NATIONAL IMMIGRANT JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

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Submitted via https://www.regulations.gov

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Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041

Re: EOIR Docket No. 19-0022, Comments in Response to Proposed Rulemaking: Administrative Closure: Appellate Procedures and Decisional Finality in Immigration Proceedings

Dear Ms. Reid:

We are writing on behalf of the National Immigrant Justice Center in response to the Executive Office of Immigration Review's ("EOIR") Notice of Proposed Rulemaking ("NPRM" or the "proposed rule") to express our strong opposition to the proposed rule to promulgate and amend regulations relating to the handling of appeals to the Board of Immigration Appeals ("BIA" or the "Board") published in the Federal Register on August 26, 2020.

The National Immigrant Justice Center (NIJC) is dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding more than three decades ago, NIJC has been unique in blending individual client advocacy with broad-based systemic change. NIJC provides legal services to more than 10,000 individuals each year, including children and their family members currently or formerly incarcerated by DHS, as well as numerous caregivers of citizen and noncitizen children.

Affording due process of law is a foundational principle of the United States' democratic system of governance. The rules proposed by the EOIR in this NPRM threaten to erode this basic pillar of judicial integrity, undermining access to justice for some of the most vulnerable populations in the United States. As an immigration legal service provider, NIJC has a strong interest in the proposed regulations and is seriously concerned that they fail to provide minimal due process protections for immigrants in the United States and further compound existing systemic barriers.

In light of NIJC's interest in commenting on the substance of the NPRM, NIJC also strongly objects to the expedited timeframe for this proposed rule. The current backlog of cases before EOIR affects hundreds of thousands of immigrants and asylum seekers, who cast their fate in adjudicators' hands to receive fair and impartial decisions. The intricacy of the immigration courts and appeals system is well-known. With this NPRM, EOIR compounds dense and complicated changes that would affect countless lives. However, EOIR provides a mere thirty days for comments on these substantial and alarming changes—in the midst of a global pandemic that has upended the lives of at least seven million and killed hundreds of thousands. There is no justification for rushing the overhaul of immigration court and appellate proceedings—and in fact, EOIR provides none.[1]

As further detailed further below, EOIR should immediately withdraw its current proposal and dedicate its efforts to advancing policies that address, rather than further exacerbate, the obstacles facing immigrants navigating the complex and unbalanced immigration court system in the United States.

Thank you for the opportunity to submit comment on the NPRM. Please do not hesitate to contact Azadeh Erfani at aerfani@heartandalliance.org or (202) 827-5166 for further information.

/s/
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[1] *See* Letter from Representatives to Office of Management and Budget (April 1, 2020), *available at* https://edlabor.house.gov/imo/media/doc/Committee%20Chairs%20Letter%20re%20Comment%20Period%20Extension.pdf (requesting that OMB direct federal agencies to extend public comment periods by at least 45 days beyond the end of the declared national emergency); *see also* Letter from Senators to Office of Management and Budget (April 8, 2020), *available at* https://www.tomudall.senate.gov/imo/media/doc/4.8.20%20United%20States%20Senate%20Letter%20to%20OMB%20Acting%20Director%20Vought%20FINAL%5b1%5d.pdf.

DETAILED COMMENTS in opposition to EOIR Docket No. 19-0022, Proposed Rulemaking: Administrative Closure: Appellate Procedures and Decisional Finality in Immigration Proceedings

In this comment, we address our concerns with each of the proposed rules in this NPRM: (1) the drastic reduction in briefing extensions; (2) the proposed issuance of deportation and voluntary departure orders from the BIA; (3) the suppression of evidence from respondents while admitting evidence on appeal submitted by the Department of Homeland Security (DHS); (4) the limits on the BIA's ability to remand; (5) the improper insertion of the EOIR Director into the appellate process, wherever judges are discontent with the BIA's decision; (6) the elimination of administrative procedure, a vital docket management tool for the administration of justice; (7) the removal of *sua sponte* authority, leaving no avenues to challenge improper denials and removal orders; (8) the imposition of an arbitrary adjudication timeframe and further politicization of EOIR adjudication; (9) the NPRM's failure to consider settled reliance interests; and (10) the alarming disregard of due process, which EOIR appears to adopt uncritically from the executive branch.

1) Decreasing the briefing schedule extension is harmful for immigrants, asylum seekers, and their representatives.

In Section A of the NPRM, EOIR proposes a near 85% decrease in time for extension to file an initial brief or a reply brief—from ninety to fourteen days, with the possibility for seeking one additional extension, upon a finding by the Board. In justifying this change, the NPRM claims that the shortened timeframe will allow the Board to more expeditiously address its growing caseload and will have "relatively little impact" on the preparation of appealed cases.

To the contrary, the proposed rule will carry significant harmful effects for immigrants, asylum seekers, and their representatives in a number of ways. First, the proposed rule will provide inadequate time for *pro se* immigrants, who are navigating the complexities of the appeals process alone and often face language barriers to prepare and submit appellate briefs. Second, for those immigrants for whom obtaining counsel is even an option, the proposed rule will mean additional, potentially insurmountable, hurdles in securing such counsel. Third, the proposed rule will further exacerbate overstretched legal services' organizations ability to offer effective aid to their clients. All of these harms are only heightened in light of the ongoing global pandemic.

a. <u>This drastic reduction provides insufficient time for *pro se* immigrants to prepare and submit an appeal.</u>

For the many who cannot obtain counsel to navigate the appeal process, a single fourteen-day extension for briefing imposes an unattainable deadline to research, draft, and submit an appellate brief in light of the numerous barriers *pro se* immigrants face. Many immigrants may not speak English as their first language and thus require additional time to garner translators, perform research, and write an appellate brief without the aid of counsel. As outlined below, the fourteen-

day extension period would be insufficient time for experienced attorneys, let alone lay immigrants who have no prior experience with the intricacies of the immigration system.

These difficulties are amplified for detained immigrants who face documented barriers to accessing law libraries and legal resources while in detention. In an investigation of one detention center in Folkston, Georgia,[2] for example, the Southern Poverty Law Center found that due to inconsistencies in law library scheduling, detainees lacked regular access to the library, and when they did receive access, such access was often not provided for the five hours required per week.[3] In light of these hurdles, shortening the timeframe available for the filing of an initial or reply brief would mean less time in which to navigate and overcome these difficult circumstances.

Notably, the proposed rule aims to justify the reduced extension period by asserting that 78% of respondents in the appellate system proceed with the aid of legal representation. As an initial matter, organizations have documented significant errors in data collected and provided by EOIR in the recent past.[4] Accordingly, the statistic presented here is not fully reliable and should be independently verified prior to forming the basis for a rule change.

Even assuming, however, that such data is accurate, the statistic would be explained by the fact that immigrants who lack legal representation rarely file appeals.[5] Taking EOIR at its own word, its data demonstrates just how rare it is for immigrants in the system to be able to satisfy the hurdles necessary to appeal without counsel. In Fiscal Year 2018, for example, EOIR found that only 17% of those receiving immigration judge ("IJ") decisions filed an appeal without counsel.[6] As explained immediately below, by shortening the timeframe for the preparation of an appeal, the rule makes it more difficult for immigrants to obtain the counsel they desperately need to file an appeal in the first place.

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[2] Southern Poverty Law Center, Detention Center Must Provide Detained Immigrants with Law Library Access (Aug. 22, 2017), available at https://www.splcenter.org/news/2017/08/22/splc-detention-center-must-provide-detained-immigrants-law-library-access.

[3] *Id.*

[4] See TRAC Immigration, Incomplete and Garbled Immigration Court Data Suggest Lack of Commitment to Accuracy (Oct. 31, 2019), available at https://trac.syr.edu/immigration/reports/580/; *see also* TRAC Immigration, After EOIR Fixes Most Egregious Data Errors, TRAC Releases New Asylum Data—But with a Warning (Sept. 16, 2020), available at https://trac.syr.edu/immigration/reports/624/.

[5] *See* David Hausman, The Failure of Immigration Appeals, 164 U. Pa. L. Rev. 1177, 1177 (2016), available at: https://scholarship.law.upenn.edu/penn_law_review/vol164/iss5/3 ("Immigrants without lawyers rarely appeal. The Board therefore rarely reviews the removal orders of immigrants who might have meritorious claims but who are assigned harsh judges and lack lawyers at the beginning of their proceedings.").

[6] U.S. Dep't of Justice, Exec. Office for Immigration Rev., Planning, Analysis, & Statistics Div., Statistics Yearbook Fiscal Year 2018, at 40, available at https://www.justice.gov/eoir/file/1198896/download.

b. Truncating extensions all but ensures that unrepresented immigrants cannot secure counsel.

It has been well-documented that less time for an extension means less time for unrepresented immigrants to secure counsel, an outcome-determinative factor in most cases.[7] A large-scale national study of access to counsel in immigration court shows that among similarly situated respondents, immigrants with representation were five-and-a-half times more likely to obtain relief from removal than immigrants without.[8] Nevertheless, even under existing conditions, "[m]any immigrants never find a lawyer, often because they cannot gather sufficient funds soon enough to employ one."[9] The proposed rule only further compounds these problems by shortening the timeframe available to immigrants to acquire the necessary funds for obtaining counsel.

In addition to the lack of funds, the shortening of the briefing schedule also aggravates geographical barriers to obtaining counsel. Immigrants in rural areas often face obstacles to accessing counsel because immigration lawyers and legal resources are clustered in urban hubs.[10] This is particularly true for detained immigrants, 52% of ICE detainees are held in rural prisons.[11] Detained immigrants already rely on their relatives to afford counsel. However, the effective provision of counsel to such individuals requires more time for travel and preparation and may carry prohibitive costs. Detained immigrants unable to meet their attorneys' fees would have no time to find alternative counsel, all but ensuring their defeat against the Department of Homeland Security (DHS).

Nonprofit legal service providers, though offering low or free representation, are typically overburdened.[12] Again, their capacity is particularly limited for services to immigrants who are in detention. For example, in Michigan, local service providers do not have the resources to handle the complexity and duration of detained removal representation in a systemic manner. The list of free legal services provided by the Detroit immigration court includes only one provider, the University of Detroit Mercy Immigration Law Clinic. There are no legal service non-profits in

[7] Ingrid V. Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. Pa. L. Rev. 1 (2015) (explaining the difficulties in and data on access to counsel by immigrants in immigration court); David Hausman, The Failure of Immigration Appeals, 164 U. Pa. L. Rev. 1177, 1200 (2016), available at: https://scholarship.law.upenn.edu/penn_law_review/vol164/iss5/3.

[8] *Id.* at 9.

[9] *See* David Hausman, The Failure of Immigration Appeals, 164 U. Pa. L. Rev. 1177, 1200 (2016), available at: https://scholarship.law.upenn.edu/penn_law_review/vol164/iss5/3.

[10] Yuki Noguchi, Unequal Outcomes: Most ICE Detainees Held in Rural Areas Where Deportation Risks Soar, NPR (Aug. 15, 2019, 7:13 AM); Yuki Noguchi, Unequal Outcomes: Most ICE Detainees Held in Rural Areas Where Deportation Risks Soar, NPR (Aug. 15, 2019, 7:13 AM).

[11] Yuki Noguchi, Unequal Outcomes: Most ICE Detainees Held in Rural Areas Where Deportation Risks Soar, NPR (Aug. 15, 2019, 7:13 AM).

[12] *See* National Immigrant Justice Center, Response to RFI "Immigration Detention Services – Multiple Areas of Responsibility" (Oct. 26, 2017), available at https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2017-10/NGOResponsetoICE-RFI_FINAL_10-26-17.pdf.

Michigan able to consider open intake from immigrants already detained in the ICE contracted jails throughout Michigan in St. Clair, Calhoun and Monroe Counties. Similarly, in Utah, Immigrant Legal Services is one of the primary providers of pro bono immigration legal services in Utah. However, the organization does not have capacity to provide pro bono legal services to all immigrants requiring its aid. Likewise, NIJC's survey of providers in states surrounding the Cibola immigration detention center in New Mexico has revealed that at maximum capacity, the local bar could only represent 6% of the jail's population.[13] These are only a few examples of a problem that persists in numerous other locations throughout the United States. Lawyers facing such workloads rely on the ability to receive briefing extensions beyond the mere fourteen days proposed here to provide effective legal aid to their clients.

Where an immigrant in detention in a rural prison is able to secure counsel despite such shortages, lawyers have to expend an inordinate amount of time in order to engage in basic aspects of the representation process, such as meeting with clients.[14] An NPR investigation from 2019 found that detainees held in rural prisons—which is the majority of detainees held by ICE—face phone shortages, poor connections, limited access to interpreters, and short visitation hours.[15] An investigation by the LA Times provides an apt picture of the practical difficulties and time-consuming nature of the process:

> Judy London [an immigration lawyer] merges onto the freeway, heading northeast toward a high desert already baking under a recently risen sun. From West Los Angeles she faces a two-hour, 100-mile drive to the Adelanto Detention Facility to meet a client who is being deported. The commute time can double if rush-hour traffic is particularly bad.
>
> London arrives at the facility and walks up a concrete path flanked by gravel to the detention facility's entrance. Once inside, rows of chairs and lockers greet her, as does a desk manned by a guard. She checks in but can't meet her client yet – the facility is undergoing its daily head count and she has to wait until it's finished.
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> It can take another hour from this moment. London still has to be cleared through security and have a guard escort her client.

[13] *See* National Immigrant Justice Center, "What Kind Of Miracle ..." - The Systematic Violation Of Immigrants' Right To Counsel At The Cibola County Correctional Center (Nov. 29, 2017), available at https://immigrantjustice.org/research-items/report-what-kind-miracle-systematic-violation-immigrants-right-counsel-cibola-county.

[14] Kyle Kim, Immigrants held in remote ICE facilities struggle to find legal aid before they're deported, LA Times (Sept. 28, 2017), available at https://www.latimes.com/projects/la-na-access-to-counsel-deportation/.

[15] Yuki Noguchi, *Unequal Outcomes: Most ICE Detainees Held in Rural Areas Where Deportation Risks Soar*, NPR (Aug. 15, 2019, 7:13 AM).

> Finally, she has to wait for an interview room. Adelanto Detention Facility has an average daily population of 1,785 but only a handful of rooms designated for lawyer-client meetings. And once a room is available, she'll have to take all her notes by hand. The facility prohibits the use of phones, laptops and other electronic devices.
>
> London, like many immigration attorneys, spends a lot of time just trying to meet face-to-face with her clients. It's a good day when she actually meets them. On bad days, she can spend hours traveling, only to be turned away. The facility has refused entrance to attorneys this summer for a variety of reasons, including a chickenpox outbreak and hunger strikes.[16]

In fact, the Southern Poverty Law Center has found in an investigation that formed the basis of a lawsuit against DHS in 2018, that housing detainees far from urban hubs is a deliberate tactic by which legal representation of immigrants is made more difficult.[17] Accordingly, the government adds insult to injury by first moving immigrants away from their representatives and then proposing to shorten the time such representatives have to reach them and offer aid in these distant locations.

c. Fourteen days are woefully inadequate for counsel to prepare effective appeals.

For those immigrants who are able to overcome these significant hurdles and obtain counsel, the fourteen-day timeframe creates insurmountable difficulties for their counsel, who themselves carry heavy workloads and face the unpredictability of the Board system. The burden placed on legal aid organizations in an effort to produce these briefs on such a short timetable is unconscionable. Representing clients competently is ingrained as a responsibility of all practitioners, and the proposed shortened timeframe could lead to attorneys' committing malpractice. Specifically, this truncated timeframe would have ripple effects on the provision of competent representation: overburdened nonprofit legal service providers such as NIJC would have to seek even more pro bono assistance from the private bar, while referrals and retention of counsel alone could consume the full fourteen days; meanwhile, the unpredictable character of BIA appellate practice and EOIR's archaic filing and transcript release system makes the provision of competent representation during this timeframe a near impossibility.

Immigration legal service providers such as NIJC are already operating at or beyond capacity to meet the demands of their clients. Despite partnering with law school clinics and leveraging the generosity of those volunteers willing to take cases on a pro bono basis from private law firms, NIJC is only able to provide representation to a fraction of the thousands of immigrants needing

[16] *Id.*

[17] *See* Compl., *Southern Poverty Law Center v. Dep't of Homeland Sec*., 1:18-cv-00760 (Apr. 4, 2018), available at https://www.splcenter.org/sites/default/files/2018-04-04_dkt_0001_complaint.pdf.

legal assistance. Because immigrants do not receive appointed counsel in either immigration court or BIA cases, many legal service providers, including NIJC, require the generosity of large commercial law firms to provide pro bono representation in cases where the legal service provider does not have in-house capacity. However, the process of conducting intake and then making a successful referral to a pro bono attorney can be time consuming; if a legal service provider identifies a person with a strong appellate claim after they have represented themselves *pro se* before the immigration court, it may take the entirety of the first fourteen-day period just to successfully find pro bono representation. Conflict checks alone for pro bono counsel may take much of that timeframe, while finding interpretation and translation to formalize the attorney-client relationship could take the remainder.

Further yet, the immigration appeals process is mired by inefficiencies and unpredictability that make it prohibitively difficult to meet a fourteen-day extension deadline. As previously documented by NIJC, the BIA is in serious need of reform.[18] The system currently lacks an online docketing and case management system and there is no universal e-filing system at EOIR.[19] Accordingly, litigants must rely on the US postal service or private courier services to make paper filings, which are regularly subject to delays and unpredictability disruptions.

Furthermore, unlike other court systems, where briefing schedules are predictable because of formulas that dictate service or record, BIA records come out arbitrarily, making it impossible for lawyers to budget BIA briefing time into their schedules. And despite the new rule's assertion of more regimented timing, history demonstrates the Board has been unable to timely issue transcripts.

Unfortunately, the time afforded by a single fourteen-day briefing extension will fall far short of that required to address the myriad of delays arising in an immigration proceeding. Given the significant backlog miring the system, in practice, immigrants and their lawyers often have to wait more than fourteen days merely for judges and members to determine whether they will grant a briefing extension. Under the proposed rule, by the time an appellant receives a response as to whether or not the extension is granted, the fourteen days are likely be expired. Moreover, where a litigant successfully demonstrates "good cause," there may be many issues that prevent filing within fourteen days, including serious medical issues or a death in the family. The proposed rules fail to account for any these possibilities by limiting the number of extensions available to one.

[18] *See* Charles Roth & Raia Stoicheva, National Immigrant Justice Center, *Order in the Court: Commonsense Solutions To Improve Efficiency and Fairness in Immigration Court* (Oct. 2014), available at https://immigrantjustice.org/sites/immigrantjustice.org/files/Order%20in%20the%20Courts%20-%20Immigration%20Court%20Reform%20White%20Paper%20October%202014%20FINAL2.pdf.

[19] *Id.* at 2.

d. Reducing the time needed for briefing in the midst of a global pandemic is unconscionable.

We draft these comments from the epicenter of a global pandemic that has already afflicted over 31 million lives with a highly infectious disease and killed approximately 200,000 people in the US alone. This unprecedented crisis not only brought business as usual to a near halt, it further compounded court delays and inefficiencies.[20]

As with the rest of the courts in the country, the immigration courts have faced serious and severe delays as a result, adding to their existing backlogs. The US postal service, on which many immigrants rely for the submission and receipt of records in relation to their cases, has also cut back its services causing historical delays.[21] NIJC's entire staff are currently required to work remotely and face disruptions in normal modes of attorney-client communication. NIJC is far from alone in our constrained capacity as other organizations are also facing similar strains. Reports suggest that the pandemic is here to stay for the foreseeable future.[22]

To suggest a reduction in the time available to appellants to navigate these circumstances is unconscionable at this time. To reduce the briefing period in the midst of a crisis of such historical magnitude is not just unreasonable; it raises serious questions as to the EOIR's motives in taking away due process rights for immigrants, while upending decades of established practice law within half the time normally granted for public comment.[23] In light of these circumstances, any reduction in the time provided for the submission of briefs would fly in the face of reason.

e. The NPRM's remaining justifications do not pass muster.

Under *State Farm*, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[24] Its decision must be "based on a consideration of the relevant factors" to survive review,

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[20] *See* WNYC, *Dysfunction in Immigration Courts System Leads to Growing Case Backlog During the Pandemic* (Sept. 22, 2020), *available at* https://www.wnycstudios.org/podcasts/takeaway/segments/immigration-courts-system-backlog-pandemic ("Under the Trump administration, the backlog of pending immigrant deportation cases has grown from roughly 500,000 in 2016 to more than 1.2 million in 2020. . . . And a lack of clear planning and messaging from the federal agency overseeing immigration courts has added an additional layer of confusion to the system with immigrants, attorneys, and even judges often having to find out over Twitter whether a court is open or closed.").

[21] *See* Broadwater, Luke; Healy, Jack; Shear, Michael D.; Fuchs, Hailey, N.Y. Times, *Postal Crisis Ripples Across Nation as Election Looms* (August 15, 2020), *available at* https://www.nytimes.com/2020/08/15/us/post-office-vote-by-mail.html.

[22] Holly Ellyatt, CNBC, *Coronavirus vaccine won't bring about 'fairytale' ending to pandemic, expert warns* (Sept. 22, 2020), *available at* https://www.cnbc.com/2020/09/22/coronavirus-vaccine-wont-bring-about-a-fairytale-ending-expert-.html.

[23] *See supra* n. 1.

[24] *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

will be deemed arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[25]

The NPRM claims that "[a]lthough current regulations allow an extension of up to 90 days, Board policy for many years has been to grant an extension of only 21 days regardless of the amount of time actually requested."[26] In so doing, the NPRM cites the BIA practice manual, which provides that "[i]f a briefing extension is granted, the Board's policy is to grant an additional 21 days to file a brief regardless of the amount of time requested."[27]

Despite the practices of the BIA, the regulations, which take precedence, grant immigrants the possibility for a 90-day extension. This 90-day extension possibility is enshrined in the current regulations, which have gone through the notice and comment process. Accordingly, these regulations take precedence over and preserve discretion not existing in the BIA's practice manual.[28] To remove the 90-day extension of current regulations based on the unilateral practice of the BIA without a proper notice and comment process would be to abrogate principles governing the administrative rulemaking process.

Furthermore, EOIR has alleged that appellants routinely abuse extension requests to skirt simultaneous briefing for "gamesmanship."[29] EOIR provides no basis for its claim of bad faith on the part of respondents. and the suggestion shows very little understanding of the barriers faced by stakeholders and respondents, outlined above. Given the myriad of legitimate reasons for which counsel and *pro se* appellants require additional time for briefing, this justification for the proposed rule change rings hollow. EOIR thus fails to provide satisfactory and rational explanations for truncated briefing extensions as currently provided in the regulations; as such, this proposed change cannot pass muster.

[25] *Id.* at 43.

[26] 85 Fed. Reg. 52,491, 52,498 (Aug. 26, 2020) (citing BIA Practice Manual at 65).

[27] U.S. Dep't of Justice, Board of Immigration Appeals Practice Manual at 65 (June 10, 2020), available at https://www.justice.gov/eoir/page/file/1284741/download.

[28] *See, e.g., Flores v. Sessions*, 862 F.3d 863, 879 n.18 (9th Cir. 2019) (characterizing administrative policy manual to "setting governmental policy on the fly," and as "inconsistent with the accountability and transparency that should be expected of every administrative agency.").

[29] 85 Fed. Reg. 52,491, 52,498 (Aug. 26, 2020).

f. The Reality of BIA Representation Further Illustrates the Harm of Truncating Extension Requests.

NIJC's firsthand experience with its client are further evidence the harm that will result to immigrants from a reduction in the number and time for briefing extension as proposed in the NPRM.

In the context of clients trapped in Migrant Protection Protocols ("MPP" or "Remain-in-Mexico"), attorneys do not have the luxury of being both in the courtroom and with their clients during proceedings. The Customs and Border facilities are not, however, equipped for simultaneous translation (at least not for the IJ decision). In Tina's[30] case, she did not receive simultaneous translation of the IJ's order. Tina's attorney was prejudiced by not being able to hear the decision announced by the judge directly, either, only hearing the Spanish translation. Tina's attorney had to depend on the briefing schedule and transcript to fully prepare for the appeal. Limiting extensions raises due process concerns because attorneys on appeal have limited time to digest and respond to the transcript, and are at a comparative disadvantage to DHS, which had the opportunity to hear the full proceeding in English.

As mentioned above, unlike other court systems, where briefing schedules are predictable because of formulas that dictate service or record, BIA records come out arbitrarily, making it impossible for lawyers to budget BIA briefing time into their schedules. And despite the new rule's assertion of more regimented timing, history demonstrates the Board has been unable to timely issue transcripts. In one NIJC case, the IJ issued a decision denying asylum to a young woman named Meryl[31] from El Salvador who experienced severe gender violence—including rape by a gang member—on March 1, 2019. Meryl's NIJC attorney timely filed a notice of appeal to the BIA on March 25, 2019. More than a year and half later, the BIA still has not issued transcripts or a briefing schedule.

That NIJC attorney of record maintains an active immigration court practice and, for example, has a week in late September where she is scheduled to represent two clients in asylum merits hearings four days apart. If the briefing schedule were to be issued in the weeks leading up to those hearings, the attorney would legitimately have reason to need an extension of more than fourteen days. The assertion that attorneys could be writing briefings in advance of the issuance of transcripts and briefing schedules is unresponsive to the problem because, as is the case in Meryl's matter, the law has changed significantly since issuance of the IJ decision.

[30] Pseudonym used to protect confidentiality.

[31] Pseudonym used to protect confidentiality.

2) EOIR's proposed changes to the finality of BIA decisions and voluntary departure ("VD") authority could cause irreparable harm.

Finality dictates whether or when a respondent may seek judicial review of agency action. The proposed change gives BIA authority to issue final orders when adjudicating an appeal, including final orders of removal when IJ has made finding of removability and application for protection has been denied; grants of relief or protection from removal; and orders to terminate or dismiss proceeding. The impact of this proposed change could be devastating, given the sheer length of appeals. For example, a respondent could have multiple grounds of eligibility, including asylum and T visa. An IJ has jurisdiction over the asylum claim only and may deny on the merits, leading the respondent to appeal. During the pendency of such appeal, the respondent could receive a grant of the T visa from DHS. However, the BIA's summary removal order, affirming the IJ's finding on the asylum claim, could result in the deportation of the individual, found by a separate agency to be a trafficking survivor. Bringing this deportation to a halt would demand substantial resources that most lack, especially under the strain and imminent risk of removal.[32]

The proposed change also provides the authority given to the BIA to consider issues relating to the IJ's decision on VD de novo and to issue final decisions on requests for VD based on the record of proceedings. This proposed change will preclude the BIA from remanding a case to the IJ solely to consider a request for VD under 240B(b). However, EOIR does not contemplate cases where DHS opposes the grant of VD and leaves open the possibility that the BIA would deny VD without a merits hearing, resolving the conflict between the respondent's proffer of VD and DHS' objection in DHS' favor. Since contested VD requires a merits hearing and fact-finding, there is no reason for the regulation not to permit remand for sole purposes of VD consideration. Failing to do so would undermine basic principles of fairness; a denial of VD means a removal order that can separate families for ten years ore more. Remanding for VD consideration is a proper safeguard to avert such dire consequences. Sacrificing this safeguard for unsubstantiated claims of efficiency is indefensible.

3) The NPRM's proposed changes to new evidence considered on appeal defy principles of fairness and betray impermissible bias in favor of DHS.

The proposed rule 8 C.F.R. § 1003.1(d)(3)(iv) would prohibit the BIA from receiving new evidence on appeal, remanding a case for the IJ to consider new evidence, or considering a motion to remand based on new evidence; parties wishing to have new evidence considered must file a motion to reopen per 8 C.F.R. § 1003.2(c). Meanwhile, the government does not have to formally move to reopen when there is new evidence on appeal. This double standard gives the appearance of impropriety and favoritism toward one party in the proceedings.

[32] *See* Zack Peterson, The Appeal, *Deported Before His Case Was Closed* (Sept. 11, 2018), *available at* https://theappeal.org/ice-deporting-people-appealing-cases/ (recounting cases where even individuals with stay of removals are wrongfully deported).

Rules against admitting previously available evidence have long existed. However, the proposed rule would specifically strip the BIA of the ability to remand a case *sua sponte* for further fact-finding or where the issue was not adequately raised below. The Board could only remand when factual issues are raised by results of biometrics. This narrow restriction ignores the reality that cases are organic and continuing in asylum matters, and critical evidence may emerge. In NIJC's experience, it frequently takes months for asylum seekers, including children, to disclose the persecution and torture they suffered as a result of trauma.[33] Ending the ability for them to proffer new evidence would preclude fundamentally fair proceedings.

The scope of the BIA's administrative notice, particularly when only DHS is permitted to submit new evidence, is problematic. DHS may submit unsworn allegations[34] of criminal or gang-related activity, containing multiple layers of hearsay; the respondent would be unable to submit counter evidence pursuant to the new rules. The BIA's unilateral acceptance of DHS' evidence would amount to unwarranted deference and undermine constitutional standards of fundamental fairness by weighing unreliable evidence against a helpless respondent.

For noncitizens who are unrepresented, the BIA would have no authority to prevent injustice and remand the case for further fact-finding even when the IJ clearly failed to develop the record. Especially considering immigration judges are faced with performance metrics that require them to adjudicate 700 cases per year, it is likely there would be less incentive to take the time to develop the record in *pro se* cases because there is no possibility that the case could be remanded for failure to do so. This provision appears designed to swiftly remove those without representation who would be least likely to understand that they have the ability to seek remand and would most heavily rely on EOIR to protect their rights with finality.

NIJC frequently sees cases where the respondent proceeded *pro se* and detained, failing to submit evidence. NIJC client Michel,[35] for example, appeared detained and unrepresented at his merits hearing, failing to comprehend that this was his final hearing. Consequently, he had no evidence to present or file as he did not understand the nature of the hearing he faced. When NIJC represented him on appeal, we successfully argued that his due process and statutory rights were at stake in accepting the evidence that the client had available, but did not know he was required to submit ahead of the hearing. With this NPRM, it would be almost impossible in cases like Michel's to successfully argue for remand, even where noncitizens are represented. Proceedings could only be remanded if the IJ's factual findings were clearly erroneous which leaves no room for the BIA to remand if the IJ's fact findings were inadequate. If this NPRM becomes final, even

[33] *See infra* section 7) for examples of the interference of trauma with asylum seekers' ability to share evidence of their persecution.

[34] *See, e.g., Prudencio v. Holder*, 669 F.3d 472, 483–84 (4th Cir. 2012) (Police reports "often contain little more than unsworn witness statements and initial impressions" and "because these submissions are generated early in an investigation, they do not account for later events, such as witness recantations, amendments, or corrections.").

[35] Pseudonym used to protect confidentiality.

represented respondents such as Michel would receive swift deportation orders, in contravention of their right to full and fair proceedings.

4) The NPRM would unjustifiably curtail the BIA's remand authority and would improperly limit the IJ'S review when the case is remanded.

This proposed rule 8 C.F.R. § 1003.1 (d)(7)(iii), (iv) would strip the BIA of its ability to remand cases in most circumstances. The BIA would be barred from remanding in "the totality of circumstances" or *sua sponte*, unless there is a jurisdictional issue. If a Board Member sees that there was a grave injustice in the adjudication by the immigration judge, but the record was not sufficiently developed to grant relief, the BIA will have no choice but to uphold the denial.

Moreover, the BIA would be barred under the proposed rule from remanding even if there is a change in the law unless the change affected grounds of removability. Under the proposed changes, the BIA would lose the ability to remand based on new grounds of relief available to the noncitizen. Consequently, an asylum seeker would be denied based on existing law at the time of the immigration hearing; Congress or the Circuit Court, may have changed the asylum eligibility criteria while the appeal was pending, making the asylum seeker potentially eligible for relief; but the BIA would be foreclosed from remanding the case to the IJ. In such a circumstance, if the record was sufficient to grant, the BIA could do so, but if further fact-finding were required, the applicant would be foreclosed from relief.

This proposed change would result in the BIA upholding almost all decisions that come before it, leaving many noncitizens in permanent limbo, such as individuals with withholding of removal who could never reopen proceedings even if they have an approved immediate relative petition or receive derivative asylum status through an immediate relative. Given the large backlog of cases, it is not uncommon for respondents to acquire new basis of relief following remand. For example, a respondent may marry a U.S. citizen and become eligible for adjustment of status after the remand. Precluding the respondent from pursuing this viable relief would result in an unfair and premature deportation order, truncating the respondent's rights. It would further separate the respondent from their U.S. citizen spouse for many years, causing irreparable harm.

The proposed rule would further severely limit the issues that an IJ could consider if a case is remanded. Under 8 C.F.R. § 1003.1 (d)(7)(iv), the BIA would be authorized to remand a case to the IJ and the IJ could not consider any other issues beyond the issue(s) specified on remand, even though the BIA would simultaneously deprive itself of jurisdiction. Therefore, if a new opportunity of relief became available in the intervening time when the noncitizen is waiting for a new individual hearing, or if the noncitizen identified another error in the prior decision, the IJ would be foreclosed from considering those issues. Immigration court proceedings would be but deportation mills, despite available opportunities to obtain legal status.

5) EOIR's proposed scheme to certify cases to the EOIR Director cannot comport with appellate order and integrity.

In proposing 8 C.F.R. § 1003.1(k), EOIR argues that although the BIA has used various informal and internal quality control measures over time, no formal mechanism exists allowing immigration judges to raise issues regarding remand orders that may need clarification or further explication. Under the proposed rule, Immigration Judges are permitted to certify BIA decisions reopening or remanding proceedings for further review by the EOIR Director in situations where the IJ alleges the BIA made an error. This change is limited to cases in which the IJ articulates a specific error committed by the BIA within following criteria: 1) BIA decision contains typo or clerical error affecting outcome of the case; 2) BIA decision is clearly contrary to provision of the INA or other immigration law or statute, applicable regulation, or published, binding precedent; 3) BIA decision is vague, ambiguous, internally inconsistent, or otherwise didn't resolve basis for the appeal; or 4) material factor pertinent to issues before the IJ wasn't clearly considered in the Board decision. Under the pretense of quality assurance, this proposed change would embolden disgruntled IJs and perturb any semblance of appellate order.

We strongly oppose this proposed rule. This provision would allow IJs who disagree with a BIA remand, to certify the case to the EOIR Director, a political appointee. Far from promoting "quality assurance," this rule further undermines the integrity of the BIA. When an IJ's decision is overturned on appeal, that judge may disagree with the BIA decision. It is fundamental to a sound system of jurisprudence that appellate bodies have the authority to review decisions by triers of fact. Although the proposed rule acknowledges that the process should not be used to express disapproval of or disagreement with the outcome of a Board decision, an IJ can certify a case to the Director are so broad—including, for example, that the IJ believes that the BIA decision is contrary to law, or is "vague". In effect, this rule further politicizes immigration courts and permits IJs who are ideologically aligned with the Director to circumvent the BIA.[36]

For clients anxiously awaiting protracted appeals, this proposed yo-yo between the BIA, the IJ, and the EOIR Director would destroy any pretense of finality—a potential last-straw for despondent individuals who have already waited too long for these life-changing decisions. This includes respondents that DHS refuses to release during the pendency of their appeal. Those individuals are more inclined to abandon their claims when their detention seems endless, and they see no end to their appeal.

[36] This concern is not merely hypothetical. Although this rule is not yet in effect, the procedural posture of *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) foreshadowed this particular problem. There, the BIA reversed a judge and remanded to proceed in accordance with binding precedent. Rather than abide by the BIA's order, the IJ issued a *sua sponte* order to certify the matter back to the Board, resulting in certification to the Attorney General and reversal of existing precedent. Such back-and-forth proceedings would become commonplace when acrimonious IJs can appeal to the EOIR Director and avert the BIA's reversal.

6) EOIR's proposed elimination of administrative closure further undermines its stated goal of efficiency.

With 8 C.F.R. § 1003.1(d)(1)(ii) and 8 C.F.R. § 1003.10(b), EOIR proposes to eliminate an incredibly useful tool, which promotes administrative efficiency. For decades, administrative closure has permitted IJs and the BIA to temporarily remove a case from their active docket or calendar under a clear legal standard established by the BIA.[37] Administrative closure allows Immigration Judges to prioritize cases in need of immediate resolution and to deprioritize cases which may be resolved by other agencies, such as collateral petitions before DHS' U.S. Citizenship and Immigration Services (USCIS). Administrative closure is also a useful mechanism for providing a noncitizen an opportunity to pursue adjudication in criminal or civil court. Ending the ability to administratively close cases means that the system will remain backlogged. This proposed rule would deprive IJs and the BIA of their ability to use their own judgement to manage their docket. The NPRM supplies no sound reason for this change, further erodes any trust in the agency's ability to uphold judicial independence, and would adversely impact the most vulnerable respondents.

a. <u>EOIR provides no reasonable justification for stripping IJs and the BIA of administrative closure authority.</u>

Unfortunately, this is not the first time that this common administrative tool is under attack. In 2018, the Attorney General issued a decision upending existing regulations to bar IJs and the BIA from administrative closure.[38] This ruling was successfully challenged in federal court,[39] where the Fourth Circuit reinstated the IJ or the BIA's authority to "take any action" that is "appropriate and necessary" in a given case, including administrative closure.[40] The Court determined that the Attorney General unreasonably "(1) breaks with decades of the agency's use and acceptance of administrative closure and (2) fails to give 'fair warning' to the regulated parties of a change in a longstanding procedure."[41] The Court also criticized the Attorney General's "purported concerns with [with] efficient and timely administration" as "internally inconsistent" with its effects of "lengthen[ing] and delay[ing] many . . . proceedings" and inviting "the reopening of over 330,000 cases," thereby "straining the burden on immigration courts."[42]

EOIR did not heed the Fourth Circuit's warnings in this NPRM. Still breaking with decades of accepted practice, the NPRM puts forth the same dubious efficiency concerns without setting forth

[37] *See Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012); *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017).

[38] *See Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018)

[39] *See Zuniga Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019).

[40] *Id.* at 292 (citing 8 C.F.R. §§ 1003.1(d)(1)(ii) & 1003.10(b)).

[41] *Id*. at 296 (quoting Christopher, 567 U.S. at 155-56).

[42] *Id*. at 297.

a reasonable justification for this substantial change. EOIR's proposed rule attempts to codify *Matter of Castro-Tum* to "eliminate any residual confusion" regarding the scope of the regulations.[43] However, the only confusion in question appears to rest with EOIR. First, EOIR purports that prior BIA precedent permitting administrative closure was contradictory, because the regulations reference the "disposition" of cases which connote a final or dispositive decision. This argument, recycled from *Castro-Tum* and the Attorney General's briefing before the Fourth Circuit, is misleading. As the Fourth Circuit stated in *Zuniga Romero*, administrative closure contributes to the final disposition of cases, by permitting respondents to actively pursue adjudication of a visa or matter that is outcome-determinative for their removal proceedings.[44] Second, EOIR contends that reading existing regulations as permitting administrative closure would make the explicit grant of administrative closure authority in other rules superfluous. Here again, EOIR missed illuminating portions of the Fourth Circuit's decision, stating that:

> … the Attorney General's reasoning is undercut by his entry into various settlement agreements in which administrative closure is authorized or ordered by an Article III judge—that is, the Attorney General's position is internally contradictory because it would allow administrative closure to be used to implement a judicial settlement even though no regulation expressly authorizes administrative closure in such a situation. Furthermore, an Article III judge could not order IJs or the BIA to administratively close cases if IJs or the BIA lacked the authority to do so—yet they have done just that. Thus, the better reading is that judicial settlement is simply a circumstance in which administrative closure is an action deemed "necessary and appropriate" under the foregoing regulations.[45]

In sum, prior litigation dispelled any confusion or paradox. Rather than learn from its failed arguments, this NPRM attempts to rewrite regulations in its favor.

b. <u>Absent reasonable justification, this proposed change would undermine IJs and the BIA's ability to exercise independent judgment.</u>

EOIR would strip IJs and the BIA of a widely used docketing tool in the federal judiciary—as well as any pretense of independent judgment.[46] Immigration judges and the BIA should be empowered to control their own dockets, especially with a tool like administrative closure which is a fundamental part of the provisional waiver process. The National Association of Immigration Judges (NAIJ) stressed that "[i]n the complex interaction between the Immigration Judge, [DHS], [ICE], [USCIS], and sometimes state courts and other authorities," administrative closure allowed

[43] 85 Fed. Reg. 52503.

[44] *See Zuniga Romero*, 937 F.3d at 294 n.13 (citing *Matter of Avetisyan*).

[45] *Id.*

[46] *See Penn-Am. Ins. Co. v. Mapp*, 521 F.3d 290, 295 (4th Cir. 2008) (explaining how district courts may administratively close cases, such as by removing them from the active docket, as a docket management tool).

judges to complete more cases by focusing on cases that were truly ripe for review while external factors hampering other cases were resolved.[47]

Neutral arbiters are required to preside over proceedings with impartiality, not advance DHS' goal to deport at all cost; however, the proposed rule would further DHS' goal by rushing the disposition of cases and ignoring avenues for relief that are not under the court's jurisdiction. According to a report by TRAC, taking administrative closure away from the Immigration Judges as a tool for managing their caseloads would disproportionately impact precisely those immigrants who are likely to obtain relief from deportation, adjust status, or otherwise obtain lawful status. The effect of an administrative closure is "to temporarily remove a case from an Immigration Judge's active calendar or from the Board's docket."[48] It does not terminate proceedings or confer any status on the noncitizen.[49] Therefore, this proposed change cures no evil, while pushing IJs and the BIA to bring cases to premature disposition—one that inevitably serves DHS' deportation agenda.

Eliminating administrative closure would also result in harsh consequences for the most vulnerable noncitizens. Adults and children in removal proceedings may want to request administrative closure for a myriad of reasons: to await adjudication of a Petition for Alien Relative (form I-130); to apply for a T visa (form I-914), U visa (form I-918), Special Immigrant Juvenile Status (form I-360), Adjustment of Status as a VAWA self-petitioner, id., or Temporary Protected Status (form I-821); to pursue a direct appeal of a conviction, or to pursue post-conviction relief relevant to maintaining/obtaining lawful immigration status; to pursue a family court order required for obtaining Special Immigrant Juvenile Status (SIJS); to seek a provisional waiver of unlawful presence (form I-601A) before departing the United State for consular processing;[50] to apply for Deferred Action for Childhood Arrivals, either as a renewal or as a new initial application (I-821d); on account of mental incompetency;[51] or in order to ensure that the cases of parents and children are decided together, where the parent and child have been placed in in separate proceedings.

Among the thousands of cases NIJC sees per year, countless would benefit from administrative closure to pursue collateral relief. NIJC recently represented Diane,[52] who entered the United States with her minor child seeking asylum protection. After entering the United States, Diane was waiting for a public bus one evening when she was kidnapped and sexually assaulted at gunpoint by a stranger. Diane immediately reported the crime to the police and submitted to a medical exam. The results of the rape kit identified the perpetrator and he is now charged in a 62 count indictment. The criminal prosecution is ongoing and Diane is fully cooperating in the

[47] Nat'l Ass'n of Immigration Judges, to Hon. Jefferson B. Sessions, U.S. Att'y Gen. 5 (Jan. 30, 2018).

[48] *See Matter of Avetisyan*, 25 I&N Dec. at 692.

[49] *See Matter of Amico*, 19 I&N Dec. 652, 654 n.1 (BIA 1988).

[50] *See* 8 C.F.R. § 212.7(e)(4)(iii)

[51] *See* Matter of M-A-M-, 25 I&N Dec. 474, 483 (BIA 2011)

[52] Pseudonym used to protect confidentiality.

prosecution. Diane submitted her application for U nonimmigrant status as the victim of a violent crime who is cooperating with law enforcement, but with current processing times, USCIS is taking more than 5 years before reviewing cases for prima facie eligibility. Meanwhile, Diane is also in removal proceedings in the meanwhile and NIJC prepares and files annual motions to continue, which the IJ reviews and grants because Diane's ongoing presence in the United States is critical to this prosecution. In the interests of administrative efficiency, there is no reason to keep this case on an active removal court docket. The IJ should have authority to administratively close cases for immigrant victims of crime waiting for a decision in their petitions for U nonimmigrant status.

Administrative closure gives respondents the opportunity to pursue more promising forms of relief, eliminates unnecessary costs associated with remaining in active removal proceedings, and allows judges to prioritize other cases while the respondent awaits the resolution of other pending matters that would make removal proceedings obsolete.[53] This tool is particularly useful in situations where immigration judges cannot complete the case until action is taken by USCIS, state courts and other authorities.

7) Removing *sua sponte* authority to reopen or reconsider a matter will eliminate judges' and Board members' ability to remedy injustices.

The proposed rule eliminates the ability of immigration judges and the BIA to sua sponte reopen or reconsider orders of removal, with few exceptions. Similarly, proposed 8 C.F.R. § 1003.23(b)(1) would only allowing an IJ to reopen on their own motion to correct a typographical or ministerial error. The rule claims that this change is necessary to "bring finality to immigration proceedings," but EOIR ignores an equally important goal of immigration law: ensuring due process. Sua sponte motions to reopen/reconsider are a vital tool for curing errors and injustices that may have occurred during removal proceedings and allow judges to grant relief to immigrants who qualify. Eliminating access to this key safety net will lead to devastating results. Under the proposed changes, with very limited exceptions, a noncitizen may only file one motion to reopen and must file that motion within 90 days of the final order. As a result, noncitizens who later become eligible for relief, for example, noncitizens who obtain an approved immediate immigrant relative petition, an approved application for SIJS status, or derivative asylum status through a spouse or parent, would be excluded from reopening their removal orders.

The proposed change will make it more difficult for unrepresented noncitizens to obtain counsel, and more difficult for unrepresented noncitizens to prevail on appeal. They will further make it more difficult for noncitizens to successfully reopen proceedings, even when they have relief available, even while DHS is permitted to reopen cases with no limitations. The proposed change would only allow the BIA to reopen proceedings based on a motion filed by one of the parties.

[53] *See* Brief of Amici Curiae Tahirih Justice Center et al. at 6, Castro-Tum, 27 I. & N. Dec. 271 (A.G. 2018) (No. A 206-842-910).

This provision would greatly reduce respondents' ability to have motions to reopen granted that are untimely or that are number-barred, even in circumstances where the noncitizen could not have filed the motion earlier. The following NIJC client cases illustrate the significant harm this proposed rule—paired with the proscription on consideration of new evidence discussed in section 3)—would inflict upon asylum seekers, children, and sexual assault survivors:

- Elizabeth[54] fled to the United States from El Salvador when she was 14 years old. At her second master calendar hearing, where she appeared *pro se*, as a 15-year-old girl, Elizabeth asked for more time to find an attorney, but the judge told Elizabeth she would have to accept voluntary departure or a removal order. Unaware of any other option, Elizabeth accepted a voluntary departure order. Because the judge failed to question 15-year-old Elizabeth about her family, immigration history, or fear of return, he was unaware of the reason she had fled El Salvador or the fact that her mother and siblings had also recently fled to the United States and were on the verge of filing for asylum. Approximately four months after accepting voluntary departure, Elizabeth, through an attorney her family had obtained, filed a Motion to Reopen. The motion asked the judge to utilize his *sua sponte* authority to reopen her case based on these facts, the judge's failure to ask Elizabeth any questions before forcing her to accept voluntary departure or deportation, and the fact that Elizabeth's mother now had a pending asylum application before the asylum office, on which Elizabeth was a derivative. Although DHS did not oppose the motion, the immigration judge denied the request to reopen Elizabeth's case, focusing almost exclusively on the status of Elizabeth and her family as "illegal" migrants. On appeal, the BIA vacated the judge's order and sustained the appeal, based on "the totality of the circumstances." In 2015, Elizabeth's mother was granted asylum and Elizabeth was granted asylum as a derivative. Years later, Elizabeth is preparing to become a U.S. citizen.

- Erick[55] fled to the United States as an unaccompanied child and was placed in the custody of the Office of Refugee Resettlement (ORR). ORR released him to the care of his cousin, but his cousin abused and neglected Erick before forcing him from the home. Homeless and 16 years old, Erick was able to find a home with his older sister in a different state. After arriving at his sister's home, however, Erick lacked the resources and information to determine how to change venue in his case or to travel back to Florida for any court hearings where his abusive cousin lived. The Immigration Court ordered him removed in absentia in early 2019 and later, Erick was detained and transferred back to ORR custody in Illinois. While in ORR custody, Erick learned for the first time that he had an in absentia removal order and that he was eligible for asylum and other relief. Erick, through his NIJC counsel, filed for asylum and a Motion to Reopen, but the IJ denied Erick asylum in a two-sentence decision that did not address the arguments presented in his motion. Erick,

[54] Pseudonym used to protect confidentiality.

[55] Pseudonym used to protect confidentiality.

through NIJC counsel, appeal the judge's denial of his motion to reopen and the BIA granted the motion to reopen in its exercise of *sua sponte* authority. Today Erick is waiting for his asylum office interview and continues to work with his NIJC attorney to prepare his asylum case.

- Leila[56] fled to the United States in 2004 after she served as a critical witness against gang members who committed a massacre in her neighborhood. Though her country's government sought to conceal her identity and placed her in witness protection, gang members quickly tracked Leila down and government officials recommended she flee because they could not protect her. When Leila arrived in the United States, she was traumatized and unfamiliar with the U.S. asylum system. Leila did not attend court for fear of being deported to her home country where she feared she will be killed. About six years later, the gang located Leila's daughter, who remained in the home country, and brutally tortured her. Leila's daughter fled to the United States. NIJC assisted Leila's daughter and also filed a motion to reopen for Leila, along with significant evidence that the gang continued to target the mother and her family. The immigration judge used *sua sponte* authority to reopen Leila's case, ultimately granting her protection in immigration court in 2019.

- Joceline[57] fled to the United States from Central Africa in 2007. Joceline was a political dissident who experienced severe persecution, including sexual violence, by government agents. When she arrived in the United States, Joceline was traumatized and still recovering physically from the attacks she experienced. She lived with three cousins who had also fled their home country and had already been granted asylum. Joceline was deeply ashamed both because of the nature of the violence inflicted against her and because she had to rely so heavily on her cousins for food, housing, and other resources. For these reasons, Joceline did not disclose to her cousins what had happened to her prior to her flight and did not request affidavits from them in support of her asylum case. Because she lacked evidence to corroborate her case, the IJ denied her case for asylum and the Board sustained the denial. NIJC prepared a motion to reopen, worked with Joceline to gather affidavits from her cousins, secured a psychological forensic exam for her, and explained to the Board how the client's trauma and shame had prevented her from gathering that evidence earlier in her case. The Board recognized the client's evidence had been unavailable previously, reopened her case, and remanded the matter to the immigration judge. In 2014, Joceline was granted asylum.

- NIJC represented Edith, a Central American woman who sought asylum after her husband was killed and her daughters, who are United States citizens, were threatened with rape by

[56] Pseudonym used to protect confidentiality.

[57] Pseudonym used to protect confidentiality.

gangs in their mother's home country. Edith was detained and initially sought protection without counsel before an IJ. Edith was highly traumatized and suffered an anxiety attack in immigration court. The IJ accused her of feigning a medical event and ordered her deported. Edith hired an attorney to represent her before the Board of Immigration Appeals, but that attorney failed to argue that the client qualified for asylum. Finding no reversible legal error, the BIA dismissed her appeal. NIJC then accepted Edith's case and filed a motion to reopen, arguing that the prior attorney's representation had been ineffective and submitting substantial countries conditions evidence and witness affidavits to corroborate the client's claim. The Board reopened the case and, on remand, Edith was granted protection before the immigration court in 2020.

As these client cases demonstrate, *sua sponte* authority is critical for the administration of justice. Affording sua sponte review permits to correct injustices and restore a sense of fair proceedings for too many who failed to navigate this complex system alone. Although the NPRM contends that "negative consequences. . . outweigh any benefits that may accrue as a result of Board members or immigration judges retaining such authority."[58] However, EOIR mostly debates whether the term "*sua sponte*" was appropriately used, in cases where the respondent moves the IJ or the Board to exercise this authority. EOIR sidesteps the fact that the regulations fully permit such discretionary exercise, which differs from granting the respondent's motion. No other "negative consequence" is identified. In contrast, there is ample reason to preserve *sua sponte* authority as a safeguard for fair adjudications.

8) Under the guise of timely adjudications, EOIR favors speed over fairness.

EOIR claims that the proposed rule 8 C.F.R. § 1003.1 (e)(1), (8) will ensure that all phases of the appeal process are subject to timeliness goals. The NPRM also argues that the proposed change will provide appropriate accounting of the timely disposition of appeals, and will provide a mechanism to ensure that no one appeal remains pending for too long without a regulatory or operational basis for the delay. The NPRM argues that current regulations do not provide for an overall timeliness goal, and the BIA's accounting of the timeliness of adjudications is confusing and potentially misleading. The proposed changes to BIA's case management system where appeals assigned to a single Board member are to be decided within 90 days of completion of record on appeal; cases assigned to three-member panel are to be decided within 180 days of assignment (which may happen after record is completed). Under the proposed rule, initial screening for summary dismissal must be completed within 14 days of filing and a decision must be issued within 30 days.

Given the number of cases pending before the BIA, we are concerned that this mandatory timeframe will lead to erroneous dismissals. The NPRM proposes specific timeframes for review by screening panel, transcript processing, issuance of briefing schedules, and review by a single

[58] 85 Fed. Reg. 52505.

Board member to determine whether single or three-member panel should adjudicate; adds tracking and "accountability requirements" for Board Chairman in cases where adjudications must be delayed; establishes specific time frames for adjudication of interlocutory appeals (generally 30 days). In doing so, EOIR appears to ignore the reason for the existing backlog; immigration cases are notoriously complex in nature, requiring significant research, review of voluminous evidence packages, and perusing of transcripts. Imposing arbitrary timeframes will only rush adjudicators to render ill-informed decisions. Finally, immigration law frequently changes in federal courts of appeal and the Supreme Court. This timeframe makes no mention of the need to hold cases in abeyance, pending resolution of a key decision. Such rush to adjudicate would show little respect for the law and federal appellate courts, whose decisions are binding upon the BIA.

NIJC is particularly concerned that appeals pending beyond 335 days would be referred to the EOIR Director for adjudication. The EOIR Director is a political appointee charged with running EOIR operations; as such, he/she/they do/es not have the expertise, training, or impartiality necessary to decide cases. EOIR acknowledges the median case appeal takes 323 days—meaning the Director could potentially decide thousands of appeals each year, drastically influencing the lives of countless respondents. The proposed rules would strip the BIA of its discretionary authority and vest further power in the EOIR Director. Delegating this authority is not just improper given the Director's lack of expertise and training; it would politicize the immigration court system even further.

9) The NPRM fails to consider settled reliance interests.

"When an agency changes course … it must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'"[59] Here, the EOIR proposes to overhaul the appellate process in its entirety, impacting the most basic and foundational rules governing the immigration system in the United States. This is no small change of course. EOIR would unlawfully disturb the settled reliance interest of various stakeholders.

NIJC staff and volunteers develop and implement trainings, *pro se* assistance, and workshop materials, all suited to assist immigrants navigate the appellate process. As such, NIJC has a reliance interest in the procedures governing the immigration appeals process and US immigration courts more broadly. The proposed changes will not only nullify years of NIJC advocacy under established US law; it will also undermine the provision of life-saving services to many immigrants because of the drastic overhaul proposed by EOIR. Under the Administrative Procedures Act, EOIR must consider detrimental reliance on the part of applicants and service organizations alike before they eviscerate the current framework in favor of the one proposed in the NPRM.

[59] *D.H.S. v. Regents of the Uni. Of C.A.*, 591 U.S. ____ (slip op., at 23) (2020) (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. ____, ____ (slip op., at 9) (2016)).

10) This NPRM confirms the Executive Branch's agenda to railroad due process for immigrants and asylum seekers.

> *We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.*
>
> President Donald J. Trump, June 24, 2018[60]

The President and his administration have been explicit in their intent to remove due process protections from immigrants in the United States; this NPRM is yet another in the line of actions taken to achieve this explicit intent. The US government has rendered the immigration court system dysfunctional through numerous unlawful decisions issued by the BIA and the Attorney General, its refusal to exercise prosecutorial discretion, and policies and practices that short circuit due process. Having intentionally ground the immigration court system to a near halt, the government now claims the answer to the problems it created is more measures that compromise due process, stack the deck against immigrants and asylum seekers, and diminish the impartial and independent role of immigration judges and Board members.

These measures would significantly curtail the due process rights of noncitizens, compromising their access to counsel on appeal by reducing the availability of briefing extensions; their right to present evidence by limiting their ability of reopen and/or remand matters for legitimate bases; and their right to seek relief by disallowing administrative closure of cases. Rather than borrowing best practices from other judicial systems, these regulations will only further increase court backlogs, flood the federal courts of appeals, and diminish the integrity of the immigration court and BIA systems.

Disturbing well-established principles of due process should have caused EOIR to pause, if not conduct a comprehensive review of the impact on respondents, the primary stakeholders in removal proceedings. And yet, EOIR makes scant and cursory references to due process, referencing vague, unsubstantiated reviews to ensure its safeguard. The human toll of due process infringement is hard to understate. For noncitizens, curtailing due process all but guarantees summary removals. Deportation is not just a death sentence for many respondents, including countless asylum seekers;[61] its mere prospect and the endless fight to prevent it causes

[60] Katie Rogers and Sheryl Gay Stolberg, Trump Calls for Depriving Immigrants Who Illegally Cross Border of Due Process Rights, NY Times (June 24, 2018), available at https://www.nytimes.com/2018/06/24/us/politics/trump-immigration-judges-due-process.html.

[61] Kevin Sieff, Wash. Post, *When death awaits deported asylum seekers* (Dec. 26, 2018), *available at* https://www.washingtonpost.com/graphics/2018/world/when-death-awaits-deported-asylum-seekers/ (reporting increased deportations of asylum seekers such as Ronald Acevedo, whose murdered body was almost unrecognizable).

unimaginable stress and harm to the loved ones of those facing the specter of deportation.[62] Due process operates as a life line for immigrants, asylum seekers, and their families. EOIR's intentional failure to protect this lifeline aligns it with a callous and racist[63] agenda to purge immigration courts of their main actors: the immigrants and asylum seekers fighting for protection.

The current administration's policies have contributed to an increase in the court backlog and has severely undermined the due process and integrity of the immigration court system. The foundational purpose of the immigration court system must be to ensure its decisions are rendered fairly and must be consistent with the law and the Constitution's guarantee of due process. However, these proposed rules circumvent long-established immigration court and appellate practice. The U.S. immigration court system suffers from profound structural problems that have eliminated its capacity to deliver just and fair decisions in a timely manner and public confidence in the system. Overall, the proposed rules will make it more difficult for unrepresented noncitizens to obtain counsel, and more difficult for unrepresented noncitizens to prevail on appeal. EOIR purports to ensure the efficient use of BIA and EOIR resources, but these proposed changes are not the answer. What's worse, EOIR ignores its responsibility to provide fair and impartial adjudication to hundreds of thousands of immigrants and asylum seekers.

Conclusion

If published, the proposed rules will further erode due process in immigration court and BIA proceedings. Specifically, the NPRM would (1) impose further obstacles to immigrants' access to counsel; (2) create insurmountable challenges for organizations such as NIJC in their ability to advocate effectively on behalf of clients; (3) render it nearly impossible for *pro se* immigrants to effectively advocate on their own behalf; (4) compound existing inadequacies and inefficiency in our current appeals process; and (5) result in sweeping changes to long-established asylum rules, which only entrench, rather than remedy, infirmities in the current system. We urge you to withdraw this NPRM in its entirety and conduct a comprehensive review of the immigration courts' and BIA's systemic failure to deliver fair and impartial proceedings. Thank you for the opportunity to submit comments on the proposed changes.

[62] Chris Outcalt, The Atlantic, *When a Family Separation Becomes Permanent* (Aug. 2, 2020), https://www.theatlantic.com/politics/archive/2020/08/ice-family-separation-death/614335/ (sharing story of a detained man Idrissa Camara, whose wife Arri Woodson-Camara committed suicide citing the 265 days of detention and separation and heartbreaking pain).

[63] Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197 (2019).