TAHIRIH JUSTICE CENTER®

Protecting Immigrant Women and Girls Fleeing Violence

September 25, 2020

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

Re: Comments in Response to Department of Justice Executive Office for Immigration Review Notice of Proposed Rulemaking: *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure,* EOIR Docket No. 19-0022; RIN 1125-AA96; A.G. Order No. 4800-2020

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 August 26, 2020.[2] Tahirih opposes the rule as both a matter of public policy and because it patently violates numerous laws, including the Immigration & Nationality Act (INA), the Administrative Procedure Act (APA), and the international obligations of the United States as a State party to the United Nations (UN) Convention Relating to the Status of Refugees and 1967 Protocol (collectively, the Convention). *See generally* UNHCR, *The 1951 Refugee Convention*.[3]

I. Introduction

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.[4]

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[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] https://www.unhcr.org/1951-refugee-convention.html.

[4] 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/.

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, *Tahirih in the News*;[5] Tahirih Justice Center, *Congressional Testimony*;[6] Tahirih Justice Center, *Comments*.[7]

Among the clients we have served are Koumba* from Benin, who was raped at the age of 11 by a man from her father's village. Four years later, she was raped a second time by a different man. She then learned that she had been promised to this man in marriage. Koumba* eventually attended university, earned her degree, and worked as a human resources professional for an insurance company. A decade passed, and she fell in love with a man from her church and married him. Koumba* put her past abuse behind her and built a happy new life with her husband.

In 2010, Koumba*'s world was violently upended when the rapist to whom she had been promised in her teens passed away. To her shock and dismay, this man and his family had never forgotten that Koumba* had been promised to him like property. Now, upon the rapist's death, his brother "inherited" Koumba*. At his direction, members of a sect from his village kidnapped her. Koumba* was forced to perform widow rituals, which included washing the dead man's body as well as her own intimate parts with the same water. She was then forced to spend the night lying next to the corpse of her rapist. A few months later, Koumba* was kidnapped again. This time, the deceased man's brother kept her in a dark hut with her arms and legs tied to a bed and raped her every day. Once again she escaped, this time the night before their formal marriage ceremony was to take place. To save her life, Koumba* knew she had no choice but to give up her career and everything she had worked for in her native land. She fled to the United States and after facing additional hardship here, she was finally able to apply asylum. Her initial application was denied due to technical complications but after retaining Tahirih to help her reopen her case, she ultimately prevailed.

Another client, Julia* from Guatemala, suffered severe domestic violence at the hands of her husband in the United States. She was so traumatized that she was initially unable to discuss the abuse in much detail. She did manage to describe some of her husband's abusive tactics, such as locking her in their bedroom, forcing her to leave the bathroom door open when she showered while their two roommates were in their apartment, berating her in public, and leaving switchblades out on display to intimidate her. He also brutally sexually abused her, and Julia* eventually had to recount these violent sexual assaults in graphic detail in order to develop and prove her case. She was severely re-traumatized throughout the entire process. However, after securing relief through the Violence Against Women Act, Julia* found the strength to rebuild her life. She became employed at a medical laboratory and continues to volunteer for the Red Cross and for a clinic serving HIV positive individuals.

Gender-based violence in all its forms involves a unique set of common characteristics that leave survivors of such violence—both abroad and within the United States—uniquely vulnerable. That set of characteristics includes (1) abuse by family members; (2) ostracization and social stigmas

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

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

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

within one's community; (3) disbelief by family, friends, and others including law enforcement; (4) internalized shame; (5) the inability to disclose violence to or in the presence of children or male family members; (6) cultural acceptance of GBV; (7) barriers to medical or mental health treatment; (8) economic abuse, social isolation, and forced dependence or unequal caretaking responsibilities; and (9) multiple victimization and revictimization.

Survivors—who include entrepreneurs, physicians, teachers, historians, grocery clerks, lawyers, authors, caregivers, politicians, entertainers, and scientists—are thus isolated, traumatized, and cut off from family and community resources, and those who do manage to escape are in desperate need of counsel,[8] medical, mental health, and other services as they navigate our system. *See, e.g.*, Tahirih Justice Center, *Immigrant Survivors Fear Reporting Violence* (May 2019).[9] Yet due to the nature of gender-based violence, survivors are *least* likely to be able to access such services. The formidable obstacles survivors already face in seeking safety have only been amplified by the global pandemic. *See, e.g.*, Rená Cutlip-Mason, *For Immigrant Survivors, the Coronavirus Pandemic is Life-Threatening in Other Ways*, Ms. Magazine (Apr. 14, 2020);[10] Tahirih Justice Center, *The Impact of COVID-19 on Immigrant Survivors of Gender-Based Violence* (Mar. 23, 2020).[11]

II. Comments on the NPRM as a Whole

The NPRM must be withdrawn in its entirety for at least three reasons.

A. Pretext

As an initial matter, the NPRM is nothing more than a pretext for severely restricting asylum and other relief available in immigration court. The Supreme Court recently made clear that "[t]he reasoned explanation requirement of administrative law … is meant to ensure that agencies offer genuine justifications for important decisions." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). To that end, the agencies' actual reasoning must be provided so that it "can be scrutinized by courts and the interested public." *Id.* at 2576. And as part of disclosing their "actual reasoning," administrative agencies "must 'disclose the basis'" of their actions. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (quoting *Phelps Dodge Corp. v. Labor Bd.*, 313 U.S. 177, 197 (1941)). The provision of "contrived reasons would defeat the purpose of the enterprise." *Dep't of Commerce*, 139 S. Ct. at 2576.

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[8] This is particularly the case for detained asylum seekers. *See, e.g.*, 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), http://www.tahirih.org/wp-content/uploads/2018/01/Tahirih-Justice-Center-Survey-Report-1.31.18-1.pdf.

[9] https://static1.squarespace.com/static/5b9f1d48da02bc44473c36f1/t/5d290b07a8dea8000138bf97/1562970888076/2019-Advocate-Survey-Final.pdf.

[10] https://msmagazine.com/2020/04/14/for-immigrant-survivors-the-coronavirus-pandemic-is-life threatening-in-other-ways/.

[11] https://www.tahirih.org/wp-content/uploads/2020/03/Impact-of-Social-Distancing-on-Immigrant-Survivors-of-Gender-Based-Violence_Final-March-23-2020.pdf.

Here, the agencies' rationales are, as shown in detail below, entirely implausible. That fact, standing alone, gives rise to a strong inference that the agencies' stated reasoning is pretextual rather than "genuine." *Dep't of Commerce*, 139 S. Ct. at 2575.

That inference is further supported by two disconnects in the NPRM. *First*, as detailed at various points below, the NPRM treats DHS very differently from asylum seekers and others who appear as respondents in immigration court, and in each case, it is DHS that receives more favorable treatment. *Second*, different portions of the NPRM treat the immigration courts and the BIA variously as judicial bodies akin to federal courts (*e.g.*, 82 Fed. Reg. at 52,504 (discussing *sua sponte* reopening), akin to the administrative tribunals that decide Social Security benefits claims (82 Fed. Reg. at 52,502 (discussing the so-called "quality assurance" proposal), or like neither courts nor administrative decision-makers (*see, e.g.*, 85 Fed. Reg. at 52,498 (discussing proposed change to briefing extensions without mentioning practices in other courts or agencies); *id.* at 52,498-99 (discussing simultaneous briefing proposal); *id.* at 52,503-04 (discussing administrative closure)). These shifts, too, are predictable: The NPRM uniformly seeks to analogize EOIR courts to whichever tribunal will justify a rule that is less favorable to respondents and their attorneys. The NPRM itself therefore leaves no room to doubt that its stated goals are mere pretexts.

The inference of pretext also finds support in the statements of those who signed or influenced the rule. To start at the top, President Donald J. Trump has stated that immigrants attempting to cross the southern border of the United States should be shot. Eugene Scott, *Trump's most insulting—and violent—language is often reserved for immigrants*, Wash. Post (Oct. 2, 2019).[12] He has suggested that the border should include an "electrified" wall with "spikes on top that could pierce human flesh." *Id.* He has referred to immigrants as "animals" who "infest" the United States. Juan Escalante, *It's not just rhetoric: Trump's policies treat immigrants like me as "animals,"* Vox (May 19, 2018);[13] Brian Resnick, *Donald Trump and the disturbing power of dehumanizing language*, Vox (Aug. 14, 2018).[14] And he has, without citing to any evidence, both associated immigrants generally with "[d]rugs, gangs, and violence" (Dara Lind, *Trump just delivered the most chilling speech of his presidency*, Vox (June 28, 2017)),[15] and said that Mexican immigrants "bring[ ] drugs," "bring[ ] crime," and are "rapists." Scott, *supra*.

More specifically, President Trump has referred to asylum seekers as "invad[ing]" and "infest[ing]" the United States. Donald J. Trump (@realDonaldTrump), Twitter (June 19, 2018, 6:52 AM);[16] Donald J. Trump (@realDonaldTrump), Twitter (June 24, 2018, 8:02 AM).[17] He has claimed without evidence that support for asylum seekers is equivalent to support for "crime," "drugs," and

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12 https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/.

13 https://www.vox.com/first-person/2018/5/18/17369044/trump-ms-13-gang-animals-immigrants.

14 https://www.vox.com/science-and-health/2018/5/17/17364562/trump-dog-omarosa-dehumanization-psychology.

15 https://www.vox.com/policy-and-politics/2017/7/28/16059486/trump-speech-police-hand.

16 https://twitter.com/realDonaldTrump/status/1009071403918864385.

17 https://perma.cc/35AQ-NSDH.

"human trafficking." *Remarks: Donald Trump Meets With Representatives of Law Enforcement* (Sept. 26, 2019).[18] And he has made clear his view that all asylum seekers should "IMMEDIATELY" be deported without any legal process whatsoever, in clear contravention of the INA and international law. Donald J. Trump (@realDonaldTrump), Twitter (June 30, 2018, 3:44 PM).[19]

President Trump has also repeatedly claimed that the asylum system routinely grants relief to people without legitimate claims. He has, for instance, claimed that there is routine "abuse" of the asylum process. Exec. Order No. 13,767, *Border Security and Immigration Enforcement* (Jan. 25, 2017). He has referred to the lawful asylum process as a "loophole" exploited by those with "fraudulent or meritless" claims. *Remarks by Pres. Trump on the Illegal Immigration Crisis and Border Security* (Nov. 1, 2018).[20] He has referred to asylum as a "hoax" and a "scam" and claimed, in clear contravention of U.S. and international law, that "we're not taking [asylum seekers] anymore." *Trump on Asylum Seekers*: 'It's a Scam, It's a Hoax', Daily Beast (Apr. 5, 2019).[21] He has expressed the unelaborated view that "asylum procedures are ridiculous" and that "you have to get rid of [immigration] judges" to get the outcomes he prefers. *Remarks by President Trump and NATO Secretary General Jens Stoltenberg Before Bilateral Meeting* (April 2, 2019).[22] He has claimed that asylum laws are "horrible" and "unfair" (*Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border* (Mar. 15, 2019))[23] and that asylum claims are "frivolous" and "bogus" (*Remarks: President Trump Signs Taxpayer First Act in the Oval Office* (July 1, 2019)).[24] None of these statements were supported by so much as a shred of evidence, and no supporting evidence exists for any of them.

These views constitute just a small sample of President Trump's anti-immigrant, and anti-asylum seeker, statements.

Attorney General William Barr, who signed the NPRM on behalf of DOJ, likewise has a long history of statements that, at the time of his confirmation, led to the accurate prediction that he would "be a loyal foot soldier for Trump's aggressive immigration agenda." Dara Lind, *William Barr hearing: attorney general nominee's immigration record aligns with Trump's*, Vox (Jan. 16, 2019).[25] For instance, in 1992, when the acquittal of the white Los Angeles police officers who savagely beat Rodney King led to violence, Barr made the astonishing claim that "[t]he problem of immigration enforcement" was in part responsible for the violence. Ronald J. Ostrow, *William Barr: A*

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18 https://factba.se/transcript/donald-trump-remarks-law-enforcement-september-26-2019.

19 https://twitter.com/realDonaldTrump/status/1013146187510243328?s=20.

20 https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/.

21 https://www.thedailybeast.com/trump-on-asylum-seekers-its-a-scam-its-a-hoax.

22 https://perma.cc/5ZKY-P53D.

23 https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border-2/.

24 https://factba.se/transcript/donald-trump-remarks-bill-signing-taxpayer-act-july-1-2019.

25 https://www.vox.com/2018/12/7/18128926/barr-confirmation-senate-immigration-trump.

"Caretaker" Attorney General Proves Agenda-Setting Conservative, L.A. Times (Jun 21, 1992).[26] Like Trump, Barr has long believed—without a shred of supporting evidence—that large numbers of asylum seekers present "patently phony claims." *Asylum and inspections reform: Hearing before the Subcommittee on International Law, Immigration, and Refugees of the Committee on the Judiciary, House of Representatives* (Apr. 27, 1993).[27] And more recently, while criticizing so-called "sanctuary" policies, Barr baselessly referred to all undocumented people as "criminal aliens." *E.g.*, Justine Coleman, *Barr announces 'significant escalation' against 'sanctuary' localities*, The Hill (Feb. 10, 2020).[28]

In short, the NPRM and the statements of those who directed its creation clearly demonstrate that NPRM's stated goals are a mere pretext for imposing further restrictions on asylum seekers. It is therefore arbitrary and capricious in its entirety. And for the same reasons, the NPRM violates the constitutional guarantee of equal protection by implementing the animus that high-ranking administration officials have repeatedly expressed about keeping non-white immigrants from places as disparate as Central America, Haiti, Mexico, the Middle East, and Nigeria out of the country.

B. Impermissible Retroactivity

The NPRM would make several of its proposed changes—*i.e.*, the proposed bar on administrative closure; the proposed bar on *sua sponte* reconsideration; and the proposed bar on the BIA's ability to refer cases to itself—applicable to all appeals pending when the final rule goes into effect. A regulation may not be applied retroactively unless Congress has included a clear statement that the agencies may promulgate regulations with that effect. *E.g.*, *INS v. St. Cyr*, 533 U.S. 289, 316-17 (2001). There is no statute that authorizes either DHS or DOJ to promulgate new bars to asylum and withholding of removal that have retroactive effect.

The application of the NPRM's proposals to pending asylum applications is therefore illegal if that application qualifies as "retroactive." The application of the proposed bars on administrative closure and *sua sponte* reconsideration would indeed be retroactive. "The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *St. Cyr*, 533 U.S. at 317 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)). The phrase "new legal consequences" encompasses any provision that would "take[ ] away or impair[ ] vested rights acquired under existing laws" or that would "create[ ] a new obligation, impose[ ] a new duty, or attach[ ] a new disability, in respect to transactions or considerations already past." *Id.* at 321 (quoting *Landgraf*, 511 U.S. at 269)). And there can be no doubt that forcibly barring current cases from administrative closure or reopening would impair the rights that asylum applicants and others have under current law, which expressly allows *sua sponte* reopening (8 C.F.R. §§ 1003.2(a) & 1003.23(b)(1)) and also clearly allows administrative closure (*see Morales v. Barr*, 963 F.3d 629 (7th Cir. 2020); *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019)).

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[26] https://www.latimes.com/archives/la-xpm-1992-06-21-op-1236-story.html.

[27] https://archive.org/stream/asyluminspection00unit/asyluminspection00unit_djvu.txt.

[28] https://thehill.com/regulation/court-battles/482425-barr-announces-significant-escalation-against-sanctuary-cities.

C. Insufficient Time for Public Comment

Finally, EOIR has provided insufficient time for public comment, and it has done so without any attempted justification. The NPRM proposes drastic and sweeping changes to the asylum process—but the public has been given a mere 30 days to respond. Even under normal circumstances, at least 60 days would be needed for the public to submit thorough, considered comments on a rule with such sweeping consequences. And these are not normal circumstances: The public is at an even greater disadvantage now due to the COVID-19 pandemic.

The 30-day period has also proven insufficient in practice, as our experience highlights. At Tahirih all employees continue to perform mandatory telework, many while simultaneously caring for babies, toddlers, and/or school-age children. As a result, full-time Tahirih employees were expected to work no more than 32 hours per week during the comment period, with the expectations for part-time employees—two of whom were crucial to the drafting of these comments—reduced proportionally. Thus, these comments do not—and cannot—represent Tahirih's full response to the rule. And they do not, because they cannot, include all of the analysis and evidence that Tahirih would have provided if given at least 60 days to respond to the rule. The agency's decision not to provide more than 30 days for comment has therefore impaired Tahirih's opportunity and ability to comment on the rules.

III. Comments on Individual Proposals in the NPRM

The individual proposals in the NPRM are, almost without exception, also infirm in numerous ways.

A. Bar on Administrative Closure of Cases

The NPRM proposes to bar administrative closure in the vast majority of cases. 85 Fed. Reg. at 52,510. That proposal would wreak incalculable harm on survivors of gender-based violence and other asylum seekers.

Immigration remedies available to survivors of gender-based violence in the United States include the U visa for victims of crime, the T visa for victims of human trafficking, and the Self-Petition for lawful permanent residence under the Violence Against Women Act (VAWA). While survivors pursue these remedies with U.S. Citizenship and Immigration Services (USCIS), they are often concurrently in removal proceedings before an immigration judge. USCIS is currently working its way through a massive, historic backlog, however, with survivors waiting in limbo for several years before their petitions are adjudicated.[29] Rather than moving forward with removal of respondents, immigration judges have the authority to "administratively close" proceedings in the meantime. Doing so gives USCIS the opportunity to review a respondent's petition in case they are

[29] *See* Am. Immigration Lawyers Ass'n, *AILA Policy Brief: USCIS Processing Delays Have Reached Crisis Levels Under the Trump Administration*, (Jan. 30, 2019) https://www.aila.org/infonet/aila-policy-brief-uscis-processing-delays.

eligible for relief.[30] The practice of averting removal for those who may ultimately qualify for relief squarely fulfills the will of a bipartisan Congress in enacting survivor-based remedies.

The NPRM, however, proposes to eliminate immigration judges' authority to administratively close *any* case—including when survivors have U or T visa petitions or VAWA self-petitions pending. Even if USCIS has agreed to expedite adjudication of a petition, or it is already at the top of the waiting list, the judge will no longer be able to close the case. The only alternative is to grant multiple, back-to-back continuances indefinitely. Petitioners will flood USCIS with urgent requests to expedite review of their petitions, unnecessarily adding to USCIS' backlogs. And the examples below illustrate how repeatedly scheduling extraneous hearings particularly where the outcome is uncertain is (1) highly inefficient, avoidably adding to unprecedently bloated immigration court dockets; (2) drains all stakeholders' resources, including DHS who must appear and prepare for each hearing; (3) inconveniences counsel; (4) diverts scarce *pro bono* time and effort away from other cases that need attention or could be taken on anew; and (5) severely re-traumatizes survivors.

Tahirih client Diana* from Honduras was a derivative on her mother's U visa petition. She was also a survivor of sexual assault, unrelated to her mother's victimization as a witness to the murder of a close friend. The judge could have granted administrative closure but denied her attorney's motion. Instead, her attorney filed five motions for continuance over the course of the next three years. When Diana's* U visa petition was finally approved, the judge granted her attorney's motion to terminate.

Another case involved Patricia*, also from Honduras, who had suffered domestic violence and sexual assault. The immigration judge in Patricia's* case refused to grant a continuance to allow enough time for USCIS to review her pending U visa petition. Instead, the judge insisted that Patricia* file for asylum even though she had a weak claim. The judge set her asylum merits hearing date, and her attorney then filed three consecutive continuance motions. Each time, she and Patricia faced the uncertainty that if the motion was denied, they would have to proceed on the merits. Her petition is still pending, so she will have to ask for another continuance at her next hearing set for early 2021.

Gloria,* also a survivor of domestic violence and sexual assault from Honduras, filed a U visa petition based on domestic violence in 2019. She has since filed three motions for continuance and is now set for a hearing in early 2021. As with Patricia's* case, the court no longer allows status dockets so Gloria's attorney will have to keep asking for continuances at each newly scheduled merits hearing until USCIS grants the petition.

Without administrative closure, judges who are unwilling to grant multiple continuances will swiftly remove survivors before their petitions are adjudicated. Upon deportation, survivors will face various hardships including a lack of access to social services, mental health counseling, medical care, and safe housing. Removal could result in separation from U.S. citizen children, and loss of child custody to an abuser. And abusers often renew threats to survivors once they are deported. They are well-aware when protection from human trafficking and domestic and sexual violence is inadequate or nonexistent in a survivor's home country. Tragically, survivors might suffer life-

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

threatening violence that will prevent them from ever safely returning to the U.S. even if their petitions are ultimately granted.

Removal of survivors with pending petitions also makes it much more difficult to prevail in the long run. If deported, many survivors of human trafficking with pending T-visa petitions will have relief denied outright for failure to maintain physical presence in the United States as required for the visa.[31] U visa petitioners are not required to remain present in the United States while their petitions are under review. However, they may be largely unable to coordinate with counsel (if represented) or receive and respond to critical case correspondence such as requests for additional evidence. And, deported survivors and their children whose petitions are subsequently granted will now have to seek unlawful presence bar waivers in order to return. These consequences grossly undermine the express intent of Congress in enacting survivor-based remedies.

Tahirih client Tanya* from Mexico currently has a U visa petition pending based on domestic violence she experienced in the U.S. While she was not deported, Tanya* was forced to return home before her petition was adjudicated due to threats from her abuser. The circumstances she faces in Mexico are illustrative of the hardship petitioners can suffer upon return or removal.

After Tanya* reported her abuser to the police, he fled to Mexico and threatened to kill her entire family there if she didn't return. She felt she had no choice but to return with her daughter out of fear that her abuser would carry out his threats. She, her family, and her abuser currently remain in Mexico. The last time her attorney was able to contact her, she learned that Tanya* had moved to a different part of the city to try to evade her abuser, and she wasn't giving her phone number to anyone but her parents. She is terrified not only of him but of cartel violence in her city. Every time her phone rings with an unknown number, she fears that one of her family members has been kidnapped by the cartel and they are calling for ransom money. This is a common occurrence where she lives. She is also deeply concerned for her young daughter's safety.

The NPRM is arbitrary and capricious because it does not, and cannot rationally, find that any justification for ending administrative closure outweighs these severe consequences to survivors.

Further, the rationales put forward in the NPRM for ending administrative closure are uniformly arbitrary and capricious on their face. The NPRM's primary rationale for the proposal is that administrative closure assertedly "exacerbated … the existing backlog of immigration court cases." 85 Fed. Reg. at 52,504. That is false. The available evidence makes clear that "far from contributing to the backlog, administrative closure has helped reduce the backlog" of cases in immigration court. TRAC, *The Life and Death of Administrative Closure* (Sept. 10, 2020);[32] *see also* TRAC*, Immigration Court Backlog Surpasses One Million Cases* (Nov. 6, 2018)[33] (noting that, as of that date, *Matter of Castro-Tum* accounted for more than one-quarter of the backlog in immigration courts).

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[31] Some T visa petitioners are granted "continued presence" by DHS, temporarily shielding them from deportation while USCIS reviews their petitions.

[32] https://trac.syr.edu/immigration/reports/623/.

[33] https://trac.syr.edu/immigration/reports/536/.

The agency's contrary belief is premised on statistical malpractice. The NPRM takes the years 2012 to 2018 in isolation, notes that administrative closure and pending cases arose during that period, and concludes—without any analysis or justification—that the rise in administrative closure *must* have caused the rise in pending cases. 85 Fed. Reg. at 52,504. The agency has, in effect, noted that ice-cream consumption and violent crime both rise in summertime and concluded that ice-cream consumption causes violent crime. That conclusion, of course, is manifestly arbitrary. In light of the contrary evidence, so too is the agency's conclusion. And although this problem is the most glaring one with the NPRM's pseudo-analysis, there are also others: The NPRM, for instance, fails to consider the full history of administrative closure; relies on data unsuited for the agency's purpose; and fails to consider the impact of new judge hires. *See* TRAC, *The Life and Death of Administrative Closure*. The agency's "analysis" is thus a transparent sham intended to justify a predetermined result.

The NPRM also seeks to base its proposal on a particular reading of pre-2012 BIA precedent (85 Fed. Reg. at 52,496, 52,503), but that precedent is—as every federal judge to consider the issue has held—clearly inconsistent with the existing text of 8 C.F.R. § 1003.1(d) and 8 C.F.R. § 1003.10(b). *See Morales v. Barr*, 963 F.3d 629 (7th Cir. 2020) (Barrett, J.); *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019). The agency's prior belief is therefore itself arbitrary and cannot be used to support a change in the regulation.

The same is true of the NPRM's suggestion that *Morales* and *Romero* were somehow wrongly decided. *See* 85 Fed. Reg. at 52,497, 52,503. Specifically, although the NPRM repeatedly relies on 8 U.S.C. § 1103(a)(1) (*see id.*), that statute plainly does nothing more than give the Attorney General "controlling" authority over "questions of law" when differences in interpretation arise between the Attorney General and other executive officers with whom he shares the "administration and enforcement" of the immigration laws. 8 U.S.C. § 1103(a)(1). Nothing in § 1103(a)(1) can even be colorably construed to give the Attorney General the authority to ignore the plain meaning of his own regulations.

The NPRM also cites other portions of existing regulations to claim that "general authority to defer the adjudication of cases lies with EOIR leadership and not with individual Board members or immigration judges themselves." 85 Fed. Reg. at 52,503. But those regulations do not negate the authority clearly given by existing law to immigration judges and Board members. Nor does the latter authority somehow render the authority of the EOIR director "superfluous"; rather, it simply makes clear that EOIR leadership has concurrent authority over dockets in individual cases with the immigration judges and BIA members hearing those cases.[34]

The NPRM's suggestion that "administrative closure lengthens and delays proceedings" (85 Fed. Reg. at 52,504), meanwhile, is either flatly wrong or beside the point. If the agency is suggesting that administrative closure delays *all* proceedings, it is entirely mistaken. Administrative closure delays the ultimate resolution of *one* proceeding, but it concurrently frees the immigration judge (or the BIA) to resolve *other* proceedings in the meantime. Thus, absent compelling evidence to the contrary—and no such evidence exists—there is no basis for claiming that administrative closure has a significant negative effect on the number of cases completed each year. And for that reason, the fact that administrative closure delays results in *specific* cases has no bearing on the agency's supposed overall goal of efficiency.

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[34] If it were otherwise, then the regulations on which the NPRM relies—which give authority to multiple individuals—would themselves be redundant and superfluous.

The NPRM also states, in a naked *ipse dixit*, that there are likely to be "inconsistent outcomes among immigration judges regarding which cases should proceed and which ones should not." 85 Fed. Reg. at 52,504. There is no evidence to support that assertion; to the contrary, the general practice among immigration judges has (as shown above) been to administratively close cases pending the resolution of applications for relief pending before USCIS. And even if there were substantial inconsistencies, those inconsistencies could be addressed by issuing guidance on the proper situations in which to use administrative closure—a route the agency has conspicuously, and arbitrarily, failed to consider.

The NPRM next suggests that administratively closing cases places the immigration judge in the role of prosecutor. 85 Fed. Reg. at 52,496, 52,503. That is simply wrong. The NPRM falsely conflates "deciding which immigration cases should be adjudicated" (*id.* at 52,496) with deciding which immigration cases should be adjudicated *now*. After all, administratively closed cases do in fact proceed to a final conclusion of a final order of removal, relief, or termination. The only question is whether there is good reason to hold them in abeyance—a question the NPRM never even pretends to address.

Finally, the NPRM suggests that current law is "inconsistent." 85 Fed. Reg. at 52,497. As the NPRM implicitly concedes, however, it was the Attorney General's decision in *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (AG 2018), that is the root cause of the inconsistency. Before *Castro-Tum* was decided, the uniform governing rule was that administrative closure was available. *See* 85 Fed. Reg. at 52,497. The flat, clear misreading of existing regulations in *Castro-Tum* upended that uniformity—and the resulting "inconsistency" results only from the fact that just two courts of appeals have yet had the occasion to address the viability of *Castro-Tum*. It is therefore the Attorney General's own action in *Castro-Tum* that caused the current lack of complete uniformity, and DOJ may not now use the results of the Attorney General's prior illegal action to justify accomplishing the same result by different means.

The proposal to end administrative closure is also arbitrary because of what the NPRM fails to say. Incredibly, the NPRM never even so much as adverts to the primary reason for administrative closure in recent years: to wait for resolution of petitions before USCIS so as not to remove individuals properly entitled to relief and status in the United States. That failure is arbitrary, as is the agency's failure to consider whether the erroneous removal of (conservatively) tens of thousands of individuals is worth the NPRM's claimed (but illusory) gains in adjudicatory efficiency. Instead, the NPRM would penalize individuals with pending petitions at USCIS by deporting them (often to dangerous situations) when a prompt adjudication by USCIS would obviate any need for deportation. That, too, is arbitrary—not to mention that it is, like every proposed and final rule related to humanitarian immigration promulgated by DOJ and DHS in the past several years, needlessly cruel.

B. Restrictions on the Presentation of New Evidence

The NPRM proposes a host of restrictions that, taken together, would severely limit the ability of respondents (but not DHS) to provide any new evidence after an immigration judge first enters a dispositive order in a case. Those proposals are arbitrary and must be withdrawn in their entirety.

1. Removal of BIA's Authority to *Sua Sponte* Reopen Cases

The NPRM's proposal to remove the authority of the BIA and immigration judges to *sua sponte* reopen cases is every bit as cruel—and every bit as arbitrary—as the proposal to end administrative closure. That authority is often used to vacate old orders of removal for individuals now in the United States. And in many cases, the BIA does so at a time when a motion to reopen would be out of time.

The NPRM mentions none of this. Instead, it argues that it is improper to reopen cases *sua sponte* on the basis of facts raised by a party. 85 Fed. Reg. at 52,504. That is a *non sequitur*: Even assuming for the sake of argument that such reopenings are improper, that cannot justify removing the authority in all cases.

Further, *sua sponte* reopenings on the suggestion of a party are, contrary to the NPRM and the two cases it cites, in no way improper. Neither immigration judges nor the BIA can be expected to follow the ins and outs of status applications filed with USCIS on behalf of individuals previously subject to removal proceedings in immigration court. And there is no gamesmanship or impropriety in a respondent informing the immigration courts; whether the courts then reopen the case or not is, of course, up to the immigration judge or the BIA members to decide on their own initiative.

The NPRM next argues that *sua sponte* authority might lead to inconsistent results because there are no standards to guide its use. 85 Fed. Reg. at 52,505. But the presence or absence of such standards is within EOIR's control: It could, instead of eliminating *sua sponte* authority, create such standards by, for instance, expressly permitting *sua sponte* reopening to vacate old orders of removal when an individual has been granted status and the time for filing a motion to reopen has expired. And its failure to consider doing so renders the proposal arbitrary and capricious in violation of the APA.

The NPRM's final rationale is that the BIA "has never utilized genuine *sua sponte* authority … as the direct basis for any precedential decision." 85 Fed. Reg. at 52,505. That is false, as the NPRM itself concedes. *See id.* at 52,505 & n.33. Further, as the agency well knows, precedential decisions form a minuscule part of the BIA's docket. The real question is thus whether the BIA has utilized its *sua sponte* authority in the non-precedential decisions that form the vast majority of its docket. Although EOIR is in a better position to address that question than anyone else, the NPRM arbitrarily leaves it entirely unanalyzed and, indeed, unraised.

Furthermore, although the NPRM crafts very narrow new exceptions to the time and number limits on motions to reopen, it does not even pretend that those new exceptions cover everyone with strong grounds for reopening their cases. *See* 85 Fed. Reg. at 52,505. Indeed, the put forward in the NPRM are patently insufficient for many respondents. As an example, consider an individual who now has status in the United States but has an old order of removal. The NPRM suggests that individual could receive relief via a joint motion to reopen (85 Fed. Reg. at 52,504), but if DHS routinely consented to such motions, respondents would not now need to seek *sua sponte* reopening. And there is no reason to believe that DHS will routinely consent to joint motions where an individual has a strong case for remaining in the United States given its apparent failure to do so in the past.

The NPRM also mentions the ability to toll the time and number limitations on motions for reopen. But equitable tolling (and EOIR's motion to reopen procedures more generally) are difficult

for even seasoned lawyers to understand. A *pro se* party respondent a situation will have no idea whatsoever what equitable tolling is, much less how to show that tolling is appropriate. The motion to reopen route therefore cannot, and will not, lead to relief for many, or even most, respondents—and the NPRM's failure to grapple with this central issue renders the proposal arbitrary.

2. Bars on Presentation of New Evidence on Appeal and on Remands for Consideration of New Evidence

Worse still, the NPRM proposes to prevent the BIA from ever considering new evidence and to prevent the BIA from remanding—or even so much as entertaining a motion to remand—for the respondent to present new evidence before the immigration judge. 85 Fed. Reg. at 52,500. The rules would instead channel *all* new evidence into motions to reopen. Given the opacity of motions to reopen and equitable tolling, the inevitable result will be to make it effectively impossible for many respondents, including all *pro se* respondents, to understand the mechanism for presenting new evidence to the immigration courts.

The NPRM never considers these effects on respondents, and it is accordingly arbitrary. It is also arbitrary for numerous other reasons. As a threshold matter, although the NPRM states that these proposals are intended "to ensure that appeals are adjudicated in a timely fashion … and consistent with the applicable law" (85 Fed. Reg. at 52,500), the proposals work directly against both of those goals. As for time, current regulations allow a respondent to secure a remand after new developments come to light, obviating both the need for the BIA to rule on facts or law that are now out of date and for the immigration judge to rule on a motion to reopen. Under the proposals, however, both of those intervening steps will be necessary. And then the immigration judge and the BIA will have to proceed to the question whether the intervening events warrant a different result. The proposal, in short, *adds* time to the process and adds additional work for immigration judges and the BIA. It is therefore flatly inconsistent with the stated goal of "timely" adjudication.

The proposal also does nothing to require appeals to be decided in accord with "applicable law." 85 Fed. Reg. at 52,500. To the contrary, the NPRM at least suggests that recent legal developments may not be brought to the BIA's attention—even if those developments involve binding caselaw from the Supreme Court or the relevant federal court of appeals. That result would blind the BIA's eyes to the applicable law, not require the application of such law. And even if the NPRM does not prohibit drawing the BIA's attention to intervening cases, it would still not "ensure" the use of applicable law. *Id.* Rather, it would simply be neutral as to what law is applied.

The NPRM contends that anything but a bright-line rule against new evidence invites "gamesmanship" and that, in fact, "respondents frequently seek remands based on evidence that could have been submitted to the immigration judge in the first instance." 85 Fed. Reg. at 52,501. That serious allegation is, however, not supported by a shred of evidence—because the agency has no evidence to back it.

The allegation is, in fact, false. In particular, the fact that a respondent submits evidence that predates the asylum application does *not* mean that the evidence was previously available. Refugees in any context are largely unable to take corroborating evidence with them as they flee their homes in desperate pursuit of safe haven. For that reason, "cases in which an applicant can provide" documentary "evidence of all of his statements will be the exception rather than the rule." UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention*

and the 1967 Protocol Relating to the Status of Refugees § 196 (1979). Survivors of gender-based violence face even greater obstacles in this regard, due to the characteristics unique to gender-based violence described above. For example, a potential witness might refuse to believe or help a woman alleging sexual assault by a relative or respected religious leader, for fear of community reprisal for doing so. And a woman who endures domestic violence might be blocked from seeking and documenting medical treatment, either by the perpetrator himself or by strict laws or customs requiring accompaniment to the doctor by a male relative. As noted by the U.N. High Commissioner for Refugees (UNHCR), in "gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution." UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/01, at 10 (2002) (*Gender Guidelines*).[35] Post-traumatic stress disorder can also severely interfere with survivors' ability to carry out even basic administrative tasks. *See, e.g.*, Tahirih Justice Center, *Precarious Protection: How Unsettled Policy and Current Laws Harm Women and Girls Fleeing Persecution* (Oct. 2009).[36]

Human traffickers and perpetrators of domestic violence also notoriously prevent survivors from holding bank accounts, purchasing bus passes, or even obtaining library cards. Survivors are constantly contending with abusers' attempts to disrupt their day-to-day lives, for example, by preventing them from filing paperwork or paying bills, attending key appointments with government agencies, or communicating with and meeting with service providers trying to help them. Abusers confiscate survivors' documents ranging from passports to personal correspondence to further manipulate, isolate, and punish them and prevent them from escaping or seeking help. A survivor might have to risk her safety trying to retain or regain control over her own documents and other belongings that could serve as key evidence in her case. *See, e.g.*, Ganley, *Health Resource Manual* 37; Snyder, *No Visible Bruises*; 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*;[37] Edna Erez & Nawal Ammar, *Violence Against Immigrant Women and Systemic Responses: An Exploratory Study* (2003);[38] Julieta Barcaglioni, *Domestic Violence in the Hispanic Community* (Aug. 31, 2010);[39] Memorandum from Paul Virtue, General Counsel, Immigration & Naturalization Service (Oct. 16, 1998), at 7-8;[40] Edna Erez et al., *Intersection of Immigration and Domestic Violence: Voices of Battered Immigrant Women*, 4 Feminist Criminology

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35 https://www.unhcr.org/3d58ddef4.pdf.

36 https://www.tahirih.org/wp-content/uploads/2009/10/Precarious-Protection_Tahirih-Justice-Center.pdf.

37 https://www.thehotline.org/is-this-abuse/abuse-and-immigrants-2.

38 https://www.ncjrs.gov/pdffiles1/nij/grants/202561.pdf.

39 https://safeharborsc.org/domestic-violence-in-the-hispanic-community.

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

32, 46-47 (2009); Immigration & Customs Enforcement, *Information for Victims of Human Trafficking* (2016);[41] National Sexual Violence Resource Center, *Assisting Trafficking Victims: A Guide for Victim Advocates* 2 (2012).[42]

In addition, the trauma survivors experience interferes with their ability to effectively develop and present testimony. Tahirih's clients have survived rape, severe and routine beatings, FGM/C, and attempted femicide. They have been trafficked for profit, and subject to acid attacks and attempted murder as a matter of family "honor." In one case, currently on appeal, our client Maria* was kept by a man as his property for 11 years, referring to her as "mi perra" ("my dog") and whistling rather than calling her by name. He told her she was registered to him like a car, and he constantly abused, controlled, and humiliated her. He tied her child up and tried to light him on fire. He mocked Maria's* religion, beat her for trying to go to church, and told her he owned her vote too. After she reported him to the police twice to no avail, he threatened to kill Maria* if she did so again. He sharpened his machete in front of her, saying he wanted a clean edge when he cut her head off.

The effects of trauma for clients like Maria*, who have been subjected to unimaginable violence and torture, are well-documented. Decades of research confirm that trauma affects demeanor in ways that could easily affect an adjudicator's perception of credibility: nervousness, passivity, inability to make eye contact, reluctance to speak, speaking too fast, giving too much detail or not enough. *See, e.g.*, Dept of Health and Human Services, SAMSA, *A Treatment Protocol: Trauma-Informed Care in Behavioral Health Services* 61-62 (2014) (common effects of trauma include "exhaustion, confusion, sadness, anxiety, agitation, numbness, dissociation, confusion, physical arousal, and blunted affect");[43] *id.* at 69 (noting that signs of dissociation include fixed or "glazed" eyes, sudden flattening of affect, long periods of silence, monotone, responses that are not congruent with the present context or situation). Trauma may also result in vague or evasive testimony due to the victim's desire to avoid or stop a flood of memories of the abuse. It might result in a withdrawn or detached witness if a victim tries to dissociate from the memory or event. Indeed, the experience of simply testifying about sexual abuse can be traumatic, because it forces the victim to "relive the crime mentally and emotionally, leading some to feel as though the sexual assault is recurring." Meg Garvin et al., *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, Nat'l Crime Victim Law Institute, Violence Against Women Bulletin at 1-2 (Sept. 2011) (internal quotation marks and alteration omitted). Research supports similar conclusions about the trauma of human trafficking: "The stress of the trafficking situation is almost guaranteed to create dissonance between thoughts, feelings, and behavior that can greatly reduce flexible coping and rational decisions that could be expected of people in free conditions." T. K. Logan et al., *Understanding Human Trafficking in the United States*, 10 Trauma, Violence, & Abuse 3, 16 (January 2009).

Courts across the country have recognized the effects of trauma on survivor interviews and testimony. The Third Circuit, for instance, has recognized the "numerous factors that might make it difficult for an [individual] to articulate his/her circumstances with the degree of consistency one might expect from someone who is neither burdened with the language difficulties, nor haunted by the traumatic memories, that may hamper communication between a government agent in an asylum

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41 https://www.ice.gov/sites/default/files/documents/Document/2017/brochureHtVictims.pdf.

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

43 https://www.ncbi.nlm.nih.gov/books/NBK207201/pdf/Bookshelf_NBK207201.pdf.

interview and an asylum seeker." *Zubeda v. Ashcroft*, 333 F.3d 463, 476 (3d. Cir. 2003) (vacating a BIA decision based in part on inconsistencies between the asylum testimony and the credible fear interview). To take another example, the Ninth Circuit has noted that

> [v]ictims of repeated physical or sexual abuse, for example, remember the gist of their experiences. However, they often confuse the details of particular incidents, including the time or dates of particular assaults and which specific actions occurred on which specific occasion. As events recur, it can become difficult to remember exactly when specific actions occurred even though memory for what happened is clear.

Singh v. Gonzales, 403 F.3d 1081, 1091 (9th Cir. 2005) (citing Deborah Davis & William C. Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. Air L. & Com. 1421, 1514-15 (2001)). As UNHCR aptly notes in its guidelines for considering claims involving gender-based persecution, survivors of sexual trauma in particular may need "second and subsequent interviews…in order to establish trust and to obtain all necessary information…" UNHCR, *Gender Guidelines at* 9.

With such limited access to evidence, survivors should certainly not be thwarted twice—first by their abusers, and then by being arbitrarily blocked from submitting whatever new evidence they are fortunate enough to procure on appeal.

In any case, the process of having such documents sent to the United States after a survivor has arrived is, even in the best-case scenario, long and involved. In many other situations, including when an asylum seeker is *pro se* and detained, the rapid receipt of documents is a logistical impossibility. At the same time, the NPRM would expressly, inequitably, and arbitrarily *allow* DHS to provide some evidence—related to investigations—even if that evidence existed before the immigration judge's decision. 85 Fed. Reg. at 52,500. The agency's charge of "gamesmanship" is thus nothing more than uninformed anti-immigrant rhetoric dressed in bureaucratic language.

For the same reason, the new rule will do nothing to "encourage the presentation of all available and probative evidence at the trial level before an immigration judge." 85 Fed. Reg. at 52,501. Those fleeing persecution and torture already have the strongest possible motivation to take that step—the avoidance of removal to a country where they will be subject to serious violence or murder. A technical agency rule adds nothing to that motivation. Furthermore, it is worth emphasizing that neither EOIR nor DHS has any evidence that fraud is a widespread, prevalent, or significant problem in the asylum system (*see, e.g.*, DHS, *Asylum Application, Interview, and Employment Authorization for Applicants*, 85 Fed. Reg. 38,532, 38,590 (June 26, 2020))—because it is not.[44] The

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[44] Any attempt to use denial rates in asylum cases as evidence of purported fraud would be arbitrary. The available evidence makes clear that the outcome of an asylum seeker's claim is primarily based on two factors not related to the merits of the claim—whether the asylum seeker is represented by counsel, and the identity of the immigration judge. *See, e.g.*, TRAC, *Asylum Decisions*, https://trac.syr.edu/phptools/immigration/asylum; TRAC, *Asylum Decisions Vary Widely Across Judges and Courts—Latest Results*, https://trac.syr.edu/immigration/reports/590/; TRAC, *Asylum Representation Rates Have Fallen Amid Rising Denial Rates*, https://trac.syr.edu/immigration/reports/491; TRAC, *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2013-2018*, https://trac.syr.edu/immigration/reports/judge2018/denialrates.html; Ingrid V. Eagly & Steven Shafer, *A National Study*

rule's effect would thus be to bar the consideration of relevant evidence that asylum seekers were genuinely unable to locate and receive before a hearing.

The NPRM also suggests that current rules "may lead to inconsistent adjudication." 85 Fed. Reg. at 52,501. But that suggestion, too, is evidence-free. The agency cites only a single Ninth Circuit opinion that deals with the irrelevant context of a case decided under the BIA's former and "unique discretionary authority to grant suspensions of deportation." *Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 868 (9th Cir. 2003). The agency, in other words, apparently could not find so much as a single example of inconsistent treatment under current law—despite the fact that the law concerning new evidence has been largely the same for many years. The only plausible inference is therefore that no such inconsistencies exist. And the agency's attempt to capitalize on a supposedly potential, but never actualized, source of inconsistency is arbitrary.

3. Limited-Scope Remands

The NPRM's proposal to allow the BIA to limit the issues considered by immigration judges on remand would make matters still worse. *See* 85 Fed. Reg. at 58,202. In combination with the proposals above, this rule would prohibit many respondents from *ever* presenting facts that come to light after the immigration judge's initial entry of a dispositive order. Under this proposal, new evidence could also be barred on most issues after a return to immigration court. That would leave respondents only with the complicated, counterintuitive route of filing a motion to reopen—a route that is so complicated as to bar the courtroom door to many respondents. *See* Section III.B.1, *supra*.

Further, the rationale for this proposal is once again wafer-thin. The NPRM claims only that immigration judges face "potential confusion" about the scope of remands under current practice. 85 Fed. Reg. at 52,502. But the NPRM cites no evidence to support the notion that there is any significant amount of *actual* confusion among immigration judges. And again, if a system works well in practice for many years, the latent, unrealized potential for confusion cannot provide a non-arbitrary reason for changes.

The NPRM's proposal would be arbitrary even if there had been actual confusion among immigration judges. The agency could adopt—but has failed to consider—any number of other potential ways to eliminate the confusion that do not entail serious negative consequences for respondents. It could, for example, adopt a "magic words" approach in which specific language in a BIA decision indicates that a particular remand is limited. And it could also adopt guidance spelling out limited situations (*e.g.*, an eventual remand for security checks and the like following a grant of relief by the BIA) in which remands may be so limited.

4. Authority to Notice Documents Adverse to Respondents

While barring respondents from presenting new evidence outside the context of a motion to reopen, the NPRM would allow the BIA to consider new evidence that is generally favorable to DHS.

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of Access to Counsel in Immigration Court, 164 U. Penn. L. Rev. 1, 48-58 (2015). Moreover, the fact that denial rates have recently risen reflects only that the Attorney General and the BIA have previously attempted to use case law to establish illegal and arbitrary restrictions on asylum. *See, e.g.*, *Matter of A-B-*, 27 I. & N. Dec. 316 (AG 2018); *Matter of O-F-A-S-*, 27 I. & N. Dec. 709 (BIA 2019).

Specifically, the NPRM proposes to allow the BIA to "take administrative notice of … current events, the contents of official documents outside the record, [and] facts that can be accurately and reliably determined from official government sources and whose accuracy is not disputed." 85 Fed. Reg. at 52,501. Most of this information—especially that contained within government documents—will be adverse to respondents. The NPRM thus creates a one-sided system in which information favorable to DHS may be considered by the BIA, but information favorable to respondents may not be. *See also* Section III.B.6, *infra*. And because the agency has not acknowledged this disparity, much less provided a rational explanation for it, the administrative-notice proposal is arbitrary.

The proposal is also arbitrary for other reasons. *First*, it assumes without either argument or evidence that the types of information it covers are "not reasonably subject to dispute." 85 Fed. Reg. at 52,501. That is false. In many countries from which asylum seekers flee, the *appearance* of events—particularly of government actions—does not map onto the *reality* of events. A series of cases from the Ninth Circuit illustrates the point: In vacating denials of both asylum and relief under the Convention Against Torture, that court has repeatedly made clear that the Mexican government's supposed efforts "to combat drug cartels and the corruption of public officials" obscure the reality of ongoing, systemic violence, torture, and corruption in that country. *Xochihua-Jaimes v. Barr*, 962 F.3d 1175, 1184-85 (9th Cir. 2020) (citing earlier cases to the same effect). Current events relevant to removal proceedings, and the meaning of those events, are therefore very frequently subject to reasonable dispute.

Second, "the contents of official documents outside the record" are also subject to reasonable dispute. There is extensive evidence that DHS records, especially those generated by CBP and ICE, routinely contain both egregious errors and coerced statements. *See, e.g.*, Univ. of Chi. Law School Int'l Human Rights Clinic, *Neglect and Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection* 28-31 (May 2018);[45] Am. Immigration Council, *Deportations in the Dark* 9-12 (Sept. 2017);[46] Human Rights First, *Crossing the Line* 10-12 (May 2017);[47] U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection* 17-23, 28 (2016);[48] Human Rights Watch, *"You Don't Have Rights Here"* (Oct. 26, 2014).[49] The contents of those records, like current events, are therefore subject to reasonable dispute in many cases. The NPRM's attempt to decree a contrary rule is contrary to the evidence and, therefore, arbitrary and capricious.

Third, although the final category of information—facts from government sources—is limited by its terms to "facts that can be accurately and reliably determined" (85 Fed. Reg. at 52,501), the unreliability of DHS records means that the contours of this category are unclear. There will, in other words, be routine disputes in the BIA and the courts of appeals concerning whether particular facts fit this category. The inclusion of this category will accordingly undermine the purported efficiency goals of the NPRM.

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45 https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1001&context=ihrc.

46 https://www.americanimmigrationcouncil.org/sites/default/files/research/deportations_in_the_dark.pdf.

47 https://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-line-report.pdf.

48 https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf.

49 https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk.

Moreover, all three of the problems above will lead to routine, protracted litigation. The NPRM does not acknowledge this fact, much less explain how it can be squared with the goal of adjudicatory efficiency. For this reason, too, the NPRM is arbitrary and capricious.

5. Inequitable Treatment of Motions to Reopen

The NPRM would also result in a second inequity between DHS and respondents: It expressly allows DHS to file as many motions to reopen as it wants, and to do so at any time, while generally limiting respondents to a single motion to reopen filed within strict time limits. *See* 85 Fed. Reg. at 52,506. The resulting inequity is in no way eliminated, or even meaningfully lessened, by the inadequate exceptions available to respondents. *See id.*

The proposal to give DHS, and only DHS, the ability to file unlimited motions to reopen is also arbitrary and capricious. The NPRM does not even expressly acknowledge that it is treating the parties differently, much less seek to justify that disparity. For that reason, and because there is no rational justification for restricting motions filed by one party in adversarial proceedings, but not similarly restricting motions filed by the other party, the proposal is arbitrary.

The NPRM's cursory justification for the proposal is also arbitrary. The agency notes that its rule would create parity with proceedings before immigration judges, in which DHS may file unlimited motions in immigration court. 85 Fed. Reg. at 52,506. But parity can also be reached by restricting DHS's ability to seek reopening—and the NPRM never considers that alternative, much less explains the agency thinks it inferior. Further, it is arbitrary for the agency to choose a rule that creates parity across judicial levels while creating *dis*parity between the parties over a rule that creates parity on both fronts.

C. Arrogation of Authority to the EOIR Director

The NPRM would give new power to the EOIR Director. Specifically, the NPRM would require the Director to decide most cases pending in the BIA for more than 335 days and would allow the Director to decide cases referred to him by an immigration judge to whom the case was remanded.[50] 85 Fed. Reg. at 52,512. This arrogation of judicial authority to an unqualified political functionary cannot stand.

BIA members, dependent though they are on the Attorney General, are judges and must be attorneys. 8 C.F.R. § 1003.1(a)(1). They have experience adjudicating cases and expertise in specific areas on immigration law. The EOIR Director, in contrast, is not a judge and need not even be an attorney. To the contrary, the Director's core functions involve administering EOIR and communicating with Congress, the bar, and other stakeholders. EOIR, *Office of the Director*, https://www.justice.gov/eoir/office-of-the-director. Nothing about the core competencies necessary to carry out those functions so much as weakly implies that the Director is also able to decide

[50] An interim final rule published in 2019, *see* EOIR, *Organization of the Executive Office for Immigration Review*, 84 Fed. Reg. 44,537 (Aug. 26, 2019), purported to give the Director similar authority when deadlines are not met. That rule is illegal for all of the reasons stated here and also because it did not undergo notice and comment before publication. *See* Tahirih Justice Center, *Comments in Response to Organization of the Executive Office for Immigration Review*, *available at* https://www.tahirih.org/wp-content/uploads/2019/10/Tahirih_EOIR-Comments.pdf.

individual appeals. In short, unlike BIA members, the Director is a mere administrative functionary—and a politically-appointed one at that. He is therefore unqualified to render decisions in individual cases.

Situations in which an immigration judge (effectively, a lower-court judge) refer cases to the Director for decision are, meanwhile, entirely corrosive of judicial independence. That proposal would make the BIA something other than the highest immigration court in the land, because its decisions would effectively be subject to appeal. In fact, the proposal would make the BIA something other than a court, because the appeal could be taken by a person with a vested interest in the outcome (*see, e.g.*, 11th Cir. R. 26.1-2) but who is not actually a party to a suit.

In addition, the use of the Director to resolve cases violates the due process rights of survivors and other immigrants. The private interest at stake is the same as when the BIA decides cases: individual lives and livelihoods. Further, there can be no question that having an administrative figure who is not experienced in adjudicating immigration cases decide those cases will result in a sharply increased rate of error. In particular, more asylum seekers who have satisfied all of the prerequisites for relief will be improperly removed to face persecution in their home countries. And this inevitable result can be avoided by the commonsense mechanism of simply allowing BIA members to do their jobs in the same way they always have, without the threat of reversal by an unqualified political appointee.

The delegation of judicial decision-making authority to the Director also violates the APA. Until an interim final rule issued last year (*see* fn.50, *supra*), the Director was expressly prohibited from deciding individual appeals. *See former* 8 C.F.R. § 1003.0(c). DOJ has never provided a reasoned, non-arbitrary explanation for that change and also has not considered public comments on that change. Section 1003.0(c) has, in other words, never been lawfully repealed. And the NPRM violates the express terms of that regulation and is thus contrary to law under the APA.

The NPRM's purported justifications for arrogating decision-making authority to the Director are also arbitrary and capricious.

As to the proposal to allow immigration judges to refer cases to the Director, the NPRM claim that such a procedure is necessary as a "quality assurance" mechanism to fix BIA errors in reopening or remanding proceedings. 85 Fed. Reg. at 52,502. But the NPRM presents no evidence, because there is no evidence, that the BIA makes a substantial number of errors of that sort. The proposal is therefore a solution in search of a problem.

That is not to say that the BIA never errs: It does. Its recent errors include ignoring the law (*e.g.*, *Doe v. Att'y Gen.*, 956 F.3d 135 (3d Cir. 2020)), failing to follow the instructions of federal courts of appeals (*see Baez-Sanchez v. Barr*, 947 F.3d 1033 (7th Cir. 2020) (Easterbrook, J.)), conflating the ability to hide with reasonable internal relocation (*Akosung v. Barr*, 970 F.3d 1095 (9th Cir. 2020) (Miller, J.)), and willfully misreading or distorting the record (*e.g.*, *Davila v. Barr*, 968 F.3d 1136 (9th Cir. 2020); *Orellana v. Att'y Gen.*, 956 F.3d 171 (3d Cir. 2020))—all to the detriment of respondents. The NPRM, however, fails to acknowledge such errors, much less attempt to remedy them. And although an agency need not remedy all evils in one rule, it is arbitrary for DOJ to remedy imaginary problems while failing to address actual shortcomings at the Board.

Moreover, there is a dramatic mismatch between the purported "quality assurance" rationale and the text of the regulation. The NPRM's justification extends only to "errors made by the BIA in reopening or remanding proceedings." 85 Fed. Reg. at 52,502. But the proposed regulatory text would allow immigration judges to refer errors that have nothing to do with the technical aspects of remands or the propriety of reopening a case. Indeed, the regulation is worded broadly enough to allow effectively any dispute about the application of a statute or regulation, or any dispute about the materiality of a fact, to be referred to the Director for decision.

Further, the NPRM provides no valid reason for its proposal to allow immigration judges to make referrals. Given the absurd burdens other portions of the NPRM would place on the parties (*see especially* Sections III.D.1-2, *infra*), DOJ's passing reference to "placing additional burdens on the parties" here rings entirely false. 85 Fed. Reg. at 52,502. In any case, as the NPRM itself acknowledges (85 Fed. Reg. at 52,502), creating a new, party-driven mechanism would not place an *additional* burden on the parties; it would instead *replace* the existing, party-driven mechanism of motions to reopen. And the fact that an erroneous remand would change an immigration judge's score under the ill-conceived and illegal "Performance Goals Policy" (*see id.*; Compl., *Las Americas Immigrant Advocacy Ctr. v. Trump*, D. Or. No. 3:19-cv-2051, Dkt. 1 (Dec. 18, 2019),[51] *mot. to dismiss denied in relevant part*, 2020 U.S. Dist. LEXIS 136392 (D. Or. July 31, 2020)) provides still another reason to remove that policy, not to craft other policies around it.

The Social Security Administration's use of a "protest" process (HALLEX 1-3-6-10) also cannot justify the NPRM's proposal. It is sufficient to note that the Social Security process does *not* allow administrative law judges—the analogue of immigration judges—to protest appellate decisions. Rather, it allows the underlying agency component to do so; the analogue of that process, which already exists, is a DHS appeal to the BIA. Further, Social Security benefits hearings are non-adversarial processes in which the agency has an affirmative obligation to assist the benefits seeker and which are decided on the papers. In contrast, individual hearings in immigration court are adversarial and in-person, like hearings in federal court, and the standards of review that the BIA applies reflect that fact.

In addition, the NPRM provides no justification at all for its proposal that referrals go to the Director as opposed to a different tribunal or official. Absent such justification, the NPRM is arbitrary and capricious by definition. Further, there is no rational justification for substituting the NPRM's proposal—which hinges on the roles of interested non-parties and political functionaries—for some mechanism that lies firmly in the control of the parties and professional adjudicators.

As to the mandatory authority to decide cases pending at the BIA for a certain time, the NPRM suggests that the Director's "authority is necessary to ensure management oversight consistent with the Director's authority to 'set priorities or time frames for the resolution of cases' and the Director's responsibility 'to ensure the efficient disposition of all pending cases.'" 85 Fed. Reg. at 52,508. The notion that having the Director decide cases is "necessary" for these purposes is simply false. Decisions in individual cases have nothing at all to do with "priorities or time frames" generally. And there are many other mechanisms for timely decisions—such as weighting cases by complexity and tying timing to the weight, or the use of non-binding exhortations—that could accomplish the goal of efficient dispositions. The utter lack of necessity for the NPRM's proposal is driven home by the fact

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[51] https://www.splcenter.org/sites/default/files/documents/ecf_1_las_americas_v._trump_and no._19-cv-02051-sb_d._or.pdf.

that no other U.S. judicial or quasi-judicial system of which we are aware punts decision-making to a political functionary after a certain time. The proposal is therefore arbitrary and capricious both because its purported justification is obviously false and because the agency has failed to consider other alternatives that would achieve its stated goals.[52]

D. Conveyor-Belt Processing of Cases

The NPRM includes a set of proposals that, taken together, create a strict and inflexible timeline for all BIA appeals. Those proposals will prevent survivors and other respondents from receiving anything approaching a fair hearing on appeal and must accordingly be withdrawn.

1. Maximum Time for Extensions

The NPRM proposes to reduce the maximum extension for any brief from 90 days to 14 days. This proposal would preclude many survivors of gender-based violence from presenting a thorough and complete case to the BIA.

As a historically marginalized population, survivors have faced a long, hard road in establishing that gender-based violence 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 above; 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.

A striking, recent example is *Matter of A-B-*, 27 I. & N. Dec. 227 (AG 2018). 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);[53] UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador* (Mar. 15, 2016);[54] UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* (2015).[55]

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[52] The proposal is also arbitrary insofar as it rests on the justifications for the proposed timelines. *See* Part III.D, *infra*.

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

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

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

In light of the above, it is essential for survivors of gender-based violence to have sufficient time—with or without counsel—to prepare the complex and nuanced legal arguments their cases demand on appeal. On average, *pro bono* attorneys representing clients in defensive asylum cases through Tahirih spend 300 hours during their first year of representation. It goes without saying that a respondent with no legal training would require much more. Yet the NPRM drastically limits the window of time within which respondents have to prepare their own legal arguments and respond to those put forward by DHS. This provision will all but guarantee failure for survivors' appeals for another reason as well: the truncated briefing period will make it nearly impossible for them to retain new or convince existing counsel—*pro bono* or otherwise[56]—to continue representation for appeals. Appearing *pro* se—already a well-documented disadvantage[57]—is currently the norm. A recent national study found only 37% of respondents were represented in immigration court, and around 86% of immigrants in detention were unrepresented. *See* Eagly & Shafer, *Access to Counsel in Immigration Court* (Sept. 28, 2016).[58] The NPRM will ensure that the number of represented respondents is even lower, and the number of denials is even higher, unduly putting survivors' lives at grave risk in the process.

That risk would be particularly high in light of the new decision in *Matter of A-C-A-A-*, 28 I. & N. Dec. 84 (2020).[59] That decision requires the BIA to consider *all* elements of an asylum claim on appeal, whether or not the non-appealing party disputes them or not. *See id.* at 88-89. And it reiterates the rule that the respondent bears the burden on each element of an asylum claim. *Id.* at 89. The result is that, in *every* case, the respondent must now address *every* element of the asylum claim in an opening brief. That task will be functionally impossible for *pro se* litigants, and many lawyers, in the allotted time period. The NPRM does not mention any increased burden on respondents and their attorneys—and the agency has no rational justification for imposing a burden of such insurmountable magnitude.

The proposal to cap extensions at 14 days is also arbitrary on its face. The NPRM again cites the generalized "efficiency" benefit to the agency of shortened briefing times, but it mischaracterizes

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[56] The vast majority of survivors are indigent and cannot afford legal representation. Among other forms of abuse, a hallmark of gender-based violence is economic abuse. Perpetrators condition survivors to expect brutal retaliation for pursuing financial independence. They withhold documents survivors need to secure employment such as work authorization, drivers' licenses, and bank statements. For those who are employed, maintaining employment is its own challenge. Survivors frequently or abruptly miss work due to unstable circumstances at home, making them vulnerable to termination. And discriminatory laws and customs that prohibit or devalue women's work in their home countries aid and abet abusers to keep them disempowered and impoverished. Discriminatory property and inheritance laws further cut women off from family resources. With limited ability to earn income consistently, survivors—whether fleeing from abroad and/or experiencing violence in the United States—are overwhelmingly left with minimal resources to support themselves, their children, and least of all retain paid counsel in immigration court.

[57] 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*.

[58] https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

[59] The decision in *A-C-A-A-* is itself illegal, though the reasons for that conclusion are beyond the scope of this comment.

the actual effect and it fails to consider any of the costs. And it fails to identify any evidence to justify its assertion that the rule will have little effect on practitioners. 85 Fed. Reg. at 52,498.

First, the agency ignores the fact that, since it sends the briefing schedule and transcript by mail, the time for briefing begins to run on the mailing date. The meager 21 days afforded for briefing by right is therefore, in reality, somewhere around 15 to 18 days—less given current problems with deliveries by the U.S. Postal Service. In the complex area of immigration law, which often involves true life-or-death issues, and which "has been termed second only to the Internal Revenue Code in complexity" (*Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987) (internal quotation marks omitted)), the BIA has already imposed a challenging timeframe for practitioners. To limit extensions by regulation to 14 days will do little to increase efficiency, but much to hamstring practitioners and *pro se* petitioners in preparing focused briefs that will be most useful to the BIA.[60]

Second, the agency imposes these restrictions on practitioners and petitioners when it will not be able to act immediately on those rushed briefs. To the contrary, the BIA is currently working on a backlog of nearly 100,000 cases. To put practitioners on such a short leash when the BIA will require a substantial time to catch up is arbitrary and capricious.

Third, there is no indication that the BIA has considered other alternatives which might help mitigate the proposal's impact. For example, the NPRM does not reflect consideration of (1) implementing a PACER-type system for electronic filing, which would obviate much uncertainty and delay due to mail; (2) emailing the transcript and briefing schedule to attorneys and immigrants with email access instead of mailing paper copies; (3) adopting the mailbox rule used by every federal court so that litigants actually have the full value of the increasingly shrinking times the rules purport to give them; or (4) extending the initial briefing schedule to 30 or 35 days instead of the current 21 days from the date of the mailed scheduling order. Giving sufficient time as an initial matter would likely cut short the number of extension requests, thereby saving the BIA resources now committed to adjudicating each of them on the basis of "good cause."

2. Simultaneous Briefing

Citing only "efficiency," and without discussing any of the significant costs to the process, the NPRM proposes abandoning the long-established practice of sequential briefing in non-detained cases and proposes *one* round only of simultaneous briefing before the BIA. 85 Fed. Reg. at 52498-99. This proposal will unduly burden survivors of gender-based violence for the same reasons as the proposal to limit briefing extensions to 14 days. *See* Section III.D.1, *supra*.

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[60] The agency suggests that appellants may have as many as one to three months to prepare for an appeal, but this is not always, or even regularly, the case. Review of the transcript is an essential part of any serious briefing process, not simply the check-the-box exercise the agency suggests. Appeals are often handled by lawyers who were *not* the lawyers at the IJ hearing, so they cannot begin their analysis of arguments until they review the transcript. Moreover, there are frequently errors in the transcript, which cannot be discovered until the transcript is received, and under current rules, the appeal often goes forward before those errors are resolved, creating yet another layer of delay. Nor will review by the Board of the transcript problems add clarity, as no one at the BIA participated in the hearing and can have no information about how to fix a transcript problem. Allowing sufficient time *after* receipt of the transcript and proceeding with the appeal only with a correct transcript will be far more efficient than the piece-meal approach the NPRM outlines.

The simultaneous briefing proposal is also arbitrary and capricious, because it will make briefing both more difficult for litigants, and less useful for the BIA, without any significant benefit in terms of efficiency.

The immigration administrative process is decidedly adversarial, unlike the Social Security process to which the NPRM makes frequent reference. *See, e.g.*, *Sims v. Apfel*, 530 U.S. 103 (2000); *Walters v. Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305, 309 (1985). And in most adversarial proceedings—including state and federal courts as well as adversarial federal administrative proceedings—sequential briefing over contested issues is the normal default rule, particularly for appeals. *See, e.g.,* 49 C.F.R. § 821.48 (NTSB administrative process); Tax Ct. R. 121.

Sequential briefing is the norm in adversarial systems because it is "more likely to promote a meaningful exchange regarding the contested points." *N.D. Ill. Adopts Local Patent Rules*, 9 J. Marshall Rev. Intellectual Prop. L. 202, 219 (2009). This is because the parties can directly respond to each other's arguments, identifying flaws in reasoning or factual claims, and marshalling precedent. *See, e.g.*, *Sied v. Duke*, No. 17-cv-06785-LB, 2017 U.S. Dist. LEXIS 204382 (N.D. Cal. Dec. 11, 2017); *Muellner v. Mars, Inc*., 714 F. Supp. 351, 353 (N.D. Ill. 1989).

In a notice of appeal, litigants list all the potential grounds for appeal. But in actual briefing, litigants must and do focus their arguments on the most significant of the errors they have identified. Once the moving or appealing party's opening brief has identified and fully discussed the issues the appellant chooses to argue, the responding party's brief focuses on *those* issues, and explores in detail the factual and/or legal arguments against those positions. *Greenlaw v. United States*, 554 U.S. 237, 243, (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."). The result of this opening-brief-and-response model is that the arguments presented to the BIA in briefing have been sharpened by the advocacy process and are more fully presented and tested for what should be neutral arbiter review.

In contrast, when parties are allowed to submit only one set of simultaneous briefs, the parties lack the opportunity to respond to the legal and factual arguments the other side has raised. Consequently, the process deprives the BIA of the benefit of well-reasoned briefs that respond to and test each party's arguments. Moreover, it opens the door for gamesmanship: the party filing the notice of appeal could identify dozens or even scores of issues, but then focus their arguments on one or two of those issues and argue them in depth. Without knowing where the appealing party will focus, the other party is forced to respond to *every one* of the dozens or scores of bases for appeal, and will therefore not be able to respond in appropriate depth to the actual issues before the BIA.

The theoretical ability of the BIA to allow for reply briefs in particular instances does not answer these issues. Any reply must be filed within 14 days, but can only be filed with leave of the BIA, and the BIA is required to make a good cause adjudication in each case. Thus, within a 14-day period, litigants will be forced to review the opposing party's brief, determine whether a reply is necessary, draft that reply while they *also* draft a motion explaining the need for the reply, file it with the Board by mail, and wait for the Board to adjudicate that request and then to respond by mail. A response from the Board unlikely to reach the litigant within 14 days, meaning that the party must draft a brief that may be rejected—a tremendous waste of party resources. A traditional sequential order of opening brief, answering brief, and optional reply would be much more efficient. This would

obviate the need for litigants to litigate and the Board to decide good cause in every case. And if the parties—who are framing the issues for the Board—do not see the need to reply, they will not file a reply.

Finally, it is also no answer that the BIA can request supplemental briefs. In an adversarial system, *the parties* are the ones with the strongest interest in and capacity to spot flaws in their adversary's arguments, and to illuminate those flaws for the Board, who acts as neutral arbiter of the parties' arguments.

The proposed rule is also arbitrary and capricious because the agency has failed to consider its costs and benefits. Extolling efficiency, the NPRM asserts that under the new rules, briefing will be complete in 35 days instead of the current estimate of 65 days. Yet it wholly ignores that in virtually every represented case, attorneys—who have a mandatory ethical duty of zealous representation—are likely to seek the opportunity to reply to the opposing party's brief to point out errors in reasoning and to advise the BIA of precedent relevant to the opposing argument which the proponent omitted or did not discuss. Putting aside the added burden on the parties and on the BIA of briefing and adjudicating just those requests for replies, under the NPRM, any reply must be filed within 14 days. Thus, many represented cases will take at least 49 days, not 35 days to complete, and the BIA will have 4 briefs to review instead of 2.

The NPRM's final attempt to justify the simultaneous-briefing proposal involves noting that simultaneous briefing is used in detained cases and says there is "no legal or operational reason to adjudicate non-detained cases in a less efficient manner than detained cases." 85 Fed. Reg. at 52,499. But the agency has long prioritized detained cases over non-detained cases, for the obvious reasons that non-criminal detention is a hardship for anyone, and a not inconsiderable expense for taxpayers. Clearly, the government has long had an interest in resolving detained cases more quickly than non-detained cases. That important interest may have justified valuing efficiency over more effective briefing options for the detained docket. But the agency does not explain how an interest in efficiency overcomes the strong interest of an adversarial system in more effective briefing in the non-detained docket when the countervailing need for expedited review is absent.

The NPRM is also arbitrary and capricious because it has not considered using sequential briefing in *both* types of cases, with shorter timelines on the detained side. After all, the NPRM itself recognizes that requiring simultaneous briefing creates inherent possibilities of "gamesmanship." 85 Fed. Reg. at 52,498. And sequential briefing eliminates that possibility without any significant loss of efficiency.

3. Maximum Time for Consideration by BIA

The NPRM also seeks to impose strict deadlines for the BIA's adjudication of both appeals and interlocutory appeals. *See* 85 Fed. Reg. at 52,507-08. Such strict timelines for decision have no place in a court system. Judicial independence requires that judges be able to take whatever time is necessary to reach the correct and just result in each individual case before them. Arbitrary deadlines, however, force judges to premise speed over accuracy and justice. It is therefore no wonder that, to

our knowledge, no federal court in the United States has previously been subject to deadlines for acting in all of its cases.[61]

The proposed timeline in the NPRM would also violate fundamental principles of due process. The Supreme Court made clear decades ago that all immigrants "within the territory of the United States," a category that includes anyone in lawful proceedings before the immigration courts, are protected by the Due Process Clause of the Fifth Amendment. *Plyler v. Doe*, 457 U.S. 202, 212 (1982). And "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time *and in a meaningful manner*.'" *Kaley v. United States*, 571 U.S. 320, 357 (2014) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)) (emphasis added). The IFR's assembly-line approach to appellate adjudication will significantly impair the ability of asylum seekers and others to receive a meaningful hearing on appeal by preventing judges from devoting significant time and thought to any case, no matter how complex.

Survivors of gender-based violence will be particularly disadvantaged by this approach, because their cases are notoriously complicated and require thorough and careful analysis. This is the result of a historically cis-male centered lens through which all asylum cases have inappropriately been, and continue to be, viewed. On average, *pro bono* attorneys representing survivors in defensive asylum cases through Tahirih spend 300 hours during their first year of representation. These cases often involve persecution inflicted by family members such as honor crimes, forced marriage, and domestic abuse. Judges frequently misconstrue or dismiss these forms of persecution as "personal" or "private" in nature that applicants can readily flee from internally, even where a government routinely refuses to protect survivors from these harms. Pervasive social stigmas around reporting gender-based violence are also common and further complicate survivors' ability to obtain objective corroboration for their claims. In short, this provision would impermissibly foreclose careful, expert consideration of survivors' cases. Justice simply cannot be served for survivors if reviewers only have time to rubber stamp each appeal.

Unsurprisingly, an application of the governing test for due-process challenges demonstrates that the IFR's timeline violates immigrants' due process rights. That test weighs (1) "the private interest that will be affected" by a government action; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value * * * of additional or substitute procedural safeguards"; and (3) "the Government's interest." *Mathews*, 424 U.S. 319 at 334-35. Here, all the weight is on one side of the scale.

As an initial matter, because the BIA renders decisions on whether individual immigrants are removed from the United States, the private interest at stake is literally life or death. The Supreme Court has repeatedly recognized that removal "may result in poverty, persecution, and even death" (*Bridges v. Wixon*, 326 U.S. 135, 164 (1945)) and of "life" or "all that makes life worth living" (*Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)). This is true of asylum seekers, who are, by definition, seeking protection from persecution. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). And it is particularly true of survivors of gender-based violence, who form a vulnerable population not protected by the governments of many countries. *See, e.g.*, U.S. Dep't of State, *Guatemala 2018*

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[61] To be sure, Congress occasionally imposes timelines that cover narrow classes of cases. *See, e.g.*, 28 U.S.C. § 1453(c)(2) (review of remand orders under the Class Action Fairness Act). But that simply chooses certain cases for prioritization—and, as a legislative body, Congress is entitled to implement its priorities in this way.

Human Rights Report 16 (2018);[62] U.S. Dep't of State, *El Salvador 2018 Human Rights Report* 16 (2018);[63] Amnesty International, *Mexico 2017/2018*;[64] U.S. Dep't of State, *Haiti 2018 Human Rights Report* 19-20 (2018);[65] U.S. Dep't of State, *Saudi Arabia 2018 Human Rights Report* 44 (2018);[66] U.S. Dep't of State, *Kenya 2018 Human Rights Report* 23 (2018).[67]

Decisions with such life-or-death consequences must include appropriate safeguards. The timeline imposed by the NPRM does not.[68] Because that timeline will rush members of the BIA to ill-considered decisions, it will unquestionably result in increased error rates in BIA determinations. This, in turn, means that it will result in increased numbers of erroneous removals from the United States—*i.e.*, *refoulement*—in direct violation of our obligations as a signatory to the 1951 United Nations Convention and 1967 Protocol Relating to the Status of Refugees. And a simple, straightforward alternative would prevent this increase—the BIA could simply decide cases without a mandatory timeline.

The NPRM only countervailing interest stated in the NPRM is trivial. The agency apparently believes that strict, unyielding timelines are necessitated by the number of cases pending, and short-term declines in productivity, at the BIA. 85 Fed. Reg. 52,507. The backlogs, however, have not been caused by immigrants seeking relief. Rather, they have been manufactured by the government itself. As noted above, the Attorney General added "330,211 previously completed cases" to "the 'pending' rolls" with the stroke of a pen in *Matter of Castro-Tum*. TRAC, *Immigration Court Backlog Surpasses One Million Cases*. And immigrants obviously have nothing to do with the claimed decline in productivity at the BIA. EOIR is thus proposing to respond to problems EOIR itself has caused by issuing an illegal fiat that unequivocally will harm great numbers of asylum seekers and other respondents.

The restrictions on adjudication times are also arbitrary and capricious for at least four reasons. *First*, the agency has entirely failed to consider the interests of survivors and other respondents (or the interest of DHS) in fair, full adjudications when proposing a solution to the perceived problem of BIA backlogs. Rather, it has proposed a conveyor-belt system that will, in the vast majority of appeals, work against respondents—whether or not they have valid claims to relief—and will accomplish nothing other than speeding deportations.

Second, the agency has not considered less draconian alternatives to strict, inflexible timelines. One alternative would be to prepare reports concerning longstanding cases, akin to the reports submitted to Congress concerning district court motions and cases that have long awaited

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62 https://www.state.gov/wp-content/uploads/2019/03/GUATEMALA-2018.pdf.

63 https://www.state.gov/wp-content/uploads/2019/03/EL-SALVADOR-2018.pdf.

64 https://www.amnesty.org/en/countries/americas/mexico/report-mexico/.

65 https://www.state.gov/wp-content/uploads/2019/03/HAITI-2018.pdf.

66 https://www.state.gov/wp-content/uploads/2019/03/SAUDI-ARABIA-2018.pdf.

67 https://www.state.gov/wp-content/uploads/2019/03/KENYA-2018.pdf.

68 Far from constituting a safeguard, the use of the EOIR Director to decide cases not otherwise disposed of in the IFR's timeframe represents an additional violation of due process. *See* Section III.C, *supra*.

adjudication. BIA members could then explain why specific cases required longer-than-usual adjudication times. Another alternative would be to *recommend* timelines and require brief explanations whenever those timelines are exceed. As part of initial screening, the agency could also subcategorize cases assigned to single BIA members or three-member panels based on apparent complexity and peg different recommended timelines to each subcategory.

Third, the agency has provided no rational explanation for the timeline it has proposed to adopt. Instead, DOJ contends that "there is no reason for a typical appeal to take more than 335 days to adjudicate," and it bases that timeframe on the median time to completion in fiscal year 2019. 85 Fed. Reg. at 52,508. But it goes without saying that not every case is typical, and that the appropriate timeline for a "typical" case, or for the median case, is not an appropriate timeline for every case. The agency, however, turns a blind eye to these undeniable facts—a response that renders the entire proposed timely arbitrary.

Fourth, given the Attorney General's recent opinion in *Matter of A-C-A-A-*, the proposal will create a pernicious double standard. *A-C-A-A-* requires the BIA to consider *all* aspects of an asylum claim before granting relief, while simultaneously stating that the BIA should only consider *one* dispositive aspect of the claim when it denies relief. *See A-C-A-A-*, 28 I. & N. Dec. at 88-89 & n.2. The BIA will therefore be pressed for time under the NPRM's proposal in every case in which it believes relief is appropriate, but in very few cases in which it believes relief should be denied. The inevitable, inequitable, and illegal result will be that the proposal pressures the BIA to deny cases it might otherwise approve for the sake of meeting an arbitrary time limit.

E. Ability to Affirm on Any Basis Presented

The NPRM proposes expansive new powers for the BIA by proposing that the BIA may affirm on any basis it chooses, regardless of the parties' arguments. *See* 85 Fed. Reg. at 52,510-11. That proposal, too, is arbitrary. As noted above, unlike the Social Security system, the immigration administrative process is adversarial. And "[i]n our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243, (2008). Thus, while affirmance on clearly argued grounds which were fully developed below, and which both parties have been able to address may be permissible, the wide scope proposed here goes well beyond those bounds.

The NPRM exacerbates this problem by defining undisputed facts as those "not meaningfully challenged on appeal." 85 Fed. Reg. at 52,501 n.22. But the agency limits briefs to 25 pages, *BIA Practice Manual* at 57, and strongly encourages litigants to focus on the issues briefed; as to facts not to relevant to those argued grounds of appeal, there is no reason to "meaningfully challenge them on appeal." But that circumstance does not and cannot justify any inference that those facts are undisputed for purposes of a *different* basis for ruling.

Indeed, the very precedent cited by the NPRM makes this point. In *Helvering v. Gowan*, 302 U.S. 238, 245 (1937), the Supreme Court took pains to point out that where the reviewing court affirms on a theory not litigated below, the parties should have the opportunity to go back to the trier of facts to establish additional facts which would affect the result. Particularly in immigration cases, which involve extraordinarily complex facts as well as law, it is contrary to law as well as arbitrary

and capricious to allow a reviewing court to select unlitigated theories for affirming by pretending that facts not "challenged" on appeal when they are not relevant to the appeal are undisputed.

In addition, the NPRM is internally inconsistent. It allows the BIA to affirm a decision below based on arguments not raised below, but it does not allow the BIA to remand to the immigration judge based on arguments not raised below. 85 Fed. Reg. at 52511. This unexplained inequity also renders the proposal arbitrary and capricious.

Finally, the agency does not seem to have considered any possible mitigating provisions, such as allowing additional briefing when the Board decides to rule on a ground different than that ruled on by the immigration judge. The agency must consider such alternative measures.

F. Other provisions

1. The NPRM proposes to end the BIA's authority to certify cases to itself. 85 Fed. Reg. at 52,506-07. This proposal, too, will disproportionately burden *pro se* respondents—the parties least likely to have a sophisticated notion of when an appeal to the BIA is worth taking. But the NPRM again fails utterly to consider this disproportionate effect, much less attempt to justify a change despite the effect on *pro se* litigants.

The NPRM also ignores a second key effect of its proposal to remove the BIA's certification authority: It will increase the difficulty in holding immigration judges to account. There is a long history of immigration judges engaging in egregious behavior on the bench, and there are several current and former immigration judges with long histories of serious misconduct. *See, e.g.*, AILA, *AILA Receives Records Relating to EOIR Misconduct in FOIA Lawsuit* (Nov. 1, 2018).[69] The BIA's ability to certify cases involving such misconduct constitutes one of the very few checks on such behavior, and removing that ability will only increase the impunity with which immigration judges treat respondents.

Moreover, none of the supposed justifications for removing the BIA's certification authority necessitates that result. *See* 85 Fed. Reg. at 52,506-07. Rather, all of the NPRM's supposed rationales could be satisfied by providing regulatory guidance to the BIA concerning when to exercise its authority. The agency's failure to consider that route renders the proposal doubly arbitrary. And to the extent the proposal rests on the basis for removing the BIA's *sua sponte* authority (*id.* at 52,507), it is arbitrary for the reasons above (*see* Section III.B.1, *supra*).[70]

2. The proposal to allow the BIA to issue final orders of various kinds (85 Fed. Reg. 52,499-500) is equally problematic. That proposal introduces another inequity: As a matter of practice, most of the final orders the BIA issues will be final orders of removal. And although DHS

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[69] https://www.aila.org/infonet/eoir-records-relating-misconduct.

[70] The agency also may not justify the proposal by analogy to the federal courts. The federal courts of appeals, of course, do not certify cases to themselves. But the process of filing a notice of appeal in federal court is straightforward, and the Federal Rules of Civil Procedure provide ample protection for *pro se* parties who make mistakes. In addition, the stakes in most civil suits arising in federal district court are, unlike the stakes in most immigration court cases, not a matter of life and death.

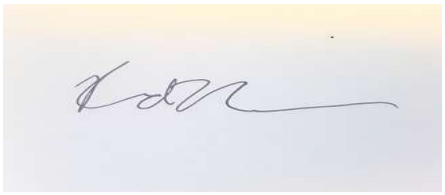
loses nothing if the BIA issues a final order in the favor of a respondent, the sudden issuance of final removal orders without a remand will cause many respondents to be deported without an opportunity to file a petition for review in federal court—a step that is particularly important given the BIA's recent history of egregious errors in decisions denying relief (*see* Section III.C, *supra*).

3. Finally, the NPRM proposes to end the practice of forwarding physical records to the BIA. 85 Fed. Reg. 52,509. The NPRM also, however, concedes that the nationwide rollout of the EOIR Case and Appeals System ("ECAS"), which would give the BIA access to electronic versions of the record, has been paused indefinitely. *Id.* at 52,509 & n.42. It makes no sense, and is arbitrary, to require use of ECAS, and remove the requirement to forward the physical record, until ECAS is ready to be deployed in every immigration court.

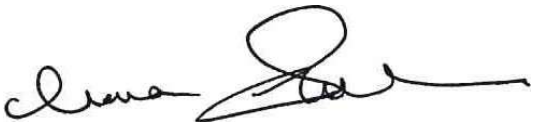
IV. Conclusion

The NPRM must be withdrawn in its entirety.

Sincerely,



Richard Caldarone
Litigation Counsel



Irena Sullivan
Senior Immigration Policy Counsel

/s/Julie Carpenter

Julie Carpenter
Senior Litigation Counsel