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

September 25, 2020

To Whom It May Concern,

We write on behalf of the Immigrant Justice Network (IJN) and its four organizational members, Immigrant Legal Resource Center (ILRC), Immigrant Defense Project (IDP), Just Futures Law (JFL), and the National Immigration Project of the National Lawyers Guild (NIPNLG), in response to the above-referenced Proposed Rules published in the Federal Register on August 26, 2020.

IJN is a leading voice against the criminalization of immigrants in the United States. Grounded in racial justice values, we build power to defend the dignity of immigrants. We fight for a world where our communities are thriving and free from policing, deportation, and imprisonment. Since 2006, IJN has partnered with community groups and directly impacted individuals who have navigated or survived the detention, deportation, and criminal legal systems to achieve these goals. These partnerships help build long-lasting power for transformational change of our criminal and immigration systems. A description of each of IJN's four organizational members follows.

- The NIPNLG is a national nonprofit organization that provides support, referrals, and legal and technical assistance to attorneys, community organizations, families, and advocates seeking to advance the rights of noncitizens. NIPNLG focuses especially on the immigration consequences of criminal convictions, and its mission is to fight for justice and fairness for noncitizens who have contact with the criminal legal system.

- The ILRC is a national non-profit that provides legal training, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profits in building their capacity.
- IDP is a New York-based non-profit that conducts litigation and provides training, education, and advocacy in support of advancing the rights of immigrants who are subject to the criminal legal system. IDP's mission is to secure fairness and justice for immigrants in the United States. The organization provides technical assistance to hundreds of immigration attorneys, DOJ-accredited representatives, and criminal and family defense attorneys on issues related to immigration, criminal, and family law, particularly the immigration consequences of law enforcement interactions and criminal court adjudications.
- JFL is a transformational immigration legal shop rooted in movement lawyering. JFL defends and builds the power of immigrants' rights groups working to disrupt and dismantle our deportation and mass incarceration systems. We are legal workers and lawyers with decades of experience, grounded in the core value that lawyering should serve movement organizing. JFL staff have worked on many cases involving the intersection of immigration and criminal law, including recent high-impact decisions on behalf of individuals and amicus curiae.

We urge the Department of Justice (DOJ) to withdraw the proposed rule in its entirety. The proposal not only fails to promote "efficiency" as the Notice of Proposed Rulemaking (NPRM) claims, but also strips important due process rights from noncitizens who appear before the immigration court and Board of Immigration Appeals (BIA or Board). Many of the proposed regulations also threaten to effectively bar noncitizens from pursuing meritorious defenses, appeals, and collateral challenges in their criminal proceedings. The importance of fairness in immigration court proceedings cannot be overstated: for many noncitizens having a fair day in court can mean the difference between living in safety in the United States or being returned to a country where they may be killed. Deportation can also lead to permanent family separation and loss of livelihood for both noncitizens and their U.S.-citizen loved ones. The U.S. government should ensure that every noncitizen has a fair hearing and access to a robust review process that safeguards their statutory and constitutional rights to present evidence, pursue appeals, and seek reopening of claims to lawful status in the United States.

The Organizations oppose the proposed rule in its entirety. However, our comment primarily addresses the due process concerns implicated by the proposed rule and the impact of these changes on individuals who are forced to navigate both the deportation and criminal legal systems. Individuals in this situation often face additional significant obstacles such as detention and lack of counsel. Because these regulations cover so many topics, we are not able to comment

on every proposed change. The fact that we have not discussed a particular proposed change to the law in no way means that we agree with it; it simply means we did not have the resources or the time, as explained below, *infra* p. 14, to respond to every proposed change.

I. The Proposed Changes to 8 C.F.R. §§ 1003.1(d)(ii), 1003.10 Unjustifiably and Arbitrarily Prevent the BIA and Immigration Judges from Administratively Closing Cases

Proposed Section 8 CFR § 1003.1(d)(ii) and 8 CFR § 1003.10 would explicitly foreclose the authority of the BIA and immigration judges (IJs) to administratively close cases. Administrative closure is a procedure by which an IJ or the BIA temporarily removes a case from the active calendar or docket as a matter of administrative convenience and docket management. *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 889 (9th Cir. 2018); *see also 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). In the preamble of the proposed rule, the Agency erroneously describes the use of administrative closure, stating that IJs have used this tool to “determine which cases should not be adjudicated,” which is “the antithesis of a final disposition.”¹ In fact, IJs largely use administrative closure to temporarily pause proceedings “when the parties are awaiting an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time.” *Id.* at 889 (quoting *Matter of Avetisyan*, 25 I. & N. Dec. 688 (BIA 2012)) (internal quotations omitted). In other words, administrative closure has served as an important tool that allows a respondent sufficient time to resolve an outside action or event that is *necessary* for a final disposition of an immigration court case. In mischaracterizing the purpose of administrative closure, the Agency misconstrues the effect of administrative closure, inaccurately stating that “administrative closure makes fair and efficient docket administration harder, not easier.”²

The Agency makes multiple grave errors in justifying the proposed change to eliminate administrative closure, and the proposal should be abandoned for these reasons. First, the Agency misrepresents the context of the increase in backlog of cases since administrative closure was strengthened in *Matter of Avetisyan* in 2012. In doing so, the Agency fails to consider extrinsic factors that have exacerbated the backlog—more so than administrative closure—and will continue to do so even if administrative closure were to be eliminated. Second, the Agency fails to consider the harm of eliminating administrative closure to the due process rights of individuals who must defend themselves against criminal charges while also facing removal proceedings, as well as the resulting harm to the integrity to the overall criminal legal system. Finally, the Agency fails to consider the harm to noncitizens who will be ordered removed based on unconstitutional criminal convictions, as the elimination of administrative closure would punish respondents who will not be allowed sufficient time to remedy the Sixth Amendment violations of their right to effective assistance of counsel in prior criminal proceedings.

¹ 85 Fed. Reg 52503.

² *Id.* at 52504.

A. The Agency Uses Misleading Evidence to Erroneously Justify Eliminating Administrative Closure

First, the Agency mischaracterizes the effect of administrative closure on the immigration court backlog, purposefully eliminating from its consideration relevant data and other extrinsic factors that likely had a greater impact on the immigration court backlog than the use of administrative closure. In the proposed rule, the Agency relies on evidence presented in its own chart, created to demonstrate the increase in backlog of cases since 2012.³ However, this chart conveniently and misleadingly hides the very small *total* increase in backlog of cases during the first four years after administrative closure was expanded by *Matter of Avetisyan*. Specifically, the immigration court backlog experienced a total four-year increase of 190,987 cases between FY 2012 and FY 2016 (an average of 47,747 cases per year),⁴ which pales in comparison to the annual increase of 113,020 cases during FY 2017 and the annual increase of 139,206 cases in FY 2018.⁵ Furthermore, this exponential increase in backlog cases in FY 2017 and FY 2018 started before administrative closure was eliminated,⁶ and is more likely attributable to the elimination of ICE prosecutorial discretion in FY 2017.⁷ Therefore, by arguing that administrative closure leads to a higher backlog of cases, the Agency not only relies on inaccurate and erroneous evidence, but it also fails to justify its proposal with sound and objective reasoning.

By failing to consider the other factors attributing to the increase in the backlog of cases, the Agency misrepresents the impact of administrative closure on such backlog. It also fails to adequately justify its proposal to eliminate administrative closure entirely, as there is no clear connection between the use of administrative closure and the increase of the backlog.⁸ As a result, the Agency's proposed change is arbitrary and capricious and should be abandoned.

³ *Id.* at 52504 n.29 (citing EOIR, *Adjudication Statistics: New Cases and Total Completions* (Apr. 15, 2020), <https://www.justice.gov/eoir/page/file/1296536/download>).

⁴ As a breakdown by years, the backlog increased 19,186 from FY12 to FY13; 63,807 from FY13 to FY14; 48,179 from FY14 to FY15; and 59,815 from FY15 to FY16; for an average annual increase of 47,747 cases per year during the first four years after administrative closure was expanded. TRAC IMMIGRATION, *Immigration Court Backlog Tool*, https://trac.syr.edu/phptools/immigration/court_backlog/ (Pending cases of all charges and states sorted by "Entire U.S.") (last visited Sept. 21, 2020).

⁵ TRAC IMMIGRATION, *Immigration Court Backlog Tool*, https://trac.syr.edu/phptools/immigration/court_backlog/ (Pending cases of all charges and states sorted by "Entire U.S.") (last visited Sept. 21, 2020).

⁶ IMMIGRATION IMPACT, *Data Shows Prosecutorial Discretion Grinds to a Halt in Immigration Courts* (Jul. 24, 2017), https://immigrationimpact.com/2017/07/24/data-shows-prosecutorial-discretion-grinds-halt-immigration-courts/#.X2i_Pj-SmUk (explaining that in February through June 2017, there was a "96 percent drop in the use of prosecutorial discretion in immigration removal proceedings" and that immigration judges' case completion rate dropped "9.3 percent over [those] five months").

⁷ See Executive Order No. 13768, *Enhancing Public Safety in the Interior of the United States*, (January 25, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>.

⁸ In fact, an even greater exponential increase in backlogs occurred after administrative closure was eliminated in *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), which illustrates that administrative closure was effective in minimizing the backlog of pending cases. See TRAC IMMIGRATION, *Immigration Court Backlog Tool*, https://trac.syr.edu/phptools/immigration/court_backlog/ (Pending cases of all charges and states sorted by "Entire U.S.") (last visited Sept. 21, 2020) (showing an increase of 255,510 backlogged cases between FY18 and FY19 and an increase of 222,397 backlogged cases between FY19 and FY20).

B. The Agency Fails to Consider the Harm to Respondents and to the Integrity of the Criminal Legal System in Eliminating Administrative Closure

Second, the Agency fails to consider the harm to respondents by forcing IJs and BIA members to resolve a removal case in the context of an incomplete and relevant collateral criminal matter. The elimination of administrative closure will prohibit the ability of IJs and BIA members to pause removal cases to allow a respondent adequate time to defend themselves in a collateral criminal case. This proposed change will result in erroneous and unconstitutional removals of respondents with rightful claims to lawful status in the United States. In fact, the courts have explicitly recognized that administrative closure can be used to allow a respondent to appeal a criminal conviction that directly impacts the respondent's eligibility for relief from removal. *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 893 n.6 (9th Cir. 2018); *see also Matter of Montiel*, 26 I. & N. Dec. 555, 556 (BIA 2015) (administratively closing removal case for pending criminal appeal).

The scenario where respondents must defend themselves in simultaneous criminal and immigration proceedings is particularly common. In recent years, hundreds of people with pending criminal charges have been targeted by DHS officers for arrest and placement in removal proceedings.⁹ In 2019 alone, at least 374 people were removed by DHS before they could resolve their criminal charges.¹⁰ These individuals, and countless more, were denied their Fifth Amendment right to due process by being removed while defending themselves from criminal charges, either at the trial level or on direct appeal. This situation will only be more commonplace if the proposed rule is implemented.

Under longstanding Supreme Court precedent, a rule that effectively frustrates a person's ability to pursue a direct criminal appeal that is safeguarded by law may itself constitute a violation of due process. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 & n.5 (1982) (as access to the courts is an entitlement, deprivation of that access may violate due process). Permitting deportations based on convictions that are still pending direct appellate review would: 1) effectively deprive many immigrants of their ability to meaningfully contest wrongful convictions, in derogation of established appellate rights; and 2) exacerbate the serious legal and practical hurdles that deported immigrants face in trying to return to the United States after prevailing in immigration-determinative legal challenges. Administrative closure protects respondents who, if otherwise deported based on a premature and illegal order of removal, would be stripped of their Fifth and Sixth Amendment rights to due process. Administrative closure allows them to fully defend themselves in criminal proceedings.

Forcing IJs to order removals before immigrants have had the opportunity to waive or exhaust direct appeals that are guaranteed to them as of right can substantially frustrate, or in some instances, effectively extinguish, their ability to exercise these established rights.¹¹ By

⁹ *See, e.g.*, IMMIGRANT DEFENSE PROJECT, *Denied, Disappeared, and Deported: The Toll of ICE Operations at New York's Courts in 2019* at 13 (January 2020), <https://www.immigrantdefenseproject.org/wp-content/uploads/Denied-Disappeared-Deported-FINAL.pdf>.

¹⁰ *Id.*

¹¹ These due process protections apply equally to immigrants upon their entry into this country. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[O]nce an alien enters the country, the legal circumstance changes, for the Due Process

eliminating administrative closure, the proposed changes threaten to impair confidence in the fair and just application of our Nation’s criminal and immigration laws, a harm that the Agency fails to consider or justify in its proposal. Elimination of administrative closure, along with the other proposed changes to motions to reopen and motions to remand that our organizations oppose below, would thus present serious due process problems. The Agency fails to explain why the proposed changes are necessary in light of the harm of frustrating the important justice and legitimacy interests that undergird both the criminal legal process as well as immigration legal processes. Therefore, it should abandon this proposed change.

C. The Agency Fails to Consider the Enhanced Risk of Unconstitutional Deportations in Proposing to Eliminate Administrative Closure

Finally, eliminating administrative closure forces IJ to move forward with removal proceedings in spite of collateral criminal matters; however, the Agency fails to consider how the proposed rule unfairly penalizes respondents who have experienced due process and other constitutional violations during their criminal proceedings. In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Supreme Court recognized that the immigration consequences of a conviction are sufficiently serious for the Sixth Amendment to require a noncitizen defendant to be competently advised of such consequences before agreeing to a guilty plea. Thus, the failure to advise a noncitizen defendant of the immigration consequences of a guilty plea is constitutionally deficient and such convictions are unconstitutional if the noncitizen was denied effective assistance of counsel in the course of accepting such a plea. In most situations, the only remedy for such violations is to obtain post-conviction relief from the state court with jurisdiction over the criminal proceedings. The elimination of administrative closure would deny respondents sufficient time to pursue this collateral matter in state court to remedy a constitutionally deficient conviction. The result would be increased removals of noncitizens based on unconstitutional grounds.

In prior administrations, the DOJ itself has recognized that there is widespread deficiency of legal representation for defendants in the criminal justice system, as well as the urgent and unmet need for reform. Attorneys General Loretta Lynch¹² and Eric Holder¹³ have spoken about the millions of people whose constitutional rights are routinely violated due to the poor quality of the Nation’s indigent defense system. The DOJ has actively participated in lawsuits in state and

Clause applies to all persons within the [U.S.], including aliens, whether their presence here is lawful, unlawful, temporary, or permanent . . .”).

¹² “It was strikingly sad that on the 50th anniversary of Gideon, we were talking about cuts to legal aid services, we were talking about cuts to essential services at both the federal and state levels that would have meant more people of poverty did not have the ability to have their essential rights vindicated.” Dept. of Justice, *Attorney General Loretta E. Lynch Delivers Remarks at White House Convening on Incarceration and Poverty*, <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-convening-incarceration-and> (last visited Sept. 21, 2020).

¹³ “Across the country, public defender offices and other indigent defense providers are underfunded and understaffed. Too often, when legal representation is available to the poor, it’s rendered less effective by insufficient resources, overwhelming caseloads, and inadequate oversight. . . . Millions of Americans still struggle to access the legal services that they need and deserve—and to which they are constitutionally entitled.” Attorney General Eric Holder, *Remarks at the American Bar Association’s National Summit on Indigent Defense*, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html> (last visited Sept. 21, 2020).

federal courts advocating for improvements in indigent defense in the criminal justice system.¹⁴ However, in this proposal, the Agency fails to consider the harm to noncitizen defendants who will be unjustifiably deported due to the elimination of administrative closure, a necessary tool for allowing respondents sufficient time to obtain post-conviction relief after having suffered this regrettably common and recognized constitutional violation.

Many noncitizen defendants do not realize the deficiency of their criminal defense counsel until they experience the immigration consequences of such convictions, including being subject to removal proceedings.¹⁵ Administrative closure allows IJs and BIA members to provide respondents with sufficient time to obtain appropriate post-conviction relief in order to ask the criminal court to reverse, vacate, expunge, or modify their conviction or sentences, without the removal case taking up space on the IJ's docket. In doing so, the immigration courts and BIA protect not only the constitutional rights of all persons who face criminal charges in the United States, but also the integrity of the immigration and criminal legal systems. In order to protect the Fifth and Sixth Amendment, and because the proposal fails to justify such harms to the constitutional rights of noncitizen defendants, the Agency should abandon this proposal.

II. The Proposed Rule Would Prevent the BIA from Remanding Cases in Most Circumstances and Would Violate the Right to Full and Fair Proceedings

The proposed rule contains various provisions that improperly circumscribe remands from the BIA to the IJ. Taken together, the proposed rule implements a scheme that (1) compels the agency to deny noncitizens a reasonable opportunity to present evidence on their behalf; (2) forecloses pathways to relief even where a change in law or fact materially impacts a noncitizen's eligibility; and (3) violates fundamental fairness by creating a double-standard that unfairly enables DHS to seek remands liberally. This scheme departs from long standing agency practice and will have a detrimental impact on *pro se* appellants, as well as those pursuing meritorious defenses and collateral challenges with respect to their criminal proceedings.

First, the proposed rule will deny noncitizens a reasonable opportunity to present evidence on their behalf, particularly in cases involving *pro se* litigants.¹⁶ The proposed rule not only permits the BIA to "affirm . . . on *any* basis supported by the record,"¹⁷ but simultaneously

¹⁴ See Matt Apuzo, *Justice Dept. Pushes Civil Rights Agenda in Local Courts*, N. Y. TIMES, Aug. 19, 2015, <https://www.nytimes.com/2015/08/20/us/justice-dept-presses-civil-rights-agenda-in-local-courts.html>.

¹⁵ See, e.g., Julianne Hing, *The Fight to Stop One Man's Deportation*, THE NATION, May 15, 2018, <https://www.thenation.com/article/archive/what-it-takes-to-stop-one-mans-deportation/>; Dan Trevas, *Court Must Reconsider Guilty Plea Withdrawal by Immigrant Facing Deportation*, COURT NEWS OHIO, May 15, 2019, <http://www.courtnewsoriohio.gov/cases/2019/SCO/0515/170915.asp#.X2jVhnlKiUk>; Olivia Covington, *Justices' ruling sparks conversation about PCR for noncitizens*, THE INDIANA LAWYER, Mar. 19, 2019, <https://www.theindianalawyer.com/articles/49742-justices-ruling-sparks-conversation-about-pcr-for-noncitizens>.

¹⁶ According to the last available DOJ Statistical Yearbook, roughly 20 percent of all BIA appeals are by *pro se* appellants. DOJ, *Statistical Yearbook Fiscal Year 2018*, at 38, <https://www.justice.gov/eoir/file/1198896/download>. EOIR statistics show that overall, 37 percent of pending cases in immigration court are unrepresented. EOIR, *Current Representation Rates*, Apr. 15, 2020, <https://www.justice.gov/eoir/page/file/1062991/download>.

¹⁷ 8 C.F.R. § 1003.1(d)(3)(v) (proposed); 85 Fed. Reg. 52510.

imposes drastic restrictions on the BIA’s ability to remand a case.¹⁸ As a consequence, even if an IJ clearly failed to fulfill their recognized duty to develop the record for an unrepresented noncitizen,¹⁹ and even if the Board member reviewing the case sees that there is a clear avenue for relief that the IJ overlooked, the BIA would have no authority to remand the case for further fact finding. Instead, the BIA would be forced to identify a basis in the record to affirm the case. Faced with performance metrics that require IJs to adjudicate 700 cases per year,²⁰ IJs would have a negative incentive to take the time to develop the record in *pro se* cases because there is no possibility that the case could be remanded—and thus the IJ held accountable—for failure to do so. In other words, the proposed rule will result in swift deportations of those who most heavily rely on the Agency to protect their statutory rights to a full and fair hearing.

Second, the proposed rule will prohibit remand even where a noncitizen presents a critical change in fact or law that renders them eligible to seek relief from removal before the IJ. Under proposed § 1003.1(d)(3)(iv)(D), the BIA could only remand a case for further factfinding if *all* of the following conditions are met:

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

In tandem with the above provision, proposed § 1003.1(1)(C) bars any remand based on “a material change in fact or law” unless it affects “a removability ground” and unless “substantial evidence indicates that change has vitiated all grounds of removability applicable to the [noncitizen].” Moreover, proposed § 1003.1(d)(7)(iv) permits the BIA to significantly limit the

¹⁸ See *id.* § 1003.1(d)(3)(C), (d)(7)(D) (proposing to prohibit *sua sponte* remand except with respect to jurisdictional issues); (d)(3)(D) (proposing to impose strict criteria for remands); (d)(7)(A)-(C) (proposing additional restrictions on remand); 85 Fed. Reg. 52510-52511.

¹⁹ Numerous Courts of Appeals have affirmed “the IJ’s duty to fully develop the record” for *pro se* individuals, and required that the IJ “scrupulously and conscientiously probe into, inquire of, and explore for *all* the relevant facts.” *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (internal citations and quotation marks omitted); see also, e.g., *Mendoza-Garcia v. Barr*, 918 F.3d 498, 504-05 (6th Cir. 2019) (“We agree with our sister circuits that to provide a fundamentally fair proceeding, immigration judges are bound by the recognized duty to help *pro se* parties develop the record.”); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464-65 (8th Cir. 2004).

²⁰ AMERICAN IMMIGRATION LAWYERS ASSOCIATION, EOIR Issues Guidance Implementing Immigration Judge Performance Metrics (Mar. 30, 2018) (publishing email from EOIR director to all IJs), <https://bit.ly/33G3Sgr>.

scope of issues to be considered on remand, even though the BIA would simultaneously divest itself of jurisdiction.²¹

The proposed provisions impose a vastly circumscribed scheme that bars noncitizens from seeking a remand for “further factfinding,” as the current regulation prudently permits.²² Requiring a noncitizen to attempt to preserve or present additional facts while presenting their case before the IJ below would be fundamentally unfair for *pro se* individuals who often lack the legal knowledge to know what evidence is relevant to establish their claims. However, even for represented individuals, it is both unreasonable and impracticable to require them to preserve an issue and to identify a clear error by the IJ when seeking remand based on a change in fact or law that was previously unavailable. The Agency proposes to require respondents to predict a future that will be created by actors beyond their control in order to obtain the lawful status that is otherwise statutorily available to them.

In addition, the proposed rule would bar noncitizens from seeking remands based on a material change in fact or law that clearly renders them eligible for relief. The limits placed on an IJ’s scope of review on remand will further foreclose meritorious claims for relief. For instance, if a new avenue of relief becomes available between a remand order from the BIA and a new hearing before the IJ, the IJ would be barred from considering those issues, thus preventing the respondent from obtaining the lawful status that is statutorily available to them. Such changes have no basis in the law, depart from agency practice, violate the right to present evidence on one’s own behalf, and in many cases, will result in orders of removal that were issued notwithstanding meritorious defenses and dispositive collateral challenges in criminal matters. The following remands, for example, would be prohibited under the proposed scheme:

- In re F-F-A-, AXXX XX2 691, 2013 WL 2610047 (BIA May 9, 2013): In this case, the noncitizen was found to be removable under INA § 237(A)(1)(b), for a failure to depart in accordance with this nonimmigrant visa. Before the IJ, the noncitizen initially sought a continuance to await the adjudication of an immigrant visa petition by his U.S.-citizen spouse, which would allow him to seek adjustment of status. However, the IJ denied the request for a continuance upon concluding that the noncitizens’ conviction for possession of testosterone foreclosed his adjustment eligibility. While his appeal to the BIA was pending, the noncitizen obtained a vacatur of the conviction, and successfully sought a remand to the IJ for further proceedings to seek relief based on the immigrant visa petition.
- In re L-I-, AXXX XX7 778, 2011 WL 400435 (BIA Jan. 21, 2011): In this case, a lawful permanent resident proceeding *pro se* was found to be removable for, among other reasons, being convicted of an aggravated felony based on a conviction for “possession to distribute Class D drug/marijuana.” On appeal, the noncitizen alleged that after the IJ’s decision, he filed a request for post-conviction relief for his drug conviction on the basis that it was constitutionally defective. The BIA found that a remand was “warranted” so

²¹ See *Matter of Patel*, 16 I&N Dec. 600 (BIA 1978) (where BIA remands case to IJ for further proceedings, it divests itself of jurisdiction of that case unless jurisdiction is expressly retained).

²² 8 C.F.R. § 1003.1(d)(3).

that the IJ may consider evidence pertaining to the post-conviction relief and to “evaluate its impact on the respondent’s removability and eligibility for relief.”

- In re V-M-G-H-, AXXX XX2 832 (BIA Oct. 4, 2016): In this case, the IJ denied a noncitizen’s request for a continuance pending the adjudication of a criminal appeal. On appeal, the respondent submitted evidence showing that the district attorney thereafter voluntarily dismissed the criminal case and asserted that “the dismissal of charges removes an impediment to establishing good moral character.” The respondent also submitted new facts to bolster a claim for cancellation of removal for non-permanent residents. Based on that evidence, the BIA remanded the case to the IJ for adjudication of the application for cancellation of removal.

While proposed § 1003.1(d)(7)(v) purports to permit noncitizens to present new evidence by filing a motion to reopen, that requirement is contrary to the statutory scheme, which specifies that motions to reopen apply only to cases that are already administratively final. *See* 8 U.S.C. §§ 1229a(c)(7)(C)(i). Where a case remains pending before the Agency, remand is appropriate to ensure noncitizens a reasonable opportunity to present evidence as required by the INA and due process. Forcing a case to terminate with a removal order before allowing the BIA to consider new evidence unnecessarily starts the removal process, which will lead to an increased risk of unjustified removals of individuals with meritorious claims to lawful status in the United States. We are additionally concerned that the proposed change will cause the BIA to reject new and material evidence solely because a *pro se* respondent mislabels their accompanying motion, as the Agency has included no procedural safeguards to prevent this harm from occurring.

Third, in contrast to the above limits on remands requested by the respondent defending themselves against removal from the United States, proposed § 1003.1(d)(7)(v)(B) allows the BIA to remand a case at any time when *DHS* seeks to present additional information. Notably, the proposed rule effectively allows *DHS* to seek remand on information that was previously available, so long as it obtained that information through “identity, law enforcement, or security investigations or examinations” that it performed after the date of an IJ’s decision. This imbalanced scheme will empower *DHS* to arbitrarily relitigate issues, resulting in greater inefficiency and inconsistency—in direct contradiction to the stated goals of the proposed rule, and in violation of the statutory and constitutional right to fundamentally fair proceedings. The Agency fails to consider or justify the harm to respondents in giving this unfettered flexibility to *DHS*, authorizing them to fail to present all relevant evidence before the IJ and denying respondents adequate opportunity to review and present additional evidence to defend themselves.

III. The Proposed Rule Would Expand the Government’s Ability to Seek Reopening of Proceedings Outside of Time and Numerical Limitations, While Eliminating the Ability of Noncitizens to Seek Reopening of Proceedings *Sua Sponte* to Avoid Manifest Injustice

The Agency’s proposal to enhance *DHS*’s authority to file motions to reopen while ending the ability of noncitizens to request *sua sponte* reopening of proceedings, is unconscionable and an arbitrary and capricious expansion of prosecutorial power that unfairly

prejudices noncitizens. Proposed 8 CFR § 1003.2(c)(3)(vii) exempts DHS from all time and numerical bars on motions to reopen with the Board, while noncitizens continue to be bound by strict statutory limitations. Simultaneously, proposed 8 CFR §§ 1003.2(a) and 1003.23(b)(1) eliminate the ability of noncitizens to request that the Board and the IJ, respectively, reopen proceedings *sua sponte* when warranted by extraordinary circumstances. These are significant changes for which little justification is offered by the Agency, and that exacerbate existing inequities in the process offered to noncitizens facing removal.

A. Elimination of Time and Numerical Limits for Motions to Reopen Filed by the Government Decreases Finality, Efficiency, and Fairness in Adjudications by the BIA

First, the Agency's proposal to permit DHS to file motions to reopen to the BIA at any time and in any number would worsen the already troublesome imbalance of power between representatives of the Government and noncitizens facing removal. EOIR is a system of adjudication with tremendous power over the future of individuals called before it, and there is often a particularly severe imbalance of knowledge and resources between *pro se* respondents and the government representative seeking their removal.²³ Due process demands that both parties who appear before EOIR proceed in a manner that ensures fairness in the outcome. These proposed rules fall short of that requirement.

The Agency justifies this expansion of DHS authority on the basis that it would establish “parity” between the operations of the Immigration Court and the Board, and defends the curtailing of Board and IJ authority as necessary for “finality.” However, critical differences between the forums of the Immigration Court and the Board weigh heavily against the proposed change. If removal proceedings are concluded at the Immigration Court stage, it is because neither party appealed the outcome. Allowing parties to move for reopening upon the discovery of material information not previously available, or to address an infirmity in the proceeding, is less damaging to the principles of finality and efficiency because the motions are addressed to the judge who presided over the initial proceeding and is in the best position to evaluate whether reopening is warranted. Reopened proceedings may allow for a fuller examination of relevant evidence and result in a new outcome, which can then be timely appealed by either party.

On the other hand, for Board jurisdiction to vest, one party has to have appealed a final order of removal or grant of relief. A final order of removal issued by the Board, unless stayed during a petition for review by a Circuit Court of Appeals, typically means that a noncitizen may be removed at any time thereafter. Although a civil penalty, deportation has come to be recognized as “a drastic measure.” *Padilla*, 130 S. Ct. at 1486. Allowing DHS to file unlimited motions to reopen, without the time limitations statutorily required of noncitizens, means that a noncitizen could be drawn into literally endless litigation over their removability, at great cost to them financially and otherwise. The simple administrative parity that the Agency cites in defense

²³ See, e.g., Misyrlena Egkolfopoulou, *The Thousands of Children Who Go to Immigration Court Alone*, THE ATLANTIC, Aug. 21, 2018, https://www.theatlantic.com/politics/archive/2018/08/children-immigration-court/567490/?utm_source=share&utm_campaign=share; Mazin Sidahmed, *Opinion: It's Like an Automatic Deportation if you Don't Have a Lawyer*, N.Y. TIMES, Aug. 13, 2019, <https://www.nytimes.com/2019/08/13/opinion/facing-the-injustice-of-immigration-court.html>.

of its proposed rule has vastly different consequences for noncitizens at the Board level and deprives them of due process, and so is arbitrary and capricious.

B. The Agency Offers No Support For its Proposal to Eliminate Noncitizens' Ability to Request *Sua Sponte* Reopening of Proceedings, Which Would Result in Manifest Injustice to Noncitizens

In addition to removing the time and numerical bars on motions to reopen by DHS, the Agency proposes to reinterpret the INA so as to prevent the Board from granting *sua sponte* requests from noncitizens. The Agency notes that the Board disfavors the use of *sua sponte* authority as a “general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship,” *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997), and views its discretion as “an extraordinary remedy reserved for truly exceptional situations.” *Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999). The Agency fails, however, to explain why these admonitions are insufficient to ensure substantial finality in adjudications, and why noncitizens should be prevented from seeking relief in exceptional situations, without the assent of DHS.

The Agency fails to support its claim that lack of uniformity pervades the Board’s *sua sponte* decisions. As it did with regard to administrative closure, the Agency also mischaracterizes the effect of *sua sponte* motions on the immigration court and Board’s docket. The Agency cites to data showing that caseloads have increased at the immigration court, and that appeals have also ballooned, but fails to present data showing the number of motions to reopen for any reason, and motions to reopen *sua sponte* specifically, or their resulting decisions, or give examples of the lack of uniformity it seeks to avoid. The fiscal year data for 2020, which was not cited in this notice of proposed rulemaking, shows an actual reduction in motions to reopen from previous years.²⁴ The increase in motions to reopen filed at the Immigration Court level has continued to rise, from approximately 15,000 in 2016 to over 20,000 by mid 2020.²⁵ But this increase could be due to the increased filing of motions to reopen *in absentia* removal orders resulting from well-publicized administrative errors committed by ICE and in response to *Pereira v. Sessions*, 138 S.Ct. 2105 (2018), where the Supreme Court held that Notices to Appear that lack a time and date of hearing are not effective to stop the accrual of continuous presence.²⁶ Regardless, the Agency offers no analysis of *sua sponte* decisions granting reopening of proceedings for their conclusion that the current use of *sua sponte* power results in lack of uniformity or finality. Consequently, this proposed rule is arbitrary and capricious, and should be abandoned.

²⁴ See EOIR, *Adjudication Statistics: Motions* (July 14, 2020), at <https://www.justice.gov/eoir/page/file/1060896/download>.

²⁵ *Id.*

²⁶ Notably, EOIR’s own data shows a sharp increase in orders of removal entered in absentia since 2018. See EOIR, *Adjudication Statistics: In Absentia Removal Orders*, July 14, 2020, <https://www.justice.gov/eoir/page/file/1243496/download>. See also Kristina Cooke & Mica Rosenberg, *No 'day in court': U.S. deportation orders blindsides some families*, REUTERS, July 26, 2019, <https://www.reuters.com/article/us-usa-immigration-deportations/no-day-in-court-u-s-deportation-orders-blindsides-some-families-idUSKCN1UL16I>; Ingrid Eagly & Steven Shafer, *Measuring In Absentia Removal in Immigration Court*, U. PENN. LAW REVIEW, Vol. 168 No. 4, March 2020, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9695&context=penn_law_review.

In general, motions to reopen removal proceedings are an important safeguard of fairness for noncitizens who were previously not represented by counsel, represented by ineffective counsel, or who have experienced intervening changes of circumstances affecting their claims for relief. Because *sua sponte* motions are not subject to any filing deadline or procedural requirements, they can provide a crucial valve for adjudicators to correct errors, and can play an especially important role for longtime U.S. residents who the government was unwilling or unable to deport. In intervening years, individuals not only develop stronger ties to the United States, but also may gain access to new evidence regarding their removal proceedings. The ability to request reopening of their proceedings *sua sponte* allows noncitizens to present evidence of favorable equities gained during a period of deferred action, including new eligibility for relief and any errors of prior counsel or in the underlying proceedings.

The interpretation of the statute in the current regulations recognizes that sometimes extraordinary circumstances exist that warrant a different outcome than removal. These include circumstances that were not contemplated by the statute, such as when a long term noncitizen with a removal order achieves significant community and family ties resulting in a new avenue of relief that did not exist at the time of their initial proceedings. In such cases, *sua sponte* reopening permits families an opportunity to avoid separation. Other extraordinary circumstances include those that fall between the statute's requirements, such as when a noncitizen has requested reopening within the time and numerical limitations, but had counsel that—while not falling beneath ethical standards—did not effectively communicate the noncitizen's claims. Where those claims include meritorious requests for asylum, *sua sponte* authority permits intervention to avoid manifest injustice, including death. Although the Agency notes that DHS may still join motions to reopen, it has not shown how such a practice would avoid the lack of uniformity it complains of resulting from the *sua sponte* authority of impartial adjudicators. The Agency has not offered a reasoned basis for denying these individuals the opportunity to request relief, and consequently the proposed rule is arbitrary and capricious and should be abandoned.

IV. The Proposed Rule Favors Speed over Fairness, Impermissibly Politicizes EOIR, and Hampers Immigrants from Mounting Effective Appeals

The proposed rule imposes numerous rigid deadlines that incentivize rushed decision making and fail to promote a fair appellate process. Under proposed § 1003.1(e)(1), initial screening for summary dismissal must be completed within 14 days of filing and those dismissals must be issued within 30 days. Given the number of cases pending before the BIA,²⁷ it is likely that imposing a sudden and arbitrary timeframe will pressure staff to conduct initial case screenings quickly rather than accurately, thus leading to erroneous dismissals of meritorious appeals. Proposed § 1003.1 (e)(8) similarly creates mandatory adjudication deadlines for cases not subject to summary dismissal, including requiring a single Board Member to determine within 14 days of receipt of each case whether to issue a single-member or three-member decision. Without additional safeguards that ensure thorough consideration, such arbitrary deadlines will compel Board Members to prioritize speed over accuracy and result in significant legal errors. Proposed § 1003.1(e)(8)(v), which requires any case that has been pending for more

²⁷ At the end of fiscal year 2019 there were over 70,000 cases pending before the BIA. See DOJ, *EOIR Adjudication Statistics*, <https://www.justice.gov/eoir/page/file/1248501/download>.

than 355 days be referred to the Director, also fails to provide a meaningful solution to delayed adjudications. This provision would force Board Members to overlook complex issues and create a significant backlog of cases pending before the Director.

In addition, the proposed rule at both §§ 1003.1(e)(8)(v) and 1003.1(k) improperly gives the EOIR Director (a political appointee rather than a career adjudicator) unprecedented authority to personally adjudicate hundreds or thousands of cases. While the rule could result in thousands of case referrals to the Director, the rule does not address how the Director will have the time to personally write decisions, or alternatively, who will write them under the Director's name and what kind of training and oversight they will receive. Proposed § 1003.1(k) further undermines the integrity of the BIA by allowing IJs who disagree with a BIA remand to certify the case to the Director. Rather than promoting its stated goal of “quality assurance,” this proposed rule will undermine any sense of uniformity and fairness. It is fundamental to our system of jurisprudence that appellate bodies have authority to review decisions by triers of fact. While the proposed rule purports that the process should not be used “as a basis solely to express disapproval of or disagreement with the outcome of a Board decision,” the bases on which 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”—that an IJ who simply disagrees could construct an argument that would fall under these rules.²⁸

The proposed rule will also severely limit the ability of immigrants to mount an effective appeal. Proposed § 1003.3(c)(1) requires all appellants to show good cause to receive at most a single 14-day briefing extension. EOIR incorrectly claims that these changes would have “relatively little impact on the preparation of cases by the parties on appeal.” On the contrary, briefing extensions are key to ensuring attorneys who are newly retained at the appeals level have adequate time to review the case history, including an often lengthy transcript involving complex issues. In particular, restricting the ability to seek briefing extensions could severely discourage new pro bono representation on appeals. Proposed 1003.3(c)(1) also implements simultaneous briefing in all non-detained cases. Respondents forced to file simultaneous briefs will likely require more time to prepare briefs as they will be required to focus on all potential claims rather than just ones raised by opposing counsel, which they would also be forced to do under an additional proposal to allow the BIA to affirm decisions “on any basis supported by the record.” See *supra* p. 7. Moreover, the proposed rule would also make it almost impossible to file a reply brief by imposing a 14-day deadline that runs from the due date of the initial brief. In the best of circumstances, it often takes nearly one week to receive mail²⁹ from the U.S. Postal Service—meaning that the opposing party may not receive the other party's brief until just before the 14-day timeframe has run out. Restrictions on reply briefing will deny immigrants a fair opportunity to respond to arguments and correct the record, ultimately resulting in a greater number of erroneous adjudications by the BIA.

²⁸ It was precisely this type of irregular procedure that led to the attorney general's decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018). In that case, the BIA had remanded a decision to Judge Couch after he had denied asylum to a woman who had survived domestic violence. See Center for Gender and Refugee Studies, *Background and Briefing on Matter of A-B-*, (Aug. 2018), <https://cgrs.uchastings.edu/matter-b/background-and-briefing-matter-b>.

²⁹ Since there is no requirement that the parties *receive* the other party's brief on the due date, and since there is no universal e-filing system for BIA briefs, it is common practice for respondent's counsel and DHS to serve their briefs on opposing counsel via regular mail.

V. The Agency Failed to Give the Public and Affected Parties Adequate Opportunity to Comment on the Proposed Rule, which Would Upend Ordinary Appellate Practice

Lastly, we note that DOJ has not provided a meaningful opportunity for the public to comment on the proposed rule. The 30-day comment period provided by the Agency, ending September 25, 2020, includes the federal holiday of Labor Day when businesses and federal and state governments are closed. Additionally, the country has been under a national emergency since March 2020 due to the COVID-19 global pandemic.³⁰ As a result, governors throughout the country have urged people to stay home and work from home, and immigration procedures have been regularly shifting in response to the new circumstances brought on by the pandemic. Practitioners have been required to expend additional time and resources to keep up-to-date with changes to immigration law and practice and to readily inform clients of the ever-changing legal landscape. The organizations have been working remotely and have more limited and inconsistent access to clients, physical documents, information, and technology needed to fully analyze and comment on the proposed rule, with minimal advance warning. Normal business operations have been dramatically disrupted, including those of DOJ and other federal agencies. The ongoing national emergency related to COVID-19 will thus prevent commenters from submitting thorough, detailed analyses of the rule within the restrictive 30-day timeframe proposed by the Agency. Despite requests to extend the comment period, the Agency has taken no steps to provide the public and affected parties adequate time to comment on such drastic and harmful proposed changes to all immigration adjudications as well as the criminal legal system.

This proposed rule, with its broad changes to EOIR practice, follows closely after DOJ and the Department of Homeland Security's (DHS) proposed rules and new forms, which would bring sweeping changes to long-established rules in immigration court and the BIA.³¹ Significant agency revisions to established practice should be well-thought out and allow the public the opportunity to fully comment. Instead, the Agency has used the summer months during a pandemic to rush through multiple proposed rules which would radically alter procedures that have been in place for decades and leave tens of thousands of noncitizens who could qualify for or potentially lose their current lawful status with no legal recourse. For this procedural reason alone, 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.

VI. Conclusion

For all the foregoing reasons, we strongly object to the substance of the proposed rule and urge the DOJ and EOIR to rescind it in its entirety. Although we object to the Agency's unfair 30-day timeframe in which to submit a comment to the proposed rule, we submit this comment, nonetheless, because we feel compelled to object to the proposed regulations which would greatly reduce the rights of noncitizens appearing before EOIR and would result in increased, permanent family separations, as well as the constitutional violations of noncitizen defendants

³⁰ Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 2020).

³¹ See *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36264 (June 15, 2020); *Security Bars and Processing*, 85 Fed. Reg. 41201 (Jul. 9, 2020).

who will be removed from the United States during the pendency of their criminal proceedings or as a result of constitutionally deficient criminal pleas. As organizations that work closely with immigrant communities, criminal defenders, and immigration attorneys, we encourage the Agency to rescind this harmful Proposed Rule in full.

We request that the Agency consider this comment on the Proposed Rule. Please do not hesitate to contact Em Puhl at em@immdefense.org if you have any questions or need any further information. Thank you for your consideration.

Sincerely,

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