TAHIRIH JUSTICE CENTER®

Protecting Immigrant Women and Girls Fleeing Violence

October 29, 2020

Submitted via https://www.regulations.gov/

Re: Comments in Response to Department of Justice Executive Office for Immigration Review Notice of Proposed Rulemaking: *Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances,* EOIR Docket No. 18-0301; RIN 1125-AA83; A.G. Order No. 4841-2020

The Tahirih Justice Center[1] (Tahirih) submits the following comments to the Executive Office of Immigration Review (EOIR) in response to the above-referenced NPRM published on September 23, 2020.[2] *See* 85 Fed. Reg. 61,640 (Sept. 30, 2020). Tahirih strongly opposes the NPRM insofar as it (i) declines to expand limited in-person representation in immigration court, while threatening the existing Friend of the Court program, and (ii) refuses to remedy local procedures that effectively bar counsel of record and prospective counsel from accessing the record of proceedings in a case.

Tahirih is a national, nonpartisan policy and direct services organization that has answered calls for help from nearly 29,000 survivors of gender-based violence and their families since its inception twenty-three years ago. Our clients are primarily women and girls who endure horrific human rights abuses such as domestic violence, rape and sexual torture, forced marriage, human trafficking, widow rituals, female genital mutilation/cutting (FGM/C), and "honor" crimes.[3]

Tahirih provides free legal and social services to help our clients find safety and justice as they engage in the daunting, courageous, and rewarding work of rebuilding their lives and contributing to their communities as illustrated by our clients' stories. Since its founding, Tahirih has also served as an expert resource for the media, Congress, policymakers, and others on immigration remedies for survivors fleeing gender-based violence (GBV). *See, e.g.*, Tahirih Justice Center,

[1] https://www.tahirih.org/. We note that although these comments are the official comments of Tahirih as an organization, individual Tahirih employees may also have submitted comments on the NPRM in their personal capacities. The agencies must, of course, also consider those individual comments.

[2] All sources cited in this comment—including, but not limited to, court opinions, legislative history, and secondary sources—are to be considered part of the administrative record.

[3] For background information on these types of gender-based violence, *see, e.g.*, UNHCR, *Guidelines on the Protection of Refugee Women* 17, https://www.unhcr.org/3d4f915e4.html; UN Women, *Defining "honour" crimes and "honour" killings*, https://endvawnow.org/en/articles/731-defining-honourcrimes-and-honour-killings.html; https://en.wikipedia.org/wiki/Female_genital_mutilation; https://en.wikipedia.org/wiki/Forced_marriage; https://www.widowsrights.org/.

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Tahirih in the News;[4] Tahirih Justice Center, *Congressional Testimony*;[5] Tahirih Justice Center, *Comments*.[6]

I. Proposal to Bar Further Limited In-Person Representation

We strongly oppose the proposed provision preventing any "individual" from "advocating in a legal capacity on behalf of a respondent in open court without filing form EOIR-28 noticing that individual's entry of appearance as a respondent's legal representative." 85 Fed. Reg. at 61,651.

There is a crisis of representation in immigration court: A recent national study found only 37% of respondents were represented in immigration court, and around 86% of immigrants held in prison by DHS pending their hearings[7] were unrepresented. *See* Eagly & Shafer, *Access to Counsel in Immigration Court* (Sept. 28, 2016).[8] And From October 2000 to March 2020, 48% of represented asylum seekers received relief in immigration court, while only 17% of unrepresented asylum seekers did. TRAC, *Asylum Decisions*.[9] These figures reflect the undeniable fact that the need for counsel far outstrips the availability of existing non-profit organizations and private lawyers to provide legal services to respondents.

That is particularly true for survivors of gender-based violence. Survivors are mostly indigent, with close to 100% of survivors of intimate partner violence suffering economic abuse,[10] and 75% of women report staying in abusive relationships due to economic barriers.[11] Furthermore, according to a nationwide survey of advocates, immigrant women, and service providers Tahirih conducted, safe and affordable housing and economic hardship ranked among the top three most urgent and prevalent systemic challenges, respectively, confronting immigrant women in the .. *See* Tahirih Justice Center, *Nationwide Survey: A Window into the Challenges Immigrant Women and Girls Face in the United States and the Policy Solutions to Address Them* (Jan. 31, 2018).[12] It is therefore exceedingly difficult for survivors to find representation in immigration court—even if they are not imprisoned by DHS pending their asylum hearings.

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4 https://www.tahirih.org/news-media/latest-updates/?tab=tahirih-in-the-news.

5 https://www.tahirih.org/pubs/?qmt%5Bpub_cat%5D%5B%5D=131.

6 https://www.tahirih.org/pubs/?qmt%5Bpub_cat%5D%5B%5D=261.

7 We decline to use the euphemism "detained."

8 https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

9 https://trac.syr.edu/phptools/immigration/asylum/.

10 *See, e.g.*, J.L. Postmus et al., *Understanding economic abuse in the lives of survivors*, Journal of Interpersonal Violence 27(3), at 411–430 (2012); A. Adams et al., *Development of the scale of economic abuse*, Violence Against Women vol. 13, at 563-588 (2008).

11 The Mary Kay Foundation. (2012). 2012 Mary Kay Truth About Abuse Survey Report available at: http://content2.marykayintouch.com/Public/MKACF/Documents/2012survey.pdf.

12 http://www.tahirih.org/wp-content/uploads/2018/01/Tahirih-Justice-Center-Survey-Report-1.31.18-1.pdf.

Tahirih's experience confirms as much. Tahirih has never been able to provide full-scale representation to all survivors who seek and qualify for our services, and that problem has recently worsened. In 2019, for example, we received 1,258 calls from immigrant survivors who are eligible for Tahirih's services. We were able to provide full representation to only 170 (13.5%) of those survivors—down substantially from 18.5% in 2018. We gave brief advice and counsel to 512 more callers but were unable to provide any services at all to the remaining 576. And we have been able to provide full-scale representation to less than 10% of eligible survivors who have sought Tahirih's assistance so far in 2020. Much of this decline traces to the myriad recent and illegal policy changes made by EOIR and DHS, which have—among other things—increased the number of time-consuming defensive asylum applications as a portion of our overall legal work; created indefensible delays in the adjudication of USCIS benefits that keep social-services clients dependent on our services for years at a time; and continually reworked immigration court calendaring priorities in ways that waste everyone's time.

This crisis of representations harms all respondents—especially the most vulnerable populations. Survivors of gender-based violence, for instance, are in desperate need of counsel to assist them with preparing their applications. Even the most straightforward cases require technical legal analysis to ensure meaningful access to the asylum process—and cases involving gender-based persecution are notoriously complex. As a historically marginalized population, survivors have faced a long, hard road in establishing that gender-based persecution is in fact a human rights abuse from which they deserve legal protection. While survivors who endure abuses such as FGM/C, domestic violence, forced marriage, and human trafficking may qualify for asylum in the United States, decision-making is routinely flawed in these cases. Among other things, this is the result of (1) ever evolving legal standards; (2) dramatic, unchecked politicization within our immigration agencies; (3) the nature of trauma itself; (4) the evidentiary challenges survivors face, as noted below; and (5) a longstanding, cis-male centered analytical framework that clings to an artificially simplistic public/private distinction to the detriment of survivors who are predominantly women and girls.

Matter of A-B-, 27 I. & N. Dec. 227 (AG 2018), provides a striking recent example of these problems. Immigration judges frequently misinterpret *Matter of A-B-* as mandating the denial of all claims involving domestic violence. The consequences of this misreading are dire; survivors' lives are put at grave risk upon deportation. It is also contrary to the well-established requirement that the merits of asylum must be considered on a case-by-case basis. And imposing a blanket prohibition on such claims is contrary to the plain language of *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). Notably, in 2016, UNHCR confirmed that the Refugee Convention's protection may extend to claims from Central American women *fleeing* gender-based violence such as the respondent in *Matter of A-B-*. *See* UNHCR, *UNHCR's Views on Gender Based Asylum Claims and Defining "Particular Social Group" to Encompass Gender* (Nov. 2016);[13] UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador* (Mar. 15, 2016);[14] UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* (2015).[15] Survivors therefore desperately need counsel to help prepare their asylum cases.

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[13] https://www.unhcr.org/en-us/5822266c4.pdf.

[14] https://www.refworld.org/docid/56e706e94.html.

[15] http://www.unhcrwashington.org/womenontherun.

The crisis of representation also has dramatic negative effects on minors. It goes without saying that—whatever certain immigration judges may think (*see, e.g.*, Kristin Macleod-Ball, *Judge Who Believes Toddlers Can Represent Themselves, Only Part of the Problem in the Battle over Representation for Kids*, Immigration Impact (Mar. 9, 2016))[16]—minors are unable to meaningfully represent themselves in court. *See, e.g.*, Lorelei Laird, *Short film dramatizes difficulties of children representing themselves in immigration court*, ABA Journal (July 9, 2018);[17] Kids in Need of Defense, *Representing Children in Immigration Matters* ch. 1.[18] And their interests cannot be safeguarded by immigration judges, many of whom exhibit constant, categorical biases against respondents. *See, e.g., see, e.g.*, Compl., *Las Americas v. Trump*, D. Or. No. 3:19-cv-2051, Dkt. 1 (Dec. 18, 2018); AILA, *AILA Receives Records Relating to EOIR Misconduct in FOIA Lawsuit* (Nov. 1, 2018).[19]

The NPRM simply ignores this crisis and includes no proposal that could even potentially lead to increased representation in immigration court. Instead, it proposes to formally bar in-person representation that is limited to specific hearings. *See* 85 Fed. Reg. at 61,645 & n.6. But the agency's utter failure to analyze the need for counsel, standing alone, renders that proposal arbitrary in violation of the Administrative Procedure Act (APA).

The NPRM's proposal is also categorically arbitrary for a second reason. In 2014, EOIR took one small—if entirely inadequate—step toward ameliorating the crisis of representation by recognizing the "growing need for support systems the courts can use to effectively and efficiently manage the cases of unaccompanied minors." Memo. from Brian M. O'Leary, *The Friend of the Court Model for Unaccompanied Minors in Immigration Proceedings* 1 (Sept. 10, 2014).[20] EOIR therefore instituted a "Friend of the Court" program that allowed lawyers to "act as the court's advisor, call attention to law or facts that may have escaped consideration, and provide requested information to the court" without representing any party. *Id.* at 2. Specifically, individuals were authorized under the program to "[g]ather and convey basic information regarding the status of … respondents' cases"; "[h]elp the respondent navigate courtroom procedures"; "[a]ssist the respondent in reviewing and filling out forms"; "[f]acilitate the respondent's attendance at hearings" via explanations and "logistical support"; and to "connect child respondents to available community resources." *Id.* at 3-5. The memorandum made clear that these permissible practices are "not exhaustive." *Id.* at 5.

On November 21, 2019, EOIR Director James McHenry issued a memorandum that superseded the 2014 guidance but did not end the Friend of the Court program. *See* Memo. from James McHenry, *Reaffirms principles related to legal advocacy by non-representatives in*

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16 https://immigrationimpact.com/2016/03/09/judge-believes-toddlers-can-represent-part-problem-battle-representation-kids/#.X5hbwFApDIU

17 https://www.abajournal.com/news/article/short_film_dramatizes_difficulties_of_children_representing_themselves.

18 https://supportkind.org/wp-content/uploads/2015/04/Representing-Children-In-Immigration-Matters-FULL-VERSION.pdf.

19 https://www.aila.org/infonet/eoir-records-relating-misconduct.

20 https://www.justice.gov/sites/default/files/pages/attachments/2016/12/21/friendofcourtguidancememo091014.pdf.

immigration court proceedings (Nov. 21, 2019).[21] That memorandum stated that "EOIR continues to maintain its longstanding policy of not allowing individuals to appear in immigration court before an immigration judge and engage in legal advocacy on behalf of a respondent," and it stated that "[i]ndividuals appearing in immigration court under the heading of an *amicus curiae* are not an exception to this policy." *Id.* at 2. But the memorandum also made clear that "EOIR has never had a policy allowing an *amicus curiae* to engage in legal advocacy on behalf of respondent in open court." Similarly, while the memorandum "formally supersedes the O'Leary Memorandum," it reaffirmed what it saw as the "central tenet" of that memorandum and declined to end the Friend of the Court program. *Id.* at 3-4. Nor did it bar Friends of the Court from performing any of the functions expressly allowed by the O'Leary Memorandum. Thus, under current EOIR policy, Friends of the Court may continue to assist unaccompanied minor respondents by gathering and conveying information to the court, assisting in the preparation of paperwork, connecting the child to community resources, helping the child understand what is happening in court, and facilitating the child's presence at hearings.

The NPRM says nothing at all about the Friend of the Court program—an omission that is shocking given the topic of the proposals. As we read proposed 8 C.F.R. §§ 1001.1(*i*)(1) & 1003.17(b), the NPRM—like the McHenry Memorandum discussed above—would not bar the Friend of the Court practices described in the O'Leary Memorandum. The agency should, however, expressly state as much in the regulations.

We further note that any attempt to end the Friend of the Court program would be arbitrary. The agency has not even attempted to articulate any rationale for barring individuals present in the courtroom from assisting unaccompanied minors in the ways specified by the O'Leary Memorandum. And given the difficulty that the courts themselves face when confronted by an unrepresented party who is unable to understand basic procedures, fill out forms, or submit information, there is no colorable basis for ending the program.

The cursory supposed justifications for the NPRM's proposed bar on further limited in-person representation—which are confined to a single footnote (*see* 85 Fed. Reg. at 61,645 n.6)—are equally arbitrary. The NPRM opines that in-person representation limited to individual hearings "would likely lead to confusion on the part of individuals in proceedings before EOIR, multiply the opportunities for fraud and abuse, and potentially complicate and lengthen immigration proceedings with comparatively little offsetting benefit to individuals and without any benefit to the government." This is a naked *ipse dixit*—and one without substance. There is no reason at all to believe that a respondent who can meaningfully consent to representation limited to a specific form, as the NPRM correctly proposes (85 Fed. Reg. at 61,646), cannot also meaningfully consent to representation limited to a specific hearing. In each case, the lawyer is saying the same thing: "I am representing you *only for this*." And "I am representing you only for this hearing" is no less clear than "I am representing you only for this pleading."

Similarly, there is no basis for believing that limited in-person representation—made in a setting in which immigration court judges are present and can both assure themselves that a respondent understands the limited nature of the representation and monitor the performance of counsel in real time—are more likely to give rise to fraud and abuse than situations involving forms, where limited-scope representation takes place out of EOIR's sight. And as the NPRM correctly notes, even there, the problem is far from intractable. 85 Fed. Reg. at 61,648.

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[21] https://www.justice.gov/eoir/page/file/1219301/download.

There is, meanwhile, no evidence that an increase in limited in-person representation will "complicate and lengthen immigration proceedings." To the contrary, representation makes proceedings shorter by ensuring that respondents have a representative who knows how to navigate the process and by preventing appeals (and petitions for review) due to errors that could have been prevented had counsel been present. And although the NPRM claims in another context that there is "less likelihood of confusion" or of "lengthening hearings" where a written record of the limited nature of representation exists (85 Fed. Reg. at 61,648 n.6), the agency can easily create a written record of representation limited to a specific hearing by a simple amendment to EOIR-28 that mirrors the proposed amendment for representation limited to specific documents. That purported justification is therefore nothing more than empty rhetoric.

The NPRM's speculation about the benefit to respondents is similarly baseless. Here, for the first and only time, the agency actually invokes evidence—but that evidence is in no way meaningful. The NPRM suggests that the vast majority of cases that have been pending for 6 months, especially long-pending asylum cases, involve representation. 85 Fed. Reg. at 61,645 n.6. That purported fact involves no citation to underlying data and—given EOIR's recent history of manipulating data to support its preferred outcomes—is in all likelihood false. *See, e.g.*, TRAC, *EOIR's Data Release on Asylum So Deficient Public Should Not Rely on Accuracy of Court Records* (June 3, 2020).[22]

In any event, the NPRM's statement ignores the highly relevant fact that, by definition, master calendar hearings start *before* a case has been pending for six months. It also arbitrarily ignores the fact that, under another (illegal) rule recently proposed by EOIR, many asylum applications would have to be filed within 15 days, and all asylum cases would end within a six-month period. *See* EOIR, *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 59,692 (Sept. 23, 2020). **T**he NPRM does not, because it cannot, deny that representation in initial hearings, and other hearings scheduled within six months, would benefit respondents. Nor can it contradict the evidence cited above that many cases in fact do not involve counsel. Further, the NPRM ignores the fact that representation rates vary wildly depending on whether a respondent is imprisoned—and, if so, the location of the prison. *See, e.g.*, TRAC, *Asylum Decisions*; Eagly & Shafer, *supra*. And it ignores indisputable and direct evidence that, on net, representation greatly benefits respondents.

The NPRM also fronts two other supposed reasons for declining to expand limited in-person representation. First, it claims "that limited representation would likely place a substantial administrative burden on EOIR." 85 Fed. Reg. at 61,645 n.6. The word "likely" renders this no more than rank speculation. It also serves to underscore that the agency—which has unparalleled access to evidence concerning what places administrative burdens on the agency—has proven unable to cite a single shred of evidence in support of its claim. That absence of evidence is telling, given that EOIR has had limited-scope representation for bond and custody hearings and that it feels comfortable allowing limited-scope representation for single documents. And the administrative burden caused by limited-scope representation at a master calendar hearing—*i.e.,* the processing of an additional EOIR-28—is precisely the same as the administrative burden caused by limited-scope representation at a bond hearing or for a specific document.

The NPRM further claims that "allowing for limited representation could have unintended negative consequences for individuals appearing before EOIR" by creating "perverse incentives" for attorneys. 85 Fed. Reg. at 61,645 n.6. But the NPRM never comes close to articulating a coherent

[22] https://trac.syr.edu/immigration/reports/611/.

theory of what those incentives are, much less how they would arise or how they would harm respondents. It asserts the truism that individuals providing limited-scope representation will not expect to represent a respondent through the entire case. *Id.* But that is true of attorneys who attend only bond proceedings and attorneys who fill out individual documents just as it is true of attorneys who attend only a master calendar hearing. And the NPRM never so much as speculates as to the supposed link between its truism and its claim of perverse incentives. Rather, it falls back on theories of confusion and lengthened proceedings, which are—as shown above—utterly without merit.

Finally, the NPRM seeks shelter in the tiny minority of three comments (of 32 total comments) that took the position the agency now proposes. *See* 85 Fed. Reg. at 61,643 & 61,645 n.3. But those comments are no more persuasive than the agency's footnote. Two comments submitted by individuals—one anonymous and one who provided a name but did not disclose any role in immigration law—both state that continuous representation is better than discontinuous, piecemeal representation. Comment Tracking Nos. 1k3-99ju-l5n1 & 1k3-99e0-1g47. No one disputes that. But piecemeal representation would not *replace* full-scale representation; it would supplement such representation. Tahirih, for instance, could keep the same number of full-representation clients while also providing limited representation to additional individuals. Given the crisis in representation described above, there is no reason to believe that other organizations would respond differently—and indeed, there is no evidence to support a contrary view. In any event, EOIR has recourse to simple mechanisms, such as lawyer certifications, for ensuring that limited-scope representation does not displace full-scale representation.

That leaves the comment submitted by the National Association of Immigration Judges. *See* Comment ID No. 1k3-99ko-5m8o. That comment, which (like the NPRM) is filled with assertions not backed by any evidence, opposed *all* limited-scope representation. And the comment did not state that any of its concerns applies uniquely to appearances at hearings, rather than appearances on paper—a fact that belies the NPRM's attempt to drive a wedge between the two. Further, to the extent that the comment relies on examples from problems that could be construed as arising only from limited in-person representation and not from limited representation for the purpose of preparing documents, the problems are ones that are more likely to occur when a respondent must proceed pro se in court than when the respondent must proceed with different attorneys over the course of time. *See id.* at 2 (new attorney appears at individual hearing and contests prior admissions); *id.* at 3 (motions for continuances to find counsel or for pro se respondents to prepare themselves for hearings).

Finally, we note that several comments proposed an alternative that EOIR has completely, and arbitrarily, failed to consider—that lawyers be able to represent respondents in court for the purpose of specific motions, especially those that the lawyers submitted to the court. *See, e.g.*, CLINIC, Comment ID #1k3-99ju-w1f1. In that case, any confusion or disjointedness related to changes in representation is indisputably created by a rule *against* limited in-court representation, not by a rule *for* it. But EOIR never mentions this proposal, much less explains why it has chosen to reject it. The NPRM's thoughtless, blithe attempts to justify the proposal to bar any further types of limited in-person representation would therefore not pass muster in a first-year law class, much less under the APA.

II. Refusal to Override Local Procedures That Preclude Counsel's Access to the Record of Proceedings

We also oppose the NPRM insofar as it proposes not to "expand access to records of proceedings." 85 Fed. Reg. at 61,649. In many situations, "current law" (*id.*) prevents access to the record of proceedings even for those who have filed form EOIR-27 or EOIR-28. The problem is rooted in local rules in various immigration courts. For instance, in Atlanta, even before COVID-19, the immigration court allowed counsel of record to access the record of proceedings only on Fridays and to allow only 15 pages of the record to be photocopied. Further, in some cases, attorneys were been told they could not review the record at all, because all courtrooms were in use on Fridays.

The practice in the court in Houston is similarly restrictive, with lawyers often having to wait weeks to access their clients' record of proceedings and copying capped at 10 pages of the record. To take another example, our understanding is that the court for imprisoned respondents in Tacoma, like the Atlanta court, allows access only on Fridays—and does not allow photocopying at all. There is simply no legitimate reason for placing such narrow restrictions on counsel's access to the record of proceedings or the reductions to the effectiveness of representation that those restrictions create.

The NPRM nevertheless asserts that "the record of proceedings is readily available for review by the [respondent] and the [respondent's] attorney or representative of record." 85 Fed. Reg. at 61,649. The NPRM cites no authority or evidence to support this assertion—and as shown above, local policies (which the NPRM arbitrarily ignores) mean this assertion is simply false in many places. The NPRM's alternate claim that respondents are served with all documents, meanwhile, ignores the reality faced by respondents. Survivors of gender-based violence, for instance, must often seek temporary housing in shelters or with friends—and frequently must move—to safely escape abuse. And if documents are sent to a "permanent" address at which the abuser resides, a survivor will never see them, because abusers are notorious for confiscating important documents, including immigration-related documents, as a tool of control. *See, e.g.*, Anne L. Ganley, *Health Resource Manual* 37 (2018); Rachel Louise Snyder, *No Visible Bruises: What We Don't Know About Domestic Violence Can Kill Us* (2019); Margaret E. Adams & Jacquelyn Campbell, *Being Undocumented & Intimate Partner Violence (IPV): Multiple Vulnerabilities Through the Lens of Feminist Intersectionality*, 11 Women's Health & Urb. Life 15, 21-24 (2012); Misty Wilson Borkowski, *Battered, Broken, Bruised, or Abandoned: Domestic Strife Presents Foreign Nationals Access to Immigration Relief*, 31 U. Ark. Little Rock L. Rev. 567, 569 (2009); Nat'l Domestic Violence Hotline, *Abuse and Immigrants*;[23] Edna Erez & Nawal Ammar, *Violence Against Immigrant Women and Systemic Responses: An Exploratory Study* (2003);[24] Julieta Barcaglioni, *Domestic Violence in the Hispanic Community* (Aug. 31, 2010);[25] Memorandum from Paul Virtue, General Counsel, Immigration & Naturalization Service (Oct. 16, 1998), at 7-8;[26] Edna Erez et al., *Intersection of Immigration and Domestic Violence: Voices of Battered Immigrant Women*, 4 Feminist Criminology 32, 46-47 (2009); Immigration & Customs Enforcement, *Information for Victims of Human*

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[23] https://www.thehotline.org/is-this-abuse/abuse-and-immigrants-2.

[24] https://www.ncjrs.gov/pdffiles1/nij/grants/202561.pdf.

[25] https://safeharborsc.org/domestic-violence-in-the-hispanic-community.

[26] https://asistahelp.org/wp-content/uploads/2018/10/Virtue-Memo-on-Any-Credible-Evidence-Standard-and-Extreme-Hardship.pdf.

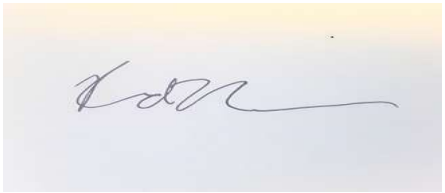
Trafficking (2016);[27] National Sexual Violence Resource Center, *Assisting Trafficking Victims: A Guide for Victim Advocates* 2 (2012).[28] Once again, the NPRM does not or cannot cite any contrary evidence. The NPRM accordingly articulates no basis consistent with the evidence before the agency for refusing to ensure that counsel of record has access to the record of proceedings.

In many courts, current policies also prevent prospective counsel from accessing the record of proceedings. This, too, is indefensible. Respondents have a statutory right to counsel. 8 U.S.C. § 1362. Prospective counsel—especially counsel potentially interested in representing the respondent on appeal to the BIA or on a petition for review—cannot meaningfully decide whether to undertake full representation of the client without reviewing the record. In fact, without such review, prospective counsel cannot even assure themselves that they can fulfill their ethical duties to the client and the court if they undertake the representation.

Nothing in the NPRM provides a colorable reason not to extend access to prospective counsel. The fact that records "typically contain sensitive information" (85 Fed. Reg. at 61,649) provides a reason to ensure that the respondent has consented to access—perhaps by amending EOIR-27 and EOIR-28 to add a check box for counsel who wish to review the record for purposes of determining whether to undertake representation and a certification that the respondent consented to review. But it is not a reason to force counsel to proceed blindly and in tension with their ethical duties. FOIA requests (*see id.*), meanwhile, take far too long to process to be useful to counsel who must decide whether to undertake representation—as Tahirih knows from its own FOIA requests with EOIR and DHS agencies. *See also, e.g.*, Am. Immigration Council, *Lawsuit Challenges Systemic USCIS & ICE FOIA Delays* (June 19, 2019).[29] The agency's chosen "balance" (85 Fed. Reg. at 61,649), then, is one between a forced lack of representation and privacy interests that are easily protected in other ways.

The NPRM's proposals not to expand either limited in-court representation or access to the record of proceedings are accordingly arbitrary and must be reconsidered.

Sincerely,



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[27] https://www.ice.gov/sites/default/files/documents/Document/2017/brochureHtVictims.pdf.

[28] https://www.nsvrc.org/sites/default/files/publications_nsvrc_guides_human-trafficking-victim-advocates.pdf.

[29] https://www.americanimmigrationcouncil.org/litigation/lawsuit-challenges-systemic-uscis-and-ice-foia-delays.