondents frequently file stay motions on an emergency basis before counsel has received a complete copy of the record of proceedings. Most of the clients that CLINIC serves through both our Remote Motions to Reopen Project and our BIA Pro Bono Project appeared pro se in proceedings before the Immigration Court. CLINIC only takes on representation at the appellate level or after entry of the final order, and accordingly must submit numerous requests for records. The government frequently does not provide the requested records in a timely manner. This has been especially true during the on-going COVID-19 pandemic due to court closures, limited staffing at immigration courts, agency delays in responding to FOIA requests, limited staffing at the Federal Records Center, mail delays, and limitations on how frequently staff can go to the office to collect mail while still adhering to safety protocols. EOIR still has not

⁵⁷ Department of Homeland Security, US Immigration and Customs Enforcement, Application for a Stay of Removal, <https://www.ice.gov/doclib/forms/i246.pdf>.

⁵⁸ EOIR has separately finalized regulations significantly increasing the fees for motions to reopen and reconsider. See Executive Office for Immigration Review; Fee Review 85 Fed. Reg. 82750 (Dec. 18, 2020). These substantial fees, in combination with the new requirements that a noncitizen seeking a stay of removal pay the \$155 fee for filing a stay request with DHS before even being permitted to file a stay request with EOIR, will effectively bar many indigent noncitizens from filing motions to reopen or reconsider and stay requests.

⁵⁹ Cf. *Perez Santana v. Holder*, 731 F.3d 50, 60 (1st Cir. 2013) (rejecting the Government's argument that even where a noncitizen "did everything right" by assiduously seeking relief and timely requesting reopening, the Government can still use its "exercise of its wholly discretionary authority to remove him from the United State" to "unilaterally preclude" the noncitizen from vindicating his rights).

digitized existing records of proceedings or started issuing FOIA disclosures through electronic means, meaning that respondents are dependent on EOIR to locate physical files, scan or copy them, and then send them by mail. Consequently, obtaining records can be an extremely slow process. In these circumstances, it may be impossible to offer a complete case history when a stay motion must be quickly filed to prevent a respondent's imminent removal. Rather, counsel must piece together the case history with the limited information available, and then seek to supplement later when the remaining records become available. The agency should not deny a stay motion merely because the agency itself has made it impossible to quickly obtain records.

CLINIC also opposes requiring a showing of reasonable diligence in seeking a stay and filing motion to reopen or reconsider.⁶⁰ First, this requirement contravenes the statute when applied to many types of motions to reopen. Notably, the statute does not include a diligence requirement for:

- motions timely filed within 90 days (or 30 days for motions to reconsider),⁶¹
- motions filed pursuant to changed country conditions, for which “there is no time limit,”⁶²
- motions filed under the special rule for battered spouses, children, and parents,⁶³
- motions to rescind and reopen based on extraordinary circumstances timely filed within 180 days,⁶⁴ and
- motions to rescind and reopen due to lack of notice.⁶⁵

Diligence is generally only relevant where the respondent seeks to equitably toll the applicable filing deadline, but it is not pertinent where the noncitizen files within the statutory period. EOIR's addition of a regulatory requirement that a respondent always show diligence is *ultra vires*, and therefore the agency should rescind this proposed regulatory change.

Furthermore, it is unclear how the agency will define reasonable diligence in the context of filing a motion for a stay of removal. Presumably, the adjudicator would evaluate diligence between the time at which removal became imminent, which is the point at which it normally would become necessary or advisable to file a stay request, and the point when the noncitizen actually filed the stay request. However, the noncitizen frequently has very little advance warning that their removal is imminent. If the proposed reasonable diligence requirement instead applies to another time period (one which does not begin when removal becomes imminent), it is unclear what that alternative time period would be. This lack of clarity will likely result in litigation over the interpretation of this requirement.

CLINIC also objects to the requirement that service of a motion for a discretionary stay on an opposing party be simultaneous and be by the same method by which the stay motion is filed with the immigration court or the Board because this new requirement does not serve its intended goal of ensuring fairness, and especially in view of EOIR's continued delay in implementing an

⁶⁰ See proposed subsection 1003.48(k)(iv).

⁶¹ See INA § 240(c)(6)(B), (c)(7)(C)(i).

⁶² INA § 240(c)(7)(C)(ii).

⁶³ INA § 240(c)(7)(C)(iv).

⁶⁴ See INA § 240(b)(5)(C)(i).

⁶⁵ INA § 240(b)(5)(C)(ii) (stating that these motions may be filed “at any time”).

electronic filing system nationwide,⁶⁶ will increase mail and courier costs to respondents. The rule's preamble explains that the agency is adding this requirement is for fairness reasons, and it certainly is sensible that the Immigration Court or the Board should not rule on a motion where the opposing party has not received timely notification of the filing of that motion. However, the regulatory language is a maladroitness attempt to ensure timely notification to the opposing party. Notably, it would force the adjudicator to deny a motion even if DHS received notice of the motion *before* the BIA or Immigration Court received the motion. For example, if a respondent had *first* served DHS and only later filed the stay motion with the Immigration Court or the BIA, the regulatory language would require denial of the motion. Likewise, the proposed regulation would require that the adjudicator deny the stay motion if counsel electronically served the motion on DHS (which allows DHS to receive the motion virtually instantaneously), but used a mail or delivery service or a courier to send the stay to the Board or Immigration Court. Respondents often cannot electronically file a stay motion with the Immigration Court or the BIA because of EOIR's exceptionally slow rollout of its electronic filing system—the EOIR Courts and Appeals System (ECAS). Similarly, counsel might be able to hand deliver a copy of the motion to DHS counsel, but be required to mail a stay motion to the BIA due to the BIA's physical location in Falls Church, Virginia. In this situation, DHS again would receive the motion before the BIA, but under the proposed regulation, the BIA would deny simply because the identical method of service was not used. Further, this requirement will cause respondents to needlessly incur additional costs for mail, delivery services, or courier services to send their stay motions to DHS because they will be forced to use the same method to serve DHS as they use to send their motion to the BIA or Immigration Court, even though DHS already has a system for secure, reliable, and free electronic service, whereas EOIR still has not fully implemented electronic filing. These additional costs will present a significant financial obstacle for many of the indigent clients that CLINIC and its affiliates serve.

Finally, CLINIC opposes the regulatory codification of the *Nken* factors for determining whether to grant an administrative stay of removal.⁶⁷ EOIR should not adopt the four-factor test from *Nken* because the Supreme Court created this test for U.S. courts of appeal to use only after the agency has already reviewed and rejected the underlying claim on the merits. The *Nken* test is inappropriate when the agency has not yet evaluated the facts, arguments, and evidence supporting the claims.

Instead, if EOIR adopts through regulation a balancing test for administrative stays of removal, EOIR should adopt a test that prioritizes preventing irreparable harm. EOIR cannot concentrate its adjudication of stay motions on the likelihood of success of the respondent's motion because that would require the adjudicator to prematurely decide the merits of the case and would be contrary to the purpose of the stay process. Stays traditionally have resolved a two-pronged problem: "what to do when [(1)] there is insufficient time to resolve the merits and [(2)] irreparable harm may result from delay."⁶⁸ A standard that does not adequately account for harm would undercut the

⁶⁶ See, e.g., Department of Justice, *EOIR Courts & Appeals System (ECAS) – Online Filing* <https://www.justice.gov/eoir/ECAS> (noting that only some courts currently have ECAS).

⁶⁷ The Supreme Court laid out four factors for U.S. courts of appeals to consider in evaluating stay requests: 1) the likelihood of success on the merits, 2) the likelihood of irreparable injury, 3) the harm that the stay would cause to the parties, and 4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 425-426 (2009).

⁶⁸ *Nken v. Holder*, 556 U.S. 418, 432 (2009); see also *id.* ("The authority to grant stays has historically been justified by the perceived need to prevent irreparable injury to the parties or to the public pending review.") (quotation omitted).

objectives of the stay process.⁶⁹ Focusing on the likelihood of success is particularly inappropriate where the exigencies of the removal process may necessitate initially filing a skeletal motion and later supplementing it.⁷⁰ Therefore, EOIR should heavily weigh the risk of irreparable harm when adjudicating a stay motion, especially where the motion to reopen introduces never-reviewed arguments and evidence.

IV. Conclusion

These proposed rules deter respondents from filing motions to reopen and reconsider by erecting new barriers that undermine the statutory right to a motion to reopen. The changes to long-standing motions practice include onerous procedural requirements and financial impediments. EOIR should have given the public at least 60 days to respond to these extensive changes and should therefore rescind the rulemaking on this basis alone. Substantively, many of the proposed rules create considerable and unwarranted obstacles to reopening and reconsideration. They make it more difficult for noncitizens to successfully reopen proceedings, radically undercutting the very purpose of motions—“to ensure a proper and lawful disposition’ of immigration proceedings.”⁷¹ Additionally, the proposed rules make it nearly impossible to obtain a stay of removal where removal is imminent, all but ensuring that countless respondents will be unjustly removed from the United States. These unjust and unwarranted removals will lead to family separations and in many cases, torture or even death. As described above, we therefore urge you to make significant changes to the proposed regulation and rescind the majority of the proposed changes.

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

Sincerely,



Anna Marie Gallagher
Executive Director

⁶⁹ Cf. *Judulang v. Holder*, 565 U.S. 42, 55 (2011) (“[A]gency action must be based on non-arbitrary, relevant factors,” including “the purposes of the immigration laws or the appropriate operation of the immigration system.”) (quotation and citations omitted).

⁷⁰ See *Yeghiazaryan v. Gonzales*, 439 F.3d 994, 1000 (9th Cir. 2006) (concluding that BIA erroneously denied a skeletal motion to reopen where counsel stated that additional evidence would be forthcoming within the 90-day statutory time period for filing a motion to reopen).

⁷¹ *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1 (2008)).